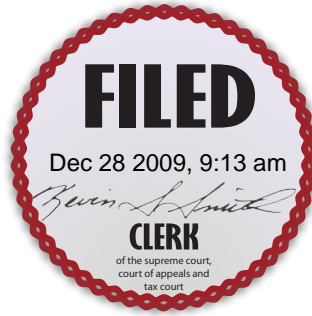


**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**JEFF SHOULDERS**  
Barber & Shoulders, LLP  
Evansville, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**JAMES E. PORTER**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL MILLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A04-0906-CR-321
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE VANDERBURGH SUPERIOR COURT  
The Honorable Wayne S. Trockman, Judge  
Cause No. 82D02-0708-FD-723

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**December 28, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Michael Miller appeals his conviction for operating a vehicle while intoxicated as a class D felony.<sup>1</sup> Miller raises one issue, which we revise and restate as whether the trial court abused its discretion by admitting evidence obtained from an investigatory stop. We affirm.

The facts most favorable to the judgment follow. Shortly after midnight, on August 12, 2007, Vanderburgh County Deputy Sheriff Robert Clark was on patrol in his marked police vehicle in an area around a strip mall where there had been recent burglaries. Deputy Clark traveled westbound on a gravel access road behind the strip mall and observed Miller's vehicle facing north without his headlights activated behind the very west end of the strip mall. As Deputy Clark's police vehicle approached Miller's vehicle, Miller turned on his vehicle's headlights and began to drive away. Deputy Clark activated his marked police vehicle's emergency lights and initiated a traffic stop.

Deputy Clark approached Miller's vehicle, requested Miller's driver's license and registration for the vehicle, and asked Miller for his reason for being in that area at night. Miller stated that he had parked his vehicle to use his cell phone. Deputy Clark noticed a "strong odor of an alcoholic beverage coming from the passenger compartment of the vehicle." Transcript at 40. Deputy Clark returned to his police vehicle and performed a routine check of Miller's driver's license status and checked for warrants. Deputy Clark

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<sup>1</sup> Ind. Code § 9-30-5-1 (2004); Ind. Code § 9-30-5-3 (2004) (subsequently amended by Pub. L. No. 82-2004 § 1 (eff. July 1, 2008)).

discovered that Miller had “two unrelated misdemeanor warrants out of Vanderburgh County” and that Miller’s “driver’s license was suspended.” Id.

Deputy Clark searched Miller’s pockets, waistband, and socks, and removed all of his personal belongings. As a result of the search, Deputy Clark discovered prescription medications. Three field sobriety tests—the horizontal gaze nystagmus, the walk and turn, and the one leg stand—were administered to Miller. Miller failed the three field sobriety tests. Miller was also administered a BAC DataMaster breath test which revealed that he had a blood alcohol content of 0.10.

On August 13, 2007, the State filed an information charging Miller with: Count I, possession of oxycodone as a Schedule II controlled substance as a class D felony; Count II, possession of hydrocodone with acetaminophen as a Schedule III controlled substance as a class D felony; and Count III, operating a vehicle with an alcohol concentration equivalent to at least 0.08 as a class C misdemeanor. Later, the State filed an information for an enhancement of Count III to operating a vehicle while intoxicated as a class D felony based upon Miller’s previous conviction of operating a vehicle while intoxicated.

On December 5, 2007, Miller filed a motion to suppress evidence obtained as a result of the August 11, 2007 traffic stop on the grounds that Deputy Clark had initiated an impermissible investigatory stop under the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution. On March 26, 2008, the trial court held a hearing on Miller’s motion to suppress evidence. At the suppression hearing, Miller argued that Deputy Clark did not have reasonable suspicion “that criminal activity may be afoot.” Transcript at 29.

