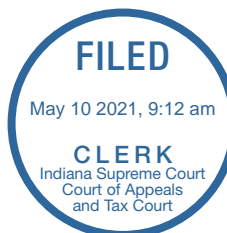


MEMORANDUM DECISION

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.



ATTORNEYS FOR APPELLANT

Yvette M. LaPlante
LaPlante LLP
Evansville, Indiana

Barry M. Blackard
Blackard & Brinkmeyer
Evansville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Megan M. Smith
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Thomas Frank Wagner,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 10, 2021

Court of Appeals Case No.
20A-CR-2027

Appeal from the
Vanderburgh Circuit Court

The Honorable
Kelli E. Fink, Magistrate

Trial Court Cause No.
82C01-2005-F3-2977

Kirsch, Judge.

- [1] In this discretionary interlocutory appeal, Thomas Frank Wagner (“Wagner”) appeals the trial court’s denial of his motion to suppress, which asked the trial

court to exclude evidence that was seized from Wagner’s vehicle and person after Wagner was stopped for driving on a fog line. Wagner raises two issues, which we restate as:

I. Whether the search of Wagner’s vehicle violated the Fourth Amendment to the United States Constitution; and

I. Whether the search of Wagner’s vehicle violated Article 1, Section 11 of the Indiana Constitution.

[2] We affirm.

Facts and Procedural History

[3] On May 9, 2020, Officer Ben Hallmark (“Officer Hallmark”) of the Evansville Police Department was patrolling a high-crime area in Evansville, Indiana around 2:00 a.m. when he noticed a black Pontiac G6 driven by Wagner exit the parking lot of the Econo Lodge motel. *Tr. Vol. II* at 4, 6-7. Officer Hallmark pulled up behind Wagner as Wagner was stopped at a stop light. *Id.* at 7. Officer Hallmark observed Wagner sit through an entire traffic light cycle without proceeding through the intersection during the green light even though there was no other traffic that impeded his ability to proceed. *Id.* Once Wagner resumed driving, Officer Hallmark continued following him because he found it “odd” that Wagner would sit through an entire traffic light cycle, so Officer Hallmark wanted to make sure that Wagner was not impaired. *Id.* at 13. Wagner pulled into a gas station, stopped at a pump, and sat in his car for three to four minutes. *Id.* at 7-8, 13-14. Officer Hallmark continued watching

Wagner from a parking lot across the street. *Id.* at 16. A sheriff's deputy pulled into the parking lot while Wagner was sitting in his car. *Id.* at 8. As soon as the sheriff's deputy left, Wagner also exited the gas station and continued driving down the street. *Id.* Officer Hallmark continued following Wagner and observed Wagner's vehicle cross the fog line. *Id.* at 8, 16. Believing Wagner could be impaired, Officer Hallmark stopped Wagner. *Id.* at 8, 18-19.

[4] Officer Hallmark approached the passenger side of Wagner's vehicle, and as he spoke to Wagner through the vehicle's window, he observed two orange syringe caps in the cup holder. *Id.* Officer Hallmark noticed that Wagner appeared to be nervous and asked Wagner to exit his vehicle. *Id.* at 9, 24-25. As Wagner exited the vehicle, Officer Hallmark walked around to the driver's side of the vehicle and observed a baggy with a white substance tucked inside the door pull. *Id.* at 9, 23. Because Officer Hallmark believed the baggy contained narcotics, he handcuffed Wagner and asked him if he had any weapons or other items "he should not have." *Id.* at 9-10. Wagner responded that he had methamphetamine and a syringe in his pocket. *Id.* at 10. Officer Hallmark searched Wagner, placed him in the patrol car, and read Wagner his Miranda warnings, which Wagner said he understood. *Id.* Wagner then told Officer Hallmark that there might be additional drugs inside his vehicle. *Id.* Officer Hallmark searched the vehicle and found more narcotics and a large box of syringes. *Id.* at 10, 21. The total time between Officer Hallmark first observing Wagner and then stopping him was between ten and fifteen minutes. *Id.* at 12.

[5] On May 11, 2020, the State charged Wagner with dealing in methamphetamine¹ as a Level 3 felony, dealing in a narcotic drug² as a Level 3 felony, unlawful possession of a syringe³ as a Level 6 felony, possession of a controlled substance⁴ as a Class A misdemeanor, and possession of marijuana⁵ as a Class B misdemeanor. *Appellant's Conf. App. Vol. II* at 18-21. On August 18, 2020, Wagner filed a motion to suppress evidence, asking the trial court to exclude from evidence any narcotics, items used to produce narcotics, and drug paraphernalia. *Tr. Vol. II* at 33-36. On September 10, 2020, the trial court heard Wagner's motion to suppress, and on September 29, 2020, it denied the motion. *Appellant's App. Vol. II* at 33-36, 46; *Tr. Vol. II* at 2-28. On October 20, 2020, Wagner filed a motion to certify the order for interlocutory appeal, which the trial court granted, and on December 4, 2020, we granted Wagner's motion for interlocutory appeal. *Appellant's App. Vol. II* at 13, 39-45, 49. Wagner now appeals.

