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IN THE
COURT OF APPEALS OF INDIANA

LYNDON J. WOODWARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-1104-CR-219
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Wendy W. Davis, Judge
Cause No. 02D04-1008-FD-822

December 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Lyndon Woodward appeals his convictions for possession of paraphernalia as a class A misdemeanor[1] and two counts of possession of a controlled substance as class D felonies.[2] Woodward raises one issue, which we revise and restate as whether the trial court abused its discretion in admitting certain evidence. We affirm.

The relevant facts follow. On August 15, 2010, Fort Wayne Police Officer Grant Sanders was patrolling an area and road which was under construction because there had been reports of traffic violations and parked his vehicle in front of several barricades which stated "no through traffic." Transcript at 6. Officer Sanders observed Woodward drive a moped around the barricades, onto the road closed to through traffic, and to another street without stopping at any house on the closed road. Officer Sanders then turned his vehicle around and pursued Woodward to conduct a traffic stop.

Woodward pulled to the side of the road and remained seated on his moped. Officer Sanders approached Woodward and "noticed he had a bulge coming from his right[] front pocket where he was seated on his moped." Id. at 8. Officer Sanders believed that "from the look of the bulge, . . . it could have been a weapon" and that based upon "the length and hardness of it, of the object [as it] appeared in his pocket," that the object "could have been a knife." Id. at 9. Based upon that observation, Officer Sanders had Woodward step off of the vehicle so that he could perform "a pat down for [Officer Sanders's] safety." Id. Prior to the pat down, Officer Sanders asked Woodward "if he had anything in his pocket that would be harmful to [him], would poke or stick,"

[1] Ind. Code § 35-48-4-8.3 (2004).

[2] Ind. Code § 35-48-4-7 (2004) (subsequently amended by Pub. L. No. 138-2011 § 14 (eff. Jul 1, 2011); Pub. L. No. 182-2011 § 14 (eff. Jul 1, 2011)).

and Woodward said that he had "nothing on him but his cell phone that was in his front right pocket." Id. Officer Sanders did not believe the object he observed in Woodward's pocket was a cell phone "[b]ased on the shape" of the bulge. Id.

Officer Sanders performed a pat down search and "felt a long, hard object in [Woodward's] right front pocket" which "felt like a weapon." Id. at 10. Officer Sanders asked Woodward if he could retrieve the object, and Woodward gave him permission to do so. Officer Sanders reached into Woodward's pocket and pulled out "a spoon along with a piece of straw and a cellophane wrapper [which] contained multi pills." Id. Officer Sanders testified "I think the straw and the spoon came out at the same time, in checking, pulled out the rest, the cellophane wrapper came out with the pills." Id. Officer Sanders contacted detectives because he found drugs on Woodward. Woodward stated that he used the spoon to crush the drugs and would snort the drugs with a straw. The drugs were later identified to be amphetamine which is a Schedule II controlled substance and alprazolam which is a Schedule IV controlled substance.

On August 19, 2010, the State charged Woodward with possession of paraphernalia as a class A misdemeanor and two counts of possession of a controlled substance as class D felonies. At Woodward's bench trial, the State introduced evidence of the spoon, the piece of straw, the cellophane wrapper, and the two controlled substances of amphetamine and alprazolam. Woodward objected to the admission of this evidence on the bases that his right to be free from unreasonable search and seizure pursuant to the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution was violated and that he had not been advised of

his rights under Pirtle v. State, 323 N.E.2d 634 (Ind. 1975). The court overruled Woodward's objection and admitted the evidence. The court found Woodward guilty of all three counts and sentenced him to one year and 183 days for each of the class D felony convictions and 180 days for the class A misdemeanor conviction. The sentences were ordered to be suspended to probation and served concurrently with each other, and Woodward was given one day of jail credit.

The issue is whether the trial court abused its discretion in admitting certain evidence. The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs "where the decision is clearly against the logic and effect of the facts and circumstances." Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001).

Woodward argues that the court abused its discretion in admitting the evidence of contents discovered in his pocket because "Officer Sanders' pat down search of [him] for officer safety exceeded the scope of a Terry search" and that "any evidence obtained from said illegal search should be suppressed." Appellant's Brief at 14. Woodward argues that "Officer Sanders failed to articulate specific facts giving rise to a reasonable suspicion to pat down or search." Id. Woodward also argues that his consent to search was invalid under Pirtle. The State argues that "Officer Sanders did not need Woodward's consent to perform the search because Pirtle does not apply to pat-downs and the pat-down was conducted for officer safety." Appellee's Brief at 3.