Deputy Clark testified at the hearing that the businesses in the area of the strip mall closed by 10:00 p.m. Deputy Clark also testified that none of the businesses were open and that he did not see any lights on in any of the businesses at the time he was patrolling the area and observed Miller's vehicle. In addition, Deputy Clark testified that he had "personal knowledge" of "say five, six, seven" recent attempted burglaries or thefts "of buildings in that area." Id. at 6. Deputy Clark testified that he had spoken with detectives who provided him with information that a restaurant located in a nearby building was burglarized on July 4, 2007. Deputy Clark also testified that "the old Wal-Mart business" in a nearby building was burglarized on July 6, 2007. Id. The restaurant and the vacant Wal-Mart building were "maybe the length of a football field" from the location that Deputy Clark observed Miller's parked vehicle on August 11, 2007. Id. at 7. Also, Deputy Clark testified that he was dispatched to a shoe store in the area in August 2006 and discovered that shoes had been stolen, and that another officer had interrupted two subjects burglarizing a storage facility in the area in 2005.

Following the suppression hearing, the trial court concluded:

The Court does believe that the facts taken together, the time of night, the location of the vehicle, where it was parked, the fact that the lights came on and the vehicle was driven away as soon as the officer approached, the previous crimes as reported to have been committed in the same area as recently as approximately thirty days prior, would lead a reasonable person to be suspicious that criminal activity could be afoot.

Id. at 31-32. The trial court denied Miller's motion to suppress evidence.

On March 13, 2009, a bench trial was held on count III and, upon motion by the State, the trial court dismissed counts I and II. At trial, Miller objected to the admission of the

evidence obtained as a result of the traffic stop on the basis that the stop was an illegal investigatory stop. The trial court overruled the objection and later found Miller guilty of operating a vehicle while intoxicated a class D felony. On May 19, 2009, the trial court sentenced Miller to two years in the Indiana Department of Correction, and the court ordered Miller to an alcohol abuse probation services (AAPS) program until January 24, 2010, with the balance of the sentence suspended. The trial court also stated that it would convert Miller's class D felony conviction to a class A misdemeanor conviction if he successfully completed his AAPS sentence.

The sole issue is whether the trial court abused its discretion by admitting evidence obtained from the investigatory stop. The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs "where the decision is clearly against the logic and effect of the facts and circumstances" before the court. Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001). In making this determination, this court does not reweigh evidence and considers conflicting evidence in a light most favorable to the trial court's ruling. Cole v. State, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007). Moreover, this court considers evidence from the trial as well as evidence from the suppression hearing that is not in direct conflict with the trial evidence. Kelley v. State, 825 N.E.2d 420, 427 (Ind. Ct. App. 2005).

Miller argues that the trial court improperly denied his motion to suppress evidence obtained from an investigatory stop. Miller argues that Deputy Clark lacked reasonable suspicion to conduct an investigatory stop of Miller and that Miller's

constitutional rights against unreasonable search and seizure were violated. Specifically, Miller argues that Deputy Clark “had no reason to think a crime had been committed before stopping Miller.” Appellant’s Brief at 4. Miller argues that “Deputy Clark stopped Miller solely because of Miller’s presence in an area where Deputy Clark knew prior crimes had occurred” and that “Deputy Clark’s articulation of facts was insufficient to support a reasonable suspicion of criminal activity as a matter of law.” Id. The State argues that the fact that Miller was parked “behind a closed business late at night creates a reasonable suspicion that criminal activity is occurring or is about to occur.” Appellee’s Brief at 6.

Generally a judicially issued search warrant is a condition precedent to a lawful search. Carter v. State, 692 N.E.2d 464, 466 (Ind. Ct. App. 1997). Thus, searches conducted “outside the judicial process” are *per se* unreasonable, subject to a few well delineated exceptions. Id. (citing Thompson v. Louisiana, 469 U.S. 17, 19-21, 105 S. Ct. 409, 410-411 (1984), reh’g denied; Fair v. State, 627 N.E.2d 427, 430 (Ind. 1993)). The State has the burden of demonstrating the existence of one of these exceptions. Id. (citing Chimel v. California, 395 U.S. 752, 762, 89 S. Ct. 2034, 2039 (1969), reh’g denied; Fyock v. State, 436 N.E.2d 1089, 1094 (Ind. 1982)). One of the recognized exceptions is the *Terry* investigatory stop. Id. (citing Shinault v. State, 668 N.E.2d 274, 276 (Ind. Ct. App. 1996)).

