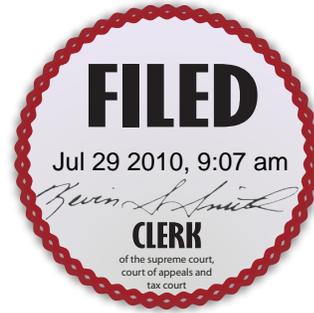


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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)
)
 Appellant-Plaintiff,)
)
 vs.) No. 71A03-0911-CR-545
)
 CARLA F. WELLS,)
)
 Appellee-Defendant.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0810-FD-1108

July 29, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Plaintiff, State of Indiana (State), appeals the trial court's Order granting Appellee-Defendant's, Carla F. Wells (Wells), motion to suppress.

We affirm.

ISSUE

The State raises one issue on appeal, which we restate as follows: Whether the trial court abused its discretion when it granted Wells' motion to suppress evidence because the officers' entry into her residence was improper pursuant to the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

FACTS AND PROCEDURAL HISTORY

On October 16, 2008, sometime after midnight, Officers Kyle Dombrowski (Officer Dombrowski), and Joseph Stitsworth (Officer Stitsworth), of the South Bend Police Department, were dispatched to investigate a crime. The Officers met with a cab driver who reported that he had driven a woman to a home in South Bend, Indiana. Once at the home, the woman exited the cab and ran into the residence without paying the fare. After speaking with the cab driver, the Officers knocked on the front door of the house. A teenage boy, later identified as Wells' thirteen-year-old son, answered the door. The Officers pointed their flashlights on the boy's face and explained why they were there and asked to speak to his mother.

The teenage boy then turned to get his mother. According to the Officers, Wells' son said "come on." (Transcript p. 15, 47). However, at trial, the boy testified that he did not tell

the Officer to “come on,” but rather that he “closed the door.” (Tr. pp. 62-63). The Officers stepped into the living room of the house as the boy went toward a bedroom. When Wells exited her bedroom, she was wearing only a t-shirt and panties. Upon discovering that the Officers were in her house, Wells became very upset. Wells asked the Officers “what the f*** are you doing here.” (Tr. p. 48) Wells was also very angry with her son and asked him “why the f*** did you let them in?” (Tr. p. 48).

After the Officers explained their reason for being in the home, the Officers asked Wells to step outside to speak with the cab driver. Wells agreed to go and then put on her clothes to go outside to meet the cab driver. Subsequently, the cab driver determined that Wells was not the person who ran from his cab without paying the fare. Wells, still angry about the Officers entering her home, began to scream and yell obscenities at the Officers. The Officers directed Wells to be quiet and return to her home because her neighbors were being disturbed. Wells complied and went back inside her home. However, as the Officers were leaving, Wells returned to her porch and began yelling at the Officers. The Officers again warned Wells to be quiet and return to her residence. Wells refused and a struggle ensued between the Officers and Wells. During this encounter, one of the Officers received an injury.

On October 17, 2008, the State filed an Information, charging Wells with disorderly conduct, a Class B misdemeanor, Ind. Code § 35-45-1-3; resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3; and battery to a law enforcement officer, a Class D felony, I.C. § 35-42-2-1(a). On October 13, 2009, Wells filed a motion to suppress evidence

claiming that the Officers' entry into her home was improper. On October 29, 2009, the trial court granted Wells' motion to suppress. The trial court stated, in pertinent part:

