

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 12, 2005

STATE OF TENNESSEE v. STEPHAN M. REYNOLDS, ALIAS

**Direct Appeal from the Criminal Court for Knox County
No. 78540 Mary Beth Leibowitz, Judge**

No. E2004-01830-CCA-R3-CD - Filed September 15, 2005

The defendant was indicted for possession with intent to sell over one-half ounce of marijuana within 1000 feet of a school (a Class D felony); possession with intent to deliver over one-half ounce of marijuana within 1000 feet of a school (a Class D felony); and possession of drug paraphernalia (a Class A misdemeanor). The trial court granted the defendant's motion to suppress after a hearing. The State now appeals the suppression of evidence. After careful review, we affirm the trial court's order of suppression.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Paul G. Summers, Attorney General and Reporter; Kathy D. Aslinger, Assistant Attorney General; Randall Eugene Nichols, District Attorney General; and Ta Kisha Fitzgerald, Assistant District Attorney General, for the appellant, State of Tennessee.

Ralph E. Harwell and Tracy Jackson Smith, Knoxville, Tennessee, for the appellee, Stephan M. Reynolds, Alias.

OPINION

The defendant, Stephan M. Reynolds, was indicted for possession with intent to sell over one-half ounce of marijuana within 1000 feet of a school; possession with intent to deliver over one-half ounce of marijuana within 1000 feet of a school; and for possession of drug paraphernalia. A motion to suppress the evidence was granted, and the State now appeals the suppression.

Testimony at the suppression hearing consisted of two witnesses, Michael Davis, a DEA agent, and the defendant. Agent Davis testified that his office had received an anonymous report that narcotic trafficking was occurring at the defendant's apartment, and there was a large

amount of currency there. On July 23, 2003, Agent Davis, accompanied by two other agents, Phil Rust and James Blanton, investigated the report by initiating a “knock and talk” with the defendant. According to Agent Davis, the defendant granted the agents’ request to enter the apartment. Upon entry, Davis smelled fresh marijuana and saw a box on a desk in the dining room. He saw loose marijuana in the box, bags of marijuana on the desk, as well as a grinder, a set of scales, and a heat shrink wrap sealer. The defendant was detained and patted down. The search of the defendant revealed a plastic bag of marijuana in the defendant’s pocket. After being administered Miranda warnings, the defendant signed a consent to a search of the apartment and his automobile. More marijuana was found in the defendant’s car and in a freezer. No currency was found during the search. The defendant was arrested on the subject charges on September 3, 2003.

The defendant testified that he received a call from a person purporting to be a Federal Express driver with a package that required a signature. The defendant later learned the caller was Agent Davis. Shortly after the defendant arrived at his apartment, three DEA agents appeared at his door and requested entry. The defendant asked if they needed a search warrant, and Agent Davis responded that he would call the sheriff’s department to bring a warrant and that the defendant would be arrested. The defendant stepped back from the door, and the three agents entered the apartment. While Agent Davis occupied the defendant near the entry way, the two other agents began searching the house. The defendant stated that there was loose marijuana in a box on the desk, approximately nineteen feet from where the agents entered but that the loose marijuana was not visible until one approached to a distance of five to six feet. The defendant denied there were bags of marijuana on the desk and stated the grinder and heat wrapper were in the kitchen. The defendant was asked if he had any weapons, and he told the agents where a firearm was stored. Agent Blanton then told the defendant he could be prosecuted on a federal offense for the firearm possession and receive a five-year sentence. The agents then attempted to recruit the defendant to work undercover and described what he would be expected to do. The defendant stated he would like to speak with an attorney first. Agent Blanton said he could call an attorney and, if he did, they would arrest him immediately and seize his vehicle. The agent further stated that they would seek leniency with the attorney general if the defendant did not call an attorney and cooperated with them.

The defendant stated that the agents were in his apartment approximately two hours. The search of the apartment and car had been done upon the agents’ entry. The defendant was not given Miranda warnings until approximately one hour after the agents’ arrival. The consent forms which Agent Davis brought were not signed until twenty minutes before the agents left.