In Terry v. Ohio, the United States Supreme Court established the standard for determining the constitutionality of investigatory stops. 392 U.S. 1, 88 S. Ct. 1868 (1968). The Court ruled that the police may, without a warrant or probable cause, briefly

detain an individual for investigatory purposes if, based on specific and articulable facts, the officer has a reasonable suspicion of criminal activity.<sup>2</sup> Id. at 27, 88 S. Ct. at 1883. Reasonable suspicion exists 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 that criminal activity has occurred or is about to occur. Powell v. State, 841 N.E.2d 1165, 1167 (Ind. Ct. App. 2006). In judging the reasonableness of investigatory stops, courts must strike “a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law [enforcement] officers.” Carter, 692 N.E.2d at 466 (quoting Brown v. Texas, 443 U.S. 47, 50, 99 S. Ct. 2637, 2640 (1979)). When balancing these competing interests in different factual contexts, a central concern is “that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.” Id. (citing Brown, 443 U.S. at 51, 99 S. Ct. at 2640). Therefore, in order to pass constitutional muster, reasonable suspicion must be comprised of more than an officer’s general “hunches” or unparticularized suspicions. Terry, 392 U.S. at 27, 88 S. Ct. at 1883. Whether an investigatory stop is justified is determined on a case by case basis. Williams v. State, 745 N.E.2d 241, 245 (Ind. Ct. App. 2001). In making this determination, we consider the totality of the circumstances. Id.

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<sup>2</sup> Although Miller does not appear to make an independent state constitutional argument, the Terry rationale is applicable in determining the legality of investigatory stops under Article 1, Sec. 11 of the Indiana Constitution. See Wilson v. State, 670 N.E.2d 27, 29 (Ind. Ct. App. 1996); Taylor v. State, 639 N.E.2d 1052, 1054 (Ind. Ct. App. 1994).

We initially note that Miller was “seized” when Deputy Clark activated his police vehicle’s emergency lights and initiated a traffic stop. At that point, Williams was restrained by Deputy Clark’s show of authority and was not free to leave. Accordingly, in determining whether the investigatory stop was reasonable, we will consider only the events that occurred prior to Deputy Clark activating his police vehicle’s emergency lights and initiating a traffic stop of Miller’s vehicle. See id. (observing that the defendant was “seized” when a police officer ordered the defendant to stop because the defendant was restrained by the officer’s show of authority and not free to leave, and noting that the court would consider only the events that occurred prior to the defendant being ordered to stop in determining whether the investigatory stop was reasonable).

“Judicial interpretation of what constitutes ‘reasonable suspicion’ is fact-sensitive.” Bridgewater v. State, 793 N.E.2d 1097, 1100 (Ind. Ct. App. 2003) (citing Wilson v. State, 670 N.E.2d 27, 30-31 (Ind. Ct. App. 1996)), trans. denied. In this case, the record reveals that Deputy Clark was patrolling a strip mall shortly after midnight on August 12, 2007, and had knowledge of “say five, six, seven” attempted burglaries or thefts “of buildings in that area,” including a burglary of a restaurant on July 4, 2007, and an “old Wal-Mart business” on July 6, 2007. Transcript at 6. The businesses in the area of the strip mall closed by 10:00 p.m. and no lights were on in any of the businesses. The record also shows that Deputy Clark traveled on a gravel access road behind the strip mall and observed Miller’s vehicle parked without its headlights activated behind the very west end of the strip mall. As Deputy Clark’s police vehicle approached Miller’s vehicle, Miller turned on his vehicle’s headlights and began to drive away.



