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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

SHARON MARIE WEAVER, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D16-4461

Opinion filed December 20, 2017.

Appeal from the Circuit Court for Hillsborough County; Chet A. Tharpe, Judge.

Howard L. Dimmig, II, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Wendy Buffington, Assistant Attorney General, Tampa, for Appellee.

CASANUEVA, Judge.

Sharon Marie Weaver challenges the denial of her motion to suppress, which she preserved for appeal when pleading guilty on one count of operating an unregistered vehicle and one count of possession of a controlled substance. We

conclude that the trial court's denial of the motion to suppress was erroneous and reverse.

I. FACTS AND PROCEDURAL HISTORY

On April 14, 2016, Ms. Weaver was stopped because the license plate on the vehicle she was driving did not match the vehicle. According to the arresting officer, Ms. Weaver explained when questioned "that her friend attached the tag to the vehicle so that she was able to drive it." The officer arrested Ms. Weaver for attaching a license plate not assigned to that vehicle. A search of Ms. Weaver incident to arrest revealed that she was in possession of amphetamine. Ms. Weaver was ultimately charged with possession of a controlled substance and operating an unregistered vehicle, § 320.02(1), Fla. Stat. (2015), rather than attaching a license plate not assigned, § 320.261.

Ms. Weaver moved to suppress evidence obtained pursuant to the arrest and search incident to arrest, arguing that the officer lacked probable cause to arrest because the officer did not observe her attach the license plate to the vehicle. Thus, she argued, the warrantless arrest for a misdemeanor committed outside the presence of the officer was illegal. The State argued that Ms. Weaver's statement to the officer combined with the officer's observations were sufficient to provide probable cause to arrest. The trial court denied the motion.

Ms. Weaver entered an open plea following the denial of the motion to suppress, reserving the right to appeal the denial of the motion. She was sentenced to forty-eight months' probation.

II. ANALYSIS

"When reviewing a motion to suppress, the standard of review for the trial court's application of the law to its factual findings is de novo, but a reviewing court must defer to the factual findings of the trial court that are supported by competent, substantial evidence." Bautista v. State, 902 So. 2d 312, 313-14 (Fla. 2d DCA 2005) (quoting Cillo v. State, 849 So. 2d 353, 354 (Fla. 2d DCA 2003)).

Ms. Weaver was arrested for unlawfully attaching a license plate not assigned to the vehicle she was driving, in violation of section 320.261. Pursuant to section 320.261,

> Any person who knowingly attaches to any motor vehicle or mobile home any registration license plate, or who knowingly attaches any validation sticker or mobile home sticker to a registration license plate, which plate or sticker was not issued and assigned or lawfully transferred to such vehicle, is guilty of a misdemeanor of the second degree . . . .

"An officer is authorized to make a warrantless arrest for a misdemeanor only when it is committed in the officer's presence." Baymon v. State, 933 So. 2d 1269, 1270 (Fla. 2d DCA 2006) (citing § 901.15(1), Fla. Stat. (2004); and Nickell v. State, 722 So. 2d 924 (Fla. 2d DCA 1998)); see also § 901.15(1), Fla. Stat. (2015).

Several cases have clearly stated that a warrantless arrest for a violation of section 320.261 is proper only if an officer observed the act of attaching the improper license plate to the vehicle. In Phillips v. State, 531 So. 2d 1044, 1045 (Fla. 4th DCA 1988), the Fourth District determined that a warrantless arrest for an improper tag violation was invalid where the defendant had not committed the offense in the presence of the officer. The Fourth District stated:

> There is nothing in the record to indicate that the police officer personally observed appellant attaching a registration license plate or a validation sticker which was not lawfully transferred to the subject vehicle. In the absence of such personal observation by the police officer herein, probable cause to make the warrantless arrest did not exist.

Id. (emphasis added). In State v. Carmody, 553 So. 2d 1366, 1367 (Fla. 5th DCA 1989), though the arrest was valid based on other grounds, the Fifth District concluded "that Carmody's arrest for the license tag offense was invalid because the police officer did not observe Carmody doing the act forbidden by the statute (illegal attachment), and he did not have a warrant."

The State cites a misdemeanor trespass case, State v. Yunker, 402 So. 2d 591 (Fla. 5th DCA 1981), in arguing that the officer in this case had substantial reason to believe that the offense was being committed in her presence. The Yunker case involved a warrantless arrest for trespass after warning. The Fifth District clarified that it was not necessary for the initial trespass warning to be issued in the officer's presence. Id. at 593. It was sufficient that the officer had " 'substantial reason' at the time of a warrantless misdemeanor arrest to believe from his observation and evidence at the point of arrest that the person 'was then and there committing a misdemeanor in his presence.' " Id. (quoting Spicy v. City of Miami, 280 So. 2d 419, 421 (Fla. 1973)). The court explained: "In the instant case, the trespass by Yunker was 'then and there' committed on July 1, 1980, in the presence of the officer, not at the time the warning was issued on June 18, 1980." Id.

The alleged offense in this case was committed when the license plate was attached to the vehicle. See § 320.261; Carmody, 553 So. 2d at 1367 (noting that the act forbidden by the statute is the illegal attachment of the license plate). Thus, in

contrast to Yunker, the misdemeanor in this case was not "then and there" committed in the presence of the officer.

The State argues that Ms. Weaver's acknowledgement that the license plate had been attached by her friend is sufficient to validate the arrest when combined with the officer's observations. First, we note that Ms. Weaver's statement points to someone else committing the act of attaching the license plate to the vehicle. Furthermore, the cases cited by the State in support of its argument are distinguishable.

Kirby v. State, 217 So. 2d 619 (Fla. 4th DCA 1969), involved a warrantless arrest based on the misdemeanor of allowing an unauthorized person to operate a motor vehicle on a public street. The officer conducted a stop after the driver ran a stop sign. During the stop, the officer discovered that the driver had no license, and the owner of the vehicle admitted to the officer that he had given the individual permission to drive knowing that she had no license. Id. at 620. The commission of the offense required both (1) granting permission to the unauthorized person and (2) operation of the vehicle on the public street by the unauthorized person. Id. at 621. The operation of the vehicle by the unauthorized person occurred in the officer's presence, but permission was initially granted outside the officer's presence. The State argued that the first element was sufficiently committed in the officer's presence because the vehicle owner admitted to the officer that he had given the driver permission. The Fourth District agreed, noting: "The offense is a continuing one as long as the car is being operated upon the public streets or highways." Id.

Here, the misdemeanor offense for which Ms. Weaver was arrested was committed and completed at the point in time when the plate was attached to the

vehicle. It is undisputed that the officer did not observe this act. Cf. Brown v. State, 91 So. 2d 175, 177 (Fla. 1956) (finding defendant who was pulled over for reckless driving committed the offense of possessing illicit liquor in the presence of the officer when he admitted to having moonshine in the vehicle). Thus, probable cause to make the warrantless arrest did not exist.

III. CONCLUSION

Because the officer did not observe the act constituting the misdemeanor offense in this case, we conclude that the warrantless arrest was invalid, and the evidence obtained pursuant to the search incident to arrest should have been suppressed. See Baymon, 933 So. 2d at 1270 ("Baymon's arrest was unlawful. Therefore, the law mandated suppression of the evidence seized in any search performed incident to that arrest.") (citing Wong Sun v. United States, 371 U.S. 471 (1963)).

Reversed and remanded.

VILLANTI and KHOUZAM, JJ., Concur.