

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI

v.

TYRONE C. BROWN

APPELLANT,

RESPONDENT.

DOCKET NUMBER WD73142
**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: September 4, 2012

Appeal From:

Jackson County Circuit Court
The Honorable Robert Michael Schieber, Judge

Appellate Judges:

Division Three:
Karen King Mitchell, Presiding Judge, and James M. Smart, Jr., Judge, CONCURRING
Gary D. Witt, Judge, DISSENTS IN SEPARATE OPINION

Attorneys:

Karen Louise Kramer and James Farnsworth, Jefferson City, MO, for **appellant**.

Patrick W. Peters, Kansas City, MO, for **respondent**.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

APPELLANT,

v.

TYRONE C. BROWN,

RESPONDENT.

No. WD73142

Jackson County

Before Division Three: Karen King Mitchell, P.J., James M. Smart, Jr., and Gary D. Witt, JJ.

Police, in the process of investigating a shooting incident in the early morning hours in which several people were wounded, found a Chevrolet Malibu in the parking lot near empty shell casings. A firearm was visible on the floorboard of the backseat of the Malibu. Police towed the car. Later that day, Latasha Wright telephoned police about the car and came to reclaim it. Her mother had rented the car for Latasha Wright to use, and Ms. Wright had allowed Defendant Tyrone Brown to drive the car. Tyrone Brown, she said, had called her at about 2:00 a.m. to inform her that he had left the car at the scene of a shooting incident. He asked her to retrieve it from that spot so that he would not have to talk to the police about it.

The police caused Latasha Wright to execute a consent to search. The police also examined her cell phone without her consent. The police, after gaining additional information concerning the "Five Ace Deuce" gang, with which Brown was reportedly associated, sought a warrant to search a particular house on Norton Street on the grounds that the information in the custody of police suggested the likelihood that firearms and ammunition would be found at that location. The warrant was issued. After the police executed that warrant, and found firearms and ammunition at that location, they sought a warrant to search an additional house (this one on Indiana Street) occupied by Brown and others, for additional contraband and evidence. That warrant was issued. That search yielded evidence linking Brown to a home-invasion robbery.

The State charged Brown with the robbery. Defendant Brown filed a motion to suppress evidence obtained in the warrantless searches and also the warrant-supported searches. After conducting a hearing, the trial court ordered all the evidence found in all the searches to be suppressed. The State appeals.

REVERSED AND REMANDED.

The Majority Opinion holds:

(1) That the trial court erred in its ruling in the search of the Malibu, in that Defendant Brown failed to carry his burden of demonstrating that he had a reasonable expectation of privacy in the Malibu at the time of the search.

(2) That the trial court erred in suppressing the evidence obtained under the search warrants by applying an improper standard of review. The validity of warrant-supported searches are determined by considering whether the *issuing* judge had a reasonable, common-sense expectation that probable cause existed to believe that contraband would be discovered in the executing of the search warrants.

Ruling of the Majority: The trial court's orders of suppression are reversed. The trial court erred in granting the motions to suppress as to both the warrantless search of the Malibu and the warrant-supported searches of the residences. The case is remanded for further proceedings.

The Dissenting Opinion holds:

The Dissent agrees that this cause should be remanded. However, the Dissent would affirm the trial court's judgment sustaining Brown's motion to suppress the evidence recovered from the automobile and therefore disagrees in part with the Majority's result. The Majority 1) fails to give appropriate deference to the extensive factual findings and credibility determinations of the trial court, 2) erroneously determines that Brown lacked standing to raise the issue of a reasonable expectation of privacy in a rental car, 3) does not adequately address that a hearing under *Franks v. Delaware* is ripe as to numerous constitutional violations by law enforcement.

Facts that support the trial court's reasoning include: The police officer testified that he could not enter the vehicle (which implies that it was locked), that everyone had scattered from the scene after the shooting (a reasonable response for anyone near where a shooting breaks out), that there was no broken glass or other damage to the Malibu, that no one was observed running to or from the Malibu, that the police had no information that the car was involved in the shooting, that another car at the scene looked like it contained bullet holes but the police chose not to search, seize or tow it, and that the tow of the Malibu was in violation of the police department's written towing procedure. The trial court also found that the police fabricated testimony; engaged in illegal coercion and trickery to obtain "permission" to search the Malibu; unlawfully searched the rental car driven by Brown; were guilty of the unlawful and unconstitutional stop of R.M. under the guise of a "car check" solely because R.M. visited a particular house; were guilty of the unlawful and unconstitutional search of R.M.'s cell phone while in that automobile; and were guilty of the unlawful and unconstitutional search of Wright's cell phone while she was being detained at the police station.

On the issue of Brown's legitimate expectation of privacy, the Majority determined without support in the record that Brown no longer possessed the automobile because he had returned the keys to the rental car to his girlfriend. The crux of the majority's holding – whether Defendant had effectively terminated his permissive use – is a factual resolution for the trial court and is beyond our province. Moreover, the case is wrought with facts that support the trial court's finding that Brown had an expectation of privacy and that his expectation of privacy was reasonable.

As to the *Franks* discussion, after a defendant has filed a motion to suppress attacking the validity of the warrant by challenging the veracity of the information contained in the supporting affidavits, it is well established that the initial determination of probable cause supporting the original warrant is no longer entitled to absolute deference.

The trial court found that the affidavit in support of the warrant contained fabricated information, but it is unclear from the record that the trial court did in fact find a *Franks* violation. The Dissent agrees with the Majority that nothing would preclude Brown from filing a more specific *Franks* motion on remand.

The trial court's order is unclear whether its holding constitutes a sanction based on the State's discovery violation as it pertained to the 200 pages of previously undisclosed materials and lack therein of the map allegedly made by the confidential informant, or whether instead it is based on a *Franks* violation as it pertains to the warrant in question. If the trial court wishes to exclude evidence pursuant to a discovery violation, the Court must follow the mandates of our applicable law. If, on the other hand, the trial court intended to issue a *Franks* order, the trial court rested its decision on the improper conclusion that the burden of production and persuasion was on the State. But, in a *Franks* hearing, the burden of proof is on the defendant.

Majority Opinion by James M. Smart, Jr., Judge
Dissenting Opinion by Gary D. Witt, Judge

September 4, 2012

This summary is UNOFFICIAL and should not be quoted or cited.