We conclude that the facts and circumstances set forth in the record would cause an ordinarily prudent person to believe that criminal activity had occurred or was about to occur.<sup>3</sup> See Hailey v. State, 521 N.E.2d 1318, 1320 (Ind. 1988) (finding sufficient evidence to justify an investigatory stop where a police officer observed a person walking down a street in a business district at approximately 1:30 a.m., noticed that the person acted suspiciously, and the person changed direction and increased his speed after seeing the officer). See also U.S. v. Hendricks, 319 F.3d 993, 1002 (7th Cir. 2003) (holding that the facts of the case, viewed in their totality, provided a police officer with reasonable suspicion to detain a vehicle's occupants where a caller reported a suspicious vehicle, the officer observed the vehicle parked behind a closed business at about 5:40 a.m., and the officer knew that several businesses in the area had been burglarized), cert. denied, 540 U.S. 856, 124 S. Ct. 149 (2003); U.S. v. Dawdy, 46 F.3d 1427, 1428-1430 (8th Cir. 1995) (concluding that a trooper had reasonable suspicion to stop the defendant where the

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<sup>3</sup> In support of his argument, Miller cites to Tumblin v. State, 664 N.E.2d 783 (Ind. Ct. App. 1996), and Williams v. State, 477 N.E.2d 96 (Ind. 1985), reh'g denied. In Tumblin v. State, the court held that the facts that a police officer observed two men walking in a high crime area at 1:28 a.m. and that when the men noticed the officer they turned and walked the other direction were insufficient to establish reasonable suspicion of criminal activity. 664 N.E.2d at 783-785. In Williams v. State, the Court held that the fact that police officers observed the defendant walking on a well-lit sidewalk in a high crime area which was partly residential and partly commercial at 1:30 a.m. with something tucked under his arm was insufficient to justify an investigatory stop. 477 N.E.2d at 98. The defendants in Tumblin and Williams were walking on public streets. Here, Miller was sitting in his parked vehicle without his headlights activated behind the west end of a strip mall where the businesses were closed and where he was observed by Deputy Clark who was traveling behind the strip mall on a gravel access road. Thus, we find this case distinguishable from Tumblin and Williams. See Tanner v. State, 228 S.W.3d 852, 858 n.5 (Tex. Ct. App. 2007) (observing that “[t]here is a considerable difference between an officer stopping a vehicle seen parked in a public parking lot . . . or a person walking late at night along a public sidewalk . . . and an officer stopping someone seen walking from behind private property well after the business was closed,” and holding that a police officer had reasonable suspicion to stop the defendant where the officer observed the defendant walk out from behind a darkened place of a private business at 3:00 a.m. and where there was nothing in the record to show that there was a public parking lot or other public access behind the business).

trooper observed the defendant's vehicle with its lights off parked after 10:00 p.m. on a Sunday night at the back of an otherwise deserted pharmacy parking lot and at some distance from the surrounding residences, where there had been previous burglary alarms at the pharmacy, and where the defendant started his vehicle and attempted to leave when the trooper's squad car entered the parking lot), cert. denied, 516 U.S. 872, 116 S. Ct. 195 (1995); U.S. v. Briggman, 931 F.2d 705, 709 (11th Cir. 1991) (holding that a police officer had reasonable suspicion to stop the defendant where the officer noticed an occupied vehicle with its parking lights illuminated parked at 4:00 a.m. in a commercial lot shared by several business establishments, where the business establishments were closed for the night, the officer was aware that numerous larcenies and robberies recently had occurred in the surrounding business establishments, and the defendant exited the parking lot as the officer's vehicle approached the defendant's vehicle), cert. denied, 502 U.S. 938, 112 S. Ct. 370 (1991). Therefore, Deputy Clark had reasonable suspicion to stop Miller, and the trial court did not abuse its discretion by admitting the evidence obtained as a result of the stop.

For the foregoing reasons, we affirm Miller's conviction for operating a vehicle while intoxicated as a class D felony.

Affirmed.

MATHIAS, J., and BARNES, J., concur.