IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL SHANE BUFORD **APPELLANT**

VS. **NO. 2019-KA-0024**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This is an appeal against a judgment of the circuit court of Rankin County, Mississippi in which the Appellant was convicted of his felony of possession of two but less than ten grams of methamphetamine, and sentenced as an habitual offender.

STATEMENT OF FACTS

The Appellant challenges neither the sufficiency nor the weight of the evidence of his guilt for possession of methamphetamine. Consequently, it will be unnecessary to set out the evidence of his guilt in great detail.

Stated generally, the evidence showed that the Appellant and his wife were inside a trailer owned by another person, but without the permission of the owner to be there. There was no lease, "oral" or otherwise, and the Appellant and his wife did not otherwise have permission to on and within the trailer. The owner contacted law enforcement and requested its assistance in removing the Appellant and his wife from the property.

When law enforcement arrived, they found the Appellant and his wife there. One of the officers asked the Appellant if he would consent to a search of his person. The Appellant gave consent, and the officer found a can inside one of the Appellant's pockets that contained a substance subsequently identified as being 2.16 grams of methamphetamine. (R. Vol. 3, pp. 137 -180).

STATEMENT OF ISSUES

1. **DID THE CIRCUIT COURT ERR IN REFUSING TO SUPPRESS THE METHAMPHETAMINE FOUND ON THE APPELLANT'S PERSON IN CONSEQUENCE OF THE APPELLANT'S CONSENT TO A SEARCH?**

SUMMARY OF ARGUMENT

The circuit court was clearly correct in refusing to suppress the methamphetamine found upon the Appellant's person. The law enforcement officers were in a place they had a right to be on

account of the owner's request for their assistance. The Appellant was asked for consent to a search, which he granted. The Appellant was not in custody at the time of the request and the search.

ARGUMENT

THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS THE METHAMPHETAMINE FOUND ON THE APPELLANT'S PERSON

FACTS

Prior to trial, the Appellant filed a motion to suppress the evidence found by law enforcement officers when they encountered the Appellant and his wife. In his first motion, the Appellant alleged that the owner of the rental house (sic) contacted law enforcement about people living in her "rental house" without her permission. It was alleged that law enforcement officers kicked their way into the "rental house" when the Appellant demanded to see a search warrant and that the Appellant had done nothing illegal or even wrong. The Appellant denied having consented to a search of his person, alleged that there was no basis for a search or even to detain his person, much less to arrest him. According to the Appellant, he was merely invoking the constitution when insisting that a warrant be produced. Thus, according to the Appellant, any evidence seized by law enforcement was illegally seized. (R. Vol. 2, pp. 33 - 36).

In addition to the methamphetamine found on the Appellant's person, it appears that a search of the trailer after the Appellant's arrest produced a re metal pipe with marijuana residue, a glass pipe with methamphetamine residue and a scale. The State sought to introduce these things into evidence under M.R.E 404(b). (R. Vol. 2, pp. 38 - 39). The trial court refused admission of the items found during the search of the trailer. (R. Vol. 2, pg. 54).

The State filed a response to the Appellant's motion. It alleged that law enforcement went to the trailer upon a report by the owner that there were people illegally living in the trailer, that the

Appellant never asked for exhibition of a search warrant and that neither he nor his wife could produce documentation demonstrating that they were validly in the trailer. The Appellant consented to a search of his person; the Appellant's wife consented to a search of the trailer. It was further pointed out that the owner had consented for the officers to be present at the trailer and to search it. It was further alleged that the Appellant had no standing to contest the search of the trailer. (R. Vol. 2, pp. 40 - 41). Relief on the Appellant's motion to suppress was denied. (R. Vol. 2, pg. 55).

The circuit court held a hearing on the Appellant's motion to suppress and the State's Rule 404(b) notice or motion.