We initially address whether the requirements of Pirtle were implicated. In Pirtle, the Indiana Supreme Court determined that a person in custody must be informed of his right to consult with an attorney concerning his consent for police to conduct a search, before a valid consent to search may be given. Wilkerson v. State, 933 N.E.2d 891, 893 (Ind. Ct. App. 2010). The burden is on the State to prove a custodial defendant expressly authorized a search after being advised of his right to consult with counsel before consenting to the search. Id. (citing Torres v. State, 673 N.E.2d 472, 474 (Ind. 1996)).

In Wilkerson, the defendant was pulled over due to the darkness of the tint of his vehicle's windows. Id. at 892-893. The defendant "kept putting his hands in his pockets despite being repeatedly told not to," and the officer asked if the defendant had any weapons. Id. at 893. The defendant said "no," the officer asked if he could pat the defendant down for weapons, and the defendant said "[s]ure. I don't have anything." Id. During the pat down, the officer felt a baggy in the area of the defendant's crotch, which led to the defendant fleeing and throwing away a white substance as he was running, and the defendant's arrest. Id. The trial court denied the defendant's motion to suppress. Id. at 892. On interlocutory appeal, the defendant argued that police failed to give him the warning required by Pirtle before securing consent to conduct a pat down search of his person. Id. at 892. This court held:

> Subsequent decisions have held the Pirtle requirement inapplicable in cases where the search consisted of field sobriety tests (Ackerman v. State, 774 N.E.2d 970, 981-82 (Ind. Ct. App. 2002), trans. denied), a chemical breath test (Schmidt v. State, 816 N.E.2d 925, 944 (Ind. Ct. App. 2004), trans. denied), or a chemical blood test (Datzek v. State, 838 N.E.2d 1149, 1159 (Ind. Ct. App. 2005), trans. denied). The rationale for these

> decisions was that in each instance the searches were non-invasive, took little time to administer, were narrow in scope, and were unlikely to reveal any incriminating evidence other than impairment. The Ackerman court contrasted these characteristics with Pirtle and the subsequent decisions applying it, all of which involved general unlimited searches of dwellings or automobiles that would have only been reasonable with probable cause. 774 N.E.2d at 981.
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> We find the pat down search for weapons to be quite like the sobriety tests conducted in Ackerman and its progeny. The pat down takes little time to administer, is narrow in scope, is non-invasive and is not designed to reveal incriminating evidence other than the presence of weapons. Moreover, probable cause is not a requirement for administering pat down searches. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968); Wilson v. State, 745 N.E.2d 789 (Ind. 2001); Williams, [754 N.E.2d 584, 587 (Ind. Ct. App. 2001), trans. denied]. It is unlike the unlimited general searches, which require probable cause, where the Pirtle rule has been applied. See Ackerman, [774 N.E.2d at 981-982.]
>
> Thus, we conclude that compliance with the Pirtle requirement was unnecessary, and [the defendant's] consent to the pat down search was therefore valid.

Id. at 893-894.

Here, Officer Sanders asked Woodward for consent to remove the object from Woodward's pocket after performing a pat down for officer safety. Specifically, Officer Sanders testified that he "felt a long, hard object in [Woodward's] right front pocket" which "felt like a weapon" and "asked if [he] could retrieve it," and Woodward "agreed that [Officer Sanders] could get the item out of his pocket." See Transcript at 10. Officer Sanders then reached into Woodward's pocket and pulled out its contents. Officer Sanders did not conduct or ask to conduct an unlimited general search. We find that Officer Sanders's search of Woodward's pocket was valid and that compliance with the Pirtle requirement was unnecessary. See Wilkerson, 933 N.E.2d at 893-894 (concluding that compliance with the Pirtle requirement was unnecessary and that the defendant's

consent to the pat down search was therefore valid); see also Garcia-Torres v. State, 949 N.E.2d 1229, 1238 (Ind. 2011) (finding that "Pirtle and the ensuing cases have applied this rule only to the weightiest intrusions," that "[t]his Court has suppressed evidence based on Pirtle when the police searched either a home or a vehicle," and that "[t]he Indiana Court of Appeals has held that Pirtle does not apply to certain minimally intrusive searches") (citing Wilkerson, 933 N.E.2d 891).

Next, we turn to whether Woodward's rights against unreasonable search and seizure were violated. Woodward does not argue that it was improper for Officer Sanders to initially pull him over for a traffic violation, but only that the subsequent pat down search was improper.

The United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968), explained that police officers may employ investigative techniques short of arrest on less than probable cause without violating Fourth Amendment interests. Wilson v. State, 745 N.E.2d 789, 792 (Ind. 2001). Terry permits a:

> reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Id. (citing Terry, 392 U.S. at 27, 88 S. Ct. at 1883). The Fourth Amendment allows privacy interests protected by the Fourth Amendment to be balanced against the interests of officer safety. Id. (citing Terry, 392 U.S. at 23-27, 88 S. Ct. at 1881-1883).

