MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Richard D. Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

November 1, 2022

Court of Appeals Case No. 22A-CR-28

Appeal from the Wabash Superior Court

The Honorable Benjamin D.R. Vanderpool, Judge

Trial Court Cause No. 85D01-1908-F6-1221

Robb, Judge.

Case Summary and Issue

[1] Richard Smith filed a motion to suppress evidence in his criminal case. Smith raises one issue for our review in this interlocutory appeal: whether the trial court erred in denying his motion to suppress. Concluding that the trial court did not err, we affirm.

Facts and Procedural History

[2] On August 24, 2019, Deputy Matthew Cox of the Wabash County Sheriff's Department was traveling behind a blue Ford Mustang driven by Smith. Aaron Tooley was a passenger in Smith's vehicle at the time. After Deputy Cox pulled behind Smith, Smith slowed his vehicle to forty-nine miles per hour in a fifty-five miles per hour zone. Deputy Cox believed this was "an indicator of criminal activity[.]" Appellant's Appendix, Volume II at 63. Deputy Cox then checked the vehicle registration and discovered the vehicle belonged to Smith. Deputy Cox knew Smith "to be involved in the trafficking of large amounts of illegal narcotics, namely methamphetamine, and to be commonly armed with a firearm." *Id.* Deputy Cox had previously received information that Smith "has commonly concealed illegal drugs in magnetic boxes." Transcript of Evidence, Volume 2 at 16.

[3] Smith then pulled into a vehicle maintenance shop, the first publicly available place to pull into. Deputy Cox followed Smith into the parking lot. Deputy Cox pulled in behind Smith and both vehicles faced the same direction. *See* Exhibits,

Volume 1 at 17. But Deputy Cox testified that his vehicle remained near the entrance instead of pulling directly behind Smith and that he was "very conscious . . . to make sure to not block him in." Tr., Vol. 2 at 13. Deputy Cox was driving a marked police vehicle but did not initiate his lights. Deputy Cox then witnessed Smith, who had exited his vehicle, kneeling in front of another vehicle. Deputy Cox approached Smith on foot and Smith indicated to Deputy Cox that he was there to meet Mike Sadler to get work done on his car. However, both Smith and Tooley began talking on their phones and based on what Deputy Cox heard, he believed "they had absolutely no actual meeting [and] were essentially scrambling to get [Sadler] there." *Id.* at 18. This led Deputy Cox to believe they had simply pulled into that parking lot to evade him.

[4] Deputy Cox then requested back-up, and once additional officers arrived, Deputy Cox could clearly observe that Smith had knives on his person. Deputy Cox then had his K9 conduct a free-air sniff around the vehicle. The K9 positively alerted on the vehicle. Smith and his companion were then detained, and the vehicle was searched. Officers located methamphetamine and small plastic baggies in the vehicle and upon searching Smith's person found another small bag of methamphetamine, as well as a baggie containing a white powdery substance believed to be heroin.

[5] The State charged Smith with possession of methamphetamine and possession of a narcotic drug, both Level 6 felonies. The State also alleged that Smith was an habitual offender. Smith then filed a motion to suppress "as evidence all

items seized pursuant to the search of the vehicle . . . , observations and statements made during or as a result of the execution of the search as well as . . . evidence found on the Defendant during his detention and arrest[.]" Appellant's App., Vol. II at 157. Smith argued that Deputy Cox lacked reasonable suspicion that he was committing a crime and thus his detention and the subsequent searches violated the Fourth Amendment to the United States Constitution and Article 1, section 11 of the Indiana Constitution.

[6] Following a hearing, the trial court denied Smith's motion to suppress evidence. Smith now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Standard of Review

[7] We review the denial of a motion to suppress in a manner similar to reviewing the sufficiency of evidence. *Sanders v. State,* 989 N.E.2d 332, 334 (Ind. 2013). We do not reweigh the evidence. *Id.* We consider conflicting evidence most favorable to the trial court's ruling, as well as undisputed evidence favorable to the defendant. *Robinson v. State,* 5 N.E.3d 362, 365 (Ind. 2014). "We defer to a trial court's determination of historical fact, but we review *de novo* whether those facts constitute reasonable suspicion." *Johnson v. State,* 21 N.E.3d 841, 844 (Ind. Ct. App. 2014), *trans. denied.* "The record must disclose substantial evidence of probative value that supports the trial court's decision." *State v. Quirk,* 842 N.E.2d 334, 340 (Ind. 2006).

