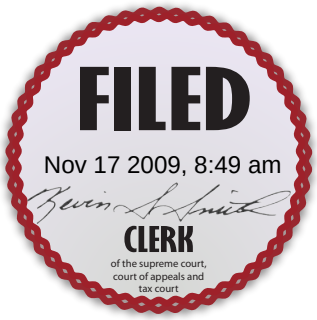

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IN THE
COURT OF APPEALS OF INDIANA

RACHEL CUSACK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0904-CR-196
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Kathleen Tighe Coriden, Judge
Cause No. 03D02-0706-CM-783

November 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Rachel Cusack appeals her conviction following a bench trial for operating a vehicle while intoxicated as a class A misdemeanor.[1]

We affirm.

ISSUE

Whether the trial court abused its discretion in admitting evidence.

FACTS

During the evening of May 27, 2007, Columbus Police Officer Ryan Floyd responded to a dispatch that restaurant employees had reported several intoxicated individuals causing a disturbance in the restaurant's parking lot. Upon arrival, he observed several people in the parking lot, including Cusack. Cusack was sitting in the driver's seat of an idling vehicle. An unidentified man was standing outside the vehicle, speaking to her through the open driver's side window.

Officer Floyd exited his patrol vehicle and began walking toward Cusack and the man, as they were the closest individuals. As Officer Floyd got within five or six feet of Cusack's vehicle, he smelled the odor of alcohol emanating from "the immediate vicinity of her vehicle." (Tr. 29). He, however, could not identify whether the odor was coming from Cusack or the man. As Officer Floyd continued to approach the vehicle, Cusack "looked up at [him] and began to drive off." (Tr. 29). She drove approximately fifteen feet before stopping at Officer Floyd's command.

[1] Ind. Code § 9-30-5-2(b).

Officer Floyd again approached Cusack and "noticed a very strong odor of alcoholic beverages from her breath and body. Her speech was slurred. Her eyes were bloodshot and glassy." (Tr. 29). When asked for her driver's license, Cusack "produced a pile of cards from her purse" and "kept thumbing through them," overlooking her driver's license "several times" until Officer Floyd pointed it out to her. (Tr. 29). She also failed to put her vehicle into park and turn off the engine when instructed, allowing the vehicle to roll forward and nearly strike Officer Floyd. Once outside the vehicle, she "had to lean against [it] to hold her balance." (Tr. 30).

Officer Floyd performed a horizontal-gaze nystagmus test, which Cusack failed. Cusack refused all other field sobriety tests. Officer Floyd therefore transported her to the police department, where another officer administered a breath test with a B.A.C. Datamaster. The breath test revealed a blood-alcohol content of .31%.

On May 30, 2007, the State charged Cusack with Count I, operating a vehicle while intoxicated as a class A misdemeanor; and Count II, operating a motor vehicle with a blood-alcohol content of .15% or greater, a class A misdemeanor. Cusack filed a motion to suppress the evidence on January 28, 2008, asserting that Officer Floyd lacked reasonable suspicion to conduct an investigatory stop. Following a hearing, the trial court denied the motion on May 14, 2008. Cusack filed a motion to reconsider, which the trial court denied on June 25, 2008. Thereafter, Cusack filed a petition for interlocutory appeal, which a panel of this court denied.

The trial court held a bench trial on February 23, 2009, after which it found Cusack guilty of Count I, operating a vehicle while intoxicated as a class A misdemeanor. On March 23, 2009, the trial court sentenced her to one year, with all but ten days suspended.

DECISION

Cusack asserts the trial court abused its discretion in admitting evidence of her intoxication. Specifically, she argues that Officer Floyd lacked reasonable suspicion to stop her, where he was acting on no more than "a dispatch report of a 'disturbance,'" and he could not ascertain who smelled of alcohol. Cusack's Br. at 6.

