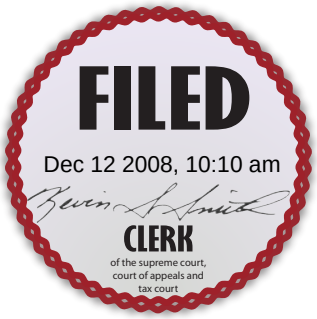

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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-0804-CR-391
	)	
ELIZABETH PULUTI,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William J. Nelson, Judge
Cause No. 49F07-0703-CM-36351

December 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

The State appeals the suppression of evidence following a traffic stop of Elizabeth Puluti. The State argues the court erred because the officers had reasonable suspicion to stop Puluti's car. We reverse.

FACTS[1] AND PROCEDURAL HISTORY

On March 3, 2007, at approximately 3:22 a.m., Puluti was driving her Mitsubishi Eclipse in downtown Indianapolis. While traveling westbound on Market Street, she stopped at a red traffic light at the intersection of Market Street and Illinois Street. What happened thereafter is disputed.

Puluti asserts she smoothly proceeded forward on Market Street after the light turned green without spinning her tires or fishtailing. She then stopped her car a half a block up Market to allow her passenger to exit the car across the street from his apartment building.

Officer Donald Weilhamer was standing on a sidewalk along Illinois Street, just south of the intersection with Market Street, talking to another police officer, Erich Hench. The officers claim Puluti's Mitsubishi accelerated quickly, spinning the tires, jumping, and fishtailing as she proceeded west on Market. Both officers got into their cars to follow the Mitsubishi. When they turned onto Market Street, the Mitsubishi had already stopped in the middle of the street, and a passenger was preparing to exit the car.

The officers stopped their cars and approached the Mitsubishi. When Officer

[1] Our review of the case was impeded by the State's failure to include a Statement of the Facts in its brief. We direct the State to follow the format for briefs provided in our appellate rules.

Weilhamer approached, he noted Puluti's breath smelled of alcohol, her speech was slurred, her eyes were bloodshot and glazed, her manual dexterity was impaired, her attitude was abusive, and her clothes were disheveled. Puluti refused to take a portable breath test, and she failed the horizontal gaze nystagmus test. Officer Weilhamer informed Puluti of Indiana's Implied Consent Law, but Puluti refused to submit to a chemical test for intoxication. Officer Weilhamer obtained a search warrant for Puluti's blood and took her to Wishard Hospital for a blood draw. The test result indicated her blood alcohol level was .24%.

The State charged Puluti with a driving infraction for an unsafe start, with Class A misdemeanor operating a vehicle while intoxicated, and with Class A misdemeanor operating a vehicle with a blood alcohol content of .15 percent or more. Puluti filed a motion to suppress. After hearing evidence, the court granted Puluti's motion in a docket entry that provided: "The Court having been duly briefed by State and Defense now grants Defendant's Motion to Suppress." (Appellant's Br. at 7.)[2]

DISCUSSION AND DECISION

When the State appeals the grant of a motion to suppress, it appeals a negative judgment. *State v. Litchfield*, 849 N.E.2d 170, 174 (Ind. Ct. App. 2006), *trans. denied* 860 N.E.2d 589 (Ind. 2006). We may reverse a negative judgment only if the court's ruling was contrary to law or if all the evidence and reasonable inferences lead to a conclusion opposite that of the trial court. *Id.* As we conduct our review, we may not

[2] The State did not provide a copy of the order in its Appendix. Accordingly we cite the copy at the back of the State's brief.

reweigh the evidence or reassess the credibility of the witnesses. *Id.* Rather, we consider only the evidence favorable to the trial court's ruling. *See State v. Quirk*, 842 N.E.2d 334, 340 (Ind. 2006) (we consider conflicting evidence most favorable to the trial court's ruling).

The State asserts the officers' traffic stop of Puluti was proper under both the federal constitution[3] and state constitution[4] because the officers observed Puluti commit two traffic infractions.

We agree with the State that police officers may stop vehicles in accordance with constitutional requirements if the officers observe a traffic infraction. *See id.* ("A traffic violation, however minor, creates probable cause to stop the driver of the vehicle."). However, we do not agree with the State that the trial court was required to view the evidence as the State does.

The State first insists the officers saw Puluti commit an "unsafe start." "A person

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[3] The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. *Cannon v. State*, 839 N.E.2d 185, 191 (Ind. Ct. App. 2005), *summarily aff'd* 866 N.E.2d 770, 774 (Ind. 2007). Nevertheless, a police officer may detain a person briefly to investigate without a warrant or probable cause "if the stop is based upon specific and articulable facts together with rational inferences from those facts, the intrusion is reasonably warranted, and the officer has reasonable suspicion that criminal activity may be afoot." *Id.* When determining whether reasonable suspicion existed, we consider whether the totality of the circumstances offer a particularized and objective basis for suspecting legal wrongdoing. *Barrett v. State*, 837 N.E.2d 1022, 1027 (Ind. Ct. App. 2005) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)), *trans. denied* 855 N.E.2d 995 (Ind. 2006). An officer had reasonable suspicion if "the facts known to the officer at the moment of the stop, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe criminal activity has occurred or is about to occur." *Cannon*, 839 N.E.2d at 191.

