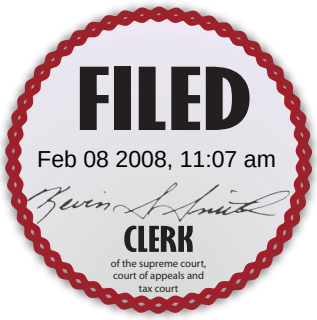

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IN THE
COURT OF APPEALS OF INDIANA

JAMES D. MCCREARY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0704-CR-349
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Natalie Conn, Judge
Cause No. 27D03-0508-FD-662

February 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

James McCreary appeals his conviction of possession of marijuana, a Class D felony.[1] We find no error in the denial of his motion to suppress, and his conviction is supported by sufficient evidence. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

In the late afternoon of May 19, 2005, Detective John Kauffman and Detective Mark Stefanatos of the Grant County JEAN Team Drug Task Force were in an unmarked SUV conducting surveillance of McCreary because they had received numerous reports he was engaged in drug activity. The detectives were parked near a storage facility. McCreary left the facility in an ivory, 4-door, 1996 Lincoln Continental, and the detectives followed him. After McCreary turned without signaling, the detectives called for a marked police car to make a traffic stop. McCreary began talking on his cellular telephone and "changed his driving behavior dramatically." (Tr. at 10.) McCreary began speeding, made a number of turns, and arrived at his destination before a marked police car could arrive. McCreary parked the Continental on the street in front of a house, got out of the car, spoke to his brother in front of the house, received car keys from his brother, and then drove away in a white Pontiac registered to his brother's girlfriend. McCreary's brother went back into the house.

The detectives asked Captain Steven Scott of the Marion Police Department to bring his police dog to conduct an exterior sniff of the Continental. The dog indicated there were narcotics in the vehicle. Detective Kauffman obtained a warrant to search the Continental. The officers smelled raw marijuana when they opened the car door. A blue

[1] Ind. Code § 35-48-4-11(1).

plastic tote on the backseat of the car contained 7.2 pounds of marijuana.

The State charged McCreary with possession of over 30 grams of marijuana, a Class D felony, and driving while suspended, a Class A misdemeanor.[2] McCreary filed a motion to suppress, which the court denied. After a bench trial, the court found McCreary guilty of both crimes. On appeal, McCreary challenges only his conviction of possession of marijuana.

DISCUSSION AND DECISION

1. Admission of Evidence

We review a trial court's admission of evidence for an abuse of discretion. *Datzek v. State*, 838 N.E.2d 1149, 1154 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied* 855 N.E.2d 1006 (Ind. 2006). We may reverse only if the court's decision was "clearly against the logic and effect of the facts and circumstances" before the court. *Id.*

McCreary claims the court abused its discretion in admitting the marijuana seized from the car because the dog sniff violated his rights under the Fourth Amendment to the United States Constitution.[3] His argument is foreclosed by *Myers v. State*, 839 N.E.2d 1154, 1158 (Ind. 2005), *cert. denied* 126 S. Ct. 2295 (2006):

> With respect to his claim that the dog sniff was unconstitutional, the defendant concedes that such dog sniffs are not "searches" requiring probable cause under the Fourth Amendment to the United States

[2] Ind. Code § 9-24-19-2.

[3] McCreary also asserts the dog sniff was invalid under the Indiana Constitution. However, his argument section does not explain the test we apply under Article 1, Section 11 or how the balancing of those factors requires suppression of the evidence in this case. Accordingly, we find his argument waived. *See Myers v. State*, 839 N.E.2d 1154, 1158 (Ind. 2005) (where defendant separately identifies the Indiana Search and Seizure Clause, but fails to present "separate argument specifically treating and analyzing a claims under the Indiana Constitution," we address only his federal claim), *cert. denied* 126 S. Ct. 2295 (2006).

