

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1995 SESSION

**FILED**

**February 21, 1996**

**Cecil Crowson, Jr.**

**Appellate Court Clerk**

STATE OF TENNESSEE, \* C.C.A. # 02C01-9410-CC-00220  
Appellee, \* HARDEMAN COUNTY  
VS. \* Hon. Jon Kerry Blackledge, Court Clerk  
ERIC CHRISTOPHER MILLER, \* (Possession of Cocaine With  
Appellant. \* Intent)

For Appellant:

C. Michael Robbins  
Asst. Dist. Public Defender  
P.O. Box 700  
Somerville, TN 38068

For Appellee:

Charles W. Burson  
Attorney General & Reporter  
Rebecca L. Gundt  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, TN 37243-0493

Jerry Norwood  
Asst. District Attorney General  
302 Market Street  
Somerville, TN 38068

OPINION FILED: \_\_\_\_\_

REVERSED AND REMANDED

GARY R. WADE, JUDGE

OPINION

The defendant, Eric Christopher Miller, was convicted of possession of over .5 grams of cocaine with the intent to sell or deliver. The trial court imposed a Range I sentence of ten years.

In this appeal of right, the defendant presents the following issues:

- (1) whether the trial court erred by denying the motion to suppress;
- (2) whether the trial court erred by admitting as an exhibit a "property envelope" held by the police;
- (3) whether the trial court erred by not declaring a mistrial after Sergeant Weaver testified about marijuana he found in the defendant's vehicle;
- (4) whether the trial court erred by altering an exhibit and then speaking to a witness out of the presence of the defense and the state; and
- (5) whether the chain of custody had been properly established before the admission of two of the exhibits.

We hold that the trial court should have granted the defendant's motion to suppress. In consequence, we must reverse the conviction.

On November 19, 1993, the Tennessee Highway Patrol, assisted by the Bolivar Police, set up several roadblocks in Hardeman County. The defendant, accompanied by Roderick Polk, was driving a friend's vehicle along U.S. Highway 64 when, about four-tenths of a mile (2,000 feet or more) before one of the roadblocks, he turned onto another roadway. Officer Mike

King of the Bolivar Police then stopped the defendant.

Upon questioning, the defendant acknowledged that he did not have a driver's license. When Officer King was able to determine that the defendant's license had been revoked, he was placed under arrest. Polk got out of the car and tried to dispose of a substance later identified as cocaine; he was arrested as well. A search of the glove compartment produced "an eight ball," approximately 2.8 grams of cocaine.

I

The defendant initially contends that the roadblock violated constitutional principles. He complains that any evidence obtained as a result of his arrest should have been excluded.

At the pretrial hearing on the motion to suppress, Bolivar Police Chief Johnny Ray Anthony testified that he had arranged with Lieutenant James Mills of the Tennessee Highway Patrol to establish the roadblock. Chief Anthony could not recall who had made the proposal but conceded that he was very interested in having a roadblock to look for "all violations of the law, not only the drugs but all violations." Chief Anthony acknowledged that he arranged to have drug detecting dogs available "to search for evidence of [any] violations."

Lieutenant Mills, the THP district supervisor for Fayette and Hardeman Counties, directed the roadblock operation. Local and state officers were assigned to three

locations. A K-9 officer and a drug task force member were present at each site. THP Sergeant Worden Gray was in charge of the roadblock on U.S. Highway 64.

Lieutenant Mills testified that he was unaware that Chief Anthony intended to investigate possible drug violations and could not recall establishing any policy regarding any vehicles that appeared to be avoiding a roadblock. Lieutenant Mills stated that he had instructed the officers to act in accordance with Tennessee Department of Safety General Order 410, which governed traffic roadblocks. Most of the officers who appeared at the hearing, however, admitted that they had never seen a copy of Order 410.

THP District Captain Bobby Arnold testified that he authorized the roadblocks but did not know that Chief Anthony was also interested in searching for drug violations. Captain Arnold stated that Chief Anthony had not been authorized to re-direct any of the officers to set up any additional roadblocks absent Lieutenant Mills' authorization.

Patrolmen Eddie Henson and Mike King of the Bolivar Police Department had initially been assigned to the roadblock on U.S. Highway 64. During the course of the evening, Chief Anthony received information that traffic was backing up on U.S. Highway 64. He learned that several of the vehicles approaching the roadblock were turning onto Old Highway 64 in an attempt to avoid either the roadblock or the associated traffic congestion. The Chief then instructed Officer Henson

to relocate to the other intersection and to stop any cars that turned so as to help relieve any possible traffic hazards. Chief Anthony acknowledged that the state troopers may have been unaware of this change in the plan.

