

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1996

February 28, 1997

**FILED**  
Cecil W. Crowson  
Appellate Court Clerk

STATE OF TENNESSEE, )

C.C.A. NO. 01001-96-0009

Appellee, )

VS. )

DICKSON COUNTY

JAMES RUSSELL WICKS, )

HON. ROBERT BURCH  
JUDGE

Appellant. )

(Certified Question-Search)

ON APPEAL FROM THE JUDGMENT OF THE  
CIRCUIT COURT OF DICKSON COUNTY

FOR THE APPELLANT:

FOR THE APPELLEE:

MICHAEL J. FLANAGAN  
DALE M. QUILLEN  
95 White Bridge Road #208  
Nashville, TN 37205

CHARLES W. BURSON  
Attorney General and Reporter

DEBORAH A. TULLIS  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, TN 37243-0493

DAN ALSOBROOKS  
District Attorney General

SUZANNE LOCKERT  
Assistant District Attorney General  
P.O. Box 580  
Charlotte, TN 37036

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

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

This is an appeal pursuant to Rule 37(b)(2)(i) of the Tennessee Rules of Criminal Procedure. The Defendant pleaded guilty to possession of marijuana for resale<sup>1</sup> and possession of drug paraphernalia.<sup>2</sup> With the agreement of the State and the trial court, he reserved a certified question of law that is dispositive of the case. The certified question arose from the trial court's denial of a motion to suppress evidence obtained through a consent search of the Defendant's residence. We affirm the judgment of the trial court.

On March 18, 1993, agents from the Twenty-First and Twenty-Third Judicial District Drug Task Forces were investigating the Defendant for possible involvement in the sale of illegal drugs. After learning the location of the Defendant's residence, multiple officers proceeded there that night. They did not find the Defendant there but discovered that Rita Tomlinson, the Defendant's "live-in" girlfriend, was at home. After conversing with Tomlinson for some period of time, officers obtained her consent to search the premises. The search yielded drug paraphernalia and a large quantity of marijuana.

Prior to trial, the Defendant filed a motion to suppress the evidence garnered from the consent search of his residence. At the hearing on the motion to suppress, several agents testified that, prior to March 18, 1993, they were unsure of the exact location of the Defendant's residence. They had recently

---

<sup>1</sup> Tenn. Code Ann. § 39-17-417.

<sup>2</sup> Tenn. Code Ann. § 39-17-425.

arrested another individual, Wade Deal, for selling five pounds of marijuana to an undercover officer. Deal had been at the Defendant's residence immediately before making the sale to the undercover officer and informed agents that he had picked up the marijuana sold in the transaction at the Defendant's home. Deal informed the agents of the precise location of the Defendant's residence.

According to the testimony of the officers, they proceeded to the Defendant's residence, a trailer in Dickson County, at approximately 10:00 p.m. on the night of March 18. Two officers, Gary Luther and Mike Holman, circled around the trailer and approached the back door. Two other officers, Stewart Goodwin and Barry Kincaid, approached the front door and knocked. Rita Tomlinson, the Defendant's girlfriend, answered the door.<sup>3</sup> The officers identified themselves and asked permission to enter the home, to which Tomlinson replied, "what's going on?" They told Tomlinson that they needed to come in and speak with her, "if it's alright." Tomlinson then invited the officers into the trailer. The officers told Tomlinson that they had information that there was marijuana on the premises and asked her to consent to a search. According to the officers, Tomlinson expressed a concern that the officers might tear up the trailer or wake up her sleeping child during a search. By this time, there were at least ten agents on the scene. The officers assured her that only a few agents would be involved in the search and would not tear up her home or wake up her child. In response to questioning, Tomlinson stated that Wade Deal had been at the trailer earlier that day.

---

<sup>3</sup> At the time of the search, Rita Tomlinson had lived with the Defendant for approximately eleven years. By the time of the suppression hearing, they were married. As a result, she had changed her last name to "Wicks." For the sake of clarity, however, we will refer to her as Rita Tomlinson throughout this opinion.

About this time, a truck matching the description of the Defendant's vehicle drove up to the trailer and then sped away. The truck was carrying a large external fuel tank on its bed. All but one of the officers pursued the vehicle. The remaining officer, Gary Luther, stayed at the trailer in case the Defendant returned. Luther did not search the premises while the other officers were absent.

The pursuing officers lost contact with the vehicle after a short chase and soon returned to the trailer. Agent Ted Tarpley then began to speak with Tomlinson. Tarpley asked Tomlinson to sign a consent form and told her that if she refused to consent, they would secure the residence and attempt to obtain a search warrant from a judge. At approximately 10:50 p.m., Tomlinson signed a written consent to search form.

Officers then searched the trailer and discovered a large set of scales as well as a note which had been torn into small pieces, with names and numbers apparently indicating weights. A search of the premises surrounding the trailer yielded one cache of approximately five pounds of marijuana hidden in a backhoe and another cache of approximately sixty to seventy pounds of marijuana hidden in a truck.

During this time, the Defendant drove up to the trailer in his truck. The external fuel tank was missing from the bed of the truck. Officers questioned the Defendant about the fuel tank. The Defendant informed agents that he would reveal the location of the tank if they would not arrest Tomlinson that night. The officers agreed to the arrangement and were led to the fuel tank. A drug-

detecting dog alerted on the tank and the bed of the pickup truck, but officers found no marijuana.

