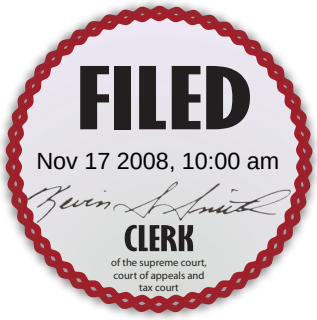

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IN THE
COURT OF APPEALS OF INDIANA

ANDREW P. KAWLEWSKI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0802-CR-70
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0605-FD-16

November 17, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE[1]

Appellant-Defendant, Andrew P. Kawlewski (Kawlewski), appeals his conviction for possession of cocaine as a Class D felony, Ind. Code § 35-48-4-6.

We affirm.

ISSUES

Kawlewski purports to raise four issues on appeal, which we restate as the following two:

(1) Whether Kawlewski, as a passenger in a car stopped by a sheriff's deputy, was detained for an unreasonable amount of time, making his eventual arrest illegal; and

(2) Whether the sheriff's deputy had probable cause to believe that Kawlewski had been in a public place for purposes of the public intoxication arrest that ultimately led to his cocaine conviction.

FACTS AND PROCEDURAL HISTORY[2]

In the early morning hours of February 11, 2006, Tippecanoe County Deputy Sheriff Robert Hainje (Deputy Hainje) was on patrol in Lafayette, Indiana, with rookie Deputy Eagy. The deputies observed a Chevrolet Lumina make a left turn while its right turn signal was

[1] We held oral argument in this case on September 3, 2008. We thank counsel for their presentations.

[2] Kawlewski's appellate counsel has alerted us that he served as judge *pro tempore* during the early stages of this case and has filed a Verified Notice of Waiver of Conflict and Consent to Representation, in which both Kawlewski and the trial prosecutor consented to appellate counsel's representation. For its part, the Indiana Attorney General's Office acknowledged the situation but did not object. We certainly do not encourage such arrangements, but, given the fact that all involved in this case have acquiesced, we have not required Kawlewski's counsel to withdraw from this appeal.

activated. Kawlewski's wife, Teresa, was driving the Lumina. Kawlewski was in the front passenger seat, and another man, John Shuee (Shuee), was sitting behind Kawlewski in the back seat. When Deputy Hainje made a U-turn to initiate a traffic stop, Teresa "accelerated very quickly." (Transcript p. 64). With Deputy Hainje following, Teresa made a right turn into the Point East Mobile Home Park, so quickly, according to Deputy Hainje, that the vehicle "actually leaned quite a bit to one side[.]" (Tr. p. 64). Once inside the mobile home park, Teresa continued to accelerate and made another sharp right turn. Deputy Hainje was eventually able to catch up with the Lumina and activate his emergency lights. Teresa came to a stop in front of the Kawlewskis' trailer at Lot 165. Deputy Hainje activated the video camera in his vehicle at 2:53 a.m. and approached the Lumina.

Deputy Hainje walked to the driver-side door, and Deputy Eagy walked to the passenger-side door. As Deputy Hainje approached the Lumina, he saw a "very large dagger knife" on the floor of the back seat. (Tr. p. 67). The deputies also saw that Shuee had an open beer in the back seat. Deputy Hainje asked the occupants for identification and removed the knife from the car. As Teresa was providing Deputy Hainje with her driver's license and vehicle registration, she told him that she lives "right here." (State's Ex. 4). Deputy Hainje asked Teresa to step out of the vehicle, and Teresa did so. At that point, the deputies had not seen Kawlewski doing anything illegal.

About a minute and a half into the stop, as Deputy Hainje was talking to Teresa behind the Lumina, Kawlewski opened his door in an apparent attempt to exit the vehicle. Deputy Eagy moved toward the door, and Kawlewski shut the door and remained in the

vehicle. Meanwhile, Deputy Hainje told Teresa that he would be performing some sobriety tests. Deputy Hainje then returned to his vehicle to check the names for outstanding warrants. There were none. Approximately five minutes into the stop, Kawlewski again opened his door. Deputy Eagy again moved toward the door, and Deputy Hainje walked toward the Lumina and told Kawlewski to keep the door shut. Kawlewski shut the door and remained in the vehicle. Other officers arrived to assist roughly thirteen minutes into the stop.

