Cite as 2011 Ark. App. 683

# ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR11-19

JOE McKINLEY JONES
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered November 9, 2011

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT
[NO. CR2010-372]

HONORABLE J. MICHAEL FITZHUGH, JUDGE

AFFIRMED

**RAYMOND R. ABRAMSON, Judge**

A Sebastian County jury found appellant Joe McKinley Jones guilty of possession of cocaine with intent to deliver and possession of drug paraphernalia. He was sentenced as a habitual offender to consecutive terms of imprisonment of thirty years for possession of drug paraphernalia and 100 years for possession of cocaine with intent to deliver. On appeal, he argues that (1) officers lacked probable cause to stop and arrest him and conduct a search of his vehicle and (2) the introduction of the crime laboratory report without cross-examination violated his right to confront the witness against him. We affirm.[1]

On March 30, 2010, Fort Smith narcotics detective Greg Napier was working with a confidential informant who stated that he could purchase crack cocaine from a person

[1]This court recently affirmed the revocation of Jones's suspended imposition of sentence. *Jones v. State*, 2011 Ark. App. 543.

named Latisha Longnecker. Napier and other officers arranged a controlled buy, which was to take place at 1323 Carthage Avenue in Fort Smith. Surveillance was set up at that location, and officers met with the confidential informant to search him and give him $40 in buy money. On the way to the area where the buy was to occur, Napier and the confidential informant saw a white Mitsubishi Galant going in the other direction. The informant ducked down and told Napier that the driver of the white Mitsubishi was "the dope guy." Napier was able to obtain the license-plate number, which he gave to the other investigators, and the controlled buy proceeded.

The officers let the informant out and watched him walk to the apartment complex, where they could see him go into the apartment. A car pulled up, and Latisha Longnecker got out and went inside the apartment. Officers could hear the conversation between the informant and Longnecker, and Longnecker then made a phone call. Ten to fifteen minutes later, the white Mitsubishi pulled into the apartment complex, and Longnecker got into the passenger seat. She was in the car for only a short time, and then she went directly back into the apartment. The Mitsubishi drove away, and officers followed it. The informant came back to the officers' vehicle and presented a small bag of an off-white, rock-like substance, which field-tested positive for cocaine. Napier gave the order to stop the Mitsubishi.

Officer Brian Rice made the stop and found appellant to be uncooperative. Appellant was placed under arrest. Rice found $380 plus the $40 in buy money in appellant's pocket, and at that point narcotics detective Ray Whitson arrived and took over. Rice then had his certified drug dog do an exterior sniff of appellant's vehicle. The dog alerted, meaning that

it detected the odor of illegal narcotics. In the area under the radio, Whitson found fourteen individually wrapped pieces of an off-white, rock-like substance in a small plastic container.

Before trial, appellant filed a motion to suppress, and a hearing was held on October 11, 2010. Testifying at the hearing were Greg Napier, Brian Rice, and Ray Whitson. At the conclusion of the hearing, the court denied the motion to suppress. The jury trial commenced the same day.

First, appellant contends that the police officers lacked probable cause to stop and arrest him or conduct a search of his vehicle. Appellant argues that, because Napier did not testify that the informant was reliable and had been an informant for other arrests resulting in convictions, Napier was "relying on the hearsay of an unproven person to use as a basis for the stop." He further contends that it is "hard to see how Napier could have observed the alleged purchase, gotten the contraband, then driven to the police station to do a field test and then instructed Rice to stop" him.

In reviewing the trial court's action in granting or denying motions to suppress evidence obtained by warrantless searches, we make an independent determination based on the totality of the circumstances, but we will not set aside the trial court's finding unless it is clearly against the preponderance of the evidence. *Perez Munguia v. State*, 22 Ark. App. 187, 189, 737 S.W.2d 658, 659 (1987). An officer has the right to stop a vehicle and make a warrantless search if it is on a public highway and he has reasonable cause to believe the vehicle contains evidence subject to seizure and the circumstances require immediate action to prevent destruction or removal of the evidence. *Willett v. State*, 298 Ark. 588, 592, 769

