

# ARKANSAS COURT OF APPEALS

DIVISION II  
No. CR-12-866

DOUGLAS W. KIRBY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered June 19, 2013

APPEAL FROM THE WASHINGTON  
COUNTY CIRCUIT COURT  
[NO. CR 2010-1885-1]

HONORABLE WILLIAM A. STOREY,  
JUDGE

AFFIRMED

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**ROBIN F. WYNNE, Judge**

Douglas W. Kirby appeals from his convictions on charges of possession of various controlled substances, possession of drug paraphernalia, simultaneous possession of drugs and firearms, and felon in possession of a firearm. He argues on appeal that the trial court erred by denying his motion to suppress evidence seized following searches of his person, his vehicle, and his home. We affirm.

On October 11, 2010, Officer Jonathon Knight with the Springdale Police Department was on foot patrol at the Springdale Public Library when he was approached by an unidentified man who claimed to have information relating to drug trafficking. The informant told Officer Knight that appellant was a habitual drug user who kept a large amount of narcotics in his residence. The informant further claimed that appellant had recently purchased stolen firearms. According to the informant, appellant always carried cocaine for



personal use in a metal container with a screw-on cap in the right front pocket of his pants. The informant told Officer Knight that appellant lived on Edmondson Street in Springdale and described to the officer the truck that appellant drove.

After speaking with the informant, Officer Knight set up surveillance a short distance from appellant's house and observed appellant go back and forth between the house and the truck described by the informant. When appellant left the residence and drove in front of Officer Knight's location, the officer noticed that the truck's side windows were excessively tinted. Officer Knight stopped appellant for violating Arkansas window-tinting restrictions. When Officer Knight tested the tint level of the windows, the level was in excess of that allowed by state law. Officer Knight requested and received permission from appellant to search the vehicle. He also requested and received permission to perform a search of appellant's person for officer safety. During the search of appellant's person, Officer Knight felt a small metal container in appellant's right front pocket. When he retrieved the container, he saw that it had a screw-on cap. The container contained a white, powdery substance that tested positive for cocaine. Appellant was then arrested for possession of a controlled substance. During a subsequent inventory search of appellant's vehicle, Officer Knight found two pieces of a red straw that contained the residue of a white, powdery substance.

Officer Knight then contacted Detective Chris Moist with the Springdale Police Department, who interviewed appellant. After the interview, Detective Moist requested and obtained a search warrant for appellant's residence. In the affidavit in support of the request for the warrant, Detective Moist recounted the information given to Officer Knight by the



informant as well as the traffic stop of appellant and the search of his person and vehicle. The ensuing search of appellant's residence resulted in the seizure of firearms, cocaine, marijuana, various pharmaceuticals, and drug paraphernalia.

Prior to his trial, appellant filed a motion to suppress the items seized from his person, his truck, and his home, arguing that the traffic stop of his vehicle was invalid due to lack of probable cause and that the search warrant was invalid because the affidavit submitted in support of the request for the warrant failed to establish the reliability of the informant. During the hearing on the motion to suppress, the State produced testimony from several witnesses, including Officer Knight and Detective Moist. Appellant produced testimony from Kenneth Martin, who performed the tinting work on appellant's vehicle and who testified that the tinting was legal. Following the testimony, the trial court ruled that the information from the informant became reliable when it was verified during the stop and search of appellant. The trial court also ruled that the stop of appellant was valid because the tinting of his windows was in excess of the amount allowed by state law. The trial court denied appellant's motion to suppress.

The case proceeded to trial. A Washington County jury convicted appellant of five counts of possession of various controlled substances, one count of possession of drug paraphernalia, one count of simultaneous possession of drugs and firearms, and one count of felon in possession of a firearm. The trial court sentenced appellant to a total of 360 months' imprisonment. This appeal followed.