Deputy Hainje performed several sobriety tests and a portable breath test on Teresa. About fifteen minutes into the stop, Deputy Hainje told Teresa that he had probable cause to believe that she was operating a vehicle while intoxicated. He then handcuffed her and asked if she had anything in her pockets. Teresa eventually admitted that she had cocaine in her pocket. However, she told Deputy Hainje that there was no more cocaine in the Lumina, including on Kawlewski and Shuee. Seventeen minutes into the stop, as Deputy Hainje searched Teresa, Kawlewski opened his door for a third time, this time more aggressively. This required Deputy Eagy to use force to hold the door closed and prompted another officer to move in to provide assistance. Immediately thereafter, Deputy Hainje put Teresa into his vehicle.

Approximately nineteen minutes into the stop, Deputy Hainje asked Kawlewski to step out of the Lumina and handcuffed him. Deputy Hainje had observed that Kawlewski was "highly intoxicated" and that he was making "a lot of exaggerated movements consistent with stimulant abuse." (Tr. p. 73). Deputy Hainje instructed Deputy Eagy to search

Kawlewski while Deputy Hainje dealt with Shuee. While searching Kawlewski, Deputy Eagy found what turned out to be a digital scale, but he did not recognize it as such and placed it back in Kawlewski's pocket. Around the same time, Deputy Hainje and another officer searched the Lumina and found a "corner baggie" and a straw that had white powdery residue on them under the seat where Kawlewski had been sitting, along with several beer containers, some empty. (State's Ex. 4; Tr. p. 84). Furthermore, "there was white powder scattered throughout the carpeting of the rear floorboard." (Tr. p. 84). Shuee told Deputy Hainje that the corner baggie and straw were not his and that he had not been using cocaine. Shuee said that he had a place to spend the night just down the street, and he was eventually allowed to go there.

In the meantime, about twenty-eight minutes into the stop, Deputy Hainje began questioning Kawlewski. He asked Kawlewski why he had been trying to get out of the Lumina, and Kawlewski said that he had heard Teresa talking "crazy" about drugs and that he is a "f****** alcoholic." (State's Ex. 4). Deputy Hainje told Kawlewski that he was going to administer a portable breath test, but Kawlewski said that it would be "high" because he had been drinking for three days. (State's Ex. 4). Deputy Hainje then informed Kawlewski that he would be transported to jail for public intoxication.

While processing Kawlewski at the jail, an officer found the digital scale and presented it to Deputy Hainje. Deputy Hainje recognized the item as a scale and observed a white powdery residue on it. He tested the powder and determined that it was cocaine. When confronted, Kawlewski said that the

scale probably had cocaine on it, and nodded affirmatively when asked whether he had used cocaine that night. (Tr. p. 87).

On May 5, 2006, the State filed an Information charging Kawlewski with Count I, possession of cocaine, as a Class D felony, I.C. § 35-48-4-6, and Count II, public intoxication, a Class B misdemeanor, I.C. § 7.1-5-1-3. In a separate count, the State alleged that Kawlewski is a habitual substance offender under Indiana Code section 35-50-2-10 based on five prior convictions for operating while intoxicated.

On August 27, 2007, the day before trial, Kawlewski filed two motions to suppress any physical evidence seized pursuant to his arrest and any statements he made following his arrest, claiming that his arrest was unlawful under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution. The trial court agreed to consider and rule upon the motions during the course of the trial.

The next day, August 28, 2007, a jury trial commenced as scheduled. Prior to *voir dire*, the State informed the trial court that it would not be pursuing the prosecution of the public intoxication charge, leaving only the possession of cocaine charge and the habitual substance offender allegation to be adjudicated. During the trial, the video of the stop was played for the jury without objection from Kawlewski. After the jury was removed from the courtroom, Kawlewski's attorney revived his two motions to suppress regarding any physical evidence seized following Kawlewski's arrest and any statements he made following his arrest, claiming that the arrest was unlawful. The trial court denied Kawlewski's motions. Later, when Kawlewski's attorney asked Deputy Hainje about his detention of Kawlewski,

Deputy Hainje testified, "We don't allow the passengers to exit the vehicle during a stop." (Tr. p. 125).

