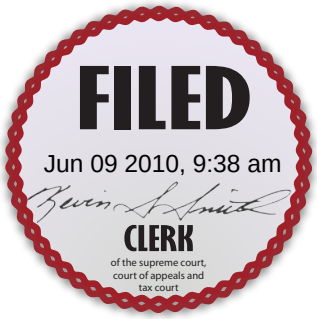

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IN THE
COURT OF APPEALS OF INDIANA

MATTHEW FERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0910-CR-606
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0806-FD-26

June 9, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Matthew Ferry appeals his convictions for Possession of Marijuana,[1] a class A misdemeanor, Maintaining a Common Nuisance,[2] a class D felony, Possession of Marijuana while Having a Prior Conviction,[3] a class D felony, and with being an Habitual Substance Offender.[4] Specifically, Ferry argues that the trial court erred in admitting evidence that was seized from his vehicle because his right to be free from unreasonable search and seizure under the Fourth Amendment to the United States Constitution and Article One, Section Eleven of the Indiana Constitution was violated when a police officer unlawfully approached his parked vehicle and detained him. Finding no error, we affirm the judgment of the trial court.

FACTS

Around midnight on March 22, 2008, Lafayette Police Officer Ronald Dombkowski was on routine patrol. At some point, Officer Dombkowski noticed a parked vehicle in an apartment complex parking lot. The vehicle was not parked in a valid parking spot and it was facing one of the buildings. Additionally, the headlights were off and there were no interior lights in the vehicle. The apartments were in a high crime area—a Village Pantry convenience store that was across the street had been the subject of various thefts and robberies during the past several months.

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[1] Ind. Code § 35-48-4-11.

[2] I.C. § 35-48-4-13.

[3] I.C. § 35-48-4-11.

[4] Ind. Code § 35-50-2-10.

Officer Dombkowski stopped his marked police vehicle immediately behind the parked car. As Officer Dombkowski approached the vehicle, he saw Ferry and a female passenger "slumped down in their seats . . . just sitting there." Tr. p. 6-7. Officer Dombkowski knew about the prior Village Pantry robberies and walked to the driver's side of the parked vehicle. Officer Dombkowski wanted to approach the vehicle and make contact with the occupants "to, number one, see if they needed any assistance. And number two, to make sure that criminal activity was not afoot." Id. at 8-9. Officer Dombkowski shined his flashlight in the vehicle and saw Ferry motion to him that he was unable to roll down his window. As a result, Ferry opened the car door.

Officer Dombkowski immediately detected the odor of burnt marijuana emanating from the vehicle. Officer Dombkowski then placed Ferry in handcuffs and "advised him that he was not under arrest but he was being detained for further investigation." Id. at 10. Moments later, Officer Albert Demello arrived with a canine unit and was informed that there was "an overwhelming odor of marijuana emitting from [Ferry's] vehicle." Id. at 29. The canine "alerted" to the presence of drugs and the officers subsequently searched Ferry's vehicle and seized twenty-eight grams of marijuana from under the driver's seat. Id. at 30.

On June 30, 2008, the State charged Ferry with the above offenses. Ferry filed a pretrial motion to suppress, claiming that the marijuana was illegally seized from his vehicle in violation of his right to be free from unreasonable search and seizure. More specifically, Ferry alleged that the evidence should be suppressed because "there was no reasonable suspicion to stop" him. Appellant's App. p. 13. Thus, Ferry claimed that the

marijuana that was seized following the alleged improper stop and detention should be excluded from the evidence at trial. Following a hearing that was conducted on March 12, 2009, the trial court rejected the State's contention that a "consensual encounter" had occurred. Id. at 25. However, the trial court denied Ferry's motion to suppress, concluding that it was reasonable for Officer Dombkowski to conduct the stop, "detain the vehicle[,] and question its occupants about their activity." Id.

During a bench trial that commenced on August 7, 2009, the trial court admitted the marijuana into evidence over Ferry's objections. Ferry was found guilty as charged and was subsequently sentenced to concurrent terms of two years for maintaining a common nuisance, one year for possession of marijuana, and two years for possession of marijuana while having a prior conviction. The trial court then enhanced the possession of marijuana charge while having a prior conviction by three years in light of the habitual substance offender determination, suspended three years of the sentence, and ordered Ferry to two years of probation. Ferry now appeals.