Officers Henson and King took a patrol car to the new roadblock location on Old Highway 64, observed the defendant and his passenger "acting suspiciously," and made the stop. Each of the officers then recognized the defendant because of his prior drug offenses. Officer Henson, who acknowledged that he had no factual basis for suspecting that the defendant had committed any criminal acts prior to the stop, called for license check and requested the K-9 officer. Officer Henson conceded that the only basis for detention was Chief Anthony's directive to pull over anyone turning off onto Old Highway 64.

The defendant was placed under arrest for driving on a revoked license. Meanwhile, Polk walked to the rear of the car and threw something to the ground. Officer King and Sergeant Weaver found what appeared to be cocaine wrapped in tissue. Sergeant Weaver, whose obligation it was to determine whether to use the dog to sniff for contraband, testified that he had not yet made that decision when Polk attempted to dispose of the cocaine. He claimed that he used the dog based upon his knowledge of the defendant's prior record and the actions of Polk. As the dog stood near the door of the defendant's vehicle, it indicated the presence of drugs. Sergeant Weaver then looked under the seats and in the

ashtray, but found only a marijuana roach-clip. Once inside the car, the dog alerted to the glove compartment where the "eight-ball" of cocaine was located.

The trial court ruled that the drug task force and the K-9 Unit "were employed to assist in further investigative efforts if needed because of possible violations of the law other than traffic." The trial court further found that Chief Anthony had sent Officers Henson and King to the second roadblock in order to stop traffic from driving away from the original location and to check for other possible violations. Neither finding, in our view, would warrant the detention of the defendant's vehicle. We will attempt to explain.

Department of Safety General Order 410, the official guideline for the agency, provides that roadblocks may be used to check (1) driver licenses, (2) equipment, (3) car weight, (4) car length, and (5) possible agricultural violations. Traffic roadblocks may not be "used as a subterfuge to search for other crimes." General Order 410 (III) & (IV) (A). Under subsection (IV) (B), an officer may take appropriate law enforcement action for any law violation detected while conducting a roadblock. See also United States v. McFayden, 865 F.2d 1306, 1312-13 (D.C. Cir. 1989).

While the defendant correctly argues that there are violations of the General Order which might invalidate the stop, a general violation of the guidelines does not necessarily require exclusion of the evidence acquired as a

result of the detention. See State v. David Lynn Hagy, No. 03C01-9505-CR-00152 (Tenn. Crim. App., at Knoxville, December 5, 1995). The real question is whether the deviation from the guidelines was of such a nature or degree that the roadblock, as implemented, was unreasonable under the state and federal constitutional provisions prohibiting unreasonable searches and seizures. State v. Sarah Hutton Downey, No. 03C01-9307-CR-00221, slip op. at 18 (Tenn. Crim. App., at Knoxville, October 10, 1995). We think it was in this instance.

Both the state and federal constitutions protect individuals from unreasonable searches and seizures. An automobile stop constitutes a "seizure" within the meaning of both the Fourth Amendment and Article I, Section 7 of the Tennessee Constitution. See Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990); Delaware v. Prouse, 440 U.S. 648, 653 (1979); State v. Binion, 900 S.W.2d 702, 705 (Tenn. Crim. App. 1994); State v. Westbrook, 594 S.W.2d 741, 743 (Tenn. Crim. App. 1979). The fact that the detention may be brief and limited in scope does not alter that fact. Delaware v. Prouse, 440 U.S. at 653; State v. Binion, 900 S.W.2d at 705; State v. Westbrook, 594 S.W.2d at 743. The basic question, as indicated, is whether the seizure was "reasonable." State v. Binion, 900 S.W.2d at 705 (citing Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990)). The state always carries the burden of establishing the reasonableness of any detention. See State v. Matthew Manuel, No. 87-96-III (Tenn. Crim. App., at Nashville, Nov. 23, 1988). A traffic roadblock which is actually used as a means to

search for drugs may result in a constitutional infringement. See United States v. Morales-Zamora, 974 F.2d 149, 152-53 (10th Cir. 1992); United States v. McFayden, 865 F.2d at 1312-13.

In determining whether a particular roadblock violates the Fourth Amendment, the United States Supreme Court has utilized the following balancing test:

Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concern served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. See, e.g., [United States v. Brignoni-Ponce, 422 U.S. 873 (1975)].