The jury ultimately found Kawlewski guilty of possession of cocaine. Kawlewski then waived his right to a jury during the habitual substance offender phase, and the trial court concluded that the State failed to produce sufficient evidence to support that allegation. On September 28, 2007, the trial court sentenced Kawlewski to three years with Tippecanoe County Community Corrections, with the level to be determined by Tippecanoe County Community Corrections.

Kawlewski now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Kawlewski argues that we should reverse his conviction because the arrest that led to the conviction was unlawful for two reasons: (1) he was detained for an unreasonable amount of time; and (2) he was not in a "public place" for purposes of the public intoxication statute.

I. *Standard of Review*

Kawlewski seeks to challenge the trial court's denial of his motions to suppress. However, he is appealing from a completed trial; therefore, the issue is appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. In any event, our standard of review on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Buckley v. State*, 886 N.E.2d 10, 13 (Ind. Ct. App. 2008). We do not reweigh the evidence, and we consider

conflicting evidence in a light most favorable to the trial court's ruling. *Id*. However, we must also consider the uncontested evidence favorable to the defendant. *Id*. We will affirm the trial court's ruling if it is supported by substantial evidence of probative value. *Id*. at 13-14.

II. *Length of Passenger Detention*

Kawlewski first contends that his arrest was unlawful because he—as a passenger—was detained for an unreasonable amount of time, in violation of both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution. Kawlewski never objected on this ground at the trial court level, either in his pre-trial motions to suppress or during trial. As such, he has waived this issue. *See Saunders v. State*, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006), *trans. denied*. "A defendant may not object on one ground at trial and raise another on appeal; any such claim is waived." *Houser v. State*, 823 N.E.2d 693, 698 (Ind. 2005). Waiver notwithstanding, we conclude that the deputies did not detain Kawlewski for an unreasonable amount of time under the circumstances.

In *Tawdul v. State*, 720 N.E.2d 1211, 1217 (Ind. Ct. App. 1999), *trans. denied*, we held that, as a general matter, police have a limited right to briefly detain a passenger in a lawfully stopped vehicle long enough for the police to make an initial assessment of the situation. "The brief detention does not necessarily encompass detaining the individual for the entire length of the traffic stop." *Id*. However, "[t]he police may detain the passenger in order to ascertain the situation *and to alleviate any concerns the officer has for his or her safety*." *Id*. (emphasis added).

Here, the extended detention of Kawlewski was justified by several officer safety concerns: (1) the traffic stop occurred late at night (approximately 2:50 a.m.); (2) Deputy Hainje was working with Deputy Eagy, a rookie who had only been on the job for a short time; (3) Deputy Hainje found a large knife in the back seat of the Lumina at the beginning of the stop; (4) the occupants of the Lumina had all been drinking; (5) Kawlewski attempted to exit the car two times in the first five minutes of the stop; and (6) until additional officers arrived approximately thirteen minutes into the stop, Deputy Hainje and Deputy Eagy were outnumbered 3-2.

Still, Kawlewski contends that even these facts only justified holding him until the end of the investigation of the driver, Teresa. He asserts that the investigation of Teresa was complete before he made his third attempt to exit the vehicle and that he should have been released at that point. We disagree. When Kawlewski attempted to exit the vehicle for the third time—requiring Deputy Eagy to use force to keep the door shut—the investigation of Teresa was still in progress. She was handcuffed, but she was still outside being questioned by Deputy Hainje. Kawlewski's act of aggression during an ongoing investigation certainly

gave the deputies probable cause to arrest him.[3] Given these facts, we cannot say that the length of Kawlewski's detention was unreasonable.[4]

III. *Probable Cause for Public Intoxication Arrest*

Kawlewski also contends that, even if his detention was not unreasonably long, his arrest for public intoxication, which led to his cocaine conviction, was unlawful because Deputy Hainje did not have probable cause to believe that Kawlewski had committed public intoxication. Specifically, Kawlewski asserts that he was not in a "public place" for purposes of the public intoxication statute. Kawlewski maintains that, if he had not been arrested for public intoxication, he would not have gone to jail and the digital scale would not have been discovered. Therefore, he argues, the trial court should have excluded the scale and his statements regarding the scale from evidence.