S.W.2d 744, 746 (1989). Reasonable cause as required by Ark. R. Crim. P. 14.1[2] exists when the officers have reasonably trustworthy information, which rises to more than mere suspicion, that the stopped vehicle contains evidence subject to seizure and a person of reasonable caution would be justified in believing an offense has been committed or is being committed. *Id.* Probable cause is assessed based on the collective knowledge of the police, not solely on the knowledge of the officer making the stop or the arrest. *Id.*

Here, the officers observed the controlled buy visually to the extent possible and also listened to the conversation between the informant and Longnecker. Based on their observations, they knew that Longnecker did not have the drugs when the informant first arrived. After going out to the white Mitsubishi, however, she returned with what she represented to be drugs. Based on the officers' own observations, it was reasonable to

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[2]Ark. R. Crim. P. 14.1(a) provides:

> An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:
>
> (i) on a public way or waters or other area open to the public;
>
> (ii) in a private area unlawfully entered by the vehicle; or
>
> (iii) in a private area lawfully entered by the vehicle, provided that exigent circumstances require immediate detention, search, and seizure to prevent destruction or removal of the things subject to seizure.

conclude that the Mitsubishi driver was involved in the drug transaction. Therefore, probable cause existed regardless of the informant's reliability.

Next, appellant appears to argue that Napier would not have had time to conduct a field test on the substance before ordering his stop. We conclude that whether the field test was done before or after appellant's vehicle was stopped is irrelevant. Napier spoke to his informant, who handed him what appeared, based on Napier's extensive experience with narcotics, to be crack cocaine. Longnecker represented that it was crack cocaine. At that point, the officers had reasonable cause to believe that the Mitsubishi driver was involved in the purported drug deal.

In this case, the trial court's denial of the motion to suppress is not clearly against the preponderance of the evidence, and we therefore affirm on this point.

Next, appellant argues that the introduction of the crime laboratory report without the chemist being available for cross-examination violated his right to confront the witnesses against him.

Arkansas Code Annotated section 12-12-313 (Repl. 2009) provides:

> (a) The records and reports of autopsies, evidence analyses, drug analyses, and any investigations made by the State Crime Laboratory under the authority of this subchapter shall be received as competent evidence as to the matters contained therein in the courts of this state subject to the applicable rules of criminal procedure when duly attested to by the Executive Director of the State Crime Laboratory or his or her assistants, associates, or deputies.
>
> (b) Nothing in this section shall be deemed to abrogate a defendant's right of cross-examination if notice of intention to cross-examine is given prior to the date of a hearing or trial pursuant to the applicable rules of criminal procedure.

> (c) The testimony of the appropriate analyst may be compelled by the issuance of a proper subpoena, in which case the records and reports shall be admissible through the analyst who shall be subject to cross-examination by the defendant or his or her counsel, either in person or via two-way closed-circuit or satellite-transmitted television pursuant to subsection (e) of this section.
>
> (d)(1) All records and reports of an evidence analysis of the laboratory shall be received as competent evidence as to the facts in any court or other proceeding when duly attested to by the analyst who performed the analysis.
>
> (2) The defendant *shall give at least ten (10) days' notice* prior to the proceedings that he or she requests the presence of the analyst of the laboratory who performed the analysis for the purpose of cross-examination.
>
> (3) Nothing in this subsection shall be construed to abrogate the defendant's right to cross-examine.

(Emphasis added.) In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the United States Supreme Court held that the admission of affidavits by state laboratory analysts without the analysts appearing to testify violated the defendant's rights under the Confrontation Clause. However, the *Melendez-Diaz* Court acknowledged that some states have notice-and-demand statutes, such as the one quoted above, and found them consistent with constitutional requirements.[3]

Here, appellant admittedly failed to give the required notice requesting the analyst's presence. The analyst's name appeared on the prosecution's witness list, and defense counsel assumed she would testify at trial. On the day of trial, the defense learned that the analyst was

[3]"The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections." *Melendez-Diaz*, 129 S. Ct. at 2541 (emphasis in original).

on maternity leave and would not be called as a witness by the prosecution. Appellant cites no authority for his argument that he was excused from the notice requirement because the analyst appeared on the prosecution's witness list. Accordingly, we affirm on this point.

Affirmed.

HOOFMAN, J., agrees.

PITTMAN, J., concurs.