

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3902

UNITED STATES OF AMERICA

v.

CEDRIC D. SIMMONS,

Appellant.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D. C. No. 06-cr-0041)
District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit LAR 34.1(a)
October 25, 2007

Before: SLOVITER, CHAGARES and HARDIMAN, *Circuit Judges.*

(Filed: October 26, 2007)

OPINION OF THE COURT

HARDIMAN, *Circuit Judge.*

Defendant Cedric Simmons (Simmons) appeals the District Court's denial of two motions to suppress evidence gathered through a vehicle search and a search of his person

incident to arrest. Because neither search violated Simmons's Fourth Amendment rights, we will affirm his conviction.

I.

On January 8, 2006, at approximately 2:30 a.m., Simmons was stopped for multiple traffic violations by Officer Brant Maley of the Penbrook Police Department. Upon approaching the car, Officer Maley detected the scent of marijuana emanating from the driver's side window. Officer Maley proceeded to run Simmons's license, and discovered that he was not the owner of the car and had a criminal record. Officer Maley conducted a pat down of Simmons, which led to the discovery of what felt like a large amount of money in his pockets. Around this time, a second officer, William Rietheimer, appeared on the scene and noted the odor of marijuana.

The officers decided to pursue consent for a search from the car's owner, Chanika Brown, and asked Simmons to contact her via his cell phone. The initial attempt was unsuccessful, but Brown returned Simmons's call a short time later and Officer Maley spoke to her. After learning that Simmons was Brown's boyfriend and had permission to drive the car, Officer Maley asked for Brown's consent to search her vehicle. Brown asked what would happen if she refused, to which Officer Maley responded that the officers would pursue a warrant. Brown does not recall whether she responded "yes" or "okay," but does not dispute consenting to the search.

During the search, a "blunt" was found in the car's ashtray that field-tested positive for marijuana. Officer Maley placed Simmons under arrest and removed the

money from his pockets, which amounted to \$2,610 separated into \$80 and \$200 folds. While Officer Maley counted the money, Officer Rietheimer completed the search of Simmons's person, and located 61.9 grams of cocaine base (crack) in Simmons's groin area.

On February 1, 2006, a grand jury sitting in Harrisburg, Pennsylvania, returned a one-count indictment against Simmons, charging him with possession with intent to distribute five or more grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1). Simmons filed a motion to suppress physical evidence on Fourth Amendment grounds and the District Court held a suppression hearing.

At the suppression hearing, Simmons called two witnesses, his girlfriend Chanika Brown and Aleem Harden. Brown testified that the reason Simmons had her car was that she was too intoxicated to drive herself home, having had approximately six drinks between the hours of 10:30 p.m and 12:30 a.m. that night. She also admitted to a previous perjury conviction. Harden, a resident of the area who described Simmons as an "acquaintance," witnessed the traffic stop from the porch of his home. He testified that the officers searched the car three times, at least twice prior to any phone conversation. This testimony contradicted that of Officer Maley and the police records, which indicate only one search pursuant to Brown's consent.

On May 9, 2006, the District Court issued a Memorandum Opinion and Order, denying Simmons's motion to suppress on the grounds that Brown validly consented to

the search and the odor along with the discovery of marijuana was sufficient grounds for probable cause to arrest.

Thereafter, on May 22, 2006, Simmons and the Government entered into a written plea agreement pursuant to which Simmons pleaded guilty to possession with intent to distribute an indeterminate amount of crack cocaine in violation of 21 U.S.C. § 841(a)(1). Simmons preserved his right to appeal the suppression issues, however.

II.

The standard of review for the denial of a motion to suppress is multi-tiered; the District Court's findings of fact are reviewed for clear error, while the application of law to these facts is reviewed *de novo*. *United States v. Givan*, 320 F.3d 452, 458 (3d Cir. 2003).

III.

We begin with the search of the vehicle. Searches pursuant to voluntary consent are a recognized exception to the warrant requirement of the Fourth Amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Whether a search was voluntarily consented to is a question of fact reviewed for clear error under the totality of the circumstances. *Id.* at 229. Standard considerations for whether consent is voluntary include: “the setting in which the consent was obtained, the parties' verbal and non-verbal actions, and the age, intelligence, and educational background of the consenting individual.” *Givan*, 320 F.3d at 459. Intoxication is also an element to be considered in applying the totality of circumstances test. Indeed, courts have found that

intoxication may override voluntary consent, but only when it is clear from the situation that the person did not comprehend the implications of consent. *See U.S. v. Schechter*, 717 F.2d 864, 866 (3d Cir. 1983).

In this case, it is clear from the record that Chanika Brown voluntarily consented to the search of her vehicle. Although she drank alcohol during the evening in question, Brown inquired what would happen if she refused consent, thus demonstrating that she comprehended the implications of that consent. Moreover, she was able to remember the manner in which she got home, the location of her car, and the bulk of her conversation with Officer Maley, all of which are consistent with her ability to give consent to search. Finally, Officer Maley did not report Brown as having any difficulties in maintaining the conversation with him, such as slurred speech or impaired capacity.

Thus, there was ample evidence on the record for the District Court to have concluded that Brown voluntarily consented to the search of her vehicle.

IV.

Having found that the search of the vehicle was proper, we next consider whether the officers had probable cause to search Simmons incident to arrest. A determination of probable cause is a matter of law reviewed *de novo*. *United States v. Harple*, 202 F.3d 194, 196 (3d Cir. 1999). When considering a finding of probable cause, a court must consider “whether at that moment [of arrest] the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information were

sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.” *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

In this case, there is no doubt that the officers had probable cause to arrest Simmons. In the context of traffic stops, the smell of marijuana alone, if articulable and particularized (as it was in this case), may establish not merely reasonable suspicion, but probable cause. *United States v. Ramos*, 443 F.3d 304, 308 (3d Cir. 2006). Moreover, while the scent of marijuana was sufficient to establish probable cause, the officers in this case went one step further. They secured voluntary consent from the car’s owner, searched the vehicle, and found a blunt. Accordingly, the District Court did not err when it found that the officers had probable cause to arrest Simmons and search his person incident to arrest.

V.

For the foregoing reasons, it is apparent from the record that the police did not violate Simmons’s Fourth Amendment rights and the District Court did not err in denying his motion to suppress. Therefore, we will affirm the judgment below.