A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests requires the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Brown v. Texas, 443 U.S. 47, 50-51 (1979) (emphasis added) (sobriety checkpoint analysis). The United States Supreme Court reaffirmed the test in Sitz and our state has adopted the rule. See State v. Sarah Hutton Downey, slip op. at 9-10. When balancing the public interest and the individual right to personal security free from arbitrary interference by law enforcement officers in a roadblock context, the standard to be relied upon is "that the seizure must be carried out



pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." See State v. Matthew Manuel, supra. Quoting State v. Deskins, 234 Kan. 529, 541, 673 P.2d 1174, 1185 (1983), this court approved of the following factors to identify areas of concern in the application of the test used in Brown:

(1) the degree of discretion, if any left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety concerns; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.

State v. Sarah Hutton Downey, slip op. at 10-11.

The first prong of the Brown test requires a determination of the state's interest in instituting the roadblock. Here, the state alleges that the roadblock was a driver's license checkpoint; the defendant argues, however, that the checkpoint was in reality designed to search for illegal drugs.

This court has previously held that there is "a substantial state interest in regulating both vehicles and drivers upon the public roads of our state." State v. David Lynn Hagy, slip op. at 4. Here, the Tennessee Highway Patrol, as the supervising authority, was apparently unaware of any

aim of the Bolivar Police to discover drug offenders. The official purpose was to check for driver licenses. Every car was to be checked. To this extent, the roadblock qualified as a part of a neutral and explicit plan.

Other factors, however, indicate that the local police intended to expand upon the original limitations of the plan. Chief Anthony acknowledged that an additional objective was to investigate drug law violations. The utilization of the local drug task force and the K-9 unit at each of these locations support the claim that the officers intended to use the roadblock as a means to search for the presence of illegal drugs. For example, Sergeant Weaver had been authorized to determine which cars would be subjected to a K-9 search. The original plan was amended when the police decided to extend the location of the roadblock so as to also stop those cars turning off U.S. Highway 64 at the Old Highway 64 intersection about a half a mile away. This action placed a focus on those individuals who might have been attempting to avoid the roadblock but, by all other appearances, were lawfully traveling a public road. It would be difficult to characterize Chief Anthony's order as "neutral or random." While Chief Anthony may have had good reason to suspect that some of these individuals were attempting to avoid detection of unlawful activity, he admitted that it was equally plausible that the drivers were merely circumventing the traffic congestion created by the original location of the roadblock.

Certainly, Chief Anthony reached the fairly logical conclusion that those persons who turned off U.S. Highway 64 were more likely to be law violators. Yet the arresting officers conceded that they had seen no unlawful conduct on the part of the defendant prior to the stop. Officers Henson and King had been dispatched to the second location to do more than relieve congestion at the Old Highway 64 turnoff. The directive to broaden the area of stop clearly exceeded the scope of the planned roadblock. If the aim was to relieve congestion, there were other, perhaps better means available. Using additional officers or simply waving backed-up traffic through may have been reasonable alternatives. General Order 410(V)(H).

It is our opinion that the officers' actions exceeded the original scope of the roadblock operation. There was a failure to comply with the official, explicit plan of the Tennessee Highway Patrol. Moreover, the expanded area of the roadblock to those turning onto Old Highway 64 would be governed by the standards established in Terry v. Ohio, 392 U.S. 1 (1968). In Terry, the United States Supreme Court held that a law enforcement officer may temporarily seize a citizen if the officer has a reasonable suspicion, based upon specific and articulable facts, that a criminal offense has been, is being, or is about to be committed. Our courts have held that the Terry doctrine applies to those persons riding in a vehicle. E.g., State v. Watkins, 827 S.W.2d 293, 294 (Tenn. 1992). Previously, this court has held that a lawful turn, some 1,000 feet away from the roadblock, did not establish the

reasonable suspicion necessary for an investigatory stop. State v. Binion, 900 S.W.2d at 705. There is really no significant difference in broadening the area of a roadblock, as in this case, and pursuing all of those who appear to be avoiding the stop, as in Binion. Each action is designed to apprehend all possible violators, irrespective of articulable suspicion.

Here, the officers acknowledged that they had seen no unlawful conduct. No facts were provided to support their claim of "suspicious activity." Chief Anthony merely deduced that those who turned off onto Old Highway 64 were more likely to be violators. Terry stops, however, are "never justified when [they] are based upon the mere hunch or inarticulable suspicion of the law enforcement officer." State v. Dale E. Morrell, No. 03C01-9409-CR-00355 (Tenn. Crim. App., at Knoxville, January 31, 1996). In Binion, this court made the following observation:

We conclude that where a motorist acts to avoid a roadblock, such action may by itself constitute reasonable suspicion that a criminal offense has been or is about to be committed.

