

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tara Michelle Kluger,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 31, 2022

Court of Appeals Case No.
22A-CR-955

Appeal from the Hamilton
Superior Court

The Honorable David K. Najjar,
Judge

Trial Court Cause No.
29D05-1909-F6-8177

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Defendant, Tara Kluger (Kluger), appeals her conviction for possession of cocaine, a Level 6 felony, Ind. Code § 35-48-4-6(a), and possession of paraphernalia, a Class C misdemeanor, I.C. § 35-48-4-8.3(b)(1).
- [2] We affirm.

ISSUE

- [3] Kluger presents two issues on appeal which we consolidate and restate as the following single issue: Whether the trial court abused its discretion by admitting certain evidence obtained during a traffic stop.

FACTS AND PROCEDURAL HISTORY

- [4] On September 17, 2019, Officer Cory Schalburg (Officer Schalburg) of the Fishers Police Department was in a fully marked police vehicle, when he observed a gray Chevrolet Impala traveling northbound at “the Interstate 69/37 split.” (Transcript Vol. II, p. 6). After the vehicle passed him, he observed the female driver, later identified as Kluger, touching her face “frantically.” (Tr. Vol. II, p. 6). As Officer Schalburg began following Kluger, he observed her fail to properly signal while changing lanes, and he signaled for Kluger to pull her vehicle too the side of the road at about 10:16 a.m. Upon approaching Kluger’s car, he continued to observe “more nervous behaviors” from Kluger, such as “chattering speech, frantic movement with head and arms,” and heavy breathing. (Tr. Vol. II, p. 7). He also observed a small red “ink cartridge, not the actual pen but the small piece of plastic that actually holds the ink” between

Kluger's legs. (Tr. Vol. II, p. 8). His prior training and experience with the Murfreesboro Tennessee Police Department, where he dealt with crack cocaine abusers, had taught him that ink cartridges are "used by crack cocaine abusers as a push-rod to introduce narcotics into the body." (Tr. Vol. II, p. 8). Based on his collective observations, Officer Schalburg believed that "most likely" there were "narcotics" inside the vehicle, and he ordered Kluger to exit the car. (Tr. Vol. II, p. 7). Kluger gave Officer Schalburg a non-verbal consent to search her pockets, but nothing incriminating was found. Next, Officer Schalburg asked Kluger if he could search her vehicle. After she declined, he obtained Kluger's driver's license and walked back to his patrol vehicle to verify her information. At that point, Officer Schalburg requested a K-9 officer to conduct a drug sniff. As soon as Officer Schalburg confirmed that Kluger was "not wanted or a fugitive" