

Robert Maurice GORDON *v.* STATE of Arkansas

CR 75-138

529 S.W. 2d 330

Opinion delivered January 19, 1976

1. SEARCHES & SEIZURES — WITHOUT A WARRANT — SEARCH OF AUTOMOBILES. — When officers have reasonable cause to believe contraband is being unlawfully transported in a vehicle, the vehicle may be the object of a warrantless search.
2. SEARCHES & SEIZURES — WITHOUT A WARRANT — DETERMINATION OF PROBABLE CAUSE. — A determination of the existence of probable cause in order to conduct a search is to be made in the light of the particular situation and with account taken of all the circumstances.
3. SEARCHES & SEIZURES — WITHOUT A WARRANT — PROBABLE CAUSE. — Arresting officer's detection of the odor of marijuana about appellant's person when he was stopped *held* sufficient to alert the officer to the possibility that the van may have contained marijuana and to provide probable cause of a limited search of the van.
4. SEARCHES & SEIZURES — SEARCH OF AUTOMOBILE — OBJECTS IN PLAIN VIEW. — Marijuana seeds on the floorboard of a van which came within the plain view of the officer could not be considered the product of an illegal search.
5. SEARCHES & SEIZURES — OBJECTS IN PLAIN VIEW. — The fact that marijuana seeds on the floorboard of a vehicle were only discernible by use of a flashlight did not preclude the observation from application of the plain view doctrine nor invalidate the propriety of the search.
6. CRIMINAL LAW — OPINION EVIDENCE — ADMISSIBILITY. — Testimony offered by arresting officer who had two years experience with the State Police narcotics section explaining the circumstances of the search and seizure and describing the odor and appearance of marijuana seeds *held* admissible.
7. WITNESSES — COMPETENCY — DISCRETION OF TRIAL COURT. — Questions going to the competence of a witness are largely discretionary with the trial judge and are not ordinarily reviewable on appeal unless so clearly in error as to constitute an abuse of discretion.
8. CRIMINAL LAW — ADMISSION OF TESTIMONY AS INFLAMMATORY — REVIEW. — Admission of arresting officer's testimony concerning other drug related crimes in order to establish a value for the marijuana seized, which was not offered to reflect on appellant's character but introduced to qualify the officer to

give an opinion on the quantity of marijuana seized, could not have inflamed the jury where appellant was not implicated in any of the crimes.

Appeal from Hempstead Circuit Court, *J. Hugh Lookadoo*, Judge; affirmed.

McArthur, Loftin & Wilson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Terry Kirkpatrick*, Asst. Atty. Gen., for appellee.

ELSIJANE T. ROY, Justice. On October 19, 1974, Officer John Sparks, a criminal investigator, and another investigator, both with the narcotics section of the Arkansas State Police, and a federal drug enforcement agent were traveling on Interstate Highway 30 west of Hope. They were conducting a general traffic check in this area. At approximately 11:30 p.m. they noticed a white Chevrolet van being driven erratically and the officers stopped it. Appellant then got out and showed Sparks his driver's license. No traffic violation was disclosed but while examining appellant's license Sparks detected a strong odor of marijuana about appellant. During the questioning of appellant another vehicle containing two representatives of the United States Border Patrol and a State policeman joined the group. The law enforcement officials looked inside the van with a flashlight and discovered what appeared to be marijuana seeds. Appellant was then arrested for possession of marijuana and advised of his rights. Sparks entered the van to obtain the seeds, then the van was removed to a service station and a search warrant obtained for further examination of the vehicle. The ensuing search resulted in the discovery of over 800 pounds of marijuana.

Appellant's first assignment of error is that the court improperly refused to grant his motion to suppress illegally seized evidence and the court's failure to prevent the introduction of said evidence at his trial.

Appellant contends that the search which produced the evidence used to convict him was not based on "probable