Whether reasonable suspicion exists must be determined from the totality of circumstances on a case by case basis. Among the factors to be considered is whether objective evidence indicates that the motorist was attempting to evade arrest or detection. Such evidence may include the distance the motorist was from the roadblock when the turn-off or U-turn was made, whether the motorist was able to see the roadblock before the motorist took evasive action, and the manner in which the motorist operates his or her automobile in making the evasive action. Other factors to be considered are the arresting officer's experience and any

other circumstances which would indicate the driver was intentionally avoiding the roadblock to evade arrest or detection.

Binion, 900 S.W.2d at 705-06 (footnotes omitted). Because the officers were unable to articulate any reasons for expanding the roadblock area to the defendant and stopping his vehicle, the search does not meet constitutional muster. In Binion, this court ruled that a lawful turn some 1,000 feet before the roadblock was an insufficient basis for the detention. Here, a lawful turn was made some 2,000 feet away. No other factors indicated the defendant "was intentionally avoiding the roadblock to evade arrest or detention." Id. In our view, the trial court should have granted the motion to suppress due to the unreasonableness of the seizure.

## II

The defendant also argues that the trial court erred by overruling his motion for a mistrial based on the admission into evidence of a manilla "property envelope" used by the Bolivar Police Department to place property in the vault for storage.

The objection to the admission of the exhibit was because Chief Anthony lacked any "personal independent recollection or knowledge." Counsel argued that "[a]ll he knows is that he got some property from Weaver on a date uncertain and his testimony was clearly based on inadmissible hearsay concerning a document, we don't even know what it is." Although the trial court had overruled the objection, the defendant later moved for a mistrial because of what he

claimed were "inadmissible and highly prejudicial notations regarding the seizure of marijuana from the defendant."

The state contends that because the defendant failed to object until after the cross-examination of Chief Anthony was completed, any error was waived. It is true that the failure to make timely objections may constitute a waiver. See Tenn. R. App. P. 36(a). We will nevertheless address the merits of this issue.

The decision whether to grant a mistrial is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). "Generally a mistrial will be declared in a criminal case only when there is a 'manifest necessity' requiring such by the trial judge." State v. Millbrooks, 819 S.W.2d at 443. Here, the trial court clearly acted within its discretionary authority when it denied the motion for mistrial. Moreover, any error that may have occurred as a result of the admission of the exhibit was clearly harmless. Tenn. R. App. P. 36(b). Subsequent testimony established a proper chain of custody of the envelope and its contents. Even though the exhibit may have been admitted prematurely, it could have been introduced later.

We also find as harmless any error which occurred in the failure to redact any reference to marijuana on the envelope. The defendant did not initially object to the

exhibit's admission on this basis. When the issue was raised, the trial court instructed the jury to disregard any reference on the exhibit to marijuana. The jury is presumed to have followed the trial court's instructions not to consider inadmissible evidence. State v. Millbrooks, 819 S.W.2d at 443; Klaver v. State, 503 S.W.2d 946, 950 (Tenn. Crim. App. 1973). There is no indication that the reference to marijuana had any effect on the results of the trial.

### III

The defendant next asserts that the trial court erred by denying his motion for a mistrial based upon Sergeant Weaver's reference to the marijuana. Specifically, Sergeant Weaver testified that he "opened the door, looked under both seats and in the ashtray ... [and] didn't see anything except a small roach part of a marijuana hand rolled cigarette -- what appeared to have been a hand rolled marijuana cigarette."

The defendant objected to the testimony and moved for a mistrial on the basis that the jury had information about illegal drugs which were not part of the charges. The trial court overruled the request for a mistrial but instructed the jury to disregard that portion of the testimony which referred to what appeared to be marijuana. The defendant maintains that the prosecution improperly elicited this testimony which was "irrelevant and highly inflammatory and prejudicial."

As stated, a mistrial will result only when there is

a "manifest necessity." The record here does not establish the necessity for granting a new trial on this basis. The testimony was volunteered by Sergeant Weaver during a lengthy description of the events surrounding the defendant's arrest. The reference to marijuana does not appear to have been sought by the state. The trial court provided curative instructions and the jury is presumed to have complied with that directive. Klaver v. State, 503 S.W.2d at 950. By the use of these guidelines, we do not believe the defendant would be entitled to relief on this basis. Tenn. R. App. P. 36(b).