> Constitution, but he contends that canine sniff activities must be supported by reasonable individualized suspicion, citing *Cannon v. State*, 722 N.E.2d 881, 884 (Ind. Ct. App. 2000) and *Kenner v. State*, 703 N.E.2d 1122, 1125 (Ind. Ct. App. 1999), as well as several federal cases condemning "fishing expeditions." The defendant argues that the sniff test in this case lacked individualized reasonable suspicion, and thus the evidence should be suppressed.
>
> The United States Supreme Court has recently addressed "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 837, 160 L.Ed.2d 842, 846 (2005). The Supreme Court observed that the dog sniff was performed on the exterior of a car and held that "[a]ny intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement." *Caballes*, 125 S. Ct. at 838, 160 L.Ed.2d at 847. Noting the absence of any contention that the traffic stop involved an unreasonable detention, the Court concluded: "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Caballes*, 125 S. Ct. at 838, 160 L.Ed.2d at 848. The effect of *Caballes* is to supercede the defendant's assertions regarding *Cannon* and *Kenner* on this point.

Accordingly, for Fourth Amendment purposes, the dog sniff of the exterior of the car McCreary had been driving was not a search, did not invade McCreary's privacy interest, and did not need to be justified by reasonable suspicion. *See also Myers v. State*, 839 N.E.2d 1146, 1149 (Ind. 2005) (After officer activated lights and siren, Myers parked his car in his own driveway. Myers argued the dog sniff of the exterior of his car occurred after traffic stop ended, thus violating his Fourth Amendment rights. His claim failed because "a canine sweep of the exterior of a vehicle does not intrude upon a Fourth Amendment privacy interest.").

2. Sufficiency of Evidence

McCreary claims there was no evidence he knowingly possessed the marijuana found in the car. Our standard of review for allegations of insufficient evidence is well settled. We look only to the facts most favorable to the trial court's judgment, and without reweighing the evidence or reassessing the credibility of the witnesses, we determine whether a reasonable trier of fact could have found evidence beyond a reasonable doubt supporting each element of the crime. *Donnegan v. State*, 809 N.E.2d 966, 976 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 972 (Ind. 2004).

"Actual possession occurs when a person has direct physical control over the item." *Henderson v. State*, 715 N.E.2d 833, 835 (Ind. 1999). "In the absence of actual possession of drugs, constructive possession may support a conviction for a drug offense." *Donnegan*, 809 N.E.2d at 976. Constructive possession occurs when a person has both the intent and the capability to maintain dominion and control over an item. *Id.*

To prove a defendant had intent to maintain dominion and control, the State must demonstrate he had "knowledge of the presence of the contraband." *Id.* Knowledge "may be inferred from either the exclusive dominion and control over the premises containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband." *Id.* (*quoting Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999)). The "additional circumstances" can include:

> (1) incriminating statements by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant,

> (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant.

Henderson, 715 N.E.2d at 836.

McCreary asserts there is no evidence his possession was exclusive or that he had knowledge sufficient to justify a finding of constructive possession. We disagree.

Detective Stefanatos testified he smelled "fresh marijuana" when the car door was opened, (Tr. at 83), and Detective Kauffman testified the smell was such that "you'd be aware of it by your other senses. I'm sure of that." (*Id.* at 73.) Accordingly, a fact finder could infer McCreary smelled the marijuana. When McCreary parked the car on the street, he locked the doors and kept the keys with him, such that he maintained dominion and control over the car and the marijuana therein. Finally, when Detective Stefanatos asked McCreary about the Continental, he denied it was his, saying instead it was Stefanatos' car; however, the car was titled in the name of McCreary's mother, and the bill of sale indicated McCreary paid cash for the car. His denial of ownership suggests McCreary was trying to distance himself from the vehicle and its contents because he knew the car contained illegal contraband. The evidence was sufficient to demonstrate McCreary constructively possessed the marijuana in the blue tote on the back seat of the Continental.

CONCLUSION

The trial court did not abuse its discretion when it found the dog sniff of the car McCreary had been driving was permissible under the United States Constitution. The odor of marijuana apparent in the car before the tote was opened was sufficient for the

trial court to infer McCreary constructively possessed the marijuana. Accordingly, we affirm his conviction.

Affirmed.

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