I know there's a dispute about whether the door was closed and they improperly opened it and committed trespass. There is a dispute there. But even taking the police officers' version as the correct version and a reliable version, even doing so, I find that under those circumstances where they had stepped into a dark house, had their flashlights on, and the mother came out – clearly it was the mother – and was making very clear that they were not there with her permission, they had an obligation immediately to leave. Immediately to leave. They had no articulate [sic] facts to think – they didn't express any nor do I find any, any articulate [sic] facts to think that she was the runner. And they know where she was. They had every obligation to leave. And if they thought it was so important, they had the right to secure the outside of the home and to attempt a search warrant. For a cab fare, you bet. Why? Because it's somebody's house. The [s]upreme [c]ourt of Indiana has been very strong about the sanctity of the home and what you need to do to invade that. Especially for police to invade that. Especially at midnight I'm saying, I'm adding. And they absolutely overstayed their welcome to put it mildly. I understand they felt they had a legitimate complaint that they were trying to settle or investigate. But the responsible adult in that house didn't want them there, and they stayed, "to explain why they were there." When an owner of a house says out of my house, the police do not have a right to remain there to explain their presence unless they have independent articulate [sic] grounds to do so. They did not.

(Tr. pp. 110-11).

The State now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

The State contends that the trial court's decision to grant Wells' motion to suppress was improper. When we review a trial court's motion to suppress, the reviewing court determines whether the record discloses "substantial evidence of probative value that supports the trial court's decision." *State v. Washington*, 898 N.E.2d 1200, 1203 (Ind. 2008)

reh'g denied (citing *State v. Quirk*, 842 N.E.2d 334, 340 (Ind. 2006)). When conducting such a review, we will not reweigh evidence or judge witness credibility. *State v. Moriarity*, 832 N.E.2d 555, 557-58 (Ind. Ct. App. 2005). Here, the State is appealing from a negative judgment and must show that the trial court's ruling on the suppression motion was contrary to law. *State v. Estep*, 753 N.E.2d 22, 24-25 (Ind. Ct. App. 2001). "This court will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that of the trial court." *Id.* "We will affirm the trial court's ruling if it is sustainable on any legal grounds apparent in the record." *Best v. State*, 821 N.E.2d 419, 423 (Ind. Ct. App. 2005) *reh'g denied, trans. denied*. The State presents arguments under both the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution; we will address each theory in turn.

II. *The Fourth Amendment*

The Fourth Amendment to the United States Constitution protects persons from unreasonable searches and seizures and this protection has been extended to the states through the Fourteenth Amendment. U.S. Const. Amend. IV. "The fundamental purpose of the Fourth Amendment is to protect the legitimate expectations of privacy that citizens possess in their persons, their homes, and their belongings." *Taylor v. State*, 842 N.E.2d 327, 330 (Ind. 2006). A search warrant is generally a prerequisite to a constitutionally proper search and seizure. *Halsema v. State*, 823 N.E.2d 668, 676 (Ind. 2005). When a search or seizure is conducted without a warrant, the State bears the burden of proving that an exception to the warrant requirement existed at the time of the search and seizure. *Id.* In this

case, the State contends that the exception to the warrant requirement was that consent was given by Wells' thirteen-year-old son.¹ Phrased objectively, the question becomes whether the facts available to the Officers at the time lead a person of reasonable caution to conclude that a minor party had authority over the premises to consent to their search.

In *Krise v. State*, 746 N.E.2d 957, 967 (Ind. 2001), our supreme court discussed the consent to search authority as follows:

It is well established that a third party may consent to the search of the premises or property of another if actual authority exists. Establishing actual authority requires a showing that there is a sufficient relationship, to or "mutual use of the property by, persons generally having joint access or control for most purpose. If actual authority cannot be shown, then facts demonstrating that the consenting party had apparent authority to consent could prove a lawful search. Under the apparent authority doctrine, a search is lawful if the facts available to the officer at the time would "warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." The State bears the burden of proving that the third party possessed the authority to consent.

(Internal citations omitted).

In *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990), the Supreme Court considered whether the Fourth Amendment was violated by the police officer's search of a dwelling based on a reasonable (but erroneous) belief that a third party possessed common authority to consent. The Court reasoned, "[w]hether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably." *Id.* at

¹ In their brief, the State also argued the doctrine of attenuation, but the issue was not raised at the trial court level; therefore any such argument is waived. See *Wurster v. State*, 715 N.E.2d 341, 347-48 (Ind. 1999) ("It is well settled that a party may not raise one ground before the trial court and a different ground on appeal.").

