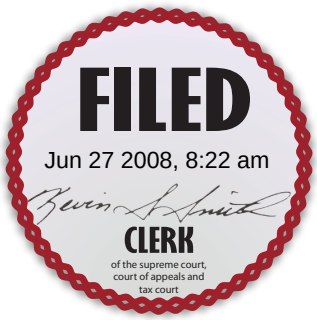

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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 02A03-0802-CR-56
	)	
KELVIN CALMES,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0708-FD-708

June 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

The State of Indiana appeals the trial court's grant of a motion to suppress filed by Kelvin Calmes. The State raises one issue, which we revise and restate as whether the trial court erred when it granted the motion to suppress. We affirm.

The relevant facts follow. On August 18, 2007, Calmes was at a gas station "hanging out by the pay phone." Transcript at 9. Fort Wayne Police Department Officers Shane Pulver and Phillip Ealing, who were patrolling the area in a squad car, had been watching Calmes intermittently for about forty-five minutes. When they observed Bridgett Holman standing near him, they pulled up, exited the squad car, asked Calmes and Holman what they were doing there, and requested identification. Calmes gave Officer Ealing his identification, but Holman explained that she did not have her identification with her and volunteered that she "was going through a relapse . . . for her addiction." Id. at 18. Officer Pulver wrote down her "identification information" and gave it to Officer Ealing, who returned to the vehicle to "run their names through the in car computer." Id. at 20, 26.

While they were waiting, Officer Pulver, who was standing three to four feet away from Calmes, asked him if he had any weapons. Calmes responded that he had a knife and reached into his pocket, but Officer Pulver took a step back, unlatched his firearm, and said: "Don't reach for it!" Id. at 20. He ordered Calmes to take his hand out of his pocket, turn around, and place his hands behind his head with his fingers interlaced. At first, Calmes refused, and Officer Pulver, believing that Calmes was concealing something under his thumb, repeated the order. When Calmes complied, an "off-white,

rock-like substance," later identified as cocaine, fell from Calmes's hand and rolled toward Officer Pulver. Id. at 22. Calmes was then placed under arrest.

The State charged Calmes with possession of cocaine as a class D felony,[1] possession of paraphernalia as a class D felony,[2] and being a habitual substance offender.[3] On October 19, 2007, Calmes filed a motion to suppress arguing that Officers Ealing and Pulver did not have reasonable suspicion to detain and question him and had therefore violated his rights secured by the Fourth Amendment to the United States Constitution.[4] After a hearing, the trial court granted the motion.

The issue is whether the trial court erred when it granted Calmes's motion to suppress. When appealing the trial court's granting of a motion to suppress, the State appeals from a negative judgment and must show that the ruling was contrary to law. State v. Augustine, 851 N.E.2d 1022, 1025 (Ind. Ct. App. 2006). We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that reached by the trial court. Id. We neither reweigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence most favorable to the judgment. Id. The State argues that Officer Pulver's "encounter with [Calmes] was consensual and at no time constituted a seizure of

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[1] Ind. Code § 35-48-4-6 (Supp. 2006).

[2] Ind. Code § 35-48-4-8.3 (2004).

[3] Ind. Code § 35-50-2-10 (Supp. 2006).

[4] In his motion to suppress, Calmes also argued that Officer Pulver's actions violated his rights secured by Article I, Section 11 of the Indiana Constitution. However, the parties do not raise this issue on appeal.

[Calmes] until the officer discovered [Calmes] was in possession of cocaine." Appellant's Brief at 5. Calmes, on the other hand, maintains that the encounter was investigatory in nature rather than consensual.

The Fourth Amendment to the United States Constitution guarantees the right to be secure against unreasonable search and seizure. Augustine, 851 N.E.2d at 1025. In order to determine whether the officer impinged upon Calmes's Fourth Amendment rights, we must first analyze what level of police investigation occurred. See id. There are three levels of police investigation, two of which implicate the Fourth Amendment and one of which does not. Overstreet v. State, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), reh'g denied, trans. denied. First, the Fourth Amendment requires that an arrest or detention that lasts for more than a short period of time must be justified by probable cause. Id. Second, pursuant to Fourth Amendment jurisprudence, the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based upon specific and articulable facts, the officer has a reasonable suspicion that criminal activity has or is about to occur. Id. The third level of investigation occurs when a police officer makes a casual and brief inquiry of a citizen, which involves neither an arrest nor a stop. Id. This is a consensual encounter in which the Fourth Amendment is not implicated. Id.

As long as an individual remains free to leave, the encounter is consensual and there has been no violation of the individual's Fourth Amendment rights. Shirley v. State, 803 N.E.2d 251, 255 (Ind. Ct. App. 2004). Factors to be considered in determining whether a reasonable person would believe he was not free to leave include: (1) the

threatening presence of several officers, (2) the display of a weapon by an officer, (3) the physical touching of the person, or (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Id.

