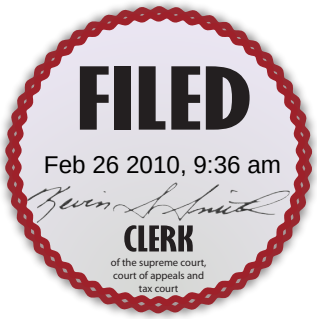

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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 19A05-0908-CR-437
	)	
JAMES SHEPHERD,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE DUBOIS SUPERIOR COURT
The Honorable Mark R. McConnell, Judge
Cause No. 19D01-0905-CM-319

February 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

The State of Indiana appeals the trial court's order that granted James Shepherd's motion to suppress. The State raises the following restated issue: whether the trial court erred when it suppressed all evidence discovered by police after a patrol officer approached a parked vehicle at around 3:30 a.m., discovered an initially unresponsive driver, and smelled alcohol when the driver opened the car door.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On May 10, 2009, Officer Ronnie Bowman of the Huntington City Police Department was patrolling Highway 231 at approximately 3:00 a.m., and due to recent burglaries in the area, he was making "passes" in the vicinity. *Tr*. at 10. During one lap, Officer Bowman noticed vehicle headlights between two houses. He made several additional laps and saw that the car had not moved. Thereafter, he parked in a nearby alley and walked with a flashlight to the vehicle.

Upon his approach, Officer Bowman noticed the out-of-county license plate. Initially, he could not tell if anyone was inside the car, but as he drew nearer, he saw a male, later determined to be Shepherd, sitting in the reclined driver's seat. Officer Bowman tapped on the window a couple of times with his hand but Shepherd did not respond. Officer Bowman did not know whether Shepherd was asleep, needed medical attention, or was even breathing. Officer Bowman then knocked on the window with his flashlight, and Shepherd opened his eyes and began fumbling to open the electric window. Because he could not get the window open, he opened the door to speak with Officer Bowman, who noticed the smell of alcohol

and that Shepherd was "groggy." *Id*. at 13. Officer Bowman asked Shepherd "where he had had been and what he was doing," and Shepherd replied that he had pulled into what he thought was his friend's driveway and parked because he was "too drunk to drive home." *Id*. at 13, 27. When Officer Bowman asked why the engine was still running, Shepherd said he must have forgotten to turn it off. Officer Bowman then asked Shepherd to exit the vehicle, and Shepherd complied. Officer Bowman administered some field sobriety tests, which Shepherd failed. Officer Bowman arrested Shepherd and transported him to the police station, where Shepherd took a chemical breath test.

The State charged Shepherd with: (1) Class A misdemeanor operating a vehicle while intoxicated;[1] (2) Class C misdemeanor operating a vehicle while intoxicated;[2] and (3) Class A misdemeanor operating a vehicle with an alcohol concentration equivalent of at least .15.[3] Thereafter, Shepherd filed a motion to suppress, alleging that the officer's investigation of the vehicle and subsequent detention of Shepherd was improper because the vehicle was legally parked, no emergency was apparent, and the officer had no probable cause that any law had been broken. After a hearing, the trial court granted Shepherd's motion. Because the suppression of the evidence effectively precluded the State's further prosecution of Shepherd, the State now appeals.

[1] *See* Ind. Code § 9-30-5-2(b).

[2] *See* Ind. Code § 9-30-5-2(a).

[3] *See* Ind. Code § 9-30-5-1(b).

DISCUSSION AND DECISION

On appeal from the grant of a motion to suppress, the State appeals a negative judgment and must show the trial court's ruling on the suppression motion was contrary to law. *State v. Cook*, 853 N.E.2d 483, 485 (Ind. Ct. App. 2006). This court will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that reached by the trial court. *Id*. Only the evidence most favorable to the decision will be considered. *Id*. We will neither reweigh the evidence nor judge the credibility of witnesses. *Id*.

On appeal, the State argues that the trial court erred when it granted Shepherd's motion to suppress because Officer Bowman had reasonable suspicion that criminal activity had or was about to occur. After reviewing the circumstances, we agree.

The Fourth Amendment to the United States Constitution guarantees the right to be secure against unreasonable search and seizure. *Denton v. State*, 805 N.E.2d 852, 855 (Ind. Ct. App. 2004), *trans. denied*. The police may stop an individual for investigatory purposes if, based on specific, articulable facts, the officer has a reasonable suspicion that criminal activity is afoot. *Id*. (quotations omitted). Such reasonable suspicion must be comprised of more than hunches or unparticularized suspicions. *Id*. That is, a police officer must be able to point to specific facts giving rise to a reasonable suspicion of criminal activity. *Id*. (citing *Finger v. State*, 799 N.E.2d 528, 533-34 (Ind. 2003)). On review, this court considers whether the facts known by the police at the time of the stop were sufficient for a man of

reasonable caution to believe that an investigation was appropriate. *Id*. The grounds for such a suspicion must be based on the totality of the circumstances. *Id*.