II. Motion to Suppress

[8] Smith contends that the trial court's denial of his motion to suppress violated the Fourth Amendment to the United States Constitution, which provides, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"[1] As a general rule, the Fourth Amendment prohibits warrantless searches. *Berry v. State*, 704 N.E.2d 462, 464-65 (Ind. 1998). Consequently, when a search is conducted without a warrant, the State has the burden of proving the search falls into one of the exceptions to the warrant requirement. *Id*. at 465.

[9] One exception to the warrant requirement is commonly called a "Terry stop." In *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), the United States Supreme Court held that a police officer may, without a warrant or probable cause, briefly detain a

[1] Smith also argues that the trial court's denial of his motion to suppress violated Article 1, section 11 of the Indiana Constitution. "The legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances." *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005) (internal citation omitted). We consider the following three factors in determining the reasonableness of a warrantless search: "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." *Id*. at 361. Smith argues that Deputy Cox lacked reasonable suspicion given the totality of the circumstances. However, Smith fails to provide any analysis of the *Litchfield* factors. A defendant cannot invoke the Indiana Constitution without analysis that is separate and independent from their Fourth Amendment claim. *See Holloway v. State*, 69 N.E.3d 924, 931 (Ind. Ct. App. 2017) (finding that a defendant waived their Article 1, section 11 claim when defendant cited *Litchfield* factors but did not provide any analysis), *trans. denied*. Accordingly, we conclude that Smith has waived his Article 1, section 11 claim.

person for investigatory purposes, if, based upon specific and articulable facts, the officer has reasonable suspicion that criminal activity may be afoot.

[10] Smith argues Deputy Cox lacked reasonable suspicion that criminal activity was afoot. Here, Deputy Cox followed Smith into a parking lot, approached him on foot, and had a conversation with him prior to police back up arriving and Deputy Cox subsequently conducting a K9 search on Smith's car. The State concedes that once back up arrived, Smith was being detained and a *Terry* stop was being conducted which required reasonable suspicion. *See* Brief of Appellee 16. However, we must first determine whether Deputy Cox's initial contact with Smith was consensual or whether it was afforded Fourth Amendment protection. *See State v. Calmes*, 894 N.E.2d 199, 202 (Ind. Ct. App. 2008) (stating a consensual encounter does not implicate the Fourth Amendment) (opinion on rehearing).

[11] Smith argues the initial interaction with Deputy Cox was not consensual. When determining whether an interaction was a consensual encounter, our evaluation turns on "whether a reasonable person would feel free to disregard the police and go about his or her business." *Clark v. State*, 994 N.E.2d 252, 261 (Ind. 2013) (quotation omitted). The test is objective; therefore, we consider not whether the particular citizen actually felt free to leave, but whether the officer's words and actions would have conveyed to a reasonable person that he was free to leave. *Id*.

[12] Examples of facts and circumstances that might lead a reasonable person to believe he was not free to leave could include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Overstreet v. State*, 724 N.E.2d 661, 664 (Ind. Ct. App. 2000), *trans. denied*. "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* (citing *United States v. Mendenhall*, 466 U.S. 544, 555 (1980)).

[13] Smith contends that because Deputy Cox impeded his ability to leave by "parking directly behind him[,] Deputy Cox was armed with his sidearm, [and in] full police uniform," he did not believe he was free to leave.[2] Appellant's Brief at 25. Deputy Cox was driving a marked police vehicle but did not initiate his lights and at no point drew his weapon. Further, Deputy Cox testified that he did pull in behind Smith, but maintained that his vehicle remained near the entrance instead of pulling *directly* behind Smith and that he was "very conscious . . . to make sure to not block him in."[3] Tr., Vol. 2 at 13.

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[2] Smith also argues that Deputy Cox's K9 dog "presumably act[ed] excitable in the vehicle[.]" Appellant's Brief at 25. However, Smith fails to point to anything in the record to support this.

