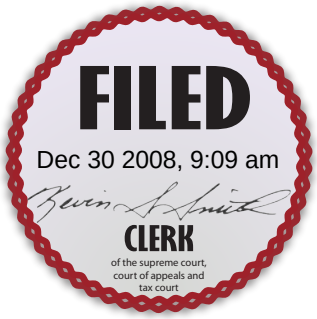

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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 02A04-0807-CR-447
	)	
ALBERT P. VILLAREAL,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Marcia L. Linsky, Magistrate
Cause No. 02D04-0709-CM-5518

December 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

The State of Indiana appeals the trial court's grant of a motion to suppress filed by Albert P. Villareal. The State raises one issue, which we revise and restate as whether the trial court erred when it granted the motion to suppress. We reverse and remand.

The relevant facts follow. On September 4, 2007, Fort Wayne Vice and Narcotics Detective Jeffrey J. Ripley stopped Villareal for speeding. As Detective Ripley approached Villareal's vehicle, he smelled a strong odor of burnt marijuana coming from the passenger compartment. Villareal provided Detective Ripley with his operator's license and registration. Detective Ripley asked Villareal whether he had marijuana in the vehicle, and Villareal responded that he did not. Detective Ripley then asked Villareal when he had last used marijuana, and Villareal responded approximately three months before. Detective Ripley repeated that he could smell marijuana coming from the vehicle, and Villareal admitted that he had a burnt roach in his ashtray and had smoked marijuana that morning. Villareal also admitted that he had a "quarter bag" of marijuana in a duffle bag in the rear seat of the car. Transcript at 9. Detective Ripley looked inside the duffle bag and found the marijuana.

The State charged Villareal with possession of marijuana as a class A misdemeanor[1] and possession of paraphernalia as a class A misdemeanor.[2] On December 11, 2007, Villareal filed a motion to suppress arguing that the search of his vehicle violated his rights secured by the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution because Detective Ripley failed to

[1] Ind. Code § 35-48-4-11 (2004).

[2] Ind. Code § 35-48-4-8.3 (2004).

inform Villareal about his right to consult with counsel about consenting to a search before a valid consent could be given. After a hearing, the trial court granted the motion.

The issue is whether the trial court erred when it granted Villareal's motion to suppress. When appealing the trial court's granting of a motion to suppress, the State appeals from a negative judgment and must show that the ruling was contrary to law. State v. Augustine, 851 N.E.2d 1022, 1025 (Ind. Ct. App. 2006). We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that reached by the trial court. Id. We neither reweigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence most favorable to the judgment. Id.

A. Indiana Constitution

Article 1, Section 11 of the Indiana Constitution 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; and no warrant shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Miller v. State, 846 N.E.2d 1077, 1080 (Ind. Ct. App. 2006), trans. denied. "Although this language tracks the Fourth Amendment [to the United States Constitution] verbatim, we proceed somewhat differently when analyzing the language under the Indiana Constitution than when considering the same language under the Federal Constitution." Id. (quoting Trimble v. State, 842 N.E.2d 798, 803 (Ind. 2006), adhered to on reh'g, 848 N.E.2d 278 (Ind. 2006)). Whereas the Fourth Amendment places focus on a defendant's reasonable expectation of privacy, "we focus on the actions of the police officer,

concluding that the search is legitimate where it is reasonable given the totality of the circumstances." Id. (quoting Trimble, 842 N.E.2d at 803).

The State argues that a Pirtle advisement was not required in this instance because Officer Ripley had probable cause to search the vehicle when he detected a strong odor resembling burnt marijuana. Villareal, on the other hand, maintains that he was in custody when Officer Ripley interrogated him about the smell of burnt marijuana and that, therefore, Officer Ripley violated his right to a Pirtle advisement.

"Under the Indiana Constitution, 'a person in custody must be informed of the right to consult with counsel about the possibility of consenting to search before a valid consent can be given.'" Id. (quoting Joyner v. State, 736 N.E.2d 232, 241 (Ind. 2000)); Pirtle v. State, 263 Ind. 16, 28, 323 N.E.2d 634, 640 (1975). In Pirtle, defendant Robert Pirtle was arrested for possession of a stolen car. At the police station, after Pirtle had requested an attorney but before he could consult with that attorney, Pirtle was questioned and consented to a search of his apartment. During the search of his apartment, officers found evidence linking Pirtle to a prior homicide. Pirtle was charged and convicted of murder. On appeal, Pirtle argued that his consent to the search of his apartment was not validly obtained because he was denied an opportunity to consult with counsel before consenting to a search. 263 Ind. at 23, 323 N.E.2d at 637. The Indiana Supreme Court agreed with Pirtle and reversed his conviction. In doing so, the Court stated:

> [A] person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent. This right, of course, may be waived, but the

> burden will be upon the State to show that such waiver is explicit, and, as in Miranda, the State will be required to show that the waiver was not occasioned by the defendant's lack of funds.