The State's first witness was one Brad Winningham of the Pearl, Mississippi police department. He testified that he had occasion to investigate a crime committed by the Appellant. The police department had received a trespassing call. The complainant related that there were people living in her mobile home who did not have her permission to be there. When Winningham arrived at the trailer, there were three officers present as well as the Appellant and his wife.

Winningham asked one of the officers already present whether the Appellant had been searched. That officer told him that she had not done so. Winningham then asked the Appellant if he had any issues with Winningham searching him. The Appellant replied that he did not, and so Winningham conducted a search and found a snuff can in one of the Appellant's pockets which contained a substance Winningham believed was "crystal meth". The Appellant was charged at that point with possession of methamphetamine.

After this occurred, the trailer was searched. Winningham testified that the officers had the owner's permission to be on the premises. Beyond that, the Appellant's wife consented to the search of the trailer. In the course of that search, a red metal pipe was found that appeared to have marijuana residue inside of it as well as a glass pipe that contained what appeared to be

methamphetamine residue inside it, A set of scales was also found.

Upon questioning by the court, Winningham testified that he was not conducting a "pat down for weapons" but was conducting a search for "anything illegal". Winningham reiterated that the Appellant gave him consent for that search. Winningham further stated that he usually asked for consent for a search when investigating a trespassing complaint rather than conducting a "pat down". He stated that he conducted a search if he received consent. He stated that when he asked the Appellant is he, the Appellant, had any issues with him searching him, the Appellant replied, "No, I do not" and then put his hands out. (R. Vol. 2, pp. 13 - 17).

The circuit court granted the defense motion to suppress the evidence of the pipes and scales, and granted the defense motion to prohibit the State from introducing evidence of the Appellant's prior crimes during its case-in-chief. As for the motion to suppress evidence of the methamphetamine found on the Appellant's person, the circuit court took additional evidence.. (R. Vol. 2, pp. 28 - 29).

The State called Sybil Brooks, who testified that she was the owner of the trailer that the Appellant and his wife were in. Brooks stated that she called the police department on March 25th of 2017 "[b]ecause there was a couple staying in my house that I had let another couple stay there and they moved them in and they moved off and left them and I didn't know what I could do to get them out". The house in question was a two-bedroom mobile home having an add-on in the back. She said the couple she let stay in her mobile home were supposed to stay in the add-on and "fix the rest of it up".

Brooks further testified that she consented to have the police enter her trailer "to go talk to them or whatever they had to do". She had no agreement with the Appellant and his wife, oral or written, which granted them permission to be in the trailer, only an agreement with the couple who

had moved out of the add-on. (R. Vol. 2, pp. 30 - 34).

Officer Jeannie Easterling of the Pearl police department received a call from "dispatch" on 25 March 2017 to investigate a report that there people living in a rental property who did not have permission to be there. When she arrived at the address given her, she walked to the door of the trailer and knocked. The Appellant opened the door and she told him the reason for her being there. Easterling asked the Appellant for some kind of proof to show that he had a right to be in the trailer, proof that the Appellant could not provide. The Appellant was "very nice"–friendly even. Three other officers arrived. The male officers spoke with the Appellant; Easterling with the Appellant's wife.

Easterling did not search the Appellant. The Appellant never asked to see a search warrant and did not tell Easterling that she could not come into the trailer. She did search the Appellant's wife. After that Easterling was dispatched to answer another call. (R. Vol. 2, pp. 39 - 45).

Easterling testified that the Appellant was not being detained prior to the time the can of methamphetamine was found. She did not recall seeing the Appellant in handcuffs prior to that time. She did not hear any of the conversation between the Appellant and Winningham. (R. Vol. 2, pp. 47 - 48).

The Appellant was then called by the defense to testify. He began his testimony with a long, convoluted story that, as best as we can make out, was to the effect that the couple he and his wife were staying with moved out of the trailer for some reason–maybe because the owner wanted them to leave. According to the Appellant, he had dealings with the owner and that the owner allowed him to stay at the trailer, at least for as long as it was going to take him to get a truck.

