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IN THE COURT OF APPEALS OF INDIANA

KENNETH W. RHYMER, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 21A01-1004-CR-174
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Daniel Lee Pflum, Judge
Cause No. 21C01-0805-FC-054

SEPTEMBER 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant Kenneth W. Rhymer, Jr., appeals from the revocation of his probation. We affirm.

ISSUES

Rhymer raises two issues for review, which we restate as:

I. Whether the trial court erred by determining that Rhymer violated the terms of his probation.

II. Whether the trial court abused its discretion by ordering Rhymer to serve his entire previously suspended sentence.

FACTS

On May 19, 2008, Rhymer pleaded guilty to burglary as a class C felony[1] and theft as a class D felony.[2] On May 29, 2008, the trial court sentenced Rhymer to serve four years and six months. The trial court suspended three years and six months of Rhymer's sentence, to be served on probation. The conditions of Rhymer's probation included a requirement that Rhymer not commit any new criminal violations during his probationary period.

Rhymer served the executed portion of his sentence and was released to probation. On November 2, 2009, Captain Robert Fee of the Connersville Police Department was on patrol. He received a report from dispatch regarding a van with a driver who was suspected to be intoxicated. As Captain Fee drove down Central Avenue, he saw the van

[1] Ind. Code § 35-43-2-1.
[2] Ind. Code § 35-43-4-2.

identified in the report going in the opposite direction. Captain Fee recognized the van's driver as Sara Miller, and he was aware that Miller's driver's license was suspended.

Captain Fee turned around to follow Miller's van, and as he caught up to the van Miller drove into the parking lot of a tobacco shop. Captain Fee also drove into the lot and parked behind Miller's van. Next, Captain Fee saw Rhymer get out of Miller's van on the passenger side and walk around to the driver's side door as if to enter the van. Captain Fee walked up to Miller's van and noted that Miller had slid over to the passenger's seat.

Captain Fee instructed Rhymer to move to the front of the van so that he could talk with Miller. Captain Fee asked Miller why they were switching seats, and Miller began to provide an explanation. As Captain Fee spoke with Miller, Rhymer repeatedly walked back towards Captain Fee and Miller and interrupted their discussion. Captain Fee repeatedly directed Rhymer to remain at the front of the van. After several minutes, Rhymer told Captain Fee he was going into the tobacco shop to buy cigarettes. Captain Fee told Rhymer to stay where he was, and when Rhymer walked towards the tobacco shop, Captain Fee arrested him. Miller was also taken into custody.

The State charged Rhymer with resisting law enforcement as a class A misdemeanor.[3] The record does not reveal how this charge was resolved. In addition, the State filed a petition to revoke Rhymer's probation. The trial court held a hearing on the State's petition to revoke and determined that Rhymer had violated the conditions of his

[3] Ind. Code § 35-44-3-3.

probation. The trial court ordered Rhymer to serve his previously suspended sentence of three and a half years.

DISCUSSION AND DECISION

I. SUFFICIENCY OF THE EVIDENCE

Rhymer contends that the State failed to prove that he violated a condition of his probation.

Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). Probation revocation is a two-step process. First, the court must make a factual determination that a violation of a condition of probation actually occurred. *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008). If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation. *Id.* A probation revocation hearing is in the nature of a civil proceeding and, therefore, a violation need only be proven by a preponderance of the evidence. *Washington v. State*, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001). If there is substantial evidence of probative value to support the trial court's decision that the probationer is guilty of a violation, revocation is appropriate. *Id.* This Court will neither reweigh the evidence nor judge the credibility of the witnesses. *Id.* Rather, we look to the evidence most favorable to the State. *Id.*

When the alleged probation violation is the commission of a new criminal offense, an arrest, standing alone, will not support the revocation of probation. *Cooper v. State*, 917 N.E.2d 667, 674 (Ind. 2009). However, if the trial court after a hearing finds that the

arrest was reasonable and there is probable cause to believe the defendant violated a criminal law, revocation will be sustained. *Id.*

The parties agree that the sole ground alleged by the State for revoking Rhymer's probation was that he had committed the offense of resisting law enforcement as a class A misdemeanor. The governing statute provides, in relevant part:

> (a) A person who knowingly or intentionally:
> (1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties;
> (2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or
> (3) flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop;
> commits resisting law enforcement, a Class A misdemeanor . . . ."

