RENDERED: OCTOBER 19, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

**ORDERED NOT PUBLISHED BY SUPREME COURT:
NOVEMBER 19, 2008
(FILE NO. 2007-SC-0860-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000691-MR

MICHAELA CARMEN SIMMONS APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
INDICTMENT NO. 03-CR-00548

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD AND WINE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

HOWARD, JUDGE: The appellant, Michaela Carmen Simmons (hereinafter Simmons), appeals from a judgment of conviction from the Hardin Circuit Court, pursuant to a jury verdict, for first-degree possession of a controlled substance, possession of marijuana,

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and possession of drug paraphernalia. Simmons received a sentence of one year's imprisonment, probated for five years. On appeal, she asserts that the trial court erred in failing to suppress evidence obtained in a search of her automobile and in failing to appoint her an attorney. Finding no reversible error in the trial court's rulings, we affirm.

On April 26, 2003, Sergeant Branson McLeod of the Radcliff Police Department stopped Simmons after she ran a stop sign. He was aware that Simmons' address was associated with drug activity and he asked for backup from other police officers when he verified her license and registration. Sergeant McLeod issued a traffic citation to Simmons and requested permission to search her car. She asked what he was looking for, and he replied that he was looking for drugs and weapons. She volunteered that she had two guns in a gym bag on the backseat of the car, and in response to McLeod's further questions, she admitted that she did not have permits for the guns. McLeod again asked Simmons for permission to search her car, and she asked him if she had a choice in the matter. McLeod informed Simmons that she had little choice but to allow him to search her car, since she had admitted to possessing concealed weapons without a permit and he could obtain a search warrant if needed. Simmons then consented to McLeod's request to search her car. McLeod took possession of the two guns and also found marijuana and methamphetamine in the car.

Simmons filed two motions to suppress the evidence. After the first hearing on June 7, 2005, the trial court denied Simmons' motion by order entered on July 11, 2005, finding the following:

> In this case, the Court finds that Officer McLeod was justified in stopping the defendant's vehicle because [Simmons] committed the violation of disregarding a stop sign. The Officer had a suspicion that further criminal activity was

> afoot since he had independent knowledge that drug activity was being reported from the Defendant's house. He detained the Defendant only for enough time to issue a citation and check her license. He asked for consent to search when he returned to her vehicle to give her the citation. The Court finds that the consent was voluntarily given and that she voluntarily gave him information concerning other possible criminal activity. This allowed the Officer to further investigate and search the vehicle for the pistols which she admitted she had concealed without the proper permits. The Court finds that a full search of the entire vehicle would then be constitutional and all evidence of illegal activity seized thereby is admissible. Therefore, Defense motion to suppress be and is hereby overruled.

On December 29, 2005, the trial court denied Simmons' second motion to suppress and referenced the findings of the July 11, 2005, order. The case proceeded to trial and this appeal followed her conviction and sentence.

Simmons first contends that the fruits of the search must be suppressed because she was illegally detained after the initial traffic stop was concluded. We disagree.

"[T]he legality of a continued detention following a stop for a traffic violation is a question of reasonableness." *Garcia v. Commonwealth*, 185 S.W.3d 658, 667 (Ky. App. 2006). Simmons does not contest the legitimacy of the initial traffic stop, but asserts that McLeod unnecessarily prolonged the stop. As part of the traffic stop, McLeod checked Simmons' license and registration. Believing that Simmons' address was one associated with methamphetamine activity, McLeod then asked Simmons for permission to search her car, and told her that he was looking for drugs and weapons. She advised him that she had two guns for which she had no permit, in a gym bag. Given the totality of the circumstances, McLeod's continued questioning and ultimate detention of Simmons after she was given the traffic citation was not unreasonable.

Next, Simmons contends that her consent to search was not voluntary. We disagree.