Discussion and Decision

[6] We review a trial court's denial of a motion to suppress in a manner similar to review of other sufficiency issues. *Sanders v. State*, 989 N.E.2d 332, 334 (Ind.

¹ See Ind. Code § 35-48-4-1.1(a)(2), (d)(1).

² See Ind. Code § 35-48-4-1(a)(2), (d)(1).

³ See Ind. Code § 16-42-19-18(a), (b).

⁴ See Ind. Code § 35-48-4-7(a).

⁵ See Ind. Code § 35-48-4-11(a)(2).

2013). There must be substantial evidence of probative value to support the ruling of the trial court. *Id.* We do not reweigh the evidence, and we consider conflicting evidence most favorably to the trial court’s ruling. *Id.* We also consider undisputed evidence favorable to the defendant. *Harris v. State*, 60 N.E.3d 1070, 1072 (Ind. Ct. App. 2016), *trans. denied*. We review the trial court’s legal conclusions de novo. *State v. Brown*, 70 N.E.3d 331, 335 (Ind. 2017).

I. Fourth Amendment to United States Constitution

[7] Wagner contends that Officer Hallmark did not have reasonable suspicion to stop Wagner and conduct a warrantless search on Wagner’s vehicle and person. To justify an intrusion upon a private citizen’s constitutionally protected interests, the officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *Atkinson v. State*, 992 N.E.2d 899, 901 (Ind. Ct. App. 2013). Reasonable suspicion is determined on a case-by-case basis by looking at the totality of the circumstances but is generally satisfied when the facts known to the officer at the moment of the stop, along 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. *Id.* at 901-02.

[8] Officer Hallmark had reasonable suspicion supporting an investigatory stop of Wagner’s vehicle to resolve his concern that Wagner was driving while impaired. “[A]n officer may make a *Terry* stop of a vehicle to investigate an

offense other than a traffic violation, as long as the officer has reasonable, articulable suspicion that a crime is being or has been committed.” *State v. Campbell*, 905 N.E.2d 51, 55 (Ind. Ct. App. 2009), *trans. denied*. While on patrol, Officer Hallmark observed Wagner leaving a motel in a high-crime area at 2:00 a.m. *Tr. Vol. II* at 6-7. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (finding that a high crime area alone is insufficient to justify an investigatory stop but that it is a relevant consideration when determining the existence of reasonable suspicion); *Patterson v. State*, 958 N.E.2d 478, 487 (Ind. Ct. App. 2011) (finding that the time of day contributes to reasonable suspicion); *State v. Belcher*, 725 N.E.2d 92, 95 (Ind. Ct. App. 2000) (finding that the time of day and area are relevant to determining reasonable suspicion).

[9] Officer Hallmark then observed Wagner sit through an entire traffic light cycle without proceeding through the intersection even though no other traffic was impeding his ability to proceed. *Tr. Vol. II* at 7. Finding this “odd,” Officer Hallmark continued following Wagner to ensure that he was not impaired. *Id.* at 7, 13. Shortly after Officer Hallmark began following him, Wagner pulled into a gas station, stopped at a pump, and sat in his car for several minutes. *Id.* at 7-8, 13-16. As soon as a sheriff’s deputy who had also pulled into the gas station left, Wagner exited the gas station. *Id.* at 8, 15. Officer Hallmark believed Wagner was attempting to avoid the police. *Id.* at 15. Evasive behavior is a relevant factor in determining reasonable suspicion. *Wardlow*, 528 U.S. at 124. When Wagner exited the gas station, Officer Hallmark continued following him and observed Wagner’s vehicle cross the fog line. *Tr. Vol. II* at 8.

Believing Wagner could be impaired, Officer Hallmark initiated a traffic stop. *Id.* at 8, 18-19. Based on the totality of the circumstances, Officer Hallmark had reasonable suspicion to believe that Wagner was impaired.

[10] While each of these behaviors individually may appear harmless, taken together they constituted reasonable suspicion. *See Belcher*, 725 N.E.2d at 95 (finding that the totality of the circumstances gave rise to reasonable suspicion even though none of the circumstances individually would have done so). Wagner's odd behavior at the traffic light gave Officer Hallmark reason to continue to surveil Wagner. Wagner's unusual behavior at the gas station and seeming attempt to avoid law enforcement gave Officer Hallmark reason to suspect Wagner was possibly impaired. Once Wagner's vehicle crossed the fog line, Officer Hallmark had a reasonable belief that Wagner was driving while intoxicated and "not merely experiencing a 'momentary distraction[.]'" *Atkinson*, 992 N.E.2d at 903. Based on the totality of the circumstances, Officer Hallmark had reasonable suspicion that Wagner was under the influence of drugs or alcohol. *See Robinson v. State*, 5 N.E.3d 362, 368 (Ind. 2014) (finding that even though the movement of the defendant's vehicle "could have been attributable to driver distraction or some other more innocuous cause, *Terry* does not require absolute certainty of illegal activity, but rather reasonable suspicion"); *Baran v. State*, 639 N.E.2d 642, 644 (Ind. 1994) (holding that unsafe driving is sufficient to justify a brief investigatory stop). "[T]he commission of an actual infraction is not a prerequisite to a determination of reasonable suspicion to conduct a stop." *Atkinson*, 992 N.E.2d at 902.