181-82. Based upon this reasoning, the Court concluded that an official search based upon a reasonable belief that a third party has common authority does not offend the Fourth Amendment. *Id.* at 188.

Here, Wells' thirteen-year-old son answered the door in the middle of the night. Seeing a minor open the door, the Officers asked the juvenile if they could speak to his mother. Both of the Officers testified on cross-examination that they clearly did not believe the juvenile was the person in charge of the house. Based on the testimony of the Officers, the Officers did not have a reasonable belief that Wells' son had authority to let them in the house. Furthermore, the fact that an adult was at home, they were asleep, and it was midnight, no person of reasonable belief would believe that a thirteen-year-old possessed the authority to allow the Officers to enter Wells' home. Therefore, when the Officers entered into Wells' home without a warrant and a belief that the juvenile was not the person in charge, they ceased to be engaged in the lawful execution of their duties. Moreover, the testimony is absolutely clear that once Wells exited her bedroom and noticed the Officers, she did not give consent for them to be there and wanted them to leave her residence. Therefore, we conclude that the warrantless entry by the Officers violated Wells' Fourth Amendment rights.

III. *Indiana Constitution, Art. 1, Sec 11*

The language of the Indiana Constitution, Article 1, Section 11, mirrors the federal protection against unreasonable search and seizure. Although the language of Section 11 is the same, the Indiana courts interpret and apply it independently from Fourth Amendment

jurisprudence. *State v. Bulington*, 802 N.E.2d 435, 438 (Ind. 2004). Even though Article 1, Section 11's words parallel the Fourth Amendment's language, it has unique vitality. *State v. Stamper*, 788 N.E.2d 862, 864-65 (Ind. Ct. App. 2003), *trans. denied*. Though the Fourth Amendment establishes a minimum level of protection to all citizens, the Indiana Constitution imposes greater restrictions upon police activity. In resolving challenges asserting Article 1, Section 11, the burden is on the State to show that under the totality of the circumstances, the police activity was reasonable. *Id.* at 864. "The reasonableness of a search or seizure turns on the balance of: (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 citizens' ordinary activities; and (3) the extent of law enforcement needs." *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005).

Applying the *Litchfield* test to the current case, we find that the degree of suspicion and knowledge that a violation had occurred is high because the cab driver told the Officers that someone had exited his cab without paying and entered into Wells residence. Although a call was made to the police that someone had taken a cab and ran into Wells' home without paying, the Officers did not have a description of the suspect or any idea what the person was wearing. The only link to Wells was the cab driver's statement that the individual who had not paid had run into Wells' residence. Second, the degree of intrusion in a citizen's ordinary activity was high. It was midnight and Wells was in her bed sleeping when she was woken up by her son. The house was completely dark. Further, when Wells exited her bedroom she was only wearing a t-shirt and panties. The fact that Wells had to come out of her bedroom

in a t-shirt and panties imposed a high degree of intrusion on Wells' ordinary activities. Third, the extent of law enforcement needs was low. Although there is a concern for police to ensure that cab drivers receive their fares, the police cannot unlawfully enter a citizen's home without a valid warrant. As the trial court stated, "the police could have gotten a search warrant or secured the house until someone came outside." (Tr. p. 117) With what the Officers knew, there was not enough information as to who to look for or even if the person was still there.

Based on the totality of the circumstances, we conclude that the degree of suspicion and knowledge was high, that the degree of intrusion was high, and that the extent of law enforcement needs was low. In considering the *Litchfield* factors, the fact that the Officers entered Wells' residence and stayed there when Wells told them to leave outweighs the degree of suspicion and knowledge that a violation had occurred. Therefore, we conclude that the Officers' warrantless entry into Wells' residence violated Article 1, Section 11 of the Indiana Constitution.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly granted the motion to suppress. The warrantless entry of the police into Wells' home violated the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.