

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE

DIVISION III

FILED BY JOY R. MCCROSKEY 2009 JUL 30 PM 5:00

KNOX COUNTY CRIMINAL COURT KNOXVILLE, TN

STATE OF TENNESSEE)
)
vs.)
)
CLIFFORD EDWARD CLARK, ALIAS)

DOCKET NO. - 90252

ORDER REGARDING MOTION TO RECONSIDER SUPPRESSION AND DISMISSAL

In this case the defendant, by and through counsel, has moved to reconsider the dismissal based upon the constitutional standards arising from State v. Ferguson, 2S.W.3d 917 (Tenn. Crim. App. 1999) regarding missing evidence and Arizona v. Gant, United States Supreme Court 556 U.S. (2009) regarding search of vehicles.

This court has issued a written ruling considering the previous motions as of April 30, 2009. This court's opinion was based upon the pat-down for officer's safety and the alleged location of scope covers which caused the officers to be concerned regarding the shooting incident which they were investigating. Subsequent, thereto, the court has received benefit of the case of Arizona v. Gant and the video tape of the stop and arrest of Mr. Clark.

For the following reasons the court reverses its decision with respect to the motion to suppress the evidence and dismiss.

It is clear from the credible testimony, of the officers, that they heard shots fired and sought to determine where the shots were coming from. They determined that the shots were coming from the back of a closed business, and proceeded in that direction. They observed a vehicle proceeding at a relatively high speed coming out from the private road connecting to that building and made a U-turn and proceeded to stop the vehicle within a short distance. The

officers removed the defendant, Mr. Clifford Clark, from the vehicle almost immediately and on the video tape which has no audio available, patted-down and handcuffed the defendant within a few seconds.

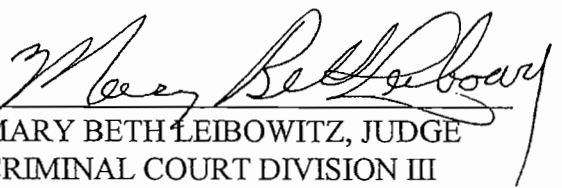
It is admitted by the state that the lens covers were not made a part of the body of evidence which is discoverable in this case. The officers testified that they took the defendant into custody and in plain view in the back of the vehicle under a rifle case sticking out from under a windshield shade. The video tape demonstrates that officers took the defendant into custody, took him back to the rear of the camera. One officer went forward to the defendant's vehicle and with a flashlight, it being in the early hours of the morning, looked in the rear of the vehicle pulling out a rifle case which he laid on the hood of the vehicle. He proceeded to open it and examine the rifle, open the other side of the vehicle and obtain other items that were within the vehicle and place them on the hood of the vehicle. Afterward another officer came and picked the rifle up and examined the rifle, put it back into the case, counted out cartridges, and packed them together and carried away the rifle. At all times the defendant was nowhere near his vehicle, or the rifle. It is also conceded that the officers immediately took action to search the vehicle without the benefit of any search warrant, nor was there any written consent to search. The defendant denies giving any oral consent to search.

Additionally, and pursuant to the motion to reconsider the court requested that the state search for the camera cover and enclosure which the defendant is alleged to have shot in order that there be an opportunity for requested testing. The state was unable to produce the evidence and the Attorney General after inquiring has determined that some of the evidence is gone, and that some of the evidence has apparently been recycled for use. Thus the defense contends that it cannot examine these items which were damaged, nor do ballistic testing. It is the courts opinion

that the search of the vehicle in the absence of a search warrant and after the defendant had been safely removed from access to the vehicle in the rear of the car in the dark with a flashlight violates the United States Supreme Court Case Arizona v. Gant in which the court held that Chimel v. California, 395 U.S. 752, requiring that a search incident to arrest be justified by either the interest in officer safety or the interest in preserving evidence applied, and that the defendant in Gant who neither posed any danger to officer safety nor was able to access the passenger compartment to harm or destroy evidence, invalidated a warrantless search of the motor vehicle. Additionally, State v. Ferguson, 2 S.W. 3d 912 (Tenn.Crim.App. 1999) holds that the constitution is violated when missing evidence has not been produced and is crucial to the opportunity of the defense to discover and examine such missing evidence. Thus it is this court's opinion that while no officer violated the law that he knew at that time, these two incidents combined together require that the evidence taken from the motor vehicle would be suppressed and the case should therefore be dismissed.

The Clerk will forward a copy of this order to counsel for the defendant and to the office of the Knox County District Attorney General.

ENTER this the 30th day of July, 2009.


MARY BETH LEIBOWITZ, JUDGE
CRIMINAL COURT DIVISION III
SIXTH JUDICIAL DISTRICT