DISCUSSION AND DECISION

Ferry claims that his convictions must be reversed because the marijuana that the police officers seized from his vehicle was improperly admitted into evidence. More specifically, Ferry argues that the evidence was seized in violation of his right to be free from unreasonable search and seizure under the Fourth Amendment to the United States Constitution and Article One, Section Eleven of the Indiana Constitution because he was improperly stopped and "illegally detained." Appellant's Br. p. 4. Ferry maintains that

because the initial stop was unlawful, the subsequent search of his vehicle was also improper and, therefore, the marijuana should have been excluded from the evidence.[5]

I. Standard of Review

In cases such as this one where Ferry originally sought to suppress evidence, but appeals following its admission, we choose to frame the issue as whether the trial court abused its discretion by admitting the evidence at trial because our standard of review for rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pretrial motion to suppress or by an objection at trial. Cole v. State, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007).

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Payne v. State, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Smith v. State, 889 N.E.2d 836, 839 (Ind. Ct. App. 2008). In making this determination, we do not reweigh evidence and consider conflicting evidence in a light most favorable to the trial court's ruling. Cole, 878 N.E.2d at 885. We also consider uncontroverted evidence in the defendant's favor. Id.

II. Ferry's Claims

A. Fourth Amendment

Ferry argues that Officer Dombkowski illegally stopped and detained him in violation of his Fourth Amendment rights. Thus, Ferry maintains that the subsequent

[5] Ferry only challenges the propriety of the initial stop and does not advance an independent claim that the subsequent arrest and search of the vehicle were unlawful.

search of his vehicle was also illegal and that the seized marijuana should not have been admitted into evidence at trial.

In resolving this issue, we initially observe that the Fourth Amendment states in relevant part that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." The purpose of this provision is to protect people from unreasonable search and seizure, and it applies to the states through the Fourteenth Amendment. Krise v. State, 746 N.E.2d 957, 961 (Ind. 2001) (citing Mapp v. Ohio, 367 U.S. 643, 650, (1961)).

The Fourth Amendment requires the police to obtain a search warrant from a neutral, detached magistrate prior to undertaking a search of either a person or private property, except under special circumstances fitting "within certain carefully drawn and well-delineated exceptions." Sellmer v. State, 842 N.E.2d 358, 362 (Ind. 2006).

Relevant to our discussion in this case are the three levels of police investigation. Two implicate the Fourth Amendment and one does not. Overstreet v. State, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000). First, the Fourth Amendment requires that an arrest or detention that lasts for more than a short period of time must be justified by probable cause. Id. Second, pursuant to Fourth Amendment jurisprudence, the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based upon specific and articulable facts, the officer has a reasonable suspicion that criminal activity has or is about to occur. Id. Finally, the third level of investigation occurs when a police officer makes a casual and brief inquiry of a citizen,

which involves neither an arrest nor a stop. Id. This is a consensual encounter that does not implicate Fourth Amendment considerations. Id.

We note that not every encounter between a police officer and a citizen amounts to a seizure requiring objective justification. Overstreet, 724 N.E.2d at 663. It is simply not the purpose of the Fourth Amendment to eliminate all contact between police and the citizenry. U.S. v. Mendenhall, 446 U.S. 544, 553 (1980). And the mere approach by law enforcement officers does not constitute a seizure. Florida v. Royer, 460 U.S. 491, 497 (1983). Indeed, we have held that a person is "seized" only when, by means of physical force or a show of authority, his or her freedom of movement is restrained. State v. Lefevers, 844 N.E.2d 508, 513 (Ind. Ct. App. 2006).

What constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary depending upon the particular police conduct at issue and the setting in which the conduct occurs. Michigan v. Chesternut, 486 U.S. 567, 573 (1988). Examples of circumstances that might indicate a seizure where the person did not actually attempt to leave the scene include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Mendenhall, 446 U.S. at 553. If that type of evidence is lacking, otherwise inoffensive contact between a member of the public and the police does not amount to a seizure of that person. Id. The test for existence of a "show of authority" is an objective one: not whether the citizen perceived that he was being

ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person. California v. Hodari D., 499 U.S. 621, 628 (1991).

