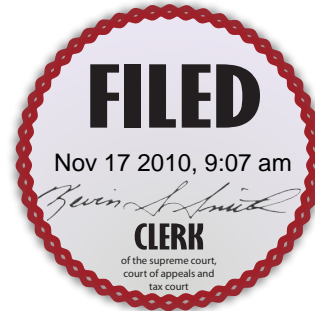


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

ROBERT D. KING, JR.
The Law Office of Robert D. King, Jr., P.C.
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ANDREW R. FALK
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY J. WOODS,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

)
)
)
)
)
)
)
)
)
)
)

No. 49A04-1003-CR-158

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael Jensen, Magistrate
Cause No. 49G20-0906-FB-55935

November 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Anthony Woods appeals his conviction, following a bench trial, of possession of cocaine within 1,000 feet of a family housing complex, a Class B felony.¹ For our review, Woods raises two restated issues: 1) whether the trial court abused its discretion by admitting allegedly unlawfully obtained evidence; and 2) whether sufficient evidence disproves Woods's claim that he was at the family housing complex only briefly and no children at least three years younger than him were present. Concluding the trial court did not abuse its discretion by admitting the cocaine as evidence, and sufficient evidence proves children at least three years younger than Woods were present when he possessed cocaine at the family housing complex, we affirm.

Facts and Procedural History

In the early morning of June 13, 2009, Officer Bragg and Officer Scott of the Indianapolis Metropolitan Police Department were conducting a foot patrol of the Beechwood Gardens Apartments (“Beechwood complex”), a public housing complex in Indianapolis. The Beechwood complex has 164 apartments and rents to families, including families with children. Due to recent reports of narcotics and gun activity, Officers Bragg and Scott, wearing full police uniforms, conducted a “thorough walkthrough” of the Beechwood complex. Transcript at 26. At some point during the walkthrough, the officers spoke with a woman previously known to them whose two children were playing outside under her supervision and were between ten and fifteen years old.

¹ Woods was also convicted of resisting law enforcement, a Class A misdemeanor, and public intoxication, a Class B misdemeanor, but does not challenge those convictions.

At approximately 1 a.m., the officers came across a group of four or five men, including Woods, standing in a parking lot of the Beechwood complex. The men appeared to Officer Bragg to be between thirty- and fifty-some years old. One of the men turned and quickly walked away as the officers approached, and Officer Scott went to follow that man. Of the men who remained, two appeared to be drinking alcohol and one was recognized by Officer Bragg as an individual he had stopped one or two weeks previously and found in possession of an assault rifle. Officer Bragg attempted to engage the men in “general conversation” such as asking them whether they lived at the Beechwood complex and why they were there. Id. at 29. The men were nonresponsive and gave Officer Bragg a “blank stare.” Id.² Officer Bragg also asked the men if they had any weapons, and all responded negatively. Officer Bragg then began to pat down one of the men who was drinking alcohol and who raised his hands to about shoulder height as a sign of being cooperative. Officer Bragg did not tell the other men that they were going to be patted down or that they needed to stay put, and Officer Bragg made no comment directed specifically at Woods.

As Officer Bragg was patting down the one man, Woods “walk[ed] over a couple of steps” toward Officer Bragg and dropped a clear plastic baggie. Id. at 32. Woods was several feet away from Officer Bragg when he dropped the baggie and appeared to be trying to “go behind” Officer Bragg’s field of vision. Exhibit Volume at 22.³ Officer Bragg turned and saw the baggie appeared to contain rock-like crack cocaine. He then

² However, Officer Bragg testified in his deposition, admitted into evidence at trial, that the men gave a “common yes/no response all at one time” when asked whether they lived there. Exhibit Volume at 18.

³ Officer Bragg’s trial testimony was that Woods was five to eight feet away when he dropped the baggie, and his deposition testimony was that Woods was approximately three feet away.

told Woods to put his hands on a nearby car, but Woods did not comply and instead shoved Officer Bragg in the arm and shoulder. The officers subdued Woods and placed him under arrest, at which time they observed signs of Woods's intoxication. They also recovered the baggie, which later tested positive for cocaine.

The State charged Woods with possession of cocaine within 1,000 feet of a family housing complex, a Class B felony, resisting law enforcement, a Class A misdemeanor, and public intoxication, a Class B misdemeanor. Woods filed a motion to suppress, and in lieu of an evidentiary hearing, the parties stipulated to admitting Officer Bragg's deposition into evidence. On November 24, 2009, the trial court denied the motion to suppress.