In an order granting the motion to suppress, the trial court made the following conclusions of law and findings of fact:

In this case the D.E.A. Agent had no grounds to institute a “knock and talk” at the home of this defendant except upon an anonymous complaint. He could not testify when he received it or whether there was any validity to it, but that he initiated a “knock and talk” anyway. The agents entered into the defendant’s home after initiating the “knock and talk” and patted the defendant in his home, sat him down and held him “not free to leave” while they smelled Marijuana and then searched the home. The agents did not collect any of the

containers holding the alleged Marijuana but instead collected all the Marijuana together and had it weighed and evaluated for the purposes of prosecuting the defendant, and also received a signed Miranda waiver and two signed consents to search. The suspicions of the agents was [sic] based upon the smell of fresh Marijuana, the items on the desk involving a shrink wrapper, zip lock bags and grinder, and the ability to see a few Marijuana seeds in a box across the room. The defendant therefore was seized in his own home while the officers entered into a search. In response to the defendant's inquiries about needing a lawyer, they asked him to turn over on other individuals. While this is often a police tactic which is valid under other circumstances, the Court does not find that the initial complaint "knock and talk" entry into the home and detention of the defendant during the course of the search has been sufficiently proven to establish that the search of the home without a warrant.[sic] The search of the defendant's home without a warrant lacked sufficient probable cause to render the fruits of such search invalid. The Court therefore, respectfully suppresses the evidence seized from the home and automobile of the defendant, Stephen Michael Reynolds.

The State contends on appeal that the trial court erred in its conclusion that the officers lacked probable cause to conduct a "knock and talk." In addition, the State contends that the officers entered the residence lawfully and observed marijuana, as well as smelled marijuana. These observations then justified a further search, which the defendant consented to after being advised of the Miranda warnings.

The defendant argues that the trial court's decision was based on a credibility issue, that the defendant's version was accredited, and that the evidence does not preponderate against this finding.

The findings of fact made by the trial court at the hearing on a motion to suppress are binding upon this court unless the evidence contained in the record preponderates against them. State v. Ross, 49 S.W.3d 833, 839 (Tenn. 2001). The trial court, as the trier of fact, is able to assess the credibility of the witnesses, determine the weight and value to be afforded the evidence, and resolve any conflicts in the evidence. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences drawn from that evidence. State v. Hicks, 55 S.W.3d 515, 521 (Tenn. 2001). However, this court is not bound by the trial court's conclusions of law. State v. Randolph, 74 S.W.3d 330, 333 (Tenn. 2002). The application of the law to the facts found by the trial court are questions of law that this court reviews *de novo*. State v. Daniel, 12 S.W.3d 420, 423 (Tenn. 2000). The appellant has the burden of establishing that the evidence contained in the record preponderates against the findings of fact made by the trial court. Braziel v. State, 529 S.W.2d 501, 506 (Tenn. Crim. App. 1975).

The "knock and talk" investigation procedure, as a consensual encounter and a means to request consent to search a residence, has been approved in Tennessee. See State v. Cothran, 115 S.W.3d 513, 521 (Tenn. Crim. App. 2003). Therein, this court quoted approvingly as follows:

Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof - whether the questioner be a pollster, a salesman, or an officer of the law.

United States v. Cromier, 220 F. 3d 1103, 1109 (9th Cir. 2000), cert. denied, 531 U.S. 1174, 121 S. Ct. 1146 (2001) (quoting Davis v. United States, 327 F. 2d 301, 303 (9th Cir. 1964). Neither probable cause nor reasonable suspicion is needed to conduct a "knock and talk." Cothran, 115 S.W.3d at 521. Neither is a search warrant required when knowing and voluntary consent to enter a residence is given by the resident. See United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988 (1974); State v. Wilson, 990 S.W.2d 726, 730 (Tenn. Crim. App. 1998).

In light of the foregoing authority, we note that the trial court misapprehended the standard for initiating a "knock and talk" investigation. That said, our reading of the trial court's findings indicates that the search was not suppressed due to an alleged faulty "knock and talk" procedure but, rather, that the trial court accredited the defendant's version of events in its fact finder's role. Support for this is contained in the trial court's findings. The trial court did not credit Agent Davis's testimony that he saw plastic bags containing marijuana on the desk and evinced skepticism of Davis's ability to see the loose marijuana in a box from his distant position. The defendant's version that he was seized and a search instituted was accepted. The defendant was the only witness who testified concerning his inquiry about contacting a lawyer and the agent's efforts to recruit him as an informer. This was explicitly adopted by the trial court.

