IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. S-2012-166
	)	
MOISES GONZALES-TELLO,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

The State of Oklahoma appeals the district court's order suppressing evidence seized during a traffic stop and which was the basis for a charge of Aggravated Trafficking in Heroin (63 O.S.2011, § 2-415(D)(4)), filed against Appellee, Moises Gonzales-Tello, in Oklahoma County District Court Case No. CF-2010-4912. A suppression hearing was held January 6, 2012, before the Honorable Kenneth C. Watson, District Judge; the court's decision was issued February 16, 2012. On February 24, 2012, the State gave timely notice of intent to appeal the court's ruling, pursuant to 22 O.S.2011, § 1053(6).[1] The State filed its Petition in Error on May 9, 2012, and its opening brief on June 4, 2012. Defendant's counsel filed a response on September 4, 2012.

The State raises the following propositions of error:

1. The district court erred in suppressing the State's evidence based on the length and scope of the traffic stop, because the detention was based on reasonable suspicion.

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[1] This provision allows the State to appeal "a pretrial order, decision or judgment suppressing or excluding evidence in cases alleging violation of any provisions of Section 13.1 of Title 21 of the Oklahoma Statutes." Aggravated Trafficking is one of those crimes (21 O.S. § 13.1(20)).

2. The district court erred in suppressing the State's evidence because the police conduct does not warrant application of the Exclusionary Rule.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we **AFFIRM** the district court's ruling.

In appeals brought under 22 O.S.2011, § 1053, we review the district court's decision for an "abuse of discretion", which has been defined as a conclusion that is clearly against the logic and effect of the facts presented.[2] *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950; *State v. Pope*, 2009 OK CR 9, ¶ 4, 204 P.3d 1285, 1287. As to Proposition 1, the court concluded that the search of the defendant's vehicle was the culmination of an unreasonably protracted detention after a routine traffic stop. The testimony showed that based on several curious facts observed during the traffic stop (the initial validity of which is not challenged), the officer called for a drug-sniffing canine to be brought to the scene. The officer asked the defendant for consent to search the vehicle, and it appears that the defendant assented to the request. However, the officer maintained that he never intended to let the defendant leave, and he never returned the defendant's license and paperwork to him. The canine arrived within the half hour, but did not indicate on the vehicle. At that point, the officers conducted their own search of the vehicle interior, whereupon a substantial amount of heroin was found.

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[2] In this case, the "facts presented" consist of the testimony of the officer who made the traffic stop. Although the district court was also provided a DVD recording of the encounter, that evidence was not made part of the appeal record.

The district court concluded that the officer lacked reasonable suspicion to continue detaining the defendant after the initial purpose of the stop was completed. The parties focus their arguments on whether the facts known to the officer constituted "reasonable suspicion" of criminal activity. Yet, regardless of whether the facts in the officer's knowledge (informed by his own specialized training and experience in drug interdiction) constituted reasonable suspicion, and regardless of whether the search was preceded by unreasonable delay – issues we need not address – the fact remains that the officer never obtained probable cause to search the vehicle.

The warrantless search of an automobile requires either (1) probable cause to believe it contains evidence of a crime, or (2) the freely-given consent of a person in control of it. *United States v. Davis*, 636 F.3d 1281, 1292 (10th Cir. 2011). The State does not claim, and we cannot find, any evidence amounting to "probable cause" – facts justifying a conclusion that, more likely than not, evidence of crime could be found in the vehicle. The drug-sniffing canine did not indicate the presence of any controlled drug. *See United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 2644-45, 77 L.Ed.2d 110 (1983); *State v. Paul*, 2003 OK CR 1, ¶ 3, 62 P.3d 389, 390 (indications by trained drug-sniffing canine can provide probable cause to search). At that point, the officer resorted to the "consent" the defendant had previously given to justify searching the vehicle interior himself. However, on appeal the State makes only very brief mention of the consent, claiming that it justified prolonging the traffic stop (not that it warranted a full-blown search). The State carries the

burden of showing consent to search was freely and voluntarily given. *State v. Kemp*, 2009 OK CR 25, ¶ 17, 217 P.3d 629, 632. On appeal, the aggrieved party has the responsibility to present sufficient argument and legal authority for any claim it advances. Rule 3.5(C), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2012); *Davis v. State*, 2011 OK CR 29, ¶ 142, 268 P.3d 86, 123. Even if consent had been argued as a justification for the search, we would reject it, because the officer made it clear that the defendant was in no position to decline the request to search and go on about his business.[3] *Florida v. Royer*, 460 U.S. 491, 503, 103 S.Ct. 1319, 1327, 75 L.Ed.2d 229 (1983); *United States v. Werking*, 915 F.2d 1404, 1408 (10th Cir.1990); *Coffia v. State*, 2008 OK CR 24, ¶¶ 14-15, 191 P.3d 594, 598; *State v. Goins*, 2004 OK CR 5, ¶ 20, 84 P.3d 767, 771. While we might have taken a slightly different route in the analysis, based on the facts presented the district court's ruling was not an abuse of discretion. *Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d at 950. Proposition 1 is denied.

In Proposition 2, the State argues that the Exclusionary Rule should not be applied in this case, and suggests that application of the Rule is inappropriate whenever a police officer's warrantless search is at least supported by reasonable suspicion of criminal activity. The State offers no authority for its position, and we cannot agree with it. *Baxter v. State*, 2010 OK CR 20, ¶ 9, 238 P.3d 934, 937. Proposition 2 is denied.

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[3] In asking to search the vehicle, the officer said something to the effect of, "Before I release you from this stop I would like to have your permission to search this vehicle."

DECISION

The district court's Order suppressing evidence is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE KENNETH C. WATSON, DISTRICT JUDGE

APPEARANCES AT TRIAL

JOAN LOPEZ
ATTORNEY AT LAW
4101 N. CLASSEN, SUITE A
OKLAHOMA CITY, OK 73118
&
GAL PISSETSKY
ATTORNEY AT LAW
53 W. JACKSON BLVD.
SUITE 1403
CHICAGO, IL 60604
ATTORNEYS FOR DEFENDANT

CLAYTON NIEMEYER
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S. KERR, SUITE 505
OKLAHOMA CITY, OK 73102
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL

DAVID PRATER
DISTRICT ATTORNEY
CLAYTON NIEMEYER
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S. KERR, SUITE 505
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR APPELLANT

JOAN LOPEZ
ATTORNEY AT LAW
4101 N. CLASSEN, SUITE A
OKLAHOMA CITY, OK 73118
ATTORNEY FOR APPELLEE

OPINION BY C. JOHNSON, J.
LEWIS, P.J.: CONCUR
SMITH, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
A. JOHNSON, J.: CONCUR IN RESULTS

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