In Overstreet, the evidence established that the defendant pulled into a gas station and was fueling his vehicle. A police officer pulled his vehicle behind the defendant without activating the lights, approached him, asked for identification, and questioned him about some suspicious activity that the officer had observed. We held that there was no "stop" or "seizure" under the Fourth Amendment. 724 N.E.2d at 664. Similarly, in Lefevers, we held the defendant was not "seized" when, of her own volition, she pulled into a convenience store parking lot and a police officer parked nearby without activating his emergency lights, got out of his vehicle, and began talking to the defendant in a non-threatening way. Lefevers, 844 N.E.2d at 513. Thus, it was determined in both Overstreet and Lefevers, that the police officers did not have to possess reasonable suspicion of wrongdoing when they initially approached the defendants and spoke to them. See also State v. Augustine, 851 N.E.2d 1022, 1025-26 (Ind. Ct. App. 2006) (observing that a police officer's initial encounter with the defendant appeared to be consensual where the officer approached the defendant who was sitting in the driver's seat of his vehicle on his driveway with the engine running and there was no evidence that the officer displayed a weapon, touched the defendant, or used any language or spoke in a tone of voice mandating compliance).

Similarly, we observed in Powell v. State, 912 N.E.2d 853 (Ind. Ct. App. 2009), trans. denied, that a number of federal courts have determined that a police officer's approach to a vehicle parked in a public place does not in itself constitute an

investigatory stop or a seizure for purposes of the Fourth Amendment. See United States v. Foster, 376 F.3d 577, 581-584 (6th Cir. 2004) (finding no seizure under the Fourth Amendment where three uniformed officers approached the defendant as he was emerging from a parked vehicle, asked the defendant his name and what he was doing, and asked whether the defendant had identification); United States v. Baker, 290 F.3d 1276, 1278 (11th Cir. 2002) (holding that a seizure did not occur where the police officers approached a vehicle stopped in traffic and the record did not reveal that officers behaved in a manner that was threatening); United States v. Dockter, 58 F.3d 1284, 1287 (8th Cir. 1995) (concluding that the defendants were not seized within the meaning of the Fourth Amendment where a police officer pulled his vehicle behind the defendants' parked car and activated his amber warning lights); United States v. Kim, 25 F.3d 1426, 1430 (9th Cir. 1994) (acknowledging that police interrogation of automobile occupants typically involves a greater degree of intrusiveness than questioning of pedestrians, but where officers approach an already parked car, the disparity between automobile and pedestrian stops dissipates); United States v. Encarnacion-Galvez, 964 F.2d 402, 410 (5th Cir. 1992) (finding that no seizure occurred where federal agents did not stop the defendant's vehicle, but approached it only after the defendant had parked it); United States v. Castellanos, 731 F.2d 979, 983-984 (D.C. Cir. 1984) (finding that a federal park officer did not seize the defendant by approaching the defendant's parked vehicle, asking several questions, and requesting identification); United States v. Pajari, 715 F.2d 1378, 1381-1383 (8th Cir. 1983) (noting that federal agents' initial approach to the defendant's vehicle car did not amount to an unlawful seizure).

In Powell, the evidence established that at approximately 2:30 p.m. on June 1, 2008, Fort Wayne Police Officer Deshaies passed a properly parked vehicle on the side of the street and noticed several occupants—including Powell who was in the driver's seat—inside the vehicle. The vehicle was not running and Officer Deshaies noticed that the occupants "turned their faces away" and "got further down in the seat" as he drove by. 912 N.E.2d at 856 (quoting tr. p. 27). Id. Moments later, Officer Deshaies returned to the scene and noticed that the individuals were still in the vehicle. Officer Deshaies was aware that there had been a "rash of burglaries" in the area. Id. at 857 (quoting tr. p. 26). As a result, Officer Deshaies, who was in police uniform and driving a fully marked squad car, "pulled up behind" the vehicle. Id. Officer Deshaies did not activate his siren or the squad car's emergency lights. Thereafter, he approached the vehicle and its occupants to "conduct an investigation to see what their purpose was in the area." Id. (quoting tr. p. 7).

