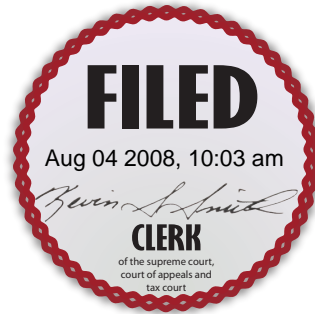


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**IN THE
COURT OF APPEALS OF INDIANA**

ROY SINGH,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A05-0801-CR-3
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick Murphy, Master Commissioner
Cause No. 49G23-0705-FA-77572

August 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Roy Singh appeals his convictions for Dealing in Cocaine, as a Class A felony,¹ and Possession of Cocaine, as a Class C felony.² We affirm the Dealing conviction and remand with instructions to vacate the Possession conviction.

Issues

Singh raises one issue on appeal, and we raise an issue *sua sponte*:

- I. Whether the trial court abused its discretion in admitting evidence found during searches of Singh's possessions by police; and
- II. We raise *sua sponte* whether the convictions entered by the trial court for Dealing in Cocaine and Possession of Cocaine, as a Class C felony, subjected Singh to double jeopardy.

Facts and Procedural History

On May 2, 2007, Indiana State Police Troopers John Campbell, Randy Pratt, and Jeffrey Segó, all dressed in civilian attire, were performing drug interdiction work at the Greyhound Bus Station in Indianapolis with the aid of Trooper Pratt's K-9 partner, Wheeler. When Singh exited from a bus, Trooper Campbell noted that Singh appeared to be startled when he saw Wheeler, which was inconsistent with most of the other passengers. After he walked to a designated smoking area to smoke, Singh continued to look in the direction of Trooper Pratt and Wheeler.

Trooper Campbell approached Singh to ask him some questions. He displayed his badge and explained to Singh the type of work he was performing at the bus station. Trooper Campbell asked Singh for permission to speak with him, and Singh agreed. At some point in

¹ Ind. Code § 35-48-4-1(b).

time, Trooper Segó identified himself and joined the conversation. Upon request, Singh provided his identification and bus ticket, which were returned to him after Trooper Campbell reviewed them. According to Trooper Campbell, Singh's route of travel was similar to that taken by narcotic smugglers. Trooper Campbell asked Singh if he was traveling with any bags. When Singh indicated that he did have a bag on the bus, Trooper Campbell asked if he could search it, and Singh gave him permission.

With Singh in the lead, Singh and Troopers Campbell and Segó walked towards the buses. Singh started to board a different bus than what Trooper Campbell observed him depart. When alerted to this fact, Singh proceeded to the correct bus. The Troopers followed him onto the bus and stood on either side of the main aisle in a row of seats close to where Singh indicated the location of his bag. Singh identified a black duffel bag and pulled it down from the overhead compartment. Again, Trooper Campbell asked for Singh's permission to search the bag, and Singh agreed. No contraband was found in the duffel bag.

When placing the duffel bag back in the overhead compartment, Trooper Campbell noticed a backpack in close proximity and asked Singh if it was his. Singh paused and then responded affirmatively. Trooper Campbell pointed out that Singh originally indicated that he only had one bag and later claimed to have two. Upon the request, Singh gave Trooper Campbell permission to search the backpack. Due to Singh's nervousness and inconsistent responses as well as the lack of security at bus stations, Trooper Campbell asked Singh's permission to take the backpack off the bus to perform the search. Singh agreed.

Inside the backpack, Trooper Campbell found a box wrapped as a birthday present

² Ind. Code § 35-48-4-6(b)(1).

with a heavy amount of tape along each seam. Trooper Campbell testified that it was common for those transporting narcotics to wrap the contraband as a present because a law enforcement official may be a little more reluctant to open a present. Then Trooper Campbell asked Singh if he would permit a K-9 to examine the box. Again, Singh agreed to the request. The wrapped box was placed among other packages. After the K-9, Wheeler, examined the boxes, his handler, Trooper Pratt, informed Trooper Campbell that the dog gave a behavior change on the box in question, indicating the detection of contraband. Trooper Campbell informed Singh of the result of the canine examination and then asked Singh if they could walk over to the Trooper's vehicle to search the package. Singh agreed and walked to the truck of one of the Troopers.

