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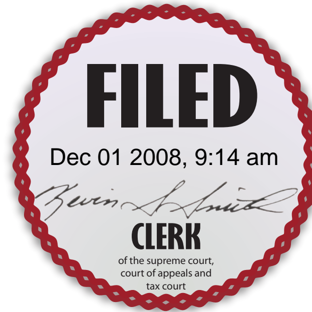

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IN THE COURT OF APPEALS OF INDIANA

DARVAY MASHAWN SALLEE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0803-CR-92
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0703-FC-31

DECEMBER 1, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Darvay Mashawn Sallee ("Sallee") appeals his conviction after a jury trial for carrying a handgun without a license with a prior conviction, a Class C felony; Ind. Code §35-47-2-1, Ind. Code §35-47-2-23(c).

We affirm.

ISSUE

Sallee presents the following restated issue for our review: whether the trial court abused its discretion by admitting into evidence a handgun seized from Sallee during an encounter with police.

FACTS AND PROCEDURAL HISTORY

On March 2, 2007, Officer Arthur Lemme of the Gary Police Department responded to a dispatch that the subject of another officer's traffic stop had fled on foot. The man who fled was described as a black male wearing a black hooded jacket. Approximately six blocks from the location of the traffic stop, Officer Lemme saw a black male, later identified as Sallee, wearing a black hooded jacket walking southbound. Officer Lemme exited his vehicle and approached Sallee. He asked Sallee where he had come from and for identification. Sallee responded that he had identification. Officer Lemme asked Sallee for permission to conduct a pat-down search for officer protection prior to Sallee retrieving his identification. Sallee consented to the pat-down search.

During the search Officer Lemme detected a heavy object that felt like a small handgun in Sallee's right rear pocket. Officer Lemme removed what turned out to be a loaded handgun from Sallee's pocket. Sallee admitted to Officer Lemme that he did not

have a permit for the gun. Sallee later gave a handwritten and typewritten statement to a detective admitting possession of the gun, although he later denied possession of the gun during his testimony at trial.

The State charged Sallee with possession of cocaine while in possession of a firearm, a Class C felony; possession of cocaine, a Class D felony; carrying a handgun without a license, a Class C felony; and carrying a handgun without a license with a prior conviction, a Class C felony. The State dismissed the cocaine charges prior to trial. At the conclusion of a bifurcated jury trial, Sallee was convicted of carrying a handgun without a license with a prior conviction, a Class C felony. The trial court sentenced Sallee to a term of six years in the Department of Correction. Sallee now appeals.

DISCUSSION AND DECISION

Sallee challenges the admission of the handgun seized from him during his encounter with Officer Lemme. While Sallee does not base his allegation of error on Article 1, Section 11 of the Indiana Constitution, Sallee does claim that the protections afforded him under the Fourth Amendment to the United States Constitution were violated during the search and seizure leading to the discovery of the handgun. Sallee asserts that the trial court erred by denying his motion to suppress, and then by overruling his objections to the admission of the handgun at trial.

A trial court has inherent discretionary power over the admission of evidence, and its decisions are reviewed only for an abuse of that discretion. *C.L.M. v. State*, 874 N.E.2d 386, 389 (Ind. Ct. App. 2007). An abuse of discretion occurs when a decision is

clearly against the logic and effect of the facts and circumstances before the court. *Alvies v. State*, 795 N.E.2d 493, 503 (Ind. Ct. App. 2003).

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. *Primus v. State*, 813 N.E.2d 370, 374 (Ind. Ct. App. 2004). The Fourteenth Amendment extended to state governments the Fourth Amendment's requirements for constitutionally valid searches and seizures. *Id*. Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure. *Id*. When a search or seizure is conducted without a warrant, the State bears the burden of proving that an exception to the warrant requirement existed at the time of the search or seizure. *Matson v. State*, 844 N.E.2d 566, 570 (Ind. Ct. App. 2006).

"The United States Supreme Court established one such exception in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), which held that a police officer may briefly detain a person for investigatory purposes without a warrant or probable cause, if, based on specific and articulable facts together with reasonable inferences from those facts, an ordinarily prudent person would reasonably suspect that criminal activity was afoot." *Howard v. State*, 862 N.E.2d 1208, 1210 (Ind. Ct. App. 2007). Reasonable suspicion is determined on a case-by-case basis by looking at the totality of the circumstances. *Id*. We review the trial court's ultimate determination regarding reasonable suspicion *de novo*. *See State v. Atkins*, 834 N.E.2d 1028, 1032 (Ind. Ct. App. 2005).

Sallee moved to suppress the handgun claiming that it had been obtained during the course of an improper and unconstitutional stop and frisk. Sallee argues that the pat-

down was improper because Officer Lemme did not have reasonable suspicion to believe that Sallee was armed. The State does not argue that Officer Lemme had a reasonable basis for a non-consensual pat-down search, but rather that the search was with the consent of Sallee. Sallee counters that the State may not argue consent to this court as it did not do so to the trial court.

A voluntary and knowing consent to search is a well-established exception to the warrant requirement. *Meyers v. State*, 790 N.E.2d 169, 172 (Ind. Ct. App. 2003). A consent to search is valid except where it is procured by fraud, duress, fear, or intimidation, or where it is merely a submission to the supremacy of the law. *Polk v. State*, 822 N.E.2d 239, 248 (Ind. Ct. App. 2005). Here, Sallee does not challenge the consent as coerced, or procured by fraud, duress, or fear. Instead, he denies that there was consent, and argues that the trial court cannot rely on his consent anyway as the evidence did not come in prior to the trial court's ruling.

As the evidence from Officer Lemme came in at trial, Sallee interrupted with an objection as Officer Lemme testified "He said he had ID, I asked him to do a quick pat down before I let him search for his ID. . . ." *Tr.* at 32. Following a voir dire of Officer Lemme by Sallee and argument to the trial court, the court ruled that "The officer certainly has a right to pat him down for officer safety when he encounters him and in fact the defendant voluntarily told him he could pat him down when he asked could he pat him down." *Tr.* at 43.

Sallee then pointed out to the trial court that there had not been any testimony of consent. The State responded that it would ask the witness about consent. The trial judge

then indicated that consent would not be part of her ruling. When testimony resumed, Officer Lemme testified that Sallee gave him permission for the pat down.

Under the circumstances, it is the case that the State did intend to show consent to the search and so advised the trial court. In any event we will affirm on any legal ground apparent in the record. *See Alford v. State,* 699 N.E.2d. 247, 250-551 (Ind. 1998) (citing *Ross v. State*, 676 N.E.2d 339, 345 (Ind. 1996), citing *Light v. State*, 547 N.E.2d 1073, 1081 (Ind. 1989), citing *Cain v. State*, 300 N.E.2d 89, 92 (Ind. 1973)). Here, the State's case presented a basis for concluding that the search was with consent prior to admitting the handgun in evidence. The subsequent denial of consent by the defendant in his testimony would not affect the admission of the handgun.

We affirm the trial court's admission of the handgun and the defendant's conviction for carrying a handgun without a license with a prior conviction, a Class C felony.

RILEY, J., and BROWN, J., concur.