MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI

RESPONDENT,

v.

CYNTHIA A. PESCE

APPELLANT.

DOCKET NUMBER WD71559
DATE: November 30, 2010

Appeal From:

Buchanan County Circuit Court
The Honorable Patrick K. Robb, Judge

Appellate Judges:

Division Four: Lisa White Hardwick, Chief Judge, Presiding, Mark D. Pfeiffer and Gary D. Witt, Judges

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Attorneys:

Shaun J. Mackelprang and James B. Farnsworth, Jefferson City, MO, for respondent.

William J. Swift, Columbia, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,

RESPONDENT,

v.

CYNTHIA A. PESCE,

APPELLANT.

No. WD71559 Buchanan County

Before Division Four Judges: Lisa White Hardwick, Chief Judge, Presiding, Mark D. Pfeiffer and Gary D. Witt, Judges

Cynthia Pesce was charged in the Circuit Court of Buchanan County with possession of a controlled substance for events occurring on October 23, 2008. The information alleged that Pesce was a "persistent offender" because she had been convicted of "two or more felonies committed at different times."

Prior to trial, Pesce filed a motion to suppress the methamphetamine, alleging that it was unlawfully seized during an "illegal detention." After an evidentiary hearing, the trial court denied Pesce's motion to suppress.

The jury returned a guilty verdict, the trial court sentenced Pesce to five years in the Missouri Department of Corrections as a prior and persistent offender.

AFFIRMED AS AMENDED

Division Four holds:

In Point One, Pesce argues that the trial court erred in overruling the motion to suppress because she was unlawfully detained once the check on her driver's license and registration were completed as that completed the investigation of the alleged traffic violation of careless and imprudent driving and that the subsequent questioning without reasonable suspicion of criminal activity constituted an illegal detention that rendered the consent to search invalid.

Pesce does not dispute that the police had probable cause to detain her for the traffic violation of careless and imprudent driving. The trial court concluded that the detention was reasonable because it only lasted the time necessary for the officer to conduct a reasonable investigation of the traffic violation. Based on our applicable standard of review, we find no error in the trial court's ruling.

Here, it is clear that Pesce's consent was obtained during a *reasonable* investigation of a traffic violation. Prior to the request to search the Trooper had confirmed that Pesce was driving while her license was revoked. When Trooper Gilliland requested consent to search her car,

Pesce had not yet been cited for the driving infraction, nor had she had been given her identification back. Pesce points to *no* evidence that demonstrated that this investigation of the traffic violation was needlessly prolonged.

In Point Two, Pesce argues that the trial court erred in sentencing her as a prior and persistent offender because the State failed to prove that she was convicted of two prior felonies as her Iowa conviction for third degree theft was a misdemeanor offense under Iowa law. We agree.

The trial court found beyond a reasonable doubt that Pesce was a prior and persistent offender. Section 558.016.2 defines "prior offender" to be "one who has pleaded guilty to or has been found guilty of one felony." Section 558.016.3 defines "persistent offender" to be "one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times."

Pesce does not dispute that the trial court properly found that she had been previously convicted of *one* felony of forgery. However, Pesce contends that there was insufficient evidence for the trial court to make the finding that she was a persistent offender because the second felony conviction relied on by the trial court does not constitute a "felony."

Pesce's Iowa conviction for theft in the third degree, is designated as an "aggravated misdemeanor," for which the range of punishment is two years. Section 556.016 defines a "misdemeanor" as a crime which is so designated or for which the range of punishment is one year or less. Section 556.016 defines a "felony" as a crime which is so designated or for which the range of punishment is greater than one year. We conclude that Pesce's prior Iowa conviction clearly falls both within the definition of "felony" and "misdemeanor", and therefore, the rule of lenity must apply. Under the rule of lenity an ambiguity in a penal statute will be construed against the government in favor of persons on whom such penalties are sought to be imposed.

For all of these reasons, we conclude that the trial court erred in sentencing Pesce as a *persistent* offender. Therefore, pursuant to our plenary powers, we enter an order amending the trial court's judgment, sentencing Pesce as a *prior* offender to five years in the Missouri Department of Correction.

Opinion by: Gary D. Witt, Judge November 30, 2010

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