Cite as 2012 Ark. App. 96

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-233

DERRICK ANTOINE WILSON, SR. APPELLANT	**Opinion Delivered** February 1, 2012 APPEAL FROM THE ASHLEY COUNTY CIRCUIT COURT [NO. CR-2010-64-1]
V.	HONORABLE SAM POPE, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant was charged with possession of a controlled substance (cocaine) with intent to deliver. After a jury trial, he was convicted of that offense and sentenced to a term of fifteen years in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in denying his motion to suppress the cocaine found in his vehicle when he was stopped by Arkansas State Police at a sobriety checkpoint. We affirm.

In reviewing the denial of a motion to suppress evidence, we conduct a de novo review based upon the totality of the circumstances, reversing only if the circuit court's ruling denying the motion to suppress is clearly against the preponderance of the evidence. *Banks v. State*, 2010 Ark. App. 383. The relevant circumstances can be briefly stated. The Arkansas State Police placed a sobriety checkpoint in Hamburg, Arkansas, at 11:00 p.m. on the night of April 10, 2010. The checkpoint was conducted for a specific period pursuant to a written plan previously prepared by State Police supervisory officers. The officers manning the

checkpoint were charged with stopping all vehicles and checking for impaired or intoxicated drivers, drivers' licenses and vehicle registrations, and any other violation in plain view. Appellant stopped at the checkpoint and was asked by a trooper to produce his driver's license. When appellant was unable to do so, the trooper relayed appellant's name and date of birth to Troop Headquarters and was informed that appellant's driver's license was suspended. The trooper, who was considering arresting appellant for driving on a suspended license, instructed appellant to exit his vehicle and patted him down for officer safety. The trooper testified that he then asked for consent to search appellant's vehicle and that appellant consented. The trooper also testified that, although he could not specifically recall having informed appellant that he had a right to refuse to consent to the search, he believed that he had done so because it was his habitual practice to inform people of their right to refuse when asking for consent to search. Appellant testified at the hearing and denied that he had consented to the search. Three plastic bags containing cocaine were found in appellant's vehicle.

Appellant's challenge to the admission of the cocaine is twofold, going both to the constitutionality of the sobriety checkpoint and the sufficiency of the evidence of consent to search. Citing *Sheridan v. State*, 368 Ark. 510, 247 S.W.3d 481 (2007), he argues that the sobriety checkpoint was an unreasonable seizure under the Fourth Amendment. We do not address this argument because it was abandoned below. In a portion of the record that appellant's attorney chose not to include in the abstract, the State introduced the written checkpoint plan as its Exhibit A, and the following colloquy occurred:

> THE COURT: I've looked at these cases before, but it's been a while, counsel. Do y'all want to argue or brief this matter?
>
> APPELLANT'S COUNSEL: Your Honor, I wasn't aware of this State's Exhibit A until—I don't think David was either until he got it and then handed it to me. That checkpoint plan is part of the case law.
>
> THE COURT: It complies?
>
> APPELLANT'S COUNSEL: Yes, sir.
>
> THE COURT: That's what I thought.
>
> APPELLANT'S COUNSEL: . . . I have no doubt that probably the checkpoint is valid because of the checklist. But on the consent, Your Honor, I think that's probably a big issue there. Thank you, Judge.

The trial court clearly understood this to be an abandonment of appellant's constitutional challenge to the checkpoint because his ruling from the bench addressed only the issue of whether appellant consented to the search. It is appellant's burden to obtain a ruling from the trial court to preserve an issue for appeal and, in the absence of a ruling, the issue is not properly before us. *See Richards v. State*, 2009 Ark. App. 721.

Next, appellant argues that the State failed to prove that he voluntarily consented to the search of his vehicle. The State has the burden of proving that the consent was freely and voluntarily given and that there was no actual or implied duress or coercion. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006). On appeal, we conduct a de novo review of the finding of consent to search based on the totality of the circumstances, reviewing findings of historical facts for clear error, giving due weight to inferences drawn by the trial court. *Id.* Appellant testified that he did not consent. The trooper testified that appellant did in fact consent. Because the testimony of the trooper and the appellant are in direct conflict, the

question of consent turns on the credibility of the witnesses, which is a question for the trier of fact. *See id.*; *see also Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988). Although the trooper had no positive recollection of advising appellant that he had a right to refuse to consent, the trooper stated that he believed that he had because such was his habitual practice, and this testimony is relevant to the question of whether the advice was given. *Pace v. State*, 265 Ark. 712, 580 S.W.2d 689 (1979); *see also Welch v. State*, 364 Ark. 324, 219 S.W.3d 156 (2005). On this record, we hold that the trial court did not err in finding that appellant consented to the search of his vehicle.

However, even if we had concluded that the State failed to prove that appellant consented to the search, we would not reverse because appellant cannot show that he was prejudiced by admission of the cocaine discovered in his vehicle. In another portion of the record that appellant's attorney chose not to abstract, we find that appellant took the stand at trial and testified during his case-in-chief that he was addicted to cocaine and that he had stolen the cocaine from a drug cache earlier that day. It is well-established that an erroneous failure to suppress evidence is not prejudicial error where the same or similar evidence was otherwise properly admitted. *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997).

Affirmed.

ROBBINS and GLOVER, JJ., agree.

B. Dale West, for appellant.

Dustin McDaniel, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.