Here, the facts known to Officer Bowman at the time of the stop were sufficient for a person of reasonable caution to believe that an investigation was appropriate. Specifically, while patrolling a particular vicinity where there recently had been "numerous" burglaries and other crimes, Officer Bowman observed, at approximately 3:00 a.m., vehicle headlights shining between two houses. *Tr*. at 19. The vehicle remained there, unmoved, for at least ten to fifteen minutes. Considering these facts, Officer Bowman had reasonable suspicion to investigate the situation. As he approached the car, he noticed its out-of-county license plate and that the engine was running. He observed Shepherd in the reclined driver's seat with his eyes closed. Officer Bowman acted reasonably when he rapped several times on the window to awaken Shepherd, as he could not discern whether he was asleep, needed medical attention, or was even breathing. Once Shepherd finally awoke, Officer Bowman requested that he roll down the window, but Shepherd was unable to locate the vehicle's window lever and had to open the door, which is when Officer Bowman smelled alcohol and noticed that he appeared "groggy." *Id*. at 13. Under these circumstances, we conclude that the facts known to Officer Bowman would cause reasonable suspicion to believe criminal activity had occurred or was about to occur.

In maintaining that the trial court properly granted his motion to suppress, Shepherd refers us to *Madison v. State*, 171 Ind. App. 492, 357 N.E.2d 911 (1976), which he argues is practically "identical" to his situation. *Appellee's Br*. at 9. We disagree and find it

distinguishable. There, Vincennes police officers were on routine patrol and observed at approximately 9:00 a.m. a parked vehicle, with a driver and one front seat passenger, in Kimmel Park near a picnic area. The officers decided to investigate because the driver's head was "laying on the window," and they did not know if the person needed medical attention. *Madison*, 171 Ind. App. at 493, 357 N.E.2d at 912. One officer, who had "heard a lot of things about Madison," recognized the vehicle as Madison's and told his partner that "it would probably be a good car to check." *Id*. When one officer asked Madison, the driver of the car, if he was alright, Madison replied he was okay and had been out all night; Madison appeared groggy and "half asleep." *Id*. The officer asked for identification, and Madison exited the car, at which time the officer noticed a belt buckle that looked like "a hash pipe." *Id*. The officer examined it and determined it had been used to smoke marijuana. He then looked in the open driver's side window and observed several cellophane bags which he thought contained marijuana. The officer retrieved the bags and arrested Madison.

Madison moved to suppress the evidence, which the trial court denied, and Madison was convicted. On appeal, we reversed, finding that the trial court should have suppressed the evidence. *Id*. at 496, 914. We note that when the police officers first observed the car, they had no basis for inferring that there was any criminal activity afoot because, "There is . . . nothing inherently suspicious about a car parked near the picnic area of a public park on a Sunday morning." *Id*. at 495, 913. We continued by finding that while it was not improper for the officers to approach the parked car to see if everything was alright, "[O]nce Madison

replied that he was okay, the basis for the initial inquiry was satisfied and no further investigation was warranted." *Id*. While *Madison* is relevant, it is distinguishable.

In contrast to *Madison*, where the location and circumstances of the parked car were not "inherently suspicious," here Shepherd's parked car was observed at approximately 3:00 a.m., in a driveway of an area where burglaries had recently occurred, *i.e.*, in an odd place at an odd time. The headlights were on, the engine was running, and the vehicle remained unmoved for at least ten to fifteen minutes. Under these circumstances, Officer Bowman acted reasonably in approaching the car to further investigate. In *Madison* the officer's knowledge of or about Madison contributed to their investigation of the parked car, whereas Officer Bowman did not recognize Shepherd or his vehicle as anyone he knew, and Shepherd's identity had nothing to do with the officer's investigation of the seemingly abandoned vehicle. Furthermore, unlike in *Madison*, Shepherd was initially unresponsive to attempts to awaken him, and even when Officer Bowman did succeed in waking him, Shepherd was unable to open the window. When he opened the door, Officer Bowman then smelled alcohol. At this point, Officer Bowman had reasonable suspicion that criminal activity was afoot, and his brief detention of Shepherd to inquire where he had been and what he was doing there was supported by ample factual justification. We therefore conclude that, under the circumstances of Shepherd's case, the trial court erred when it suppressed the evidence that was discovered during the stop.[4]

[4] We express no opinion on other issues referenced by Shepherd such as if or when *Miranda* warnings were required or whether the suppressed evidence standing alone would be sufficient to support an operating while intoxicated conviction. *See Appellee's Br*. at 6-7.

Reversed and remanded for proceedings consistent with this opinion.[5]

DARDEN, J., and MAY, J., concur.

[5] The State also argues on appeal that the encounter between Officer Bowman and Shepherd was consensual, meaning it was a brief inquiry of a citizen that did not involve either an arrest or a stop, and no constitutional protections were implicated. *Appellant's Br*. at 4-7. Because we are reversing the trial court's decision on other grounds, namely that Officer Bowman's investigation was a valid investigatory stop, we do not reach the State's alternative argument regarding the consensual nature of the encounter.