263 Ind. at 29, 323 N.E.2d at 640.

Here, the State correctly points out that Villareal did not consent to the search of his vehicle and that Pirtle is therefore inapposite. Moreover, we note that if probable cause existed, the vehicle could have been searched without the necessity of obtaining a warrant. State v. Hawkins, 766 N.E.2d 749, 750-751 (Ind. Ct. App. 2002) (citing Maryland v. Dyson, 527 U.S. 465, 119 S. Ct. 2013 (1999)). Probable cause to search a vehicle authorizes the search of every part of the vehicle as well as closed containers there that may conceal the object of the search. See Krise v. State, 746 N.E.2d 957, 964 (Ind. 2001) (citing United States v. Ross, 456 U.S. 798, 852, 102 S. Ct. 2157 (1982); California v. Acevedo, 500 U.S. 565, 572, 111 S.Ct. 1982 (1991)). We conclude that Detective Ripley had probable cause to search the vehicle.

In Miller, an officer observed the defendant driving at night without his headlights on. After pulling the defendant over, the officer observed the defendant and a male passenger lunge forward "as if they were stuffing something under the seat." Miller, 846 N.E.2d at 1079. As the officer approached the vehicle and asked for identification, he detected the odor of marijuana emanating from the vehicle. He asked the defendant and the passenger to step out of the vehicle, handcuffed the men, and radioed for backup. The officer observed a plastic bag containing what appeared to be pills sitting in the vehicle's ashtray. He then asked the defendant for consent to search the vehicle. The defendant consented, and the officer discovered a plastic bag containing marijuana

underneath the driver's seat. After his motion to suppress was denied, the defendant was convicted of Class D felony maintaining a common nuisance, two counts of Class D felony possession of a controlled substance, Class A misdemeanor possession of marijuana, and Class C misdemeanor illegal consumption of an alcoholic beverage.

On appeal, the defendant argued that the warrantless search of his vehicle violated his rights under both the Indiana Constitution and the Fourth Amendment. We reasoned that the defendant's consent was invalid because, having been handcuffed, the defendant was "in custody" for purposes of the Pirtle requirement and was thus entitled to be informed of his right to consult with counsel before consenting to the search. Id. at 1081. However, we determined that this invalid consent did not give rise to a reversal because there was probable cause for the police to search his vehicle. Id.

"Probable cause to search exists where the facts and circumstances within the knowledge of the officer making the search, based on reasonably trustworthy information, are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed." Id. at 1081-1082. "[W]e have no hesitation in deciding that when a trained and experienced police officer detects the strong and distinctive odor of burnt marijuana coming from a vehicle, the officer has probable cause to search the vehicle." Id. at 1082.

In the present case, when Detective Ripley approached Villareal's vehicle, he smelled a strong odor of burnt marijuana coming from the passenger compartment. We hold that, under our reasoning in Miller, probable cause existed to justify the warrantless

search of Villareal's vehicle and that the search was therefore reasonable under the Indiana Constitution. See, e.g., id.

B. Fourth Amendment

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Id. Specifically, it reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id. (quoting U.S. CONST. amend. IV). "The reasonableness of the search requires that the subject of the search has exhibited an actual subjective expectation of privacy that society as a whole is prepared to recognize as objectively 'reasonable.'" Id. at 1082-1083 (quoting Trimble, 842 N.E.2d at 801; Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507 (1967) (Harlan, J., concurring)). "The Fourth Amendment does not protect objects, activities, or statements that a citizen has exposed to the 'plain view' of outsiders because the individual has expressed no intention of keeping those activities private." Id. at 1083 (quoting Trimble, 842 N.E.2d at 801).

As discussed in Miller, we have held that a police officer's detection of the strong and distinctive odor of marijuana coming from a vehicle establishes probable cause to search the vehicle. Id.; State v. Hawkins, 766 N.E.2d 749, 752 (Ind. Ct. App. 2002). There, we further stated: "[t]hat is true under *both* the Fourth Amendment of our federal constitution and under Article 1, Section 11 of the Indiana Constitution." Miller, 846 N.E.2d at 1083. As such, we conclude that Detective Ripley's warrantless search of

Villareal's vehicle was supported by probable cause and therefore did not violate the Fourth Amendment. See, e.g., id.

We hold that Detective Ripley had probable cause to justify a warrantless search under both Article 1, Section 11 of the Indiana Constitution and the Fourth Amendment. Accordingly, we reverse the trial court's grant of Villareal's motion to suppress.

Reversed and remanded.

ROBB, J. and CRONE, J. concur