#### IV

The defendant next contends that the trial court erred (1) by removing part of the contents of an exhibit identified by a witness, and (2) by later conferring with the witness outside the presence of the state and the defense. The claim is that these actions "placed an official stamp of approval on that evidence in the minds of the jurors."

The defendant alleges that when Sergeant Weaver took a small white envelope out of the larger manilla envelope, the trial court removed some of the contents. The record, however, does not affirmatively establish that such an event occurred. No objection was made on the record.

The defendant also claims that the trial court erred by later speaking to Sergeant Weaver during the course of his testimony. Neither side could hear what was said. During Sergeant Weaver's testimony, the assistant district



attorney asked that the witness be instructed not to refer to the roach or marijuana in his answers. This was due to the defendant's earlier objection. Immediately following this request, the trial judge spoke to the witness outside the hearing of the parties and the jury. Defense counsel then offered the following objection:

Judge, I don't want to interrupt the proceedings but an opportune moment, could we have the jury out? I just think this whole spectacle of all this that's going on in front of the jury is prejudicial and I'd like to be heard on that, but I'll permit this to continue--

The trial court then suggested that defense counsel could "be heard on it later." The defendant did not raise the issue again.

The defendant claims that these matters were presented and overruled at the hearing on the motion for a new trial; the transcript of that hearing, however, is not part of the record. It is the duty of the appellant to prepare a record which conveys a fair, accurate and complete account of what transpired in the trial court with respect to the issues which form the basis of his appeal. Tenn. R. App. P. 24(b). Without a transcript of the hearing on the issue, this court must presume that the evidence supports the trial court's actions and rulings. State v. Taylor, 669 S.W.2d 694, 699 (Tenn. Crim. App. 1983); State v. Baron, 659 S.W.2d 811, 815 (Tenn. Crim. App. 1983). Even assuming that this occurred, the defendant has failed to demonstrate any specific prejudice as a result. Accordingly, the defendant is not entitled to relief on this issue.

Lastly, the defendant claims that the trial court erred by admitting exhibits five and six because the evidence did not establish a proper chain of custody. The exhibits consisted of the drugs which were recovered from the glove compartment and from the tissue paper thrown down by the passenger.

The state initially argues that the issue is waived because the defendant did not timely object when these exhibits were first introduced into evidence. The defendant objected only after the state was attempting to introduce a different exhibit through Sergeant Weaver. Again, we choose to address the merits of the issue.

Tenn. R. Evid. 901(a) requires that tangible evidence be authenticated and provides as follows:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.

Identification may be by a witness or by the demonstration of an unbroken chain of custody, but identification need not be absolutely certain. State v. Woods, 806 S.W.2d 205, 212 (Tenn. Crim. App. 1990); State v. Ferguson, 741 S.W.2d 125, 127 (Tenn. Crim. App. 1987). Whether tangible evidence has been properly authenticated is left to the discretion of the trial court. Tenn. R. Evid. 901(a); see also Ritter v. State, 3 Tenn. Crim. App. 372, 462 S.W.2d 247 (1970). The trial

court's decision will not be disturbed absent a clearly mistaken exercise of that discretion. State v. Baldwin, 867 S.W.2d 358, 361 (Tenn. Crim. App. 1993).

At trial, Sergeant Weaver identified the envelope in which he had placed a large rock of cocaine and four smaller rocks. He testified that the exhibits appeared to be the same items he had placed into a plain envelope and sealed with tape. He had not marked the envelope with his name but he had sealed it in his usual manner and delivered it to another officer for placement into the property envelope. Officer King had testified that he gathered the cocaine from the ground and gave it to Sergeant Weaver. Sergeant Weaver testified that he first put the evidence in his pocket and later performed a field test. He then put the cocaine in the plain envelope. He and Chief Anthony placed it inside of the property envelope. Chief Anthony stored it in the vault at the police department. Other officers testified about taking the envelope to the crime lab for testing and then returning the envelope to the vault. Under these circumstances, we cannot find that the trial court abused its discretion in determining that the chain of custody had been sufficiently established for each of the two exhibits.

#### Conclusion

Based upon our finding that the additional "roadblock" was not supported by reasonable suspicion and thus violated the defendant's state and federal constitutional rights, the judgment of conviction is reversed. The cause is

remanded to the trial court for disposition.

---

Gary R. Wade, Judge

CONCUR:

---

Joe B. Jones, Judge

---

John K. Byers, Senior Judge