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IN THE COURT OF APPEALS OF INDIANA

RANDY ALLEN LONG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0909-CR-903
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0806-FD-25

July 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Randy Long appeals his conviction of possession of marijuana, a Class D felony,[1] and possession of paraphernalia, a Class A misdemeanor.[2] He argues the investigatory stop and his subsequent arrest were unlawful. We affirm.

FACTS AND PROCEDURAL HISTORY

On the evening of May 19, 2008, members of the Lafayette Police Department set up a "controlled buy" from Brittany Summers. Although the controlled buy was to take place at another location, Officer Dempster was stationed at Summers' residence to ensure the drugs bought in the controlled buy originated there.

While Officer Dempster was watching Summers' residence, a white Oldsmobile arrived. The two occupants, Long and Miranda Buerkle, went to Summers' apartment, stayed only briefly, and left. Officer Dempster recognized Buerkle as someone he had encountered previously, and he knew she "use[d] crack cocaine." (Tr. at 12.) The white Oldsmobile returned a short time later, and Buerkle entered Summers' residence briefly, exited the residence, opened and looked inside the driver's door of a nearby SUV, and returned to the Oldsmobile. After Buerkle returned to the Oldsmobile, she and Long sat in the parked car.

Soon thereafter, Officer Dempster learned Summers had been arrested and had consented to a search of her apartment. When Officers Gossard and Lamar arrived at Summers' apartment to search it, Officer Dempster advised them they should, for officer

[1] Ind. Code § 35-48-4-11(1).
[2] Ind. Code § 35-48-4-8.3(a).

safety, approach and identify the occupants of the white Oldsmobile before searching the apartment. Officer Gossard parked his patrol car behind the white Oldsmobile and shined a spotlight into the car. When Officer Gossard approached, he saw what he believed was a crack pipe in the passenger door compartment. He arrested Buerkle and told Officer Lamar to take Long into custody. Officer Lamar then conducted a "weapons pat-down" of Long and found a cigarette case in his front pocket. The officer opened the case with Long's consent and found a marijuana cigarette.

Another officer at the location, Officer Payne, then read Long his *Miranda* rights and asked "if he had any more marijuana back at his residence." (*Id*. at 80.) Long replied he had "a half an ounce of weed" at his house. (*Id*. at 88.) Long consented to a search of his home and gave Officer Payne a key to his house. The police found sixty-eight grams of marijuana, a digital scale, and a pipe used to smoke marijuana.

Long was charged with possession of marijuana, possession of paraphernalia, and maintaining a common nuisance.[3] Long filed a pretrial motion to suppress the drugs and paraphernalia based on unlawful search and seizure, but that motion was denied. The trial court found him guilty of possession of marijuana and possession of paraphernalia.

DISCUSSION AND DECISION

The trial court has broad discretion in ruling on the admissibility of evidence. *Drake v. State*, 655 N.E.2d 574, 575 (Ind. Ct. App. 1995). We will reverse a ruling on admissibility of evidence only when the trial court abused its discretion. *Carter v. State*, 692 N.E.2d 464,

[3] Ind. Code § 35-48-4-13.

465 (Ind. Ct. App. 1997). A decision to deny a motion to suppress is reviewed as a matter of sufficiency. *Wilson v. State,* 670 N.E.2d 27, 29 (Ind. Ct. App. 1996). Thus, in reviewing a decision on a motion to suppress, we do not reweigh the evidence or judge the credibility of witnesses, but determine if there was substantial evidence of probative value to support the ruling. *Whitfield v. State,* 699 N.E.2d 666, 668 (Ind. Ct. App. 1998), *trans. denied.*

1. Reasonable Suspicion

When evaluating determinations of reasonable suspicion, we accept the factual findings of the trial court unless they are clearly erroneous. *L.A.F. v. State*, 698 N.E.2d 355, 356 (Ind. Ct. App. 1998). We review *de novo* the ultimate determination of reasonable suspicion. *Id.* Law enforcement officers may make a brief investigatory stop of a person provided they have a reasonable and articulable suspicion that the person has been, is, or is about to be engaged in unlawful behavior. *Terry v. Ohio,* 392 U.S. 1 (1968). Whether a particular situation justifies an investigatory stop is determined on a case-by-case basis. The "reasonable suspicion" requirement of the Fourth Amendment is satisfied if the facts known to the officer at the moment of the stop are such that a person "of reasonable caution" would believe that the "action taken was appropriate." *Lyons v. State,* 735 N.E.2d 1179, 1183 (Ind. Ct. App. 2000), *trans. denied.* In other words, the requirement is satisfied where the facts known to the officer, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe criminal activity has occurred or is about to occur. *Id.* Reasonable suspicion entails something more than an inchoate and unparticularized suspicion or hunch, but considerably less than proof of wrongdoing by a

preponderance of the evidence. *Id.* at 1184. Consideration of the totality of the circumstances necessarily includes a determination whether the defendant's own actions were suspicious. *Id.*

Long argues there was no reasonable suspicion to detain him, and thus the evidence gleaned from the search of his person and home should be suppressed. He notes he was not seen doing anything unlawful and asserts his presence in a high crime area does not create "reasonable suspicion." *See Bridgewater v. State,* 793 N.E.2d 1097, 1100 (Ind. Ct. App. 2003) (presence in a high crime area does not alone constitute reasonable suspicion), *trans. denied*. Nevertheless, presence in a high crime area is a factor that may be considered when assessing the whether the totality of the circumstances support finding reasonable suspicion. *Id.*

In addition, Long asserts, the officers did not see the activities of the other occupants of Summers' apartment and suggests there might have been a reason unrelated to illegal drugs for Long and Buerkle to be visiting. The record reflects the officers did not run a license plate check on the Oldsmobile prior to the stop, officers could not observe the activity occurring in the apartment, Long committed no traffic violations, no warrants were outstanding on Long or Buerkle, officers had not seen Long or Buerkle with controlled substances in their possession, and Long and Buerkle had not made any furtive movements before or after police illuminated the car with a spotlight.