The Appellant said he didn't know why Brooks called the police. According to him, all he knew is that the police showed up that morning. He said he told her–Easterling, we will assume–that

he was not Jason Sebren. He told her it didn't matter who he was, that she needed to get a warrant and that he would tell her then. The next thing the Appellant said he knew was that twelve minutes after he told Easterling what she needed to do Easterling began talking about kicking the door in. The Appellant encouraged her to do so, saying it would be so much "funner" if she did so.

The Appellant said he then went back to the bedroom where his wife was located. She told him that Miss Sybil would surely make them pay for the door, that they had spent eight hundred dollars for that door. So the Appellant jumped up and ran to the door. And when "that dude" began beating on the door he explained to "that dude" that he had to get another key to open the door, that it took two keys from the inside and outside, if you know what the Appellant was saying. Anyway, the Appellant said that once he managed to unlock the door he cracked it just a little bit and saw that there were eight (8) polices in his yard. The Appellant was worrying about what the neighbors were going to think when "the dude" behind Miss Jay and maybe other polices shoved the door in, telling the Appellant that they didn't need a warrant, that they were the f___ing warrant. The Appellant said he knew his rights and knew that his attorney was going to eat their breakfast and that he was going to eat their supper that night, that being "the honest God's truth".

The Appellant denied having given consent for entry into the trailer and denied having given consent to a search of his person. (R. Vol. 2, pp. 49-53). He did admit that Brooks had told him that he had to leave the premises. (R. Vol. 2, pg. 55). The Appellant denied having ever seen the can with the methamphetamine. He thought that Jason might have had one like it, though. He denied ever having possessed the can and its contents. (R. Vol. 2, pp. 56 - 57).

Willingham did not specifically ask the Appellant for consent to look in the can he found in the Appellant's pocket. (R. Vol. 2, pg. 63).

The circuit court denied relief on the motion to suppress the evidence of the

methamphetamine found on the Appellant. The court found that the owner of the trailer gave consent for the officers to enter the trailer, that the Appellant and his wife did not have a right to be in the trailer, and that the Appellant did consent to the search of his person. (R. Vol. 2, pp. 67 - 68).

ARGUMENT

The Appellant asserts that his consent to the search was not freely and voluntarily given, or that it was tainted on account of the alleged fact that he was being illegally detained when he gave it. He also asserts that his consent did not extend to a consent to search the contents of the can.

When reviewing the denial of a motion to suppress evidence, this Court must determine whether the trial court's factual findings, considering the totality of the circumstances, are supported by credible evidence. *Moore v. State*, 933 So.2nd 910, 914 (Miss. 2006). In the course of reaching its decision, a trial court has the sole authority in determining witness credibility. Its determination will not be overturned without a substantial showing that it was manifestly wrong. *Id.*, at 918. Voluntary consent, of course, obviates any requirement for a search warrant. *Id.*, at 916.

As to whether the Appellant's consent was given, the record demonstrates--clearly, we think--that it was. As we have stated above, the Appellant was asked whether he would consent to a search. The Appellant clearly gave his consent and then held his hands out. He was not at that point under arrest. In fact, the record does not show that he was even being detained. It may be that the Appellant, in his wandering, odd testimony denied having given consent, but this was a matter of fact for the circuit court to determine, and that determination turned upon what testimony to believe. There was clearly a factual basis for finding that the Appellant gave his consent. The Appellant's testimony to the contrary, given his testimony as a whole, was not credible. The circuit court was not clearly or manifestly in error in finding that the Appellant consented to the search. There was no claim in the trial court and no claim made here that the Appellant did not know that he had the

right not to consent to a search of his person.