Here, Officer Sanders noticed a "bulge coming from [Woodward's] right[] front pocket" and testified that it appeared the object "could have been a knife" based upon the "length and hardness of . . . the object." See Transcript at 8-9. Officer Sanders also observed that Woodward was on "a moped rather than a vehicle," that "his chances of doing something . . . would be higher," and that "[f]or his safety, [he] took extra precaution." Id. at 15. Woodward stated that he had a cell phone in his right front pocket, but Officer Sanders testified that based upon his observation of the bulge and "on the shape, the bulge did not appear to be a cell phone." Id. at 9. Officer Sanders then performed a pat down of Woodward and "felt a long, hard object in [Woodward's] right front pocket" which "felt like a weapon" and, after obtaining Woodward's permission to retrieve the item, removed the contents of the pocket. Id. at 10. Officer Sanders testified that upon seeing the straw and spoon he "[c]ompletely emptied the pocket" in that straws and spoons are "[u]sually [] used for ingesting drug material." Id. at 11. Under the circumstances, Officer Sanders did not exceed the scope of his authority by performing a pat down of Woodward and later removing the contents of Woodward's right front pocket to determine whether the hard object was, as he believed it might be, a knife. See Willis v. State, 907 N.E.2d 541, 547 (Ind. Ct. App. 2009) (holding that an officer did not exceed the scope of his authority by patting down the defendant's clothing to feel for a weapon or removing the bulge from the defendant's pocket to determine whether the hard object was, as he believed it might be, a small handgun). Further, upon discovering the spoon and straw which Officer Sanders believed to be drug paraphernalia, he had probable cause for further search. See Kyles v. State, 888 N.E.2d 809, 812-813 (Ind. Ct.

App. 2008) (noting that "[w]hen officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety" and holding that the officer had probable cause to believe the defendant committed the offense of possession of paraphernalia as a class A misdemeanor under Ind. Code § 35-48-4-8.3 and thus that the officer's warrantless search of the defendant did not violate the Fourth Amendment) (citing Virginia v. Moore, 553 U.S. 164, 178, 128 S. Ct. 1598, 1608 (2008)); see also Ind. Code § 35-48-4-8.3 (providing in part that a person who knowingly or intentionally possesses an instrument, a device, or other object that the person intends to use for introducing into the person's body a controlled substance commits possession of paraphernalia as a class A misdemeanor). We conclude the trial court did not abuse its discretion in admitting the evidence under the Fourth Amendment.

Woodward also cites to Article 1, Section 11 of the Indiana Constitution, which provides for the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure . . . ." In conducting analysis under this provision, we focus on whether the officer's conduct "was reasonable in light of the totality of the circumstances." Holder v. State, 847 N.E.2d 930, 940 (Ind. 2006). In making this determination, we balance: (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. Here, the record reveals that Officer Sanders noticed a bulge in

Woodward's right front pocket and believed the object could have been a weapon or knife and was not a cell phone. Officer Sanders performed a pat down of Woodward and felt a long hard object in his right front pocket. While there was an intrusion upon Woodward's person and privacy as a result of the pat down, that concern was outweighed by law enforcement concerns given the shape and appearance of the bulge in Woodward's pocket. Under the circumstances, we conclude that Officer Sanders's pat down of Woodward and action of removing the contents from Woodward's pocket to determine whether the hard object was a knife did not violate Woodward's rights under Article 1, Section 11 of the Indiana Constitution.

In summary, we cannot say that the trial court abused its discretion in admitting the evidence challenged by Woodward under the Fourth Amendment or Article 1, Section 11 of the Indiana Constitution and conclude that compliance with the Pirtle requirement was unnecessary.

For the foregoing reasons, we affirm Woodward's convictions.

Affirmed.

BAKER, J. concurs.

KIRSCH, J., dissents with separate opinion.

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STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

KIRSCH, Judge, dissenting.

I respectfully dissent.

Concerns of officer safety are all too real in today's world. On a daily basis, police officers confront dangerous situations. They are entitled to protection and our gratitude; however, officers who use such concerns as a ruse to conduct an unconstitutional search undermine the legitimate safety concerns of our officers.

Neither a spoon, nor a straw, feels like a knife, and a police officer who is unable to differentiate between the two lacks the skills necessary for law enforcement and the credibility to be expected from such officers testifying at trial. Moreover, when the officer here had removed the spoon and the straw from the Woodward's pocket, all concerns of officer safety were extinguished. No threat was posed by the cellophane wrapper remaining in Woodward's pocket, and removing it could not be justified by

concerns for officer safety. Since there was no basis for the continued search other than officer safety concerns, the search and removal of the cellophane wrapper violated constitutional protections.

The trial court erred in admitting the challenged evidence, and Woodward's convictions should be reversed.