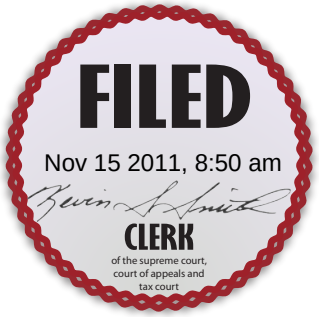


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| JASON ROSS, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 12A05-1102-CR-82 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE CLINTON SUPERIOR COURT
The Honorable Justin H. Hunter, Judge
Cause No. 12D01-1004-FD-59

**November 15, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

This case addresses the question of what constitutes a reasonable suspicion such that an officer may conduct an investigatory stop of a vehicle irregularly parked in an otherwise empty parking lot of a closed gas station/convenience store after midnight, where the driver slouched down and began to pull away upon seeing the officer. Here, the defendant, Jason Ross, was arrested following the stop and the ensuing search that produced a marijuana pipe. The State charged him with operating a vehicle as a habitual traffic violator ("OWHTV") and possession of drug paraphernalia. The trial court denied his pretrial motion to suppress the evidence seized during the stop and convicted him as charged.

Ross now appeals, claiming that the trial court erred in admitting the evidence seized as a result of what he alleges to be an unconstitutional traffic stop. Finding that the officer had reasonable suspicion to conduct the stop, we affirm.

## Facts and Procedural History

After midnight on August 23, 2009, Clinton County Sheriff's Deputy Robert Mitchell observed a truck parked askew across several spaces in the parking lot of a local gas station/convenience store. The truck had no interior or exterior lights on and had only one occupant. The store had been closed for over an hour, and Deputy Mitchell was aware of incidents of broken windows and activated burglar alarms in that area in the past. When he passed by the truck at a distance of about five feet, he observed a person sitting in the driver's seat slouching down as if to avoid detection. Immediately thereafter, the deputy saw the truck's brake lights illuminate, and he decided to go back and investigate.

As he approached the truck, the driver began to pull away. When the truck stopped, Deputy Mitchell asked the driver for his license, and the driver, Ross, stated that he did not have a driver's license. Instead, he produced an identification card and gave it to the deputy. He explained that he had driven from a nearby Wal-Mart and had pulled over merely to make a cell phone call. Deputy Mitchell immediately radioed dispatch and learned that Ross was a habitual traffic violator ("HTV") with a suspended license and a history of drug offenses. The deputy noted that Ross appeared nervous and sweaty despite the cool weather and his lightweight clothing. He also observed that Ross stuttered and did not make direct eye contact with him when he spoke. Ross gave consent for Deputy Mitchell to search his truck, and the deputy immediately detected a marijuana odor. Underneath the driver's seat, he found a wooden box containing a "one hitter" marijuana pipe. State's Ex. 2.

On April 8, 2010, the State charged Ross with class D felony OWHTV and class A misdemeanor possession of paraphernalia. Ross filed a motion to suppress the evidence seized as a result of the traffic stop, which the trial court denied. On February 4, 2011, the trial court found him guilty as charged. Ross now appeals. Additional facts will be provided as necessary.

**Discussion and Decision**

Ross contends that the trial court erred in denying his motion to suppress. However, it is more properly stated as a challenge to the trial court's decision to admit the evidence seized as a result of the traffic stop. *Shell v. State*, 927 N.E.2d 413, 418 (Ind. Ct. App. 2010). In reviewing a trial court's ruling on the admissibility of evidence, we do not reweigh the

evidence; rather we determine if there is substantial evidence of probative value to support the trial court's ruling. *Id*. We look to the totality of the circumstances and consider all uncontroverted evidence together with conflicting evidence that supports the trial court's decision. *Id.*

"The Fourth Amendment[1] prohibits unreasonable searches and seizures by the government, and its safeguards extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *L.W. v. State*, 926 N.E.2d 52, 55 (Ind. Ct. App. 2010). Both Ross and the State agree that the stop involved in this case was an "investigatory" or "*Terry* stop," based on U.S. Supreme Court case of *Terry v. Ohio*, 392 U.S. 1 (1968). In conducting a *Terry* stop, "a police officer may briefly detain a person for investigatory purposes without a warrant or probable cause if, based upon specific and articulable facts together with rational inferences from those facts, the official intrusion is reasonably warranted and the officer has a *reasonable suspicion* that criminal activity 'may be afoot.'" *L.W.*, 926 N.E.2d at 55 (quoting *Terry*, 392 U.S. at 21-22) (emphasis added).