The standard of review of a trial court's order on a motion to suppress was stated in *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002) (internal citations omitted):

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

When the Commonwealth relies upon consent to justify the lawfulness of a search, it has the burden of proving by a preponderance of the evidence that the consent was, in fact, freely and voluntarily given. *Anderson v. Commonwealth*, 902 S.W.2d 269 (Ky. App. 1995). Consent cannot be coerced explicitly or implicitly. *Schneckloth v. Bustamonte,* 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). "Whether consent is the result of express or implied coercion is a question of fact, and thus, we must defer to the trial court's finding if it is supported by substantial evidence." *Krause v. Commonwealth*, 206 S.W.3d 922, 924 (Ky. 2006) (internal citation omitted).

Simmons asserts that her consent was the product of coercion and duress. However, the evidence at the two suppression hearings does not support this contention. It is well established that a statement by an officer that he will get a search warrant if consent is not given does not negate the voluntariness of the consent, unless the statement was baseless or deceptive, that is, unless the officer could not, in fact, have gotten a warrant. *See United States v. Salvo*, 133 F.3d 943 (6th Cir.), *cert. denied*, 523 U.S. 1122

(1998); *United States v. Blanco*, 844 F.2d 344, 351 (6th Cir.), *cert. denied*, 486 U.S. 1046 (1988); and *United States v. White,* 979 F.2d 539, 542 (7th Cir. 1992), in which the court said, "When the expressed intention to obtain a search warrant is genuine . . . and not merely a pretext to induce submission, it does not vitiate consent."

In this case, no evidence suggests that McLeod's statements, that Simmons had little choice after admitting possession of two concealed weapons and that he could obtain a search warrant if needed, were baseless or deceptive. Such statements did not vitiate Simmons' otherwise valid consent to search her vehicle.

We also believe that *Krause v. Commonwealth*, 206 S.W.3d 922 (Ky. 2006), is distinguishable from the facts at bar. In *Krause*, 206 S.W.3d at 926, the Court described a police officer's ploy to gain entry to search the defendant's residence as follows:

> Trooper Maner confronted Appellant and his roommate at an alarming hour (4:00 a.m.) with unnerving news -- a young girl had just been raped and he needed to look around the house in order to determine if it was the place that she had described to police. Stunned and sure that they were not the perpetrators of this heinous crime (since in fact, it never occurred), Appellant and his roommate made a split second decision to allow Trooper Manar into the residence in order to assist the trooper in his investigation. . . .
>
> [w]hat distinguishes this case most, perhaps, from the bulk of other [constitutionally valid] ruse cases is the fact that Trooper Manar exploited a citizen's civic desire to assist police in their official duties for the express purpose of incriminating that citizen. The use of this particular ruse simply crossed the line of civilized notions of justice and cannot be sanctioned without vitiating the long established trust and accord our society has placed with law enforcement.

206 S.W.3d at 926-927.

Neither does the fact that officer McLeod asked several times before Simmons gave consent negate the voluntariness of the consent. The facts before us are very close to those in *Hampton v. Commonwealth*, ___ S.W.3d ___, 2007 WL 2403401 (Ky. 2007). The police officer in *Hampton* admitted that he had to ask Appellant for consent to search "several times before it was given." Nonetheless, the Supreme Court affirmed the trial court's finding that Hampton's consent was voluntary. Likewise, the trial court's finding in this case that Simmons voluntarily consented to a search of her car, based on McLeod's testimony at the suppression hearings, is not clearly erroneous and is therefore affirmed.

Next, Simmons asserts that the trial court erred in failing to appoint an attorney for her when she stated that she could not afford to retain one. We agree, but find that the trial court subsequently corrected this error, and Simmons was not unrepresented at any critical stage of the proceedings.

The record shows that Simmons appeared in court without an attorney for her arraignment on January 27, 2004, and that trial was initially scheduled for November 18, 2004. That trial date was continued when she again appeared without an attorney. She asserted in the trial court that she could not afford an attorney. Simmons, *pro se,* engaged in preliminary plea negotiations with the Commonwealth, but no agreement was reached. The trial court, noting that Simmons was employed full time, had posted bond and owned property, entered an order on February 4, 2005, finding that Simmons was not indigent. However, while there is no subsequent order in the record appointing counsel, on April 29, 2005, Simmons was represented by the public defender, as he filed on that date her initial motion to suppress. The parties agree that this representation was

pursuant to an order (apparently oral) of the circuit court. She was ably represented by the public defender's office throughout the remainder of the trial court proceedings.

