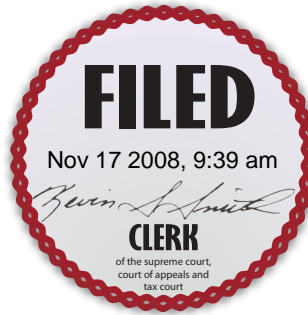


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

D.M.,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0712-JV-1109
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Beth Jansen, Magistrate
The Honorable Marilyn Moores, Judge
Cause No. 49D09-0708-JD-2651

November 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

D.M. appeals the true finding regarding an allegation that he possessed cocaine, a Class D felony if committed by an adult. We affirm.

Issue

D.M. raises one issue, which we restate as whether the juvenile court properly admitted evidence obtained during a patdown of D.M.

Facts

On August 15, 2007, Indianapolis Marion County Police officers Charles Wheeler and Jeffery Viewegh observed a car run a stop sign at the intersection of 20th Street and Kessler Boulevard in Indianapolis. The officers initiated a traffic stop and as they approached the car, they smelled the odor of burnt marijuana. The officers ordered the four passengers to get out of the car and conducted patdown searches. During the patdown search of D.M., Officer Viewegh felt a bulge in D.M.'s pocket and removed what he believed to be narcotics. The contents removed from D.M.'s pocket were later determined to be .853 grams of crack cocaine.

On August 29, 2007, the State alleged D.M. to be a delinquent child based on his possession of cocaine, a Class D felony if committed by an adult. Following a hearing, the juvenile court determined the allegations to be true. D.M. now appeals the true finding.

Analysis

D.M. argues that the juvenile court improperly admitted evidence obtained during the patdown search because it was conducted in violation of his United States and Indiana

constitutional rights. Because the admission and exclusion of evidence falls within the sound discretion of the juvenile court, we review the admission of evidence only for abuse of discretion. N.W. v. State, 834 N.E.2d 159, 161 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the juvenile court. Id.

The Fourth Amendment protects people from unreasonable search and seizure, and this protection has been extended to the states through the Fourteenth Amendment. Id. at 162. Generally, the Fourth Amendment prohibits a warrantless search. Id. When a search is conducted without a warrant, the State has the burden of proving that an exception to the warrant requirement existed at the time of the search. Id.

One exception to the warrant requirement was explained in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968), in which the Supreme Court determined that the Fourth Amendment to the United States Constitution permits a police officer to approach a person for purposes of investigating possible criminal behavior without probable cause to make an arrest and to execute a reasonable search of the person for weapons for the officer's own protection. Burkett v. State, 691 N.E.2d 1241, 1244 (Ind. Ct. App. 1998), trans. denied. When a Terry patdown is conducted the officer need not be absolutely certain that the individual was armed but only that a reasonably prudent person in the same circumstances would be warranted in the belief that his or her safety or that of others was in danger. Id. “[G]eneralized concerns of officer safety will not support a lawful frisk.” Swanson v. State, 730 N.E.2d 205, 210 (Ind. Ct. App. 2000), trans. denied.

D.M. contends that the odor of burnt marijuana emanating from a vehicle does not give rise to an inference that an occupant of the vehicle is armed and dangerous. When considering the totality of the circumstances, however, we disagree. It was nearing dark when the officers saw a car run a stop sign in a “high crime, high narcotic area.” Tr. p. 29. As the officers approached the car, they smelled burnt marijuana. Given these circumstances, especially the possible presence of illegal drugs, a reasonably prudent person would be warranted in the belief that his or her safety might be in danger. The officers’ patdown of the occupants of the car was based on specific officer safety concerns. D.M. has not established that the patdown was unlawful.

D.M. also argues that Officer Viewegh improperly retrieved the cocaine from his pocket under the “plain feel” doctrine. In Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130 (1993), the Supreme Court determined that police officers may seize contraband detected through the officer’s sense of touch, hence the term “plain feel” doctrine, during a search of a person for weapons for the safety of the officer. Smith v. State, 780 N.E.2d 1214, 1216 (Ind. Ct. App. 2003), trans. denied. The Dickerson court stated:

If a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Dickerson, 508 U.S. at 375-76, 113 S. Ct. at 2137. Thus, for an item seized under the “plain feel” doctrine to be admissible: “(1) the contraband must have been detected during an initial search for weapons rather than during a further search, and (2) the

identity of the item or items must have been immediately apparent to the officer.” Smith, 780 N.E.2d at 1217.

Here, Officer Viewegh discovered the cocaine in D.M.’s pocket during a lawful patdown search. D.M. claims, however, that it was not immediately apparent to Officer Viewegh that the item in his pocket was contraband. Although the probable cause affidavit was not admitted into evidence, D.M.’s argument is based on Officer Viewegh’s cross-examination testimony in which he was questioned about the contents of the probable cause affidavit. The affidavit provided, “I removed the small bulge from [D.M.]’s pocket to see if in fact, it was possibly the source of the marijuana that I had previously smelled.” Tr. p. 44.

Given the entire record in this case,¹ however, we disagree with D.M.’s assessment of Officer Viewegh’s actions. At the hearing, Officer Viewegh testified that he patted D.M.’s clothing and felt a small bulge in the watch pocket of his pants. During Officer Viewegh’s cross-examination, Exhibit A was admitted into evidence. In the exhibit, titled “juvenile fact sheet,” Officer Viewegh wrote: “When patting down [D.M.] I felt in his watch pocket what I immediately believed by my training and experience what I believed was susp[ected] narcotics. I retrieved that item and discovered it to be susp[ected] crack cocaine.” Exhibit A (emphasis added). On cross-examination, the following discussion took place between defense counsel and Officer Viewegh:

¹ A portion of the tape of the hearing containing most of Officer Viewegh’s testimony was damaged and could not be transcribed. A certified statement of the missing evidence was submitted to this court. Although our review of the evidence was hampered, our decision is based on the portions of the transcript submitted to us and the certified statement of the evidence.