> The "reasonable suspicion" requirement for a *Terry* stop is satisfied when the facts known to the officer, 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. Reasonable suspicion entails something more than an inchoate and unparticularized suspicion or hunch, but considerably something less than proof of wrongdoing by a preponderance of the evidence.

*Rich v. State*, 864 N.E.2d 1130, 1132 (Ind. Ct. App. 2007). Reasonable suspicion sufficient

[1] We agree with the State's contention that Ross waived any Indiana constitutional claim for failure to raise and develop a separate analysis of it in his appellant's brief. Ind. Appellate Rule 46(A)(8). *See also Micheau v. State*, 893 N.E.2d 1053, 1059 n.8 (Ind. Ct. App. 2008), *trans. denied* (2009).

to justify an investigatory stop is also less demanding than a showing of probable cause. *Ertel v. State*, 928 N.E.2d 261, 264 (Ind. Ct. App. 2010), *trans. denied*.

We review the trial court's ultimate determination regarding reasonable suspicion de novo. *Moultry v. State*, 808 N.E.2d 168, 171 (Ind. Ct. App. 2004). If the facts known by the police at the time of the investigatory stop are such that a person of reasonable caution would believe the action taken was appropriate, the Fourth Amendment is satisfied. *Rich*, 864 N.E.2d at 1132.

Here, Ross was sitting in the driver's seat of his truck after midnight with the lights off. His truck was parked askew across the parking spaces in the parking lot of a gas station/convenience store that had been closed for over an hour. The truck was five feet from the roadway, and when Deputy Mitchell drove by him, Ross slouched down in the driver's seat. Immediately thereafter, Ross turned on the ignition, and when Deputy Mitchell observed the brake lights, he decided to investigate. As he approached Ross's truck, Ross began to pull away.[2] There is nothing inherently criminal about sitting in a parking lot late at night. However, the lateness of the hour, the location and position of Ross's vehicle, the deputy's knowledge of other late-night incidents of broken windows and burglar alarms in the area, Ross's conduct in slouching to avoid detection, and his conduct in starting the ignition and attempting to pull away were articulable facts and circumstances which

[2] Ross cites an unpublished decision as support for his contention that his conduct of sitting in a parked vehicle was not reasonably suspicious. Appellant's Br. at 4. This was improper. *See* Ind. Appellate Rule 65(D) ("Unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and *shall not be cited* to any court except by the parties to the case to establish *res judicata*, collateral estoppels, or law of the case") (emphasis added).

combined to support a finding that Deputy Mitchell was acting on reasonable suspicion and not merely on a hunch. *See McKnight v. State*, 612 N.E.2d 586, 588 (Ind. Ct. App. 1993) (among the factors supporting a finding that officer had reasonable suspicion to stop defendant's vehicle were the late hour, relatively empty streets, and defendant's location in vicinity of reported incident), *trans. denied*. *See also Arcuri v. State*, 775 N.E.2d 1095, 1098 (Ind. Ct. App. 2002) (defendant's conduct of slouching down in vehicle when he saw officer was indication of evasiveness contributing to finding of reasonable suspicion), *trans. denied*. Thus, we conclude that a person of reasonable caution, presented with the facts and circumstances known to the deputy at the time, would have held a reasonable suspicion that Ross had committed or was about to commit a crime. Based on the foregoing, we conclude that the trial court did not abuse its discretion in admitting the evidence seized as a result of the investigatory stop. Accordingly, we affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.