Ind. Code § 35-44-3-3(a). The parties further agree that the only portion of the statute that applies to this case is subsection (a)(3). Thus, at the probation revocation hearing, the State was required to prove, by a preponderance of the evidence, that Rhymer: (a) knowingly or intentionally; (b) fled from Captain Fee; (c) after Captain Fee had identified himself by visible or audible means; and (d) ordered Rhymer to stop.

Rhymer asserts that there is insufficient evidence that he fled from Captain Fee. We disagree. In *Roberts v. State*, 799 N.E.2d 549, 550 (Ind. Ct. App. 2003), police officers came to a house to serve an arrest warrant on Roberts. When the officers arrived at the house, they saw several people, including Roberts, standing on a porch. *Id.* Roberts walked towards the door of the house, and the officers ordered him to stop. *Id.* Roberts looked at the officers, went into the house, and shut the door. *Id.* Roberts later

came back outside and was arrested. *Id.* On appeal, Roberts argued that he had no intent to flee because he came back outside after being told he was wanted by the police. *Id.* at 551. A panel of this Court concluded that Roberts' continued movement into the house despite an officer's order to stop demonstrated intent to flee. *Id.*

In this case, after repeatedly moving away from the front of Miller's van and interfering with Captain Fee's discussion with Miller, Rhymer stated that he was going into the tobacco store to purchase cigarettes. After Captain Fee told Rhymer to stay at the front of the van, Rhymer walked towards the store, and Captain Fee arrested him. As in *Roberts*, Rhymer displayed intent to flee from a law enforcement officer despite being told to remain where he was. Whether Rhymer would have purchased cigarettes and returned to the scene is not dispositive of the question of intent to flee, just as Roberts' eventual exit from the house was not dispositive in *Roberts*. Consequently, the State presented sufficient evidence to establish, by a preponderance of the evidence, that Rhymer committed resisting law enforcement as a class A misdemeanor. This evidence is sufficient to support the trial court's determination that Rhymer violated a condition of his probation.

Next, Rhymer contends that the trial court should not have relied on the allegation that he resisted law enforcement to revoke his probation because Captain Fee unlawfully detained Rhymer in the tobacco shop's parking lot in violation of his rights under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution.

Rhymer concedes that at the probation revocation hearing he did not object to Captain Fee's testimony against him on constitutional grounds. Thus, Rhymer has waived his search and seizure claims for appellate review. *See Clark v. State*, 580 N.E.2d 708, 712 (Ind. Ct. App. 1991) (determining that the appellant waived a challenge to an expert witness' qualifications on appeal because the appellant failed to object to the witness' qualifications at a probation revocation hearing).

Rhymer attempts to avoid waiver by contending that the admission of Captain Fee's testimony was fundamental error. The doctrine of fundamental error allows an appellate court to review an unpreserved error. *Trice v. State*, 766 N.E.2d 1180, 1182 (Ind. 2002). Our Supreme Court has emphasized the "extremely narrow applicability" of the fundamental error doctrine. *Carter v. State*, 754 N.E.2d 877, 881 (Ind. 2001). As our Supreme Court has stated:

> A fundamental error is "a substantial, blatant violation of basic principles of due process rendering the trial unfair to the defendant." It applies only when the actual or potential harm "cannot be denied." The error must be "so prejudicial to the rights of a defendant as to make a fair trial impossible." An appellate court receiving contentions of fundamental error need only expound upon those it thinks warrant relief. It is otherwise adequate to note that the claim has not been preserved.

Id. (internal citations omitted).

We will address Rhymer's search and seizure claims although, as we discuss below, we do not conclude that the admission of Captain Fee's testimony on the circumstances of Rhymer's arrest was fundamentally erroneous and warrants relief.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures by the government, and its safeguards extend to brief investigatory

stops of persons or vehicles that fall short of traditional arrest. *Thayer v. State*, 904 N.E.2d 706, 709 (Ind. Ct. App. 2009). A police officer may briefly detain a person for investigatory purposes without a warrant or probable cause if, based upon specific and articulable facts together with rational inferences from those facts, the official intrusion is reasonably warranted and the officer has a reasonable suspicion that criminal activity "may be afoot." *Id.* (quoting *Moultry v. State*, 808 N.E.2d 168, 170-171 (Ind. Ct. App. 2004)). Stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention quite brief. *Id.* Even if the stop is justified, a reasonable suspicion only allows the officer to temporarily freeze the situation for inquiry and does not give him or her all of the rights attendant to an arrest. *State v. Campbell*, 905 N.E.2d 51, 54 (Ind. Ct. App. 2009), *trans. denied*.