Q All right. Officer Viewegh, have, have you ever felt a bulge in a person that you were searching, that turned out to be something other than drugs?
A In a watch pocket, not very often. No.
Q Not very often. But it can happen, can't it.
A Rarely.
Q But it can happen, can't it?
A I suppose it could. Yeah.

* * * * *

Q Okay. And actually, you, you took them out in order to ascertain what they were didn't you?
A Yes.
Q Okay. So what you did is you, you felt the bulge and then you took it out in order to determine whether or not it was suspected drugs? Correct?
A No.
Q Yes or no?
A No.

* * * * *

Q Yes or no? You took it out of the pocket to see what it was?
A To see if it was what I thought it was.
Q Okay. You took it out of the pocket to see if it was what you thought it was?
A Correct.

Tr. pp. 40, 43, 46.

Based on Officer Viewegh's written statement in Exhibit A and his unequivocal hearing testimony, it was immediately apparent to him that the bulge in D.M.'s pocket was contraband—narcotics. Even if in addition to officer safety the patdown was conducted to locate narcotics as Officer Viewegh stated, D.M. has not established that the

patdown search exceeded the parameters of the “plain feel” doctrine. The juvenile court was within its discretion to admit this evidence.²

D.M. also argues that the patdown search was conducted in violation of Article 1, Section 11 of the Indiana Constitution. “Our analysis of claims under Section 11 does not demand that we look to the same requirements as those examined under the United States Constitution; rather, our investigation under Section 11 places the burden on the State to demonstrate that each relevant intrusion was reasonable in light of the totality of the circumstances.” Holder v. State, 847 N.E.2d 930, 940 (Ind. 2006). Our determination of the reasonableness of a search or seizure under Section 11 often 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 the 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)).

Here, D.M. was a passenger in a car that ran a stop sign in a high crime area. Two police officers who observed the car run the stop sign initiated a traffic stop. As they approached the car, the police officers smelled burnt marijuana. Under these facts, there is a high degree of suspicion that criminal activity was occurring. Further, the drugs in D.M.’s pocket were recovered during a patdown search of the outside of D.M.’s clothing that was conducted for officer safety purposes. Thus, the degree of the intrusion was not

² Because the admission of the evidence is affirmed on this ground, we need not address D.M.’s argument that this was an unlawful search incident to arrest. Similarly, although the State contends that the odor of marijuana alone establishes probable cause to search the occupants of the car, because the patdown search was lawful, we need not address this argument.

excessive. Finally, contrary to D.M.'s assertion, the officers' actions of conducting a patting down of the passengers of a car during a traffic stop that involved marijuana was consistent with the law enforcement needs of officer safety. The patdown search of D.M. did not violate Article 1, Section 11 of the Indiana Constitution.

Conclusion

The juvenile court did not abuse its discretion in admitting the cocaine discovered during a patdown search of D.M. We affirm.

Affirmed.

FRIEDLANDER, J., concurs.

DARDEN, J., dissents with separate opinion.

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DARDEN, Judge, dissenting

I respectfully dissent. I concur with the majority’s analysis in concluding that the circumstances here permitted the officer to conduct an investigation of possible criminal behavior and a weapons patdown of the vehicle occupants pursuant to Terry. However, I note the absence of any facts regarding the marijuana odor (which gave rise to the officer’s suspicion of criminal behavior) that specifically pointed to D.M. as the individual culpable of a marijuana offense. Thus, the facts warranted no more than a patdown of D.M. based on officer safety concerns.

I part with the majority in their conclusion that the “plain feel” doctrine applies here. Specifically, I cannot find that the record reflects that it was “immediately apparent” to the officer that D.M.’s watch pocket contained contraband. The officer’s

probable cause affidavit stated that he “removed the small bulge from [D.M.]’s pocket to see if it in fact, was possibly the source of the marijuana that [the officer] had previously smelled.” (Tr. 44). The record further contains an exhibit in which the officer had written that “[w]hen patting down” D.M., he felt in D.M.’s “watch pocket what [he] immediately believed by [his] training and experience what [he] believed was susp[ected] narcotics,” which he then “retrieved and discovered . . . to be crack cocaine.” (Ex. A). In the officer’s cited testimony, he denies removing the material “to determine whether or not it was suspected drugs,” and affirmed that he “took it out of the pocket to see if it was what [he] thought it was.” (Tr. 46).

In summary, the officer thought the contents of D.M.’s pocket might be the source of the marijuana odor he had experienced emanating from the vehicle in which D.M. was a passenger. He removed from the pocket what – based on his training and experience, he “believed was susp[ected] narcotics” of an identified nature. (Ex. A). He proceeded to remove the material and determined that it was crack cocaine.

“A ‘general exploratory search’ violates the Fourth Amendment.” Tumblin v. State, 736 N.E.2d 317, 323 (Ind. Ct. App. 2000), trans. denied (quoting Smith v. State, 713 N.E.2d 338, 344 (Ind. Ct. App. 1999), trans. denied. Given that the warrantless search here was not of a vehicle search but one of D.M.’s person, I would find that the Fourth Amendment barred its admission into evidence.