Long likens the facts of his case to those of *Bridgewater*, 793 N.E.2d at 1099. Police saw Bridgewater standing outside a building in a high crime area. When the police drove by,

Bridgewater ran into the apartment and watched them from an upstairs window. He came back outside, but then ran back inside when officers approached on foot. A few minutes later, Bridgewater walked back out of the apartment with his hands in his pockets and strolled past the officers, who were talking to another person outside the building. The officers detained him, frisked him, and found cocaine. We held the officers did not have reasonable suspicion to detain Bridgewater. *Id.* at 1103.

In *Williams v. State*, 745 N.E.2d 241, 245 (Ind. App. Ct. 2001), we held there was no reasonable suspicion to stop Williams because the officers who saw Williams make an exchange with another man did not know what was exchanged. In so holding, we distinguished Williams' facts from those in *Shinault v. State*, 668 N.E.2d 274 (Ind. Ct. App. 1996), where police saw Shinault make an exchange in a high crime area with a person known to be involved in illegal activity. We held that, even though it was unclear what Shinault and the other man were exchanging, the totality of the circumstances created reasonable suspicion to stop Shinault. *Id*. at 277.

We find Long's facts more like those in *Shinault*, such that police had reasonable suspicion Long was engaged in illegal activity. In a high crime area, Long and Buerkle had entered and exited the residence of someone "known to deal crack cocaine," (Tr. at 8), and Buerkle was known to Officer Dempster as someone who used drugs. Long and Buerkle came back to the apartment the same night, Buerkle returned to the apartment and looked inside an SUV, and then they waited in the car in the apartment's parking lot. Other people had made brief stops at the apartment during the time Officer Dempster was watching the

apartment. During trial, the officers testified they presumed Long and Buerkle were waiting for Summers to return.

When asked why he and Officer Lamar approached Long's vehicle, Officer Gossard replied, "One, for safety. We didn't want to enter the apartment with people sitting in the vehicle right behind us. Two, we weren't sure of their involvement in the case. One of the subjects had entered the apartment and exited so we wanted to get them identified and see what their involvement was." (Tr. at 27.) Officer safety alone is does not justify an investigatory stop. *State v. Atkins*, 834 N.E.2d 1028 (Ind. Ct. App. 2005). However, when added to the other factors discussed, officer safety provides another legitimate reason for the investigatory stop. *See e.g.*, *Carroll v. State*, 822 N.E.2d 1083, 1086 (Ind. Ct. App. 2005) (citing *Michigan v. Summers*, 452 U.S. 692, 702-3 (1981)) (detention of person exiting house to be searched lawful for officer safety and evidence preservation purposes).

Additionally, Officer Payne, who questioned Long after his arrest, testified Long's behavior, coupled with the additional people making brief stops at Summers' apartment, was in his "experience, all related to drug trafficking." (*Id*. at 86.) Officer Dempster, who was watching the apartment, indicated the behavior "can possibly be drug related." (*Id*. at 22.) In light of the totality of the circumstances, the officers had reasonable suspicion to stop Long and Buerkle. *See*, *e.g. Shinault*, 668 N.E.2d at 277.[4]

[4] Long also argues the search was in violation of his rights under Indiana Constitution Art. 1, Sec. 11. The factors we set out in *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005), require us to balance the "(1) degree of concern, suspicion, or knowledge that a violation has occurred, (2) the degree of intrusion the method of search or seizure imposes on the citizen's ordinary activities, and (3) the extent of law enforcement needs." As set forth in our discussion of Long's Fourth Amendment claims, we find no violation of his rights under either constitutional provision.

2. Probable Cause

Long also argues there was not probable cause for his arrest. Probable cause for a warrantless arrest exists when, at the time of the arrest, the officer has knowledge of facts and circumstances that would warrant a person of reasonable caution to believe the suspect committed a criminal act. *Griffith v. State,* 788 N.E.2d 835, 840 (Ind. 2003). Officer Lamar testified he took Long into custody after Officer Gossard observed what he believed to be a crack pipe in an area where "both occupants could have placed it." (Tr. at 56.) The crack pipe gave the officers probable cause to arrest Long for possession of drug paraphernalia and to conduct a search incident to that arrest. *See Kyles v. State*, 888 N.E.2d 809, 813 (Ind. App. Ct. 2008) (holding drug paraphernalia in plain view created probable cause for arrest).[5]

The trial court did not err in admitting the evidence collected after the stop and arrest of Long. Accordingly, we affirm.

Affirmed.

BAILEY, J., and BARNES, J., concur.

[5] Long also argues the search was unlawful under *Pirtle v. State*, 323 N.E.2d 634, 640 (Ind. 1975), which requires a person giving consent to search while in police custody be advised of his right to counsel. However, Long objected at trial to the search of his cigarette pack based on the illegality of his stop and detention, not his lack of *Pirtle* warning. Having not raised it at the trial court, he has waived the issue for our review. *See White v. State*, 772 N.E.2d 408, 411 (Ind. 2002) (stating a party may not object on one ground at trial and raise a different ground on appeal). Waiver notwithstanding, the search of Long was incident to a lawful arrest, and thus a *Pirtle* warning was not required. *See Miller v. State*, 846 N.E.2d 1077, 1080-81 (Ind. Ct. App. 2006) (*Pirtle* advisement not required when probable cause to search exists), *trans. denied*.