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IN THE
COURT OF APPEALS OF INDIANA

DAVID A. SHARTZER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 14A01-0701-CR-32
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DAVIESS SUPERIOR COURT
The Honorable Dean A. Sobeki, Judge
Cause No. 14D01-0505-CM-410

December 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

David Shartzer was convicted of possession of marijuana as a class A misdemeanor. As the sole issue on appeal, Shartzer challenges the trial court's admission into evidence of a marijuana cigarette that was found inside a cigarette box taken from his front, shirt pocket during a search incident to arrest.

We affirm.

An arrest warrant for Shartzer was issued in Pike County, Indiana. On May 2, 2005, Officer Terry Carr of the Washington Police Department was assigned to watch a home in Washington, Indiana, where Shartzer was expected to arrive in a red truck. When a red truck arrived at the specified location as expected, Officer Carr initiated contact with the driver and confirmed his belief that the individual was Shartzer. Officer Carr then confirmed the warrant. Officer Carr placed Shartzer under arrest pursuant to the authority granted by the warrant and conducted a search incident thereto. During the search incident to the arrest, Officer Carr found a cigarette box in Shartzer's front, shirt pocket. Officer Carr opened the cigarette box and discovered a partially smoked, hand-rolled marijuana cigarette. Subsequent testing confirmed that the cigarette contained .12 grams of marijuana.

On May 5, 2005, the State charged Shartzer with possession of marijuana as a class A misdemeanor. At the conclusion of a bench trial conducted December 11, 2006, Shartzer was found guilty as charged. The court subsequently sentenced Shartzer to one year, with all but thirty days suspended.

Shartzer contends that the trial court erred in admitting into evidence the marijuana discovered in a cigarette box taken from his front shirt pocket during the

search incident to arrest because he claims the search violated his Fourth Amendment rights[1] in that the search exceeded the bounds of a search incident to arrest. Specifically, Shartzer argues that he had a reasonable expectation of privacy with regard to the contents of the cigarette box and that it was unreasonable for Officer Carr to look inside the cigarette box because it was not apparent to him that the box contained contraband. In support of his argument, Shartzer relies on *Barfield v. State*, 776 N.E.2d 404 (Ind. Ct. App. 2002), wherein the court held that the search of a cigarette box during a *Terry* stop (i.e., an investigatory stop) exceeded the bounds of a legitimate pat-down search. Shartzer asserts that the principles and limitations applicable to a pat-down search during a *Terry* stop are applicable to a search incident to a valid arrest.[2]

"The admission or exclusion of evidence is a matter left to the sound discretion of the trial court, and we will reverse only upon an abuse of that discretion. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and

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[1] In his appellate brief, Shartzer identifies the issue presented for review as whether his rights under both the federal and state constitutions were violated by an unreasonable search and seizure that exceeded the scope of a search incident to arrest. In the argument section of his brief, however, Shartzer notes the protection afforded by article 1, section 11 of the Indiana Constitution, but does not provide a separate analysis under that provision. In his reply brief, Shartzer, while conceding authority contrary to his position under Fourth Amendment jurisprudence, maintains that "as raised in [his] initial brief" (*Appellant's Reply Brief* at 2), the Indiana Constitution provides greater protections and that his rights thereunder were also violated. Shartzer then sets forth the standard under the Indiana Constitution and analyzes the facts of his case in light of that standard. As noted, however, Shartzer did not provide a separate, distinct analysis under article 1, section 11 of the Indiana Constitution in his initial brief; presenting the analysis in a reply brief is not the appropriate manner in which to bring the issue before this court for review. *See* Ind. Appellate Rule 46(c) ("No new issues shall be raised in the reply brief"). Shartzer has therefore waived his state constitutional argument for review.

[2] The trial court rejected Shartzer's argument as to the applicability of the *Barfield* decision, stating:

> I'm going to overrule the objection. Barfield applies to a "Terry" search clearly. The circumstances we have before us is a search incident to arrest, and that is, factually, different, and the level of search, certainly, that is allowed under the Indiana and federal constitutions are different from a pat down search and a search incident to arrest.