Giving the defendant the strongest legitimate view of the evidence, we turn now to the voluntariness of the consent given by the defendant for the agents to enter the residence. The record reflects in the defendant's testimony that he first said he would come outside and talk with the three agents. Agent Davis stated they would rather come inside. The defendant then asked if a warrant was needed for that. One of the agents remarked that he smelled marijuana, and Agent Davis stated if the defendant would not consent to their entry, he would have a warrant brought out by the sheriff's office and the defendant would be arrested. According to the defendant, he asked twice about the need for a search warrant. The defendant then stepped back, and the officers entered and immediately undertook a search of the residence while the defendant was detained. A consent which comes only after a threat to obtain a warrant is not a voluntary consent. Bentley v. State, 552 S.W.2d 778, 780 (Tenn. Crim. App. 1977), cert. denied.

We have acknowledged the officers' right to appear at the defendant's door and make inquiry of the allegations they have received. As we have noted, that privilege, in the absence of specific prohibition, extends to the general public. However, that point of entry, absent exigent circumstances, does not extend one or two feet into the home; it ends at the entrance. State v. Clark, 844 S.W.2d 597, 599 (Tenn. 1997) (citations omitted). The mere action of a defendant stepping back from the door will not be construed as an invitation for officers to enter. Id. "For constitutional purposes nonresistance may not be equaled with consent." United States v. Most, 876 F. 2d 191, 199 (D.C. Cir. 1989).

The defendant indicated at one point in his direct testimony that his behavior indicated a consent for the officers to enter.

Q: Ultimately, did you invite him in?

A: Yes. I -- I -- I didn't tell him to come in. I took a step away from the door backwards into by [sic] apartment, and I -- I didn't shut the door.

Q: Did you feel like you were agreeing that they could --

A: Yes.

Q: -- come in?

A: Yes.

On cross-examination, the defendant clarified the circumstances of the officers' entry.

THE COURT: I think that's the answer to the question. He allowed them into his apartment.

A: No, I did not give them verbal permission to come into my apartment.

Q: So you gave them --

A: Prior to this he had his foot in the doorstep so that I could not shut the door though.

Q: Okay. So you gave them nonverbal permission to come into your apartment?

A: No. I stepped away from the door --

“Consent to enter and search a home will not be lightly inferred, nor found by mere acquiescence to unlawful authority.” Clark, 844 S.W.2d at 599. “In order to pass constitutional muster, consent to search must be unequivocal, specific, intelligently given, and uncontaminated by duress or coercion.” State v. Brown, 836 S.W.2d 530, 547 (Tenn. 1992). The two authorities cited were concerning consents to search, but we find them equally applicable to consent to enter the home for the ostensible purpose of “talking.” We further observe that if talking was the agents' true goal, it could have been as easily done outside as within the defendant's premises.

The totality of circumstances surrounding the officer's entry was fraught with a heavy taint of coercion. Beginning with the ruse to lure the defendant home, to the presence of the three officers at the door issuing a threat of arrest, and their insistence on entry which culminated in an unauthorized and unlawful entry.

The trial court did not specifically address the issue of the two consent to search forms but, by implication, necessarily rejected their validity. Accreditation of the defendant's testimony that the consent forms were signed well after the search was complete would render the consents invalid. Consent to search must be unequivocal, specific, intelligently given, and uncontaminated by duress or coercion. Brown, 836 S.W.3d at 547. An after-the-fact consent can hardly be characterized as consensual or free of coercion, especially after discussions of leniency in exchange for cooperation.

Conclusion

While the trial court's findings could have been more explicit, it is our view that a complete and fair reading reveals that the defendant's version of events were accredited. The facts do not preponderate against these findings which are binding on this court. Accordingly, the order of suppression is affirmed.

JOHN EVERETT WILLIAMS, JUDGE