

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,)

Appellant,)

vs.)

TERRENCE TUTSON,)

AND)

KINDRA HEARTFIELD)

Appellees.)

NOT FOR PUBLICATION

No. S-2013-718

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 22 2014

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

SMITH, VICE PRESIDING JUDGE:

Terrence Tutson and Kindra Heartfield were charged with Possession of a Controlled Dangerous Substance (Marijuana) With the Intent to Distribute in violation of 63 O.S.2011, § 2-401 (Count I), Possession of an Offensive Weapon While Committing a Felony in violation of 21 O.S.2011, § 1287 (Count II), and Possession of a Controlled Dangerous Substance (Percocet) in violation of 63 O.S.2011 2-402 (Count III), in the District Court of Oklahoma County, Case No. CF-2011-6018. On June 24, 2013, Tutson and Heartfield filed a Motion to Suppress and Dismiss. After a hearing, the Honorable Jerry D. Bass sustained the Motion to Suppress and stayed proceedings in the case. The State filed a timely Notice of Intent to Appeal under 22 O.S.2011, § 1053(5).¹

The State raises two propositions of error in support of its petition:

¹ The State references this subsection, which refers to pretrial decisions suppressing or excluding evidence, but where the case is not dismissed, in its Petition in Error. In its Notice of Intent to Appeal the State cites 22 O.S.2011, § 1053(3). That subsection, which provides for appeal upon a reserved question of law, is not an appropriate avenue for this State appeal.

- I. The District Court erred in suppressing the State's evidence based on the lack of evidence of consent being clear and voluntary because the matter was raised by the Court *sua sponte*.
- II. The District Court erred in suppressing evidence because no police misconduct occurred in this case to warrant proper application of the exclusionary Rule.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief.

Our standard of review for appeals under § 1053(5) is abuse of discretion. *State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369. An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161,170. We will not disturb the ruling unless the trial court's findings have no support in the record. *State v. Kemp*, 2009 OK CR 25, ¶ 12, 217 P.3d 629, 631.²

We find in Proposition I that the trial court did not *sua sponte* raise the issue of consent. The record shows that Tutson and Heartfield raised the issue of consent in their motion to suppress, the State had notice that consent was an issue of

² The State incorrectly cites the standard of review that applies when we consider a trial court's denial of a defendant's motion to suppress. The Appellees argue that review is not in the interests of justice because the State has failed to make any claim that it cannot proceed without the suppressed evidence, or that suppression of the evidence substantially impairs or restricts its ability to present the case. *State v. Sayerwinnie*, 2007 OK CR 11, ¶ 6, 157 P.3d 137, 139. While the State neglects to formally make this claim in its brief, it is clear from the discussion in the brief and from the record that the State's case cannot proceed without the suppressed evidence, and review is in the best interests of justice. The Appellees also argue that the State has waived this claim, at least in part, because it did not file a motion to reconsider alleging it had not had the opportunity to address the consent issue. The record does not support this claim. After the trial court's decision the State filed a "Motion to Reconsider Suppression of Evidence, claiming that the State had not been given notice that the trial court intended to base its ruling on the issue of consent.

concern to the trial court, the State was offered the opportunity to brief the issue, and the State was given an opportunity to argue the issue.

We find in Proposition II that the trial court did not abuse its discretion in granting the motion to suppress. *Love*, 1998 OK CR 32, ¶ 2, 960 P.2d at 369. Like the federal courts, this Court judges the voluntariness of consent to search from the totality of the circumstances. *State v. Goins*, 2004 OK CR 5, ¶ 19, 84 P.3d 767, 771. The State must provide clear and convincing proof that the consent was free and voluntary. *State v. Kemp*, 2009 OK CR 25, ¶ 17, 217 P.3d 629, 632; *Goins*, 2004 OK CR 5, ¶ 19, 84 P.3d at 771. The trial court, on the record, delivered a comprehensive summary of the cases governing warrantless searches and consent to search. The trial court noted that courts are urged to consider and balance several factors in determining whether consent is voluntary, and concluded that, as no evidence had been presented concerning those factors, nothing supported a finding that Heartfield's consent was free and voluntary. This conclusion is supported by the record.³

DECISION

The Order of the District Court of Oklahoma County sustaining the Defendants' Motion to Suppress is **AFFIRMED**. The case is **REMANDED** for further proceedings consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the*

³ We reject the State's strong implication that suppression of evidence is not justified where an officer conducting a warrantless search has a reasonable suspicion of criminal activity. This restrictive application of the exclusionary rule conflicts with our determination that "the question is whether the illegal evidence was 'come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Baxter v. State*, 2010 OK CR 20, ¶ 9, 238 P.3d 934, 937, quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963). We note that, given the facts of this case, the good faith doctrine does not apply. We further note that any argument regarding presumption against involuntary waiver of a constitutional right when in the context of a consent issue is irrelevant in this case, as the trial court did not make any such presumption in issuing its ruling.

Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE JERRY D. BASS, DISTRICT JUDGE

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OPINION BY: SMITH, V.P.J.

LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULT
C. JOHNSON, J.: CONCUR
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