The Indiana Supreme Court addressed an issue similar to the present one in Finger v. State, 799 N.E.2d 528 (Ind. 2003). In Finger, a police officer, responding to a dispatch regarding a suspicious vehicle stopped at an intersection, activated his emergency lights and approached the vehicle, where he found the defendant sitting in the driver's seat and a passenger beside him. Id. at 530. The defendant claimed that the car was out of fuel and that a passerby would be returning soon with more gasoline. Id. The officer noted that the defendant seemed nervous, though a stranded motorist should have been relieved to receive assistance. Id. at 531. As the officer conversed with the defendant, the explanation for his presence changed. Id. The officer then asked for and received the defendant's and the passenger's driver's licenses and ran warrant and license checks, which came back negative. Id. As the officer continued to converse with the defendant, he did not return the driver's licenses or say that they were free to leave. Id. When the officer asked about a knife on the back seat and ammunition in the front seat of the vehicle, both in plain view, the defendant claimed not to know why these items were in the car or to whom they belonged. Id.

Fifteen to twenty minutes after the officer first encountered them, he heard a radio report of an armed robbery at a liquor store less than one block from the car. Id. At this point, the officer asked the pair to exit the car and read them Miranda rights. Id. Next, based on safety concerns, he retrieved the ammunition and knife from the car. Id. In the

meantime, police officers had been sent to the liquor store in response to the robbery call and learned that possible suspects were at the intersection where the officer had found the defendant's vehicle. Id. After a witness to the robbery identified the passenger in the defendant's car as one of the men in the store, the defendant and the passenger were placed under arrest. Id.

The defendant, charged with robbery, conspiracy to commit robbery, and criminal confinement, moved to suppress both the statements he made to the officer and the knife and ammunition seized from his car. Id. The trial court denied the motion, finding that the officer's initial approach to the defendant's vehicle and his interaction with the defendant did not constitute an investigative stop but that, after the officer learned of the robbery nearby, he had reasonable suspicion to detain the defendant. Id. The ruling was certified for interlocutory appeal, and this court reversed, concluding that the officer detained the defendant when he retained the defendant's driver's license and that, at that point, the officer did not have reasonable suspicion to execute a lawful investigative stop. Id. at 532.

The Indiana Supreme Court granted transfer and affirmed the decision of the trial court. Id. at 535. The Court held that "a reasonable person in [the defendant's] position would not feel free to leave after [the officer] retained his identification." Id. at 533. Thus, the defendant was "detained for purposes of the Fourth Amendment." Id. However, although it agreed that the officer's retention of the driver's license converted a consensual encounter into an investigative stop, the Court concluded that, at that point,

"the officer had reasonable suspicion to detain defendant for a brief investigative period" and "therefore did not violate the Fourth Amendment." Id.

In the present case, Calmes was standing by a pay phone when Officers Ealing and Pulver pulled up in their squad car, asked him what he was doing, and requested his identification. Calmes gave them his identification, and, while they were waiting for Officer Ealing to run Calmes's name through the "in car computer," Officer Pulver asked him if he had any weapons. Transcript at 20. We conclude that, under Finger, a reasonable person in Calmes's position would not feel free to leave after the officers took his identification and, therefore, that the encounter at that point was no longer consensual. See 799 N.E.2d at 533. Accordingly, Calmes was detained for purposes of the Fourth Amendment. See id.

The officers needed reasonable suspicion that criminal activity had or was about to occur to detain Calmes briefly for investigative purposes. See Overstreet, 724 N.E.2d at 663. The State, however, does not argue that they had reasonable suspicion. Therefore, the encounter was an illegal stop, and the trial court did not err when it granted Calmes's motion to suppress.[5] See, e.g., Dowdell v. State, 747 N.E.2d 564, 567 (Ind. Ct. App.

[5] The State relies on Cochran v. State, 843 N.E.2d 980, 984 (Ind. Ct. App. 2006), reh'g denied, trans. denied, cert. denied, __ U.S. __, 127 S.Ct. 943, 166 L.Ed.2d 722 (2007), for the proposition that "[o]fficers are free to ask any person for identification without implicating constitutional analysis." See also Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, 542 U.S. 177, 185, 124 S.Ct. 2451, 2458 (2004). In Cochran, we held that a town marshal did not seize the defendant for purposes of the Fourth Amendment when he asked the defendant for his name. 843 N.E.2d at 984. However, we specifically distinguished that case "from one in which a police officer physically retains a piece of identification belonging to a person, such as a driver's license, without which a person might feel compelled to wait until the officer returned the identification." Id. at 985.

2001) ("Therefore, Officer Teagardin's encounter with Dowdell constituted a stop and thus required reasonable suspicion."), trans. denied.

For the foregoing reasons, we affirm the trial court's grant of Calmes's motion to suppress.

Affirmed.

NAJAM, J. and DARDEN, J. concur