Woods waived his right to a jury trial. On January 4, 2010, the trial court held a bench trial at which Officer Bragg testified and his deposition was admitted as part of the trial record. The cocaine baggie was admitted into evidence over Woods's objection that his dropping the cocaine was "forced abandonment because there's illegal detention of not only Mr. Woods but the other individual at the scene." Tr. at 54. Woods also argued that if convicted, his conviction should be entered as merely a Class D felony because he was at the Beechwood complex only briefly and there was no evidence he was at least three years older than any children present. The trial court took this argument under advisement and, on January 27, 2010, found Woods guilty as charged. Following a sentencing hearing, the trial court sentenced Woods to fifteen years. He now appeals.

Discussion and Decision

I. Admission of Evidence

A. Standard of Review

Although Woods states the issue as whether the trial court erred by denying his motion to suppress, because Woods appeals from a completed trial, “the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial.” Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We defer to the trial court’s findings of historical fact, do not reweigh the evidence, and consider conflicting evidence in a light most favorable to the trial court’s ruling. Meredith v. State, 906 N.E.2d 867, 869 (Ind. 2009). We “consider[] afresh any legal question of the constitutionality of a search or seizure.” Id.

B. Fourth Amendment⁴

Woods argues the cocaine was seized as a result of an improper patdown search and was therefore inadmissible. Yet Woods was not the subject of Officer Bragg’s patdown, another individual was. Fourth Amendment rights are personal rights and a defendant may not vicariously assert the Fourth Amendment rights of a third party. Smith v. State, 744 N.E.2d 437, 439 (Ind. 2001) (citing Rakas v. Illinois, 439 U.S. 128, 133-34 (1978)). That is, “[i]n order to qualify as a person aggrieved by an unlawful search . . . one must have been a victim of a search . . ., one against whom the search was directed,” and not be claiming prejudice only from the use of evidence obtained as a result of a search directed at a third party. Rakas, 439 U.S. at 134-35 (quotation and

⁴ Woods addresses only the Fourth Amendment to the U.S. Constitution and does not develop an argument under Article 1, section 11 of the Indiana Constitution.

emphasis omitted). Thus, Woods cannot prevail merely by showing that Officer Bragg lacked reasonable suspicion to conduct the patdown of the other individual.

Further, Woods's cocaine baggie was not seized until after he dropped it on the ground. Woods acknowledges he abandoned the cocaine. Abandoned property generally is not the subject of Fourth Amendment protections. Wilson v. State, 825 N.E.2d 49, 51 (Ind. Ct. App. 2005); see California v. Hodari D., 499 U.S. 621, 629 (1991) (holding that cocaine abandoned while defendant was running from police but before he was seized was properly admissible evidence).

However, Woods argues "there was a causal nexus between the improper pat-down and Woods abandoning the cocaine." Brief of Appellant at 9. If a person's decision to discard an item is caused by improper police conduct, then the abandonment is not voluntary and the evidence is not admissible. Swanson v. State, 730 N.E.2d 205, 210 (Ind. Ct. App. 2000), trans. denied; see also Gooch v. State, 834 N.E.2d 1052, 1054 (Ind. Ct. App. 2005) ("[I]f property is abandoned after a citizen is improperly detained, the evidence is not admissible."), trans. denied; State v. Pease, 531 N.E.2d 1207, 1209-10, 1212 (Ind. Ct. App. 1988) (concluding contraband that defendant abandoned after being subjected to improper patdown was not admissible). Nonetheless, "if the abandonment is truly voluntary – *i.e.*, not caused by police misconduct – evidence found is admissible even if there was a prior or subsequent illegal search or seizure." United States v. Simpson, 944 F. Supp. 1396, 1404 (S.D. Ind. 1996).