But the Appellant says that even if there was consent, that consent was "tainted" by the alleged fact that he was being unlawfully detained at the time he gave consent. He says, citing *Florida v. Royer*, 460 U.S. 491 (1983), that consent given during an illegal detention is ineffective. While he concedes that officers may impose a brief, investigatory detention when they have a reasonable suspicion that criminal activity is afoot, citing *Terry v. Ohio*, 392 U.S. 1 (1968), he claims that the officers far exceeded the bounds of a *Terry* detention once the officers found that the Appellant could not prove his right to be in the trailer. The Court is told that the officers should have simply told the Appellant to quit the trailer at that point.[1] (Brief for the Appellant, at 10 - 12).

First of all, as we have said, there is nothing in this record to show that the Appellant was being "detained". There is nothing to show or suggest that the Appellant could not have simply left the trailer. On the other hand, there is evidence to show that the Appellant thought he at least had the permission of the owner to stay in the trailer until he got a truck, even if he did not have some kind of documentary proof of his right to be in the trailer. There is nothing to show that the Appellant was under the impression he could not leave the trailer, but there is evidence to show that he did not want to leave the trailer. The facts do not show that the Appellant was being detained when he was asked for his consent to a search.

The evidence in this case shows that the presence of the police officers at the trailer was to follow up the complaint made to law enforcement. They were there at the request and permission of the owner and so had a right to be there. The simple fact that there were police officers on the

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[1] But for some reason he does not suggest that maybe the officers might just have well arrested him for trespass, if indeed the officers had come to the conclusion that he was trespassing.

scene does not mean that the Appellant was being detained. As *Royer* points out, law enforcement officers are free to encounter a person and ask him questions so long as they do not detain that person where they have no cause to do so. Mere questioning by the police does not constitute a seizure. *Gales v. State*, 153 So.3rd 632, 639 (Miss. 2014). The Appellant did not seem threatened at all, according to Officer Easterling. The Appellant never testified that he did not think he was free to leave. There is no testimony to show that the Appellant was told he could not leave. Indeed, the officers might have been happy to see him leave on his own accord. Up until the point that the Appellant was arrested, there was no detention, simply an attempt by the officers to determine whether the Appellant was trespassing. The officers were not present to investigate a narcotics offense, merely a trespassing complaint. A person is "seized" only when, by means of physical force or show of authority, his movement is restrained. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). There simply is nothing to show a seizure here.

The Appellant suggests that the presence of more than one police officer is a factor to be considered as to whether the Appellant was detained. Perhaps that is one factor, but the Court is to consider the totality of the evidence. If the Court does review State's Exhibit 2, we doubt that it will consider that action of an officer leaning against a door frame to be particularly indicative of an intimidating environment. Beyond that, Officer Easterling remarked upon the Appellant's friendliness. One would not expect such an attitude had the Appellant felt intimidated or threatened. This Court has held that a consent is more likely to be seen as voluntary when the person involved is being cooperative with law enforcement. *May v. State*, 222 So.3rd 1074, 1078 - 1079 (Miss. Ct. App. 2016).

The Appellant also notes that he was not informed of the right to refuse consent, noting, however, that there was no requirement that he be so informed. On the other hand, the Appellant

in his testimony did show familiarity with the warrant requirement for a search, and he had extensive experience with the criminal law. Since he was aware of the warrant requirement, and, allegedly insisted that the police get a warrant, he necessarily was aware that he did not have to consent to a search. These were factors to take into account as well, as *Schneckcloth v. Bustamonte*, 412 U.S. 218 (1973) teaches. The Appellant also says he was not given his *Miranda* rights. Perhaps he was not, but there was no requirement that he be given those rights prior to a custodial interrogation. Besides that, nothing in the *Miranda* advice would have concerned a consensual search, or any kind of search.

The Appellant suggests that there had to be a "legitimate need" for a search. If nothing else, there was the need was for officer safety. That there might have been some other way to see to officer safety hardly means that officers could not ask for consent to search.