Article One, Section Eleven of the Indiana Constitution parallels the language of the Fourth Amendment to the United States Constitution, providing, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated . . . ." Notwithstanding the textual similarity of Article One, Section Eleven to that of the federal Fourth Amendment, Section Eleven is interpreted separately and independently from Fourth Amendment jurisprudence. *State v. Washington*, 898 N.E.2d 1200, 1205-1206 (Ind. 2008), *reh'g denied*. The purpose of this section is to protect those areas of life that Hoosiers consider private from unreasonable police activity. *Id.* at 1206. When police conduct is challenged as violating this section, the burden is on the State to show that the search was reasonable under the

totality of the circumstances. *Id.* The determination of the reasonableness of a search and seizure under the Indiana Constitution turns "on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." *Id.* (quoting *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005)).

In *Tawdul v. State*, 720 N.E.2d 1211, 1213 (Ind. Ct. App. 1999), *trans. denied*, an officer on patrol in a marked car saw a car driving in the opposite direction with its bright lights illuminated. The officer flashed his lights to signal the driver of the other car to switch to low beams, and the driver did not dim the lights. *Id.* The officer activated his emergency lights to direct the other car to stop, but the driver of that car drove on and parked in a private driveway less than a mile down the road. *Id.* The officer saw the driver of the car and a passenger, Tawdul, get out of the car. *Id.* The officer directed them both to remain in the car, but Tawdul refused and went inside to use the restroom. *Id.* Tawdul came back outside a few moments later and was arrested. *Id.* Tawdul was convicted of resisting law enforcement. *Id.* On appeal, Tawdul claimed that he was illegally seized in violation of the Fourth Amendment to the United States Constitution and Article One, Section Eleven of the Indiana Constitution. *Id.* at 1214. Tawdul contended that the officer had no reasonable suspicion that he, as a passenger, was involved in criminal activity, so the officer should not have detained him. *Id.* A panel of this Court disagreed, concluding, "the police have a limited right to briefly detain a passenger who exits the vehicle after it has been lawfully stopped." *Id.* at 1216-1217.

The Court noted, "although under no suspicion of culpability, the passenger is still subject to the limited authority of the officer." *Id.* at 1217. Consequently, the Court concluded that the officer's detention and arrest of Tawdul did not violate his federal or state constitutional protections against unreasonable search and seizure. *See id.*

In the current case, applying *Tawdul*, Captain Fee made a lawful investigatory stop of Miller's vehicle because he had a reasonable suspicion that she was driving with a suspended license. Once Captain Fee detained Miller, he also lawfully detained Rhymer for the limited period necessary to investigate the matter. Rhymer contends that Captain Fee should have arrested Miller immediately upon detaining her, thereby ending the stop and eliminating any basis for Rhymer's further detention under the Fourth Amendment or Article One, Section Eleven. We disagree. Captain Fee was investigating a report of driving while intoxicated, which required Captain Fee to talk with Miller. Furthermore, Rhymer prolonged the stop by failing to comply with Captain Fee's directive to remain at the front of the van.

We cannot say that the trial court's admission of Captain Fee's testimony was so prejudicial to Rhymer as to render a fair trial impossible. Therefore, the admission of Captain Fee's testimony was not fundamentally erroneous, and Rhymer's search and seizure claims are waived.

II. SENTENCING

Rhymer argues that his sentence is excessive.

Upon revoking a defendant's probation, the court may impose the one or more of the following sanctions: (1) continue the person on probation, with or without modifying

or enlarging the conditions; (2) extend the person's probationary period for not more than one year beyond the original probationary period; (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing. *See* Ind. Code § 35-38-2-3(g). Accordingly, a trial court's sentencing decision for a probation violation is reviewable using the abuse of discretion standard. *Prewitt*, 878 N.E.2d at 188. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

Rhymer contends that his probation violation was minor in nature and does not justify the imposition of a three and a half year sentence. We disagree. By statute, the trial court had the authority to sentence Rhymer to the full portion of his suspended sentence, and the trial court's sentence does not exceed the amount of the sentence that was originally suspended. We conclude that Rhymer's sentence is not against the logic and effect of the facts and circumstances of the case, and the trial court did not abuse its discretion.

III. CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

RILEY, J., and BARNES, J., concur.