Trooper Campbell lowered the tailgate and placed the package on the tailgate. Again, Trooper Campbell asked Singh if he could open the package. Singh gave his permission. After Trooper Pratt carefully unwrapped the present, two bundles of cocaine were found inside the box, weighing almost 2000 grams in total. Singh was placed under arrest.

The State charged Singh with Dealing in Cocaine, as a Class A felony, and Possession of Cocaine, as a Class C felony. Prior to trial, Singh moved to suppress the evidence from the searches, contending that the searches were in violation of the federal and Indiana constitutional provisions prohibiting unreasonable searches and seizures. After an evidentiary hearing, the trial court denied the motion. The case was tried to a jury, which found Singh guilty as charged. The trial court sentenced Singh to thirty years imprisonment with ten years suspended to probation. This appeal ensued.

Discussion and Decision

I. Admission of Evidence

On appeal, Singh argues that the trial court abused its discretion in admitting the evidence obtained from the searches of his property because the searches violated the federal Fourth Amendment and Article I, Section 11 of the Indiana Constitution. A trial court has broad discretion in determining the admissibility of evidence. Fentress v. State, 863 N.E.2d 420, 422-423 (Ind. Ct. App. 2007). A ruling on the admissibility of evidence will only be reversed when the trial court abuses its discretion. Id. at 423. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. Id.

A. Fourth Amendment

The basis of Singh's argument on appeal is his contention that his consent to search his bags and wrapped package were not voluntary, making the subsequent searches by police violations of his Fourth Amendment right against unreasonable searches and seizures. The Fourth Amendment generally prohibits warrantless searches. Rush v. State, 881 N.E.2d 46, 50 (Ind. Ct. App. 2008). However, "[a] warrantless search based on lawful consent is consistent with both the Indiana and Federal Constitutions." Campos v. State, 885 N.E.2d 590, 600 (Ind. 2008). The burden is upon the State to prove that the consent was in fact voluntarily given rather than being the result of duress or coercion, express or implied. Id. "Voluntariness is a question of fact to be determined from all of the circumstances[.]" Id. (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973)).

The “totality of the circumstances” from which the voluntariness of a detainee’s consent is to be determined includes, but is not limited to, the following considerations: (1) whether the defendant was advised of his *Miranda* rights prior to the request to search; (2) the defendant’s education and intelligence; (3) whether the defendant was advised of his right not to consent; (4) whether the defendant has had previous encounters with law enforcement; (5) whether the officer claimed authority to search without consent; (6) whether the officer was engaged in any illegal action prior to the request; (7) whether the defendant was cooperative previously; and (8) whether the officer was deceptive as to his true identity or the purpose of the search.

Meyers v. State, 790 N.E.2d 169, 172 (Ind. Ct. App. 2003).

In the facts at hand, there were four separate consents given to perform some type of search on a piece of Singh’s property: as to the duffel bag, the backpack, a canine sniff of the wrapped package, and the opening of the wrapped package. From the beginning of the encounter between Singh and Troopers Campbell and Segó, the Troopers identified themselves and their purpose of speaking with people at the bus station. Based on this general purpose, Trooper Campbell requested to search Singh’s bag, which Singh later identified as the duffel bag. Trooper Campbell repeated his request to search the bag after Singh identified his bag on the bus. While on the bus, the Troopers stood so as to not block the center aisle. Singh had not been advised of his Miranda rights as they were not required because Singh was not under arrest and under interrogation. Id. Although the Troopers did not inform Singh of his right not to consent, neither Trooper made a claim that he had the authority to search the duffel bag without his consent or indicated that Singh was required to consent. During the entire encounter, Singh was cooperative and the tone of the interaction was conversational. Based on these circumstances along with the general factor that Singh had had prior encounters with law enforcement, the totality of the circumstances indicates

that Singh's consent to search the duffel bag was voluntary.

The circumstances surrounding Singh's consent as to his backpack are almost identical to those of the duffel bag. Once Singh acknowledged that the backpack was his, he also agreed to have the Troopers search it. Trooper Campbell then asked Singh if he would allow them to depart the bus to search the backpack. Again, Singh continued his cooperation and agreed. As the search was subsequently conducted just outside of the bus, this minute change in location of the search does not change the voluntariness of Singh's consent.