[3] The State also introduced a surveillance video of a portion of Deputy Cox's interaction with Smith. *See* Exhibits, Volume 1, State's Exhibit F (Video). Deputy Cox's vehicle was out of the frame of the video, however, which also leads us to disagree with Smith's contention that Deputy Cox was parked directly behind him.

[14] After parking, Deputy Cox walked over to Smith and engaged in conversation. Smith did not give Deputy Cox any indication that he or Tooley wanted to leave and in fact they stated that they were waiting on Sadler. At one point, both Smith and Tooley were on their phones while in Deputy Cox's presence. *See Overstreet*, 724 N.E.2d at 664 ("As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy to require some particularized and objective justification.").[4] The record is clear that the initial interaction between Deputy Cox and Smith was inoffensive, and a reasonable person would have believed he was free to leave. Therefore, we conclude that the initial encounter between Deputy Cox and Smith was consensual and did not require reasonable suspicion.

[15] However, as stated above, once backup arrived Deputy Cox's encounter with Smith turned into a *Terry* stop requiring reasonable suspicion. *See Danh v. State*, 142 N.E.3d 1055, 1060 (Ind. Ct. App. 2020) ("It is well-settled that a traffic stop must be supported by, at least, reasonable suspicion that . . . criminal activity is afoot.") (quotation omitted), *trans. denied*. In assessing whether a stop was

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[4] The dissent in *Overstreet* stated:

> I do not think that any reasonable person, when approached by a police officer and questioned about his activities, would honestly feel free to refuse to answer or to leave. And even more to the point, how many people know that they have such a right?

724 N.E.2d at 665. This remains a valid criticism of the "consensual encounter" jurisprudence. However, our supreme court denied transfer in *Overstreet* and did not address this point. Accordingly, we must conclude here that given the nature of the encounter, the Fourth Amendment was not implicated.

justified by particularized reasonable suspicion, we consider the totality of the circumstances, including the defendant's conduct. *Glasgow v. State*, 99 N.E.3d 251, 257 (Ind. Ct. App. 2018). We will conclude reasonable suspicion existed if the facts known to the officer, together with any reasonable inferences, would cause a person of ordinary prudence to believe that criminal activity has or is about to occur. *Campos v. State*, 885 N.E.2d 590, 597 (Ind. 2008). Further, a set of individually innocent facts, when observed in conjunction, can be sufficient to create reasonable suspicion of criminal activity. *Finger v. State*, 799 N.E.2d 528, 534 (Ind. 2003).

[16] Here, Deputy Cox was driving behind Smith when Smith slowed his vehicle and began going under the speed limit. Deputy Cox ran Smith's license plate through dispatch, realized it belonged to Smith, and recognized him as a person known to be involved in drug activity. Smith then pulled into the first publicly available parking lot. Deputy Cox testified this was an indicator of criminal activity. After pulling into the parking lot to follow Smith, Deputy Cox witnessed Smith out of his vehicle and kneeling near another vehicle. According to Deputy Cox, Smith was known to conceal illegal drugs in magnetic boxes, and he believed him to be "attempting to hide contraband[.]" Tr., Vol. 2 at 16. When Deputy Cox approached Smith and Tooley, they told him that they were waiting for Sadler to arrive. However, Smith and Tooley began talking on their phones and based on what Deputy Cox heard, he believed "they had absolutely no actual meeting . . . [and] were essentially scrambling to get him there." Tr., Vol. 2 at 18. This led Deputy Cox to believe

they pulled into the parking lot for the sole purpose of evading him. Deputy Cox also noted that Tooley was nervous. *Polson v. State*, 49 N.E.3d 186, 190 (Ind. Ct. App. 2015) ("While nervousness alone is not enough, nervousness can constitute reasonable suspicion supporting an investigatory stop when combined with other factors."), *trans. denied*.

[17] We hold that based on the totality of the circumstances, Deputy Cox had reasonable suspicion to conduct a stop and Smith's Fourth Amendment rights were not violated. Therefore, the trial court did not err by denying Smith's motion to suppress evidence.

Conclusion

[18] We conclude Smith's Fourth Amendment rights were not violated, and the trial court did not err by denying Smith's motion to suppress. Accordingly, we affirm.

[19] Affirmed.

Pyle, J., and Weissmann, J., concur.