

STATEMENT OF THE CASE

Christopher Donegan brings this interlocutory appeal of the trial court's denial of his motion to suppress.

We affirm.

ISSUE

Whether the trial court erred in denying Donegan's motion to suppress.

FACTS

On January 23, 2008, at approximately 11:40 a.m., Indiana State Police Trooper Kirby Stailey, a squad sergeant with fifteen years on the force, began to pull from the median in the center of I-64 to travel eastbound when he observed a silver Volkswagen Jetta station wagon pass at a speed that appeared to exceed the seventy miles per hour speed limit. Trooper Stailey caught up with the Jetta and "pace[d] it" at a speed of "75 miles an hour." (Tr. 4). As they approached the area where two ISP officers had a vehicle stopped alongside the highway, the Jetta's driver "signaled to move over for the emergency vehicles" and then moved into the left travel lane. (Tr. 6). Subsequently, the driver moved the Jetta back into the right lane "without signaling." (Tr. 7). Trooper Stailey "activated [his marked vehicle's] lights and initiated a traffic stop" based on the "the speed" and the "improper lane change, failing to signal." *Id.*

Trooper Stailey approached the vehicle, advised the driver – Donegan – of the reasons for the stop, and requested his license and registration. Trooper Stailey observed that Donegan was "very anxious" and "very nervous." (Tr. 7, 23). As the trooper began

to write a warning, he also observed “a large tree air freshener hanging on the rearview mirror” and a “bottle of air freshener” lying on the center console. (Tr. 8). Trooper Stailey asked Donegan about his travel route, and Donegan stated that he “was coming from . . . Grass Valley, California” and “on his way to Charlottesville, Virginia.” (Tr. 9). When asked the reason for his trip, Donegan responded “that he had an aunt that was sick of cancer and that she was in the hospital there.” *Id.* When Trooper Stailey asked his aunt’s name, there was “a long pause and hesitation” before Donegan “said Virginia.” *Id.* When asked about “what type of cancer she had,” Donegan said he “didn’t know”; asked what hospital, Donegan again said “he didn’t know.” *Id.*

Trooper Stailey returned to his ISP vehicle and called for a check of Donegan’s “driver’s license and registration” to determine whether “the vehicle [wa]s properly registered” and he was “properly licensed,” a procedure he always followed on traffic stops. (Tr. 10). While awaiting a reply, Trooper Stailey called Trooper Brian LaRoche – one of the officers that had been with the stopped vehicle approximately one mile back. Trooper Stailey asked that Trooper LaRoche and his canine – trained to detect “the odor of narcotics” (Tr. 47) – come to the scene. Within two minutes, Trooper LaRoche and the canine were there. Trooper Stailey still had not received a response to his request for the license and registration check, a necessary prerequisite to the traffic stop being complete so as to allow Donegan to leave. At this point, approximately “five or six minutes” had elapsed since the trooper stopped him. (Tr. 13).

Trooper Stailey approached the Jetta, advised Donegan that a drug-detecting canine was present, and “asked him if he would care if [the officer] walked the dog around the car”; Donegan “said no[,] there’s nothing in here. I don’t care.” (Tr. 11). Trooper Stailey asked him to step out of the car, and he did. The canine walked around the perimeter of the Jetta and “alerted that he detected the odor of narcotics” on the driver’s side. (Tr. 48). Trooper Stailey advised Donegan that the canine had alerted, providing “probable cause to search” the vehicle and any containers inside. (Tr. 18).

Trooper Stailey removed a retractable sunshade in the rear of the Jetta, revealing three large suitcases. In the first suitcase, he found “numerous vacuum-sealed packages containing what appeared to be marijuana, based on [Trooper Stailey’s] training and experience.” (Tr. 19).

On January 24, 2008, the State charged Donegan with two class C felony offenses: possession of marijuana in an amount of more than ten pounds, and dealing marijuana in an amount of more than ten pounds. On March 6, 2008, Donegan filed a motion to suppress, asserting that the search of his vehicle was improper. At a hearing on May 5, 2008, Trooper Stailey and Trooper LaRouche testified to the foregoing facts. Trooper Stailey also testified that until the canine alerted, the detention of Donegan was no longer than an ordinary traffic stop.

On June 6, 2008, the trial court issued its written order denying Donegan’s motion to suppress. The trial court found that the initial stop was a valid traffic stop, following the officer’s observation of traffic violations; that the canine sniff did not extend the

duration of the original traffic stop and was not a search; and that based upon the canine's alert and Trooper Stailey's observations, the officers had probable cause to search the Jetta.

DECISION

We review de novo the interlocutory appeal of a trial court's ruling on the constitutionality of a search or seizure. *Membres v. State*, 889 N.E.2d 265, 268 (Ind. 2008). However, we give deference to a trial court's determination of the facts, which will not be overturned unless clearly erroneous. *Id.* Thus, we do not weigh the evidence but consider conflicting evidence most favorable to the trial court's ruling. *Id.*

1. The Stop¹

The Fourth Amendment of the U.S. Constitution and Article 1, Section 11, of the Indiana Constitution protect citizens from unreasonable searches and seizures. *Holder v. State*, 847 N.E.2d. 930, 935 (Ind. 2006). However, a police officer may stop a vehicle when he observes a traffic violation because a traffic violation creates probable cause for the stop. *U.S. v. Hernandez-Rivas*, 513 F.3d 753, 758-59 (7th Cir. 2008) ("officer has probable cause for a traffic stop when he has an objectively reasonable basis to believe a traffic law has been violated"); *State v. Quirk*, 842 N.E.2d 334, 340 (Ind. 2006) ("traffic violation, however minor, creates probable cause to stop the driver of the vehicle" under Indiana Constitution). The trial court did not err when it found that after Trooper Stailey

¹ Although Donegan does not begin with "the stop," the analysis necessarily begins there. Further, Donegan's conclusion is that the State failed to establish that "the arresting officer had reasonable suspicion that criminal activity was afoot when he pulled over and detained" Donegan. Donegan's Br. At 11.

observed Donegan commit traffic violations, “the initial stop was permissible.” (App. 28).