Generally, exposure of a closed container located in a public place to a trained canine does not constitute a search within the meaning of the Fourth Amendment. U.S. v. Place, 462 U.S. 696, 707 (1983). Nevertheless, Singh's consent as to the canine sniff of the birthday package was also voluntary. Trooper Campbell explained to Singh his reasons for requesting the examination: Singh's inconsistent actions and answers. Singh continued to be cooperative by explaining that the gift was for his daughter. Again, the Troopers did not indicate that they had authority to perform the search without Singh's consent. After obtaining consent, the canine sniff was performed in Singh's presence.

Finally, Singh's most crucial consent was that to open the birthday package. After the canine sniff, Trooper Campbell informed Singh that the dog indicated that it detected the odor of narcotics. Trooper Campbell then requested Singh's permission to search the package. This information regarding the canine indication followed by a request to search clearly indicated that the Trooper's purpose of the search was to determine whether the package contained narcotics as indicated by the canine. Thus, the Troopers were not being

deceptive as to the purpose of the search. Furthermore, they had not engaged in any illegal action prior to this request as all the prior searches were pursuant to valid consent, and Singh had cooperated during the entire encounter. Also, as mentioned previously, Singh has had previous encounters with law enforcement. Based on these circumstances, we conclude that Singh's consent was valid. Therefore, Singh's Fourth Amendment rights were not violated.

B. Article I, Section 11

Singh also contends that the searches violated his rights under Article I, section 11 of the Indiana Constitution in that he was not informed of his Pirtle rights. As originally explained in Pirtle v. State, Article I, section 11 requires that a person in police custody who is asked to give consent to a search is entitled to the presence and advice of counsel prior to making such a decision. Pirtle v. State, 263 Ind. 16, 29, 323 N.E.2d 634, 640 (1975). This right may be waived, but the State must demonstrate that the waiver was explicit and that it was not occasioned by the person's lack of funds. Id. The critical question here is whether Singh was in custody, determining the attachment of the right to receive the Pirtle advisement.

A defendant is deemed to be in custody if his freedom has been significantly deprived or if a reasonable person in the defendant's circumstances would not believe that he was free to leave. To determine whether a defendant is in custody, we apply an objective test, asking whether a reasonable person under the same circumstances would believe themselves to be under arrest or not free to resist the entreaties of the police. The test is how a reasonable person in the suspect's shoes would understand the situation. . . . Whether a person was in custody at a given time depends not upon the subjective views of either the interrogating officers or the subject being questioned but upon the objective circumstances.

Polk v. State, 822 N.E.2d 239, 249 (Ind. Ct. App. 2005), trans. denied.

Singh argues that he was in custody because the Troopers initiated the encounter by displaying their badges, two Troopers were present at all times, the Troopers informed him that the K-9 detected contraband in the package, and the bus on which Singh was traveling left prior to the completion of the investigation. We disagree. Officers presenting their badge as proof that they are law enforcement, especially when they are not in uniform, without more does not communicate the restriction of freedom. In fact, a person engaged in a consensual encounter, as in this case, should be informed that they are dealing with law enforcement. The Troopers spoke with Singh in a conversational tone throughout the encounter and explained the reasons for their questions and actions. The record does not indicate that any guns were brandished, deception or intimidation on the part of the Troopers, or the creation of a police dominated environment. Furthermore, the encounter was only fifteen to twenty minutes in length. Finally, it is true that Singh's bus left prior to the completion of the entire investigation and interview with Singh. However, the cocaine was discovered prior to the departure of the bus. Thus, Singh was not significantly deprived of his freedom at the time of any of the searches.