The admission of evidence is a matter left to the sound discretion of the trial court, and a reviewing court will reverse only upon an abuse of that discretion. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). 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.* "We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling." *Lundquist v. State*, 834 N.E.2d 1061, 1067 (Ind. Ct. App. 2005). "However, we must also consider the uncontested evidence favorable to the defendant." *Id.*

Both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution protect the privacy and possessory interests of individuals by prohibiting unreasonable searches and seizures. *Barfield v. State*, 776

N.E.2d 404, 406. (Ind. Ct. App. 2002). This protection also governs "'seizures' of the person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

A person may be detained on less than probable cause if the officer has a justifiable suspicion the suspect has committed a crime, providing the intrusiveness and nature of the seizure is "reasonably related in scope to the justification for [its] initiation. The officer must be able to point to specific and articulable facts which reasonably warrant the intrusion upon the individual's right of privacy." *Id.* at 21. "[T]he reasonable-suspicion inquiry is fact-sensitive and thus must be determined on a case-by-case basis." *State v. Belcher*, 725 N.E.2d 92, 94 (Ind. Ct. App. 2000), *trans. denied*. Officers "must have more than an inchoate and unparticularized suspicion or hunch, but need not have the level of suspicion necessary for probable cause." *Id.* Whether reasonable suspicion exists is subject to de novo review. *State v. Bulington*, 802 N.E.2d 435, 438 (Ind. 2004).

Furthermore, under Article 1, Section 11 of the Indiana Constitution, the State must show that, in the totality of circumstances, the intrusion was reasonable. *Finger v. State*, 799 N.E.2d 528, 535 (Ind. 2003). "Under this analysis, the State must show that the facts at the time, along with the reasonable inferences arising from those facts, would justify a prudent person in believing that a crime has been or is about to be committed." *Id.*

Here, Officer Floyd initially acted on a report from employees of the restaurant that several unidentified intoxicated individuals were causing a disturbance in the restaurant's parking lot.

> The United States Supreme Court has held that an anonymous tip is not enough to support the reasonable suspicion necessary for a "Terry" stop. However, a tip from an identified or known informant can provide the basis for an investigatory stop if it contains sufficient indicia of reliability. One of the reasons for this is that "a known or identified informant's reputation can be assessed and . . . [he may] be held responsible if [his] allegations turn out to be fabricated . . . ." Whether a tip has sufficient indicia of reliability to establish reasonable suspicion is determined by looking at the totality of the circumstances.

Washburn v. State, 868 N.E.2d 594, 599 (Ind. Ct. App. 2007) (internal citations omitted), *trans. denied*. "While there may be greater indicia of reliability in the report of a concerned citizen, the ultimate test to establish reasonable suspicion is the 'totality of the circumstances.'" *Id.*

Although there is no indication that the restaurant employees were unreliable, we cannot say that a report regarding several unidentified and intoxicated individuals alone contained the requisite indicia of reliability to provide reasonable suspicion for Officer Floyd to stop Cusack's vehicle. The report, however, did provide Officer Floyd a sufficient basis to initiate an encounter with Cusack once he arrived at the restaurant. *See State v. Augustine*, 851 N.E.2d 1022, 1026 (Ind. Ct. App. 2006) (determining that an identified caller's tip could provide police with a basis to initiate an encounter, which then could provide police with information to justify an investigatory stop). At this point, the Fourth Amendment was not implicated. *See Bentley v. State*, 846 N.E.2d 300, 305

(Ind. Ct. App. 2006) (holding that a seizure does not occur "simply because a police officer approaches a person, asks questions, or requests identification"), *trans. denied*.

While approaching Cusack and from a distance of five to six feet, Officer Floyd detected a strong odor of alcohol emanating from "the immediate vicinity of her vehicle." (Tr. 29). This created more than an inchoate and unparticularized suspicion that Cusack was one of the allegedly intoxicated individuals reported to be in the parking lot and justified his detention of her to determine whether she was, in fact, intoxicated.[2]

Given the facts, namely the employees' report of intoxicated individuals and Officer Floyd's subsequent observations, we find that Officer Floyd had reasonable suspicion to believe that Cusack was operating a vehicle while intoxicated. Thus, we cannot say that the police stop or the evidence gathered as a result thereof violated the Fourth Amendment. Also, given the totality of the circumstances, we find that the Officer Floyd's stop of Cusack was a reasonable intrusion, and therefore, did not violate Article 1, Section 11 of the Indiana Constitution. Accordingly, we find no abuse of discretion in admitting evidence of Cusack's intoxication.

Affirmed.

ROBB, J., and MATHIAS, J., concur.

[2] Citing to several cases, Cusack argues that the smell of alcohol alone was an insufficient basis for stopping her. *See* Cusack's Br. at 7-8. These cases, however, are relevant to whether police officers had probable cause to compel the defendants to submit to blood draws not whether reasonable suspicion existed to justify an investigatory stop.