We agree with Simmons that the trial court erred in denying her application for appointment of counsel, at least without the benefit of a hearing. In *Tinsley v. Commonwealth,* 185 S.W.3d 668, 672, (Ky. App. 2006), we quoted *Jenkins v. Commonwealth,* 491 S.W.2d 636 (Ky. 1973), to state,

> The exact point on the economic scale at which a defendant becomes indigent and therefore entitled to have counsel furnished is not subject to precise measurement but must be determined in the case of each individual in the light of all pertinent circumstances.

We went on in *Tinsley* to refer to the factors set out in KRS 31.120(2), to determine whether or not a defendant is a "needy person" and therefore entitled to appointment of counsel. We also pointed out that a hearing should be conducted in any event, as the defendant, if he was determined not to be indigent, would be entitled to a hearing under *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), to determine if his waiver of counsel is voluntary and to give him the appropriate warnings about the "perils" of waiving counsel and representing himself. *Tinsley,* 185 S.W.3d at 674. We concluded that opinion as follows:

> In summary, while we are aware of the dilemma faced by trial courts upon the issues of indigency and the appointment of counsel, we offer the following observations: first, if a defendant raises the issue of indigency, a hearing must be held thereon for a determination in accordance with the requirements set forth in KRS Chapter 31, and the court must enter findings at the conclusion thereof. If the findings support indigency, counsel shall be appointed. Second, if the findings do not support indigency, and the defendant persists in not employing counsel, he shall be deemed to have waived counsel, whereupon he is entitled to the protections of *Faretta.*

Tinsley, 185 S.W.3d at 675.

Thus, we agree with Simmons that the circuit court erred in this case in ordering, without conducting a hearing or making findings of fact, that she did not qualify for appointed counsel.[2] However, it does not automatically follow that Simmons is entitled to a new trial. Pursuant to *Stone v. Commonwealth*, 217 S.W.3d 233 (Ky. 2007), the appropriate inquiry is whether or not the defendant was denied counsel at any *critical* stage of the proceeding. To determine if a stage is critical, the appellate court should conduct a "retrospective inquiry" as to "how counsel would have benefited the defendant at these moments." *Stone,* 217 S.W.3d at 238.

We are not persuaded that *Stone* compels reversal in this case. Simmons appeared *pro se* only at her arraignment and various other hearings that amounted to no more than scheduling conferences, as well as at least one session of "plea negotiations," although it is not clear that any offers were made at that time. She testified that the Commonwealth Attorney told her that he needed to talk with the police officers, and then he would be in position to make an offer. It does not appear that any offers were actually made until she was represented. In *Stone,* the defendant appeared *pro se* at multiple hearings, including a hearing on an amended indictment, a suppression hearing, and at least one other hearing regarding evidentiary matters. 217 S.W.3d at 236. He also attempted to negotiate a plea *pro se,* but without the benefit of the advise of counsel turned down an offer which, in hindsight, was much more lenient than the jury verdict. While *Stone* did hold that plea negotiations were a "critical stage" in that case, it did not

---

[2] We note that the *Tinsley* opinion was issued several months after the circuit court entered its order denying counsel in this case, so that the trial judge did not have the benefit of that opinion.

hold that they must always be critical. Again, the question is "how counsel would have benefited the defendant at these moments." 217 S.W.3d at 238.

As Simmons points out, *Stone* holds that, "[t]he denial of counsel at a critical stage is not subject to harmless error analysis once a lawyer-less stage has been deemed as critical." 217 S.W.3d at 238. However, while the inquiries are similar, this does not mean that we should not evaluate whether a stage of the proceedings at which a defendant was unrepresented was critical. In fact, we are compelled to do so. In this case, we find, based on the above facts, that Simmons was not unrepresented at any critical stage of the proceedings. That is, it does not appear that counsel would have significantly benefited her at any stage of the proceedings at which she appeared *pro se.* Therefore, although she should have been provided with counsel, or at least with a hearing on her request for counsel, earlier than she was, we find no reversible error in this regard.

The circuit court judgment of conviction is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald H. Morehead
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Office of Attorney General
Frankfort, Kentucky