

IN THE CRIMINAL COURT FOR WILSON COUNTY, TENNESSEE

State of Tennessee	*	Case No. 08-CR-133
	*	
Plaintiff	*	
	*	
v.	*	
	*	
Loy D. Perry	*	
	*	
Defendant	*	

MOTION TO SUPPRESS

The Defendant moves the Court to suppress the evidence seized from his person and vehicle, to wit:

1. The 3.4 grams of plant material identified in the lab report from the TBI as THC (marijuana); and
2. One (1) pack of JB rolling papers.

The consent to search Mr. Perry's vehicle and person was obtained in violation of his rights under Article 1 Section 7 of the Constitution of the State of Tennessee.

As the factual context of this motion, the Court may accept as true the allegations contained in the narrative portion of the report of Officer Nokes of the Lebanon Police Department, a copy of which is attached hereto as Exhibit 1. Officer Nokes states that he stopped Mr. Perry because his muffler was allegedly not working. FTO Brockman asked Mr. Perry to exit the vehicle. The report does not state a reason why Mr. Perry was asked to exit the vehicle but goes on to say that "while we were talking to Perry he seemed nervous and answered to our questions did not make any sense." (sic). The report then says that Perry

consented to a search of his pockets and the vehicle and, in the course of the search the contraband material was found.

While the initial traffic stop was arguably lawful any such stop must be temporary and may last no longer than necessary to effectuate the purpose of the stop. See *State v. Cox*¹. In this case, the purpose of the traffic stop was to investigate and give Mr. Perry a citation for having a loud muffler. While it is permissible for the officers to ask Mr. Perry to step out of the vehicle, any questions asked of Mr. Perry must reasonably relate to the purpose of the stop. Officer Nokes' report says that Mr. Perry was asked what he was doing and that he replied that he was looking for a place to turn around – an answer that seems to make perfect sense.

Officer Nokes' report states no reason for requesting consent to search the vehicle other than the fact that Mr. Perry appeared nervous. Being nervous is an understandable reaction to having been stopped by the police asked to exit the vehicle and interrogated by the side of the road.

As the Tennessee Supreme Court observed in *State v. Berrios*² it is important for the courts to carefully scrutinize the parameters of traffic stops since the police can easily come by a factual basis for the stop and that such stops are often pretextual or arbitrary in nature. That appears to be the case here, where Officer Nokes initiated a stop and asserts the pretext that Mr. Perry's muffler was too loud, but then escalated the stop into a search for drugs. While Officer Nokes' instincts may have been correct, the *Berrios* case holds that the fact that the actions of an officer may frustrate the illegal activities of a defendant, conduct that violates the defendant's rights cannot be permitted to stand.

¹ *State v. Cox*, 171 S.W.3d 174 (2005)

² *State v. Berrios*, 235 S.W. 3d 99 (2007)

The traffic stop here exceeded the scope and duration that would have been required to merely write Mr. Perry a citation for a loud muffler. Mr. Perry's alleged consent to search was not freely given, but was a result of his being illegally detained beyond the scope of the traffic search. The search was illegal and the contraband discovered is fruit of the poisonous tree and must be suppressed.

Mr. Perry's consent to search was also not given with full knowledge of his rights to refuse. He will testify at the suppression hearing that he simply did not know that he had the right to refuse to permit the search.

It is interesting that police are required to give the famous *Miranda* warnings to ensure that defendants are aware of their Fifth Amendment rights ('You have the right to remain silent...') and their Sixth Amendment rights ('You have the right to an attorney...') but neither the Tennessee Supreme Court nor the United States Supreme Court has yet seen fit to elevate either the Fourth Amendment or Article 1 Section 7 to those lofty levels. Perhaps it is time to visit that issue and require that the police inform a traffic detainee that they have the right to refuse a search of their person or vehicle. Such an approach would assist the courts in making short work of the pretextual stops that gave the Tennessee Supreme Court pause in *Berrios* and would also make certain that the consent was freely given with full knowledge of the defendant's rights. For an example of how this might work in practice, see *Ohio v. Robinette*³. A copy of the *Robinette* decision is attached for the convenience of the Court.

³ *Ohio v. Robinette*, 653 N.E. 2d 695, 73 Ohio St. 3d 650, 1995 Ohio LEXIS 1872 (Ohio Supreme Court 1995)

The *Robinette* case imposed a rule requiring the police to first conduct their traffic stop to its conclusion, then inform the detainee that “You are free to go” prior to requesting permission to search.

Although *Robinette* was later overturned by the United States Supreme Court and the Ohio Supreme Court held upon remand that the Ohio Constitution did not afford its citizens more protection than the Fourth Amendment to the United States Constitution the Tennessee Supreme Court has held that the Tennessee Constitution provides more protection to our citizens than does the Fourth Amendment.

Mr. Perry would urge this Court to adopt the *Robinette* rule and suppress the search on those grounds.

Respectfully submitted,

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THIS MOTION WILL BE HEARD BY THE COURT ON JULY 22, 2008 AT 9:00 AM.

CERTIFICATE OF SERVICE

This certifies that a true copy of the foregoing was served upon the Plaintiff by mailing same to the office of the District Attorney General, 119 S. College St., Lebanon, Tennessee 37087, this 17th day of June, 2008.