Furthermore, the circumstances in this case do not compare to those where our state appellate courts have found a Pirtle violation based on the defendant being in custody. See Morris v. State, 871 N.E.2d 1011 (Ind. Ct. App. 2007) (while at police station officers told defendant that it was in her best interests to cooperate, asked incriminating questions and told her she faced criminal charges, and the interview was several hours in length), trans. denied; Sellmer v. State, 842 N.E.2d 358 (Ind. 2006) (officer repeatedly asked for permission to

search car based on anonymous tip, asked incriminating questions, told defendant it was in her best interests to consent and that she would be permitted to leave once she consented, and failed to advise defendant of right to refuse despite her repeated question of whether she was required to consent); Friend v. State, 858 N.E.2d 646 (Ind. Ct. App. 2006) (although officer informed defendant that he was not under arrest, defendant had been patted down for weapons, detained for forty-five minutes, and repeatedly directed to remain in the patrol car); and Miller v. State, 846 N.E.2d 1077 (Ind. Ct. App. 2006) (defendant consented to search while already handcuffed), trans. denied. Rather, the facts before us are more akin to those in Clarke v. State, 868 N.E.2d 1114 (Ind. 2007).

In Clarke, a police officer responded to an anonymous tip regarding a parked car. Id. at 1116. On approach, the officer activated the vehicle's emergency lights and walked up to the car. Id. After the officer verified Clarke's identification, she questioned Clarke about his purpose for being in the area and whether there was anything illegal in the car. Id. at 1116-17. When Clarke replied there was nothing illegal in the car, the officer asked for consent to search, and Clark consented. Id. at 1117. Our Supreme Court held that Clarke's consent was valid because "a police officer who neither explicitly nor implicitly communicates that a person is not free to go about his or her business may ask questions of the person to investigate allegations of criminal activity without implicating the Fourth Amendment or requiring the advisement of rights under the Indiana Constitution." Id. at 1116. As we believe the circumstances here are comparable to those in Clarke, we conclude that Singh was not in custody when his consent was requested to perform each search, and therefore, the

right to receive the Pirtle advisement did not attach.

Based on the foregoing analysis under the federal and Indiana constitutions, we conclude that the trial court did not abuse its discretion in admitting the evidence resulting from the searches.

II. Double Jeopardy

Finally, we raise *sua sponte* whether Singh's convictions for Dealing in Cocaine and Possession of Cocaine violate the constitutional prohibition against double jeopardy, because both are based on the same conduct. "Possession of a narcotic drug is an inherently included lesser offense of dealing that drug, and a defendant generally may not be convicted and sentenced separately for both dealing and possession of the same drug." Quick v. State, 660 N.E.2d 598, 601 (Ind. Ct. App. 1996). Here, the trial court entered judgments of conviction for both counts, which are based on the same cocaine. At sentencing, the trial court imposed only one sentence, which we assume was for Dealing in Cocaine, as the sentence is within the statutory range for a Class A felony. Presumably this was done because the two convictions would constitute double jeopardy. Although the trial court did not specify that it was merging the convictions, its actions of entering a judgment of conviction on each count but only imposing sentence as to one of the counts has the same effect. A trial court's act of merging, without also vacating the conviction, is not sufficient to cure a double jeopardy violation.³ A double jeopardy violation occurs when judgments of conviction are entered and

³ In Green v. State, our Supreme Court held that "a merged offense for which a defendant is found guilty, but on which there is neither a judgment nor a sentence, is 'unproblematic' as far as double jeopardy is concerned." Green v. State, 856 N.E.2d 703, 704 (Ind. 2006). The facts before us are distinguishable from Green because the trial court entered judgment on both counts. App. at 11 and 12. The entry of judgment of

cannot be remedied by the “practical effect” of concurrent sentences or by merger after conviction has been entered. Morrison v. State, 824 N.E.2d 734, 741-42 (Ind. Ct. App. 2005), trans. denied. We therefore remand this cause to the trial court with an order to vacate Singh’s Class C conviction for Possession of Cocaine.

Conclusion

In sum, the trial court did not abuse its discretion in admitting the evidence resulting from the searches conducted at the bus terminal. However, Singh’s convictions for Dealing in and Possession of Cocaine based on the same cocaine is a double jeopardy violation. Accordingly, we remand with instructions to vacate the conviction for possession.

Affirmed and remanded with instructions.

FRIEDLANDER, J., and KIRSCH, J., concur.

conviction twice for the same offense is a violation of a defendant’s constitutional rights. Id. Therefore, the implicit act of merging the previously entered judgments at the sentencing hearing did not cure the double jeopardy violation.