As Officer Deshaies looked inside the vehicle, he immediately noticed beer cans, a vodka bottle, and a "spent .22 shell casing in the back seat." Id. (quoting tr. p. 9). Powell told Officer Deshaies that he was "waiting for a friend" and started mumbling something. Id. The record does not reflect that Officer Deshaies displayed a weapon as he approached Powell's vehicle or used any language or spoke in a tone that mandated compliance.

Officer Deshaies noticed that Powell was "favoring his right side by his thigh area." Id. Concerned that about Powell's muttered statements and the possibility that there were weapons in the vehicle, Officer Deshaies ordered Powell to get out of the car

"so he could speak to him." Id. (quoting tr. p. 10). Officer Deshaies "immediately removed [Powell] from the car" after Powell turned his back to him. Id. Officer Deshaies then conducted a limited pat-down search of Powell for weapons. Another officer, who subsequently arrived at the scene, ordered the front passenger from the vehicle and saw him move his hand toward the space between the door and the passenger seat. As the passenger stepped from the vehicle, the officer saw three small baggies that contained suspected marijuana on the floor board on the right side of the passenger seat. Id. at 858. The officers also noticed a suspected amphetamine pill near the center console.

As a result of the incident, Powell was charged with—and ultimately convicted of—possession of marijuana and possession of a controlled substance, both class D felonies. On appeal, we rejected Powell's claim that the drugs seized from the vehicle were improperly admitted into evidence. In affirming Powell's convictions, we observed that

> Given these facts, and in light of the preceding cases, we cannot say that Officer Deshaies's approach to the parked vehicle in which Powell was an occupant and initial contact with Powell constituted an investigatory stop or a seizure under the Fourth Amendment. The record supports the trial court's ruling that the initial encounter here was consensual and thus fell outside the ambit of the Fourth Amendment's guarantee against unreasonable searches and seizures. Therefore, under the circumstances, Officer Deshaies did not have to possess reasonable suspicion of wrongdoing in order to park behind or approach Powell's vehicle in order to ask Powell his purpose for being in the area. See Foster, 376 F.3d at 581-584 (concluding there was no seizure where three uniformed officers approached the defendant emerging from a parked vehicle and asked the defendant his name, what the defendant was doing, and whether the defendant had identification); Lightbourne, 438 So.2d at 387-388 (holding that an officer was permitted to approach a parked vehicle and ask the

> defendant a few simple questions as to the reason for his presence there); see also Manigault, 881 N.E.2d at 685 (finding that police did not need to possess reasonable suspicion to initially approach the defendant); Lefevers, 844 N.E.2d at 513 (finding that the defendant was not seized under the Fourth Amendment); Augustine, 851 N.E.2d at 1025-1026 (noting that police interaction was a consensual encounter and that police were not required to possess reasonable suspicion to approach the defendant); Overstreet, 724 N.E.2d at 664 (holding that an interaction between an officer and the defendant was a consensual encounter and thus the officer was not required to possess reasonable suspicion of wrongdoing to approach the defendant).
>
> Based upon these facts, we conclude that Officer Deshaies had reason to believe that he was dealing with an armed and dangerous individual. When the small baggies containing marijuana in the vehicle became visible to the officers, seizure of the marijuana was proper pursuant to the "plain view doctrine. . . ." Therefore, the trial court did not abuse its discretion in overruling Powell's objection to the admission into evidence of the marijuana or methamphetamine based upon the Fourth Amendment.

Id. at 862-63.

Here, as discussed above, the record demonstrates that Officer Dombkowski, who was in full uniform, pulled up in his marked police car behind Ferry's parked vehicle, which was not parked in a "valid" space at the apartment complex. Tr. p. 7. Officer Dombkowski approached Ferry's vehicle with a flashlight and could not remember whether the squad car's "red and blue" emergency lights were on at the time. Id. at 22. Officer Dombkowski did not speak to Ferry at the outset, and Ferry voluntarily opened his door after motioning to Officer Dombkowski that he was unable to roll down the window. Id. Officer Dombkowski immediately smelled the odor of burn marijuana and placed Ferry in handcuffs "for further detention." Id. at 10. When Officer Demello arrived, his canine unit alerted to the presence of narcotics. Id. at 12.