Since the Appellant was not being detained, his arguments concerning how long such a detention could last are misplaced. Since the Appellant was not being detained, his consent was not potentially "tainted". The case at bar is hardly similar in its facts to the facts of *Royer,* where officers, suspecting that a person was involved in drug trafficking, exceeded the limits of an investigatory stop by asking the suspect to accompany them to a small room, retaining the person's airline ticket and drivers' license and did not indicate that the person was free to go.

We will also point out that the officer who conducted the search made it quite clear that he did not intend to conduct a *Terry* "pat down" but in fact a search, properly called. He sought consent and was given consent to a full blown search. The Appellant was not under arrest at that point.[2]

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[2] The Appellant claims that State's Exhibit 2 shows that the Appellant was handcuffed before the search occurred. Thus, according to the Appellant, any consent he might have given was "tainted" because he was illegally under arrest. (Brief for the Appellant, at 13). The video,

The Appellant did consent to a search. The record does not show that he was being detained at the time he gave his consent. But even if he was being detained, the totality of the circumstances does not show that his will was overborne. The Appellant was not told that he had to give consent and there is nothing to show that law enforcement was presenting a hostile, intimidating confrontation. The search did not occur at a police department but in a place where the Appellant was living, and the Appellant was not under arrest. There was no suggestion that the Appellant was intoxicated or otherwise possibly mentally impaired. There was no prolonged period of questioning, and of course the Appellant was not deprived of food or sleep. There is not the first suggestion in the record that force of any kind was presented or threatened or suggested in order to obtain consent.

The Appellant cites *Eaddy v. State*, 63 Do.3rd 1209 (Miss. 2011) and says that the officer in the case at bar exceeded the scope of the stop. Yet, as we have said, there was no stop. Beyond that, *Eaddy* involved a search and seizure subsequent to what the state supreme court determine was an invalid investigatory traffic stop. The search there was not consensual. The appellant in that case was in fact detained prior to the discovery of contraband on his person. Those are not the facts in the case at bar.

THE CONTENTS OF THE CAN

The officer who found the can inside the Appellant's pocket did not do so in the course of

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however, does not show what the Appellant says it shows. The video does show the Appellant being handcuffed by an officer while another officer, leaning against a door, examines what appears to be a packet that the arresting officer gave him. The video then shows the arresting officer completing the arrest by finishing handcuffing the Appellant and then competing his search of the Appellant's pockets, that search by that time having become also a search incident to arrest. It seems clear enough that the camera was activated as the arrest was occurring, and at that time the officer in the background already had an object given to him by the arresting officer. We think this corroborates the officer's testimony that the Appellant was not under arrest when consent was sought.

a *Terry* pat down. The officer made it quite clear that his request was to search the Appellant. Just the same, the Appellant says the consent he gave did not include a consent to open the can and view its contents. However, there is nothing in this record to support the notion that the Appellant's consent was a qualified one.

The Appellant cites *May v. State*, 222 So.3rd 1074 (Miss. Ct. App. 2016). In *May*, a person not under arrest was asked to take a shoe off after a law enforcement officer noticed that he was behaving suspiciously with respect to the shoe. The individual complied and a Zippo lighter fell out of the shoe. The officer opened the lighter and discovered contraband. This court held that the consent to take off the shoe did not extend to a consent to a search of the lighter. In the case at bar, however, the officer intended to search for anything illegal and he sought and obtained the Appellant's consent. The request was not limited to a specific item of clothing. In the case at bar, the officer stated that he had consent from the Appellant to search the Appellant and anything on his person. (R. Vol. 2, pp. 18 - 19). The officer stated that while he had not specifically asked about the can he had consent to search the Appellant and all items on the Appellant's person. In other words, the Appellant gave consent to search all items the office might find. (R. Vol. 2, pp. 62 - 63).

The Appellant's Assignment of Error should be denied.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Because the Appellant gave consent to a search of his person and all items found on his person, *May* is inapplicable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

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This the 17th day of December, 2019.

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