Transcript at 25-26.

circumstances." *Greenboam v. State*, 766 N.E.2d 1247, 1250 (Ind. Ct. App. 2002) (citations omitted), *trans. denied*. When reviewing a trial court's ruling on the validity of a search, we consider the evidence most favorable to the trial court's ruling and any uncontradicted evidence to the contrary to determine whether there is sufficient evidence to support the ruling. *Navarro v. State*, 855 N.E.2d 671 (Ind. Ct. App. 2006).

The Fourth Amendment generally prohibits warrantless searches. *See U.S. v. Robinson*, 414 U.S. 218 (1973). A search incident to a lawful arrest, however, is a traditional exception to the warrant requirement. *Id*. Pursuant to a search incident to a lawful arrest, the arresting officer has "unqualified authority" to search the person of the arrestee and the area within the control of the arrestee. *Id*. at 225. It has been held that under this exception, when an arrest is made, it is reasonable for an arresting officer to search the person arrested in order to remove weapons or "'to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.'" *Id*. at 226 (*quoting Chimel v. California*, 395 U.S. 752, 762-63 (1969)).

In *Robinson*, a police officer initiated a traffic stop and ultimately arrested the driver for operating a vehicle after revocation of his operator's permit and for obtaining a permit by misrepresentation. After effecting a full-custody arrest, the officer conducted a search incident to that arrest. During the search, the officer felt an object in the left breast pocket of the driver's coat, but could not tell what it was. The officer removed the object and discovered that it was a "crumpled up cigarette package." *Id*. at 223. While the officer had no idea what was in the package, he knew it did not contain cigarettes. He then opened the cigarette pack and discovered several gelatin capsules containing heroin.

The Supreme Court held that the discovery of the heroin "did not offend the limits imposed by the Fourth Amendment." *U.S. v. Robinson*, 414 U.S. at 224. The Court rejected the notion that the stricter standards applicable to investigatory stops[3] carried over to searches incident to a lawful arrest, finding that the purpose, character, and extent of the two types of searches were distinct. *U.S. v. Robinson*, 414 U.S. 218 (*citing Terry v. Ohio*, 392 U.S. 1 (1968)). Reviewing precedent spanning nearly forty years, the Court noted the broad authority to search a person incident to arrest, acknowledging that "[t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." *Id*. at 234. The Court noted that it had previously held that during a search incident to arrest "'it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.'" *U.S. v. Robinson*, 414 U.S. at 226 (*quoting Chimel v. California*, 395 U.S. at 762-63). In applying these principles to the facts of the case, the court held:

> Having in the course of a lawful search [incident to arrest] come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as "fruits, instrumentalities, or contraband" probative of criminal conduct.

[3] During an investigatory stop, also referred to as a *Terry* stop, an officer is authorized to conduct a limited frisk of outer clothing to check for weapons if the situation reasonably warrants such intrusion. *See U.S. v. Robinson*, 414 U.S. 218. The limited scope of a frisk or pat-down during an investigatory stop is based, in part, on the fact that the investigatory stop is based on less than probable cause to arrest. In such case, a search for weapons "must . . . be strictly circumscribed by the exigencies which justify its initiation." *Id*. at 227-28 (*quoting Terry v. Ohio*, 392 U.S. at 25-26).

Id. at 236 (citations omitted).

As in *Robinson*, here, during a valid search incident to a lawful arrest,[4] Officer Carr discovered a cigarette box in Shartzer's front, shirt pocket. As part of the search incident to the arrest, Officer Carr was entitled to inspect the cigarette box. His inspection revealed the partially smoked marijuana cigarette. Officer Carr was thus entitled to seize the marijuana cigarette. In his reply brief, Shartzer acknowledges the *Robinson* holding as determinative of the outcome of this case with respect to the protections afforded by the Fourth Amendment. Given that Officer Carr was authorized to inspect the cigarette box, including opening it to verify its contents, as part of the search incident to arrest, the marijuana cigarette was properly discovered and seized. We therefore conclude that the trial court did not abuse its discretion in admitting the evidence of the marijuana cigarette.

The judgment is affirmed.

RILEY, J., and SHARPNACK, J., concur.

[4] Shartzer does not challenge the validity of the arrest warrant or the arrest itself.