cause” and thus is violative of Fourth Amendment proscriptions against unreasonable search and seizure. It has been recognized that where officers have reasonable cause to believe that contraband is being unlawfully transported in a vehicle then such vehicle may be the object of a warrantless search. *Carroll v. U.S.*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); *Moore v. State*, 244 Ark. 1197, 429 S.W. 2d 122 (1968), cert. denied 393 U.S. 1063, 89 S. Ct. 714, 21 L. Ed. 2d 705 (1969). A determination of the soundness of concluding that probable cause existed to conduct a search is to be made “. . . in the light of the particular situation and with account taken of all the circumstances.” *Brinegar v. U.S.*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). The facts, or “circumstances”, of the instant case support the conclusion that there existed probable cause to conduct the very limited warrantless search of the vehicle that was conducted immediately subsequent to stopping appellant. Arresting Officer Sparks testified that appellant had an odor of marijuana about his person, a fact which apparently alerted him to the possibility that appellant’s vehicle may have contained a quantity of the substance. That this odor is sufficient to arouse suspicion and thus provide the underpinning for a showing of probable cause to conduct a search was recognized in *People v. Newman*, 14 Cal. App. 3d 246, 92 Cal. Rptr. 205 (1971), vacated for other reasons 95 Cal. Rptr. 12, 484 P. 2d 1356 (1971). See also *Moore*, supra, and *Anderson v. State*, 256 Ark. 912, 511 S.W. 2d 151 (1974). While it was recognized in *Newman* that a stop for a traffic violation, without more, did not justify a search of the vehicle, the court stated:

The odor of burning marijuana recognized by the officers afforded probable cause to believe that the car contained contraband, and that its occupants were the probable offenders. (Citations omitted)

The examination of the interior of the vehicle, conducted at 11:30 p.m., revealed marijuana seeds on the floorboard. The search involved concerned only a visual scrutiny of the van interior, and the marijuana seeds were openly visible. The seeds that were detected came within the “plain view” of the arresting officer and, as was recognized in *Harris v. U.S.*, 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968), cannot

be considered the product of an illegal search. Moreover, the fact that the seeds were only discernible by use of a flashlight does not invalidate the propriety of the search. In *U.S. v. Johnson*, 506 F. 2d 674 (8th Cir. 1974), cert. denied 421 U.S. 917, 95 S. Ct. 1579, 43 L. Ed. 2d 784 (1975), a case also involving the use of a flashlight, the court observed that:

The fact that the contents of the vehicle may not have been visible without the use of artificial illumination does not preclude such observation from application of the "plain view" doctrine. (Citations omitted)

It follows that the limited search in this instance suffers no constitutional defect nor was the seizure of the seeds an unpermitted outgrowth thereof. Needless to say, the constitutionality of the later search and seizure which netted the 800 odd pounds of marijuana is not open to question since probable cause existed for the initial intrusion and a valid search warrant was procured before further search was made of the van.

Appellant next contends that the testimony of Officer Sparks as to the odor and seeds should have been excluded at trial below since no foundation was laid qualifying Sparks as an expert witness. Officer Sparks disclaimed any expertise except the experience that he had gained as a result of two years with the narcotics section of the Arkansas State Police. Sparks' testimony would be more accurately described as being a non-expert offering opinion evidence. We have approved opinion evidence offered by ordinary witnesses, derived from observation, in those situations where from the nature of the subject matter the facts cannot otherwise be presented to the jury. *Miller v. State*, 94 Ark. 538, 128 S.W. 353 (1910). In the instant case only by explaining the circumstances of the search and seizure could the jury be adequately apprised of the basis for probable cause of the search. Descriptions involving odor and appearance are uniquely personal to the observer and explanations based thereupon must rely on the observer's opinion.

Furthermore, questions going to the competence of a witness are largely discretionary with the trial judge and are

not ordinarily reviewable on appeal unless so clearly in error as to constitute an abuse of discretion. *Farmers Equipment Co. v. Miller*, 252 Ark. 1092, 482 S.W. 2d 805 (1972); *Lee v. Crittenden County*, 216 Ark. 480, 226 S.W. 2d 79 (1950). No such error is here evident and the testimony was properly received.

Appellant's final contention is that the court erred in allowing Officer Sparks' testimony concerning other drug related crimes in order to establish a value for the contraband seized in the instant case. The appellant argues that Sparks' testimony impugns appellant's character and is likely to have an inflammatory effect on the jury. We do not find this contention meritorious. The testimony was not offered to reflect on appellant's character but was introduced to qualify Officer Sparks to give an opinion on the large quantity of marijuana seized. In *Williams v. State*, 129 Ga. App. 103, 198 S.E. 2d 683 (1973), an officer with several years experience in narcotics work testified as to the value of drugs seized, and the Georgia court observed:

* * * While the value of the drugs is not a necessary ingredient which the State must prove, it can be helpful to the jury in the light of other circumstances in the evidence to know whether the quantity of drugs was inconsequential or substantial.

Appellant was not implicated in any of these crimes, hence the jury could not be inflamed.

Finding no reversible error, the case is affirmed.