We conduct a de novo review of a denial of a motion to suppress under the totality



of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, and giving due weight to the inferences drawn by the circuit court and proper deference to the circuit court's findings. *Powell v. State*, 2013 Ark. App. 322, 427 S.W.3d 782. We reverse only if the circuit court's ruling is clearly against the preponderance of the evidence. *Id.*

Appellant argues that the items seized from his person and his vehicle should have been suppressed because the stop of his vehicle was pretextual. Officer Knight testified that he stopped appellant due to the excessive tinting of his side windows. He further testified that when he tested appellant's windows, the tinting exceeded the amount allowed by law. Although appellant produced testimony that the tinting was legal, it is the province of the trial court to determine the credibility of the witnesses. *Freeman v. State*, 2012 Ark. App. 144, 391 S.W.3d 682. Here, the trial court credited Officer Knight's testimony that the tinting on appellant's windows was illegal. Appellant consented to the search of his person and his vehicle, and the straws were seized from his vehicle during an inventory search following his arrest. We hold that the trial court did not err by finding that the traffic stop and the ensuing searches of appellant's person and truck were valid.

Appellant also argues that the search warrant obtained by Detective Moist was invalid because there is no indication from the affidavit submitted in support of the request for the warrant that the informant was reliable. He also argues that the affidavit lacks any reference to when any alleged illegal conduct occurred. The State asserts in its response brief that appellant's argument that the affidavit lacks the necessary time element was not raised below



and is not preserved for appellate review. We agree. It is well settled that this court will not address arguments for the first time on appeal. *Clark v. State*, 2012 Ark. App. 496, 423 S.W.3d 122. Appellant never raised his time-element argument before the trial court. Accordingly, we will not consider the argument on appeal.

Regarding appellant's argument that the affidavit fails to establish the reliability of the informant, the reliability of an informant is determined by a totality-of-the-circumstances analysis that is based on a three-factored approach our supreme court adopted in *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998). The factors are 1) whether the informant was exposed to possible criminal or civil prosecution if the report is false; 2) whether the report is based on the personal observations of the informant; and 3) whether the officer's personal observations corroborated the informant's observations. *Id.* at 118, 959 S.W.2d at 741. Regarding the satisfaction of these factors, the *Frette* court stated that

the first factor is satisfied whenever [the informant] gives his or her name to authorities or if the person gives the information to the authorities in person. With regard to the second factor, "an officer may infer that the information is based on the informant's personal observation if the information contains sufficient detail that 'it [is] apparent that the informant had not been fabricating [the] report out of whole cloth ... [and] the report [is] of the sort which in common experience may be recognized as having been obtained in a reliable way.'" The third and final element may be satisfied if the officer observes the illegal activity or finds the person, the vehicle, and the location as substantially described by the informant.

*Id.* (quoting *State v. Bybee*, 131 Or. App. 492, 884 P.2d 906 (1994)).

In this case, the informant gave the information to Officer Knight in person. The information given to Officer Knight contained very specific details. Officer Knight investigated appellant based upon the information obtained from the informant and personally



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verified substantial parts of the information from the informant, including such specific details as where appellant kept his cocaine for personal use and the type of container in which the cocaine was stored. All of this information was included in the affidavit submitted by Detective Moist. Based upon the foregoing analysis and the totality of the circumstances presented, we hold that the trial court did not err by determining that the affidavit submitted in support of the request for the search warrant sufficiently established the reliability of the informant.

Appellant's final argument is that the trial court erred by determining that the officers who executed the search warrant did so in good-faith reliance upon the issuance of the warrant. Because the trial court found that probable cause existed to support the issuance of the warrant, and we have held that this finding was not in error, it is unnecessary for us to consider this argument on appeal.

Affirmed.

PITTMAN and GRUBER, JJ., agree.

*Erwin L. Davis*, for appellant.

*Dustin McDaniel*, Att'y Gen., by: *Rebecca B. Kane*, Ass't Att'y Gen., for appellee.