[4] Article I, Section 11 provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated . . . ." The purpose of this Section is "to protect from unreasonable police activity those areas of life that Hoosiers regard as private." *State v. Quirk*, 842 N.E.2d 334, 340 (Ind. 2006). We are to liberally construe this provision, and the State has the burden to demonstrate an intrusion was reasonable under the totality of the circumstances. *Id.*

may not start a vehicle that is stopped, standing, or parked until the movement can be made with reasonable safety." Ind. Code § 9-21-8-23.[5] When a driver accelerates from a stop on wet pavement such that the tires spin and the car fishtails, and the driver fails to let off of the gas pedal, leaving a police officer with the belief the driver is not in control of the vehicle, the officer can properly stop that driver for violating the unsafe start statute. *Beasey v. State*, 823 N.E.2d 759, 762 (Ind. Ct. App. 2005).

The State notes testimony from Officers Weilhamer and Hench, which the State asserts "established Defendant's violation of that statute and permitted the officers' stop of her vehicle for that infraction." (Appellant's Br. at 4.) But the State fails to acknowledge that all the evidence it cites contradicts the trial court's ruling and, thus, cannot be considered when reviewing the court's determination.

Rather, we must consider the evidence favorable to the court's ruling. Puluti was driving a 1996 Mitsubishi Eclipse, which she testified is a front wheel drive vehicle. Puluti testified she did not accelerate quickly and her car did not fishtail. As follow-up questions, the court asked Puluti:

> THE COURT: So are you saying Miss Puluti that a front wheel drive car cannot swerve back and forth from the rear end?
> DEFENDANT: Not that I know of. . . . . I know that I have never done it.
>
> * * * * *
>
> THE COURT: I am asking you. You don't think a front wheel drive car can ever well fishtail?
> DEFENDANT: No.

[5] Violation of that statute is a Class C infraction. Ind. Code § 9-21-8-49.

(Tr. at 30.) Because Puluti's testimony supports the finding Puluti did not commit an unsafe start, we cannot find error therein.

Next, the State asserts the manner in which Puluti stopped her car on Market Street constituted commission of a second infraction.[6] "[A] vehicle stopped or parked upon a roadway where there is an adjacent curb must be stopped or parked with the right-hand wheels of the vehicle parallel with and within twelve (12) inches of the right-hand curb." Ind. Code § 9-21-16-7.[7]

The State notes the officers testified that Puluti's car was "stopped in the middle of the street with the brake lights on." (Tr. at 5.) Upon further questioning Officer Weilhamer opined her car was "about twelve (12) feet" from the right hand curb, such that there was room to pull a car between her car and the curb. (*Id.* at 6.) He also noted there were available parking spaces along the north side of Market Street in the area where she stopped the car, such that Puluti could have stopped her car along the curb, rather than in the lane of travel.

On cross-examination,[8] Puluti testified as follows:

Q You said that you let your friend out?
A Yes.

[6] We note Puluti's Brief of Appellee does not respond to this second argument by the State. Where an appellee fails to respond to an appellant's argument, it is akin to failing to file a brief. *Cox v. State*, 780 N.E.2d 1150, 1162 (Ind. Ct. App. 2002). In such situations, we review the claim for *prima facie* error. *Merlington v. State*, 839 N.E.2d 260, 263 n.2 (Ind. Ct. App. 2005). *Prima facie* errors are those appearing "at first sight, on first appearance, or on the face of it." *Cox*, 780 N.E.2d at 1162. We apply this diminished standard because "it is not the duty of this court to controvert arguments presented by the appellant." *Merlington*, 839 N.E.2d at 263 n.2.

[7] Violation of this statute is also a Class C infraction. Ind. Code § 9-21-16-9.

[8] The only question asked on direct examination regarding her stopping the car was: "Did you stop in the street to let your friend out?" (Tr. at 28.) Puluti replied, "Yes." (*Id.*)

Q You were more than a foot away from the curb weren't you?
A I pulled in there a little yes. I didn't pull close enough but he's a big guy and he needs a little room to get out.
Q And there were parking spots available next to the curb?
A Yes however I always let him out in that same spot.
Q In the middle of the street?
A Well, no it was on the side right in front of the doors.
Q But you were still in the middle of the street?
A I wouldn't say in the middle.
Q You were in the lane of traffic?
A I didn't pull all the way in.
Q So you were in the lane of traffic?
COUNSEL: Judge she has answered the question. That has been asked and answered.
THE COURT: Yes or no were you in the lane of traffic?
DEFENDANT: I guess I might have been. I'm not sure.
THE COURT: So you don't know?
DEFENDANT: Yes.

(*Id.* at 28-29.) On re-direct examination, she testified:

Q Did you say that you pulled over towards the curb to let him out?
A Yes.
Q Were there cars parked along Market Street there?
A There were some cars.
Q Okay, you just don't know if there were any at that particular spot?
A Yes.
Q And you pulled over directly in front of the doors of the Block building correct?
A Yes.

(*Id*. at 29.)

Unlike with the alleged violation of the safe start statute, Puluti did not provide any testimony that she complied with the stopping or parking statute. Rather, she testified she "didn't pull all the way in" and "didn't pull close enough." There is no evidence Puluti did not violate the statutory requirement that she stop her car within

twelve inches of the curb.

Puluti's violation of Ind. Code § 9-21-16-7 provided a basis for the officers' traffic stop of Puluti. Accordingly, the court should not have granted Puluti's motion to suppress evidence, and we must reverse.

Reversed.

ROBB, J., and NAJAM, J., concur.