2. The Canine Sniff

Donegan appears to argue that his constitutional rights were violated by “the calling and implementing of the canine” without circumstances that warranted Trooper Stailey’s “particularized and objective basis for suspecting wrongdoing.” Donegan’s Br. at 8. Citing *Wilson v. State*, 847 N.E.2d 1064 (Ind. Ct. App. 2006), Donegan argues that his “Fourth Amendment and Article 1, Section 11 Indiana Constitution rights were violated when police officers detained him after his traffic stop, while a drug sniffing dog was brought to the scene.” Donegan’s Br. at 8. However, in *Wilson*, the officer had completed writing “the warning tickets some time before the dog had arrived. *Id.* at 1067. Here, Trooper Stailey had neither completed the warning ticket nor received a response to his request for a check on Donegan’s license and registration, a necessary prerequisite for Donegan’s release from the scene.

A canine sweep around the exterior of a vehicle does not require the officer’s reasonable, articulable suspicion because it does not intrude upon a Fourth Amendment privacy interest. *Myers v. State*, 839 N.E.2d 1146, 1149 (Ind. 2005) (citing *Illinois v. Caballes*, 543 U.S. 405 (2005)). So long as the “canine sweep was conducted before the traffic stop was completed,” there is no Fourth Amendment violation. *Myers*, 839 N.E.2d at 1149-50. The trial court found that the canine sweep was done in a timely manner and did not extend the duration of the traffic stop. The evidence supports the trial court’s

determination of those facts. *Membres*, 889 N.E.2d at 268. Accordingly, there was no Fourth Amendment violation in conducting the sweep.

To determine whether a search or seizure violates Indiana's constitutional provision, we evaluate "the 'reasonableness of the police conduct under the totality of the circumstances,'" considering "both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer had selected the subject of the search or seizure." *Myers v. State*, 839 N.E.2d 1146, 1153 (Ind. 2005) (quoting *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005)). The use of the canine to sniff Donegan's vehicle did not extend the duration of Donegan's detention for the officer to conduct his customary procedure for writing a warning ticket. Further, Donegan's unusually nervous behavior -- "very inconsistent with that of the normal motoring public" the officer dealt with "every day," (Tr. 24), the quantity of air freshener products observed, and Donegan's difficulty in responding to simple inquiries provided an articulable basis for utilizing the canine in a timely manner to sniff the vehicle. The use of the canine sniff was not unreasonable under the circumstances.

3. Warrantless Search

As Donegan correctly notes, the State bears the burden of proof to sustain a warrantless search. *See Middleton v. State*, 714 N.E.2d 1099, 1101 (Ind. 1999) (federal constitution); *Brown v. State*, 653 N.E.2d 77, 79 (Ind. 1995) (Indiana Constitution). He argues that the "State failed to meet its burden." Donegan's Br. At 11. We disagree.

Trooper Stailey observed Donegan traveling at a rate in excess of the speed limit and his failure to signal for a lane change -- facts justifying the execution of a traffic stop. During the course of the resulting traffic stop, and without extending the duration thereof, a canine trained to detect the odor of narcotics sniffed the exterior of Donegan's vehicle. The canine alerted for narcotics.

Federal jurisprudence has long provided the "automobile exception" to the Fourth Amendment search warrant requirement, "based on ready mobility and exigent circumstances." *Myers*, 839 at 1150 (citing *Carroll v. State*, 267 U.S. 132 (1925), and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)). "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Myers*, 839 at 1151 (quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996)). The alert of the trained narcotics-detecting canine provided probable cause for the search of Donegan's readily mobile vehicle alongside the interstate highway.

In *Brown*, our Supreme Court found that the warrantless search of an unoccupied automobile found parked along the public street in a residential neighborhood was unreasonable under the Indiana Constitution. 653 N.E.2d at 83. Subsequently, in *Myers*, our Supreme Court considered another warrantless search of a vehicle parked by the defendant on private property. It noted that the defendant driver "was present," had "unquestionably driven" the vehicle during the commission of traffic violations, and had "exhibited suspicious behavior during the traffic stop." 839 N.E.2d at 1154. It further

noted that the vehicle had been “positively identified by a police canine sniff test for the presence of drugs.” *Id.* It then concluded that the warrantless interior search of Myers’ vehicle was reasonable under the totality of the circumstances and did not violate the Indiana Constitution.

Here, Donegan was present; Donegan had been driving the vehicle when the traffic violations occurred; Donegan’s behavior and circumstances during his conversation with Trooper Stailey raised the suspicion of possible criminal activity; the stopped vehicle was alongside an interstate roadway; and a trained canine alerted – indicating the presence of narcotics. Accordingly, we conclude that the warrantless search of Donegan’s vehicle was not unreasonable under the Indiana Constitution.

Affirmed.

RILEY, J., and VAIDIK, J., concur.