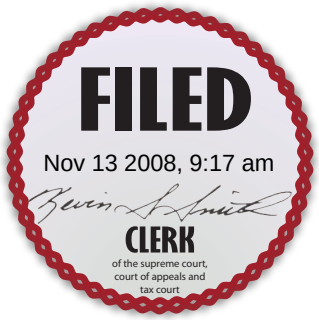


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# IN THE COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| DAEMEN SAMPSON, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 07A01-0803-CR-147 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Chris D. Monroe, Judge
Cause No. 07C01-0506-FB-0182

**NOVEMBER 13, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**HOFFMAN, Senior Judge**

Daemen Sampson appeals his convictions for causing a death while operating a motor vehicle with a schedule I or II controlled substance in the blood having a prior conviction within the prior five years, a class B felony, and criminal recklessness, a class A misdemeanor. We affirm.

Sampson raises two issues for our review:

1. Whether the trial court erred in admitting his blood test results into evidence; and

2. Whether the trial court erred in instructing the jury.

On December 2, 2004, twenty-five-year-old Sampson was driving on State Road 46 when he lost control of his vehicle and slid sideways into an oncoming car. Sampson and his front seat passenger were transported to a nearby hospital for treatment of their injuries. Sampson's back seat passenger was killed.

Brown County Sheriff's Department Deputy Bradley Stogsdill was sent to the hospital to obtain a blood draw from Sampson. At the hospital, Deputy Stogsdill, who was dressed in his uniform, told Sampson that he needed to draw Sampson's blood because the accident involved a fatality. Sampson calmly consented to the blood draw.

The blood test results revealed that Sampson had marijuana, a schedule I controlled substance, in his blood at the time of the accident. The State charged Sampson with causing a death while operating a motor vehicle with a schedule I or II controlled substance in the body. The offense was elevated to a class B felony because Sampson had been convicted of driving while intoxicated within five years of the accident.

Sampson was also charged with reckless homicide as a class C felony and criminal recklessness as a class A misdemeanor.

At trial, the trial court admitted Sampson's blood test results into evidence over Sampson's objection. The jury convicted him of the causing death while operating a motor vehicle charge as well as criminal recklessness. Sampson appeals.

Sampson first argues that the trial court erred in admitting his blood test results into evidence. Specifically, he contends that his consent to the blood test was not voluntary. We review a trial court's decision to admit evidence for an abuse of discretion. *Collins v. State*, 826 N.E.2d 671, 677 (Ind. Ct. App. 2005), *trans. denied, cert. denied*, 125 S.Ct. 1058 (2006). We will find that a trial court has abused its discretion when its decision is clearly against the logic and effect of the facts and circumstances before it. *Id.*

Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure. *Navarro v. State*, 855 N.E.2d 671, 675 (Ind. Ct. App. 2006). In cases involving warrantless searches, the State bears the burden of proving an exception to the warrant requirement. *Id.* When the State relies upon the defendant's consent to justify a warrantless search, the State has the burden of proving the consent was freely and voluntarily given. *Id.*

The voluntariness of a consent to search is a question of fact to be determined from the totality of the circumstances. *Id.* These circumstances include, but are not limited to: 1) whether the defendant was advised of his *Miranda* rights prior to the request to search; 2) the defendant's degree of education and intelligence; 3) whether the

defendant was advised of his right not to consent; 4) whether the defendant had previous encounters with law enforcement; 5) whether the officer made any express or implied claims of authority to search without consent; 6) whether the officer was engaged in any illegal activity prior to the request; 7) whether the defendant was previously cooperative; and 8) whether the officer was deceptive as to his true identity or the purpose of the search. *Id.*

Here, our review of the evidence reveals that Deputy Stogsdill went to the hospital in his uniform and advised Sampson that he was there to obtain a blood sample from Sampson because the accident resulted in a fatality. Sampson calmly consented to the blood draw. There is no evidence that Deputy Stogsdill made any claims of authority to search without consent, was engaged in any illegal activity, or was deceptive as to his identity or the purpose of the search. In addition, Sampson's prior encounters with the law enforcement included two convictions for possession of marijuana, one conviction for operating a vehicle with a schedule I or II controlled substance, and one conviction for operating a motor vehicle while intoxicated. Based upon this evidence, we find that Sampson's consent to the blood draw was voluntary. The trial court did not err in admitting Sampson's blood test results into evidence. *See id.*

Sampson also argues that the trial court erred in instructing the jury. Specifically, Sampson points out that Preliminary Instruction 4 and Final Instruction 3 state that Sampson was charged with operating a motor vehicle with a schedule I or II controlled substance in his body rather than in his blood, and that Preliminary Instruction 5 and Final Instruction 7 use both the terms body and blood interchangeably in the same

instruction. Sampson, however, has waived appellate review of this issue because he failed to object to the instructions at trial. *See Clay v. State*, 766 N.E.2d 33, 36 (Ind. Ct. App. 2002)(stating that failure to object to jury instructions waives any claim of instructional error on appeal).

Waiver notwithstanding, we find no error. Even if the trial court erred in instructing the jury, instructional errors are harmless where the conviction is clearly sustained by the evidence and the jury could not properly have found otherwise. *See Kelly v. State*, 813 N.E.2d 1179, 1186 (Ind. Ct. App. 2004), *trans. denied*. Here, our review of the evidence reveals that Sampson's blood test results show that he had a schedule I controlled substance in his blood at the time of the accident, and that the accident caused the death of his passenger. Sampson's conviction for causing a death while operating a motor vehicle with a schedule I or II controlled substance in the blood is therefore clearly sustained by the evidence, and the jury could not properly have found otherwise. Any instructional error would therefore have been harmless.

Affirmed.

RILEY, J., and MATHIAS, J., concur.