According to the testimony of the officers, at no time did Tomlinson ask them to leave or refuse consent to search. On cross-examination, Agent Ted Tarpley was confronted with his testimony from the preliminary hearing, which indicated that Tomlinson had refused consent to search at first. Tarpley, however, explained that he must have misunderstood the question at the preliminary hearing. Tarpley stated that his testimony actually indicated that he had told Tomlinson that if she refused consent, he had a right to go before a judge in order to attempt to secure a search warrant.

Rita Tomlinson testified on the Defendant's behalf at the suppression hearing. She stated that her dog began barking on the night in question, prompting her to look out the window. She observed three men, who did not appear to be police officers, walking through her yard. Tomlinson overheard one of the men talking about kicking down the door. One of the men tapped on a nearby window and announced that they were police officers, and Tomlinson opened the front door.

According to Tomlinson, Agent Mike Shires pulled open the storm door and walked inside, saying that they had to ask her some questions. Shires began searching the trailer while other officers talked with her. She told Agent Shires that he had no right to search the trailer, to which Shires responded that he would get a warrant and "flip my trailer upside down." Tomlinson remembered speaking with Agent Ted Tarpley, who asked her to sign a consent form. She was

somewhat confused and did not want officers to tear apart the trailer or to wake up her child. She recalled that some officers were talking about taking her child away from her. Contrary to the testimony of the agents, Tomlinson testified that she asked the officers to leave several times and specifically refused consent to search, but they continued to ask her to sign the consent form.

During this time, she saw the Defendant drive up to the trailer and suddenly speed away. She testified that she heard an officer outside saying "shoot him, shoot him" as the Defendant drove away. Most of the officers pursued the Defendant but soon returned to the trailer. Upon returning, they again asked her to sign the consent form. She recalled that the officers had a dog out running around her yard. On cross-examination, she stated that she believed the dog was searching her yard rather than looking for a place to relieve itself, but could not explain the specific reasons supporting her belief. Tomlinson eventually signed the consent form because an officer told her "that it would look good on me when I came to court, if I signed it, and that he'd make sure that I stayed home and my little boy stayed home with me, and that they wouldn't tear my trailer apart." On cross-examination, Tomlinson stated that she was not intimidated by the police dog and that it had nothing to do with her signing the consent form.

After the hearing, the trial court denied the motion to suppress by a memorandum opinion filed on December 16, 1993. The trial court, after carefully considering the testimony offered at the hearing, found that the consent to search was voluntarily given. With the motion to suppress denied, the Defendant

entered guilty pleas while reserving the certified question that is the subject of this appeal.

Through his certified question, the Defendant argues that the actions of Agent Mike Shires and the police dog constituted an illegal search which tainted the consent given by Rita Tomlinson. As a result, he asserts that the consent given by Tomlinson was involuntary and, therefore, invalid. The Defendant contends that the State did not carry their burden at the suppression hearing of demonstrating that the warrantless search of the trailer and its surrounding premises was reasonable.

We agree with the Defendant that a warrantless search is presumed to be illegal and, accordingly, the State bears the burden of establishing that the search and seizure were reasonable. State v. Crabtree, 655 S.W.2d 173, 179 (Tenn. Crim. App. 1983). Of course, there are exceptions to the warrant requirement, such as when a co-occupant of premises voluntarily consents to the search. See, e.g., State v. Green, 613 S.W.2d 229, 232 (Tenn. Crim. App. 1980); McGee v. State, 451 S.W.2d 709, 712 (Tenn. Crim. App. 1969).

We also note that the “party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence.” State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). The credibility of witnesses, the weight of the evidence, and the resolution of conflicts in the evidence are all matters entrusted to the trial judge as the trier of fact. Id. Thus, the factual findings of the trial court in suppression hearings are presumptively

correct on appeal and will be upheld unless the evidence preponderates against them. Id.; see also State v. Tate, 615 S.W.2d 161, 162 (Tenn. Crim. App. 1981) (citing Nix v. State, 530 S.W.2d 524, 527 (Tenn. Crim. App. 1975)).

We believe that, due to both the substance of some of the conduct testified to by Rita Tomlinson and the conflicting nature of the testimony of Tomlinson and the officers involved, it was implicit in the trial judge's ruling on the suppression motion that he accredited the testimony of the witnesses for the State and rejected the series of events recounted by Tomlinson. Certainly the trial judge was in a far better position to evaluate credibility than we are. Moreover, Tomlinson herself admitted on cross-examination that the actions of the police dog had no effect on her decision to sign the consent form.

After hearing the witnesses, evaluating their credibility, and weighing the evidence, the trial court found that Rita Tomlinson had voluntarily consented to the entry and search of the trailer and its surrounding premises. From our review of the record, we can only conclude that the evidence does not preponderate against the trial court's finding. From the record before us, we cannot conclude that Tomlinson's consent was preceded by an illegal search. Accordingly, the trial court did not err in denying the Defendant's motion to suppress. Therefore, we affirm the judgment of the trial court.

---

DAVID H. WELLES, JUDGE



CONCUR:

---

JOHN H. PEAY, JUDGE

---

JERRY L. SMITH, JUDGE