Here, the only evidence of a causal connection between the patdown of the other individual and Woods's abandonment of the cocaine is the timing of events, in that

Woods dropped the cocaine after Officer Bragg began patting down the other individual. Yet such a temporal connection does not equal a causal connection given the facts of this case. Officer Bragg did not do anything physical in relation to Woods before Woods dropped the cocaine, did not tell Woods he would be subjected to a search, and his conversation with the group of men was brief and non-confrontational. See Overstreet v. State, 724 N.E.2d 661, 664 (Ind. Ct. App. 2000) (holding officer was permitted to approach defendant, inquire about his activities, and ask for identification, and such actions did not amount to a stop or seizure), trans. denied. Cases relied upon by Woods are unlike the present case in that they involved an actual or threatened search or seizure directed at the same person who then involuntarily abandoned the property. See Swanson, 730 N.E.2d at 210 (police officer ordered defendant to remove his hands from pockets with understanding that officer would perform frisk for weapons, and defendant while removing hands dropped item); Pease, 531 N.E.2d at 1209-10; Simpson, 944 F. Supp. at 1404 (finding defendant “threw the cocaine off his balcony in response to hearing officers opening the door to his apartment”).

Here, by contrast, we cannot say Woods’s abandonment of the cocaine was the product of improper police conduct, and we reach this conclusion irrespective of whether Officer Bragg’s patdown of the other individual was improper. The trial court therefore did not abuse its discretion by admitting the cocaine into evidence.

II. Sufficiency of the Evidence

Indiana Code section 35-48-4-6(a) provides it is a Class D felony for a person to knowingly or intentionally possess cocaine. However, the offense is enhanced to a Class

B felony if the defendant possesses cocaine in, on, or within 1,000 feet of a family housing complex. Ind. Code § 35-48-4-6(b)(2).⁵ It is a “defense” to this enhancement that “(1) [the defendant] was briefly in, on, or within one thousand (1,000) feet of . . . a family housing complex . . .; and (2) no person under eighteen (18) years of age at least three (3) years junior to the [defendant] was in, on, or within one thousand (1,000) feet of the . . . family housing complex . . . at the time of the offense.” Ind. Code § 35-48-4-16(b). This court has held that this “defense” actually sets forth a “mitigating factor that reduces culpability, and therefore the defendant does not have the burden of proof but only the burden of placing the issue in question where the State’s evidence has not done so.” Harrison v. State, 901 N.E.2d 635, 642 (Ind. Ct. App. 2009) (quotation omitted), trans. denied. This principle, which Harrison stated with respect to the enhancement for being within 1,000 feet of a public park, has been adopted by our supreme court with respect to the enhancement for being within 1,000 feet of school property, Griffin v. State, 925 N.E.2d 344, 347 (Ind. 2010), and would appear equally applicable where the enhancement and defense relate to being within 1,000 feet of a family housing complex. Thus, once at issue, the State must rebut at least one component of the defense by proving beyond a reasonable doubt that either the defendant was within 1,000 feet of the family housing complex more than “briefly,” or children under age eighteen and at least three years younger than the defendant were within 1,000 feet of the family housing complex. See Harrison, 901 N.E.2d at 642.

⁵ This enhancement also includes being within 1,000 feet of school property, a public park, or a youth program center. Ind. Code § 35-38-4-6(b)(2).

Woods argues this defense was placed at issue by the evidence and not rebutted by the State. The evidence at trial did place at issue whether children were present at the Beechwood complex at the time of Woods's offense. However, no evidence was presented regarding the length of time Woods was present at the Beechwood complex, and neither the State in its opening statement nor Woods, who waived opening statement, commented on whether Woods was present only "briefly" until after the close of evidence.

Assuming for the sake of argument that the evidence regarding the presence of children was sufficient to place the entire defense at issue, we conclude the State presented sufficient evidence that children at least three years younger than Woods were present at the time of his offense. Specifically, Officer Bragg testified at least two juvenile children were playing in the Beechwood complex.⁶ Officer Bragg's deposition testimony, admitted as "part of the record" for trial, tr. at 52, was that the men including Woods appeared to be "between thirties and fifties" in age, Exh. Vol. at 26. Even though Officer Bragg could not be sure of Woods's exact age, his testimony credited as a true approximation would necessarily lead to the inference that Woods was more than three years older than the children. Thus, the trial court reasonably inferred from the evidence that children under age eighteen and three or more years younger than Woods were

⁶ At trial Officer Bragg testified both children appeared to be under twelve, while in his deposition, which was admitted at trial, he testified one child was fourteen or fifteen and the other was between ten and twelve.

present when he possessed cocaine at the Beechwood complex.

Conclusion

The trial court did not abuse its discretion by admitting the cocaine as evidence because Woods voluntarily abandoned the cocaine. Further, sufficient evidence proves children at least three years younger than Woods were present when he possessed the cocaine at a family housing complex. His conviction is therefore affirmed.

Affirmed.

MAY, J., and VAIDIK, J., concur.