[11] Wagner attempts to distinguish this case from previous cases involving drivers crossing the fog line by emphasizing the length of time Officer Hallmark followed him – ten to fifteen minutes - before Officer Hallmark saw Wagner cross the fog line. Wagner, however, ignores that during that time period, Officer Hallmark observed other suspicious behaviors, including the fact that Wagner sat through an entire traffic light cycle without proceeding through the intersection and sat at a gas pump until a nearby sheriff's deputy left the vicinity. Once that officer left the area, Wagner immediately began driving again. Officer Hallmark then observed Wagner swerve across the fog line. Officers are not required to know for certain that a driver is impaired or observe numerous erratic behaviors before they can initiate an investigatory stop. *See Robinson*, 5 N.E.3d at 368 (citing *Virginia v. Harris*, 558 U.S. 978 (2009) (Roberts, C.J., dissenting from denial of certiorari) (stating that police are not required to grant intoxicated drivers one free swerve). Based on the totality of the circumstances, Officer Hallmark had reasonable suspicion that Wagner was impaired and thus had reasonable suspicion to stop Wagner.

II. Indiana Constitution

[12] Although Article 1, Section 11 of the Indiana Constitution shares the same language as the Fourth Amendment, Indiana courts have interpreted and applied the state protection independently. *State v. Bulington*, 802 N.E.2d 435, 438 (Ind. 2004). “Instead of focusing on a defendant’s reasonable expectation of privacy, we focus on the actions of the police officer, and employ a totality-of-the-circumstances test to evaluate the reasonableness of the officer’s actions.”

Duran v. State, 930 N.E.2d 10, 17 (Ind. 2010). We give Article 1, Section 11 “a liberal construction in favor of protecting individuals from unreasonable intrusions on privacy.” *Rush v. State*, 881 N.E.2d 46, 52 (Ind. Ct. App. 2008). To determine reasonableness, we consider: “1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen’s ordinary activities, and 3) the extent of law enforcement needs.” *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005).

[13] The traffic stop of Wagner did not violate Article 1, Section 11 of the Indiana Constitution. The degree of concern or suspicion was high. Officer Hallmark observed several suspicious behaviors while following Wagner. First, Officer Hallmark found it “odd” that Wagner would sit through an entire traffic light cycle when no other traffic was around. *Tr. Vol. II* at 7, 13. This odd behavior gave rise to some suspicion that Wagner might be impaired and caused Officer Hallmark to continue following Wagner. Wagner then quickly pulled into a gas station, parked at a gas pump, and sat in his car for several minutes. *Id.* at 7-8, 13-16. As soon as a nearby sheriff’s deputy left the area, Wagner immediately began driving again. *Id.* at 8, 15. This seeming attempt to avoid law enforcement created further suspicion in Officer Hallmark that Wagner was impaired. Wagner then swerved and crossed the fog line. *Id.* at 8, 16. Believing Wagner was impaired, Officer Hallmark initiated a traffic stop. *Id.* at 8, 18-19. Based on the totality of Officer Hallmark’s observations of Wagner, the degree of suspicion was high.

[14] The degree of intrusion was not substantial because the initial intrusion -- a *Terry* stop -- was relatively minor. *Robinson*, 5 N.E.3d at 368; *see also State v. McCaa*, 963 N.E.2d 24, 34 (Ind. Ct. App. 2012) (finding the degree of intrusion caused by a traffic stop that lasted for twenty-five minutes and required the defendant to move his truck to a nearby gas station was not “disproportionately high”). Officer Hallmark only escalated the stop after he noticed what he believed to be syringe caps in the cup holder and methamphetamine in the door pull.

[15] Finally, law enforcement needs were also high. *See McCaa*, 963 N.E.2d at 34. Law enforcement has a strong interest in preventing alcohol-related accidents, and police should have every legitimate tool at their disposal to get drunk drivers off the road. *Robinson*, 5 N.E.3d at 368. Thus, Officer Hallmark faced a situation where the needs of law enforcement were high. Therefore, under the totality of the circumstances, Officer Hallmark’s conduct was reasonable, and the traffic stop did not violate Article 1, Section 11 of the Indiana Constitution. We conclude that the trial court did not abuse its discretion in denying Wagner’s motion to suppress.

[16] Affirmed.

Altice, J., and Weissmann, J., concur.