Again, the threshold problem is that, during trial, Kawlewski made no objection to the admission of the scale into evidence, and he made no objection as Deputy Hainje testified at length about the scale and Kawlewski's statements. Eventually, after the video of the stop was played for the jury, Kawlewski renewed his motions to suppress. To preserve an

[3] On appeal, Kawlewski argues that he was only trying to get out of the vehicle because he had to urinate, the implication being that he did not present a threat to officer safety. However, even if this were relevant to our analysis, the record before us indicates that Kawlewski did not express his need to urinate to the deputies until approximately thirty minutes into the stop, thirteen minutes after his third attempt to exit the vehicle. Kawlewski's trial attorney argued to the trial court that Kawlewski was trying to get out because he had to urinate, but the attorney's argument does not constitute evidence.

[4] Though we conclude that the detention of Kawlewski in this case was lawful, we note our concern with Deputy Hainje's trial testimony that "[w]e don't allow the passengers to exit the vehicle during a stop." (Tr. p. 125). This apparently-blanket policy is at odds with our discussion in *Tawdul* of "a limited right to briefly detain a passenger." *Tawdul*, 720 N.E.2d at 1216.

argument regarding the admission of evidence for appeal, a contemporaneous objection is necessary at the time the evidence is offered. *Prewitt v. State*, 761 N.E.2d 862, 871 (Ind. Ct. App. 2002). A contemporaneous objection allows the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced. *Id*. The failure to make such an objection generally results in waiver of the alleged error on appeal. *Brown v. State*, 783 N.E.2d 1121, 1125 (Ind. 2003). Waiver notwithstanding, we will address Kawlewski's argument on its merits.

Under Indiana Code section 7.1-5-1-3, "[i]t is a Class B misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication caused by the person's use of alcohol or a controlled substance (as defined in IC 35-48-1-9)." Kawlewski admits that he was in a state of intoxication, but he argues that he was not "in a public place or a place of public resort." He emphasizes that he was on a private road in a private mobile home park at the time of his arrest. We conclude that this fact is not dispositive.

There is no dispute that the traffic stop that gave rise to Kawlewski's arrest was initiated on a public road. There is no dispute that Kawlewski was a passenger in the vehicle, on the public road, when the traffic stop was initiated. We have held that a conviction for public intoxication may stand where the defendant was a passenger in a private vehicle stopped by police on a public road. *Jones v. State*, 881 N.E.2d 1095, 1097 (Ind. Ct. App. 2008).[5] Kawlewski has not shown us why we should reach a different result simply because

[5] We agree with the author of *Jones* that the public policy behind this rule is questionable. *Jones*, 881 N.E.2d at 1098 n.2. For now, however, it is the rule, and Kawlewski does not challenge it.

Teresa was able to drive the vehicle off the public road and into a private mobile home park before stopping. In other words, while Deputy Hainje ultimately arrested Kawlewski on private property, he had observed Kawlewski, minutes earlier, in a public place. As such, given Kawlewski's undisputed state of intoxication, Deputy Hainje had probable cause to believe that Kawlewski had committed public intoxication.

Kawlewski contends that our opinion in *Moore v. State*, 634 N.E.2d 825 (Ind. Ct. App. 1994), "establishes that the mere fact that the Kawlewskis had to travel along a public road in order to reach the private drive into their mobile-home park is not sufficient" to support a finding that he was in a "public place." (Appellant's Br. p. 18). He misrepresents the holding in that case. In *Moore*, we simply refused to *infer* that the defendant had driven on public roads to get to the private residence where he was arrested. *Moore*, 634 N.E.2d at 827. Here, we do not have to infer anything. There is no dispute that Kawlewski was on a public road immediately before his arrest.

In sum, we conclude that the trial court did not abuse its discretion in admitting the scale and Kawlewski's statements regarding the scale into evidence.

CONCLUSION

Based on the foregoing, we conclude that Kawlewski was not detained for an unreasonable amount of time and that Deputy Hainje had probable cause to believe that Kawlewski had been in a public place for purposes of the public intoxication arrest.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.