As in Powell, Officer Dombkowski approached Ferry's vehicle after it was already stopped. Moreover, there is no evidence that Officer Dombkowski displayed a weapon, initially approached in a manner that would be considered intimidating or aggressive, or spoke in a tone of voice that mandated compliance. Therefore, as we concluded in Powell, we cannot say that Officer Dombkowski's approach to the vehicle and the initial contact with Ferry amounted to an investigatory stop or a seizure under the Fourth Amendment. Thus, Officer Dombkowski was not required to have a reasonable suspicion of wrongdoing in order to park behind Ferry, approach his vehicle, and investigate "to make sure that criminal activity was not afoot" in light of the fact that the Village Pantry across the street had been the target of several robberies during recent months. Powell, 912 N.E.2d at 862.

However, even assuming solely for the sake of argument that Officer Dombkowski's initial contact with Ferry could not be deemed consensual as the trial court determined, we note that the Fourth Amendment is not violated by a brief, investigatory stop conducted by an officer who has a reasonable, articulable suspicion—based on the totality of the circumstances—that criminal activity is afoot. Terry v. Ohio, 392 U.S. 1, 30, (1968); see also Potter v. State, 912 N.E.2d 905, 907 (Ind. Ct. App. 2009). Reasonable suspicion requires more than mere hunches or unparticularized suspicions. Id.

Again, Officer Deshaies observed that Ferry's vehicle was improperly parked in a high crime area in the middle of the night close to the Village Pantry that was a well-known target for robberies. Tr. p. 7-8. The vehicle was not in operation, no lights were

on in the vehicle, and Ferry and his passenger were "slumped down" in their seats. Id. at 7-9. As Officer Dombkowski testified, these circumstances "set off a red flag" in his mind. Id. at 5. Although these factors may not have risen to the level of probable cause, it was reasonable for Officer Dombkowski to assume that criminal activity might be afoot and that Ferry may have been waiting for an opportunity to rob the nearby store. Hence, it was reasonable for Officer Dombkowski to approach and detain Ferry to further investigate the situation and to confirm or dispel his suspicions. See Hardister v. State, 849 N.E.2d 563, 570 (Ind. 2006) (holding that the scope of a Terry stop includes "inquiry necessary to confirm or dispel the officer's suspicions"). And once Officer Dombkowski smelled the marijuana emanating from the vehicle, he was justified in conducting a further investigation of the situation. See Hoop v. State, 909 N.E.2d 463, 468 (Ind. Ct. App. 2009) (observing that just as evidence in the plain view of officers may be searched without a warrant, evidence in the plain smell may be detected without a warrant). For all these reasons, we conclude that Ferry does not prevail on his claim that the evidence should have been excluded from the evidence on Fourth Amendment grounds. Appellant's App. p. 13.

B. Article 1, Section 11 of the Indiana Constitution

Ferry also maintains that Officer Dombkowski's initial approach towards the vehicle and initial encounter violated Article 1, Section 11 of the Indiana Constitution, which provides for the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure. . . ." Despite the fact that the text of Article 1, Section 11 is nearly identical to the Fourth Amendment, Indiana courts

interpret and apply it independently from federal Fourth Amendment jurisprudence. Mitchell v. State, 745 N.E.2d 775, 786 (Ind. 2001).

We have previously determined that investigatory stops constitute intrusions into the privacy of the detained individual that invoke the protections of Article 1, Section 11 of the Indiana Constitution. Taylor v. State, 639 N.E.2d 1052, 1054 (Ind. Ct. App. 1994). However, a brief police detention of an individual during an investigation is reasonable if the police officer reasonably suspects that the individual is engaged in, or is about to engage in, illegal activity. Id. When analyzing the circumstances in accordance with Article 1, Section 11, we focus on whether the police officer's conduct was reasonable under the totality of the circumstances. Holder v. State, 847 N.E.2d 930, 940 (Ind. 2006). In making this determination, we balance: (1) the degree of concern, suspicion, or knowledge that a violation has occurred; (2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities; and (3) the extent of law enforcement needs. Id.

As we have determined above, even assuming for the sake of argument that Officer Dombkowski's initial contact with Ferry was not a consensual encounter, the totality of the circumstances nonetheless established that Officer Dombkowski's suspicion was reasonable that criminal activity had occurred or was about to occur. As a result, we conclude that Ferry's rights against unreasonable search or seizure under Article 1, Section 11 of the Indiana Constitution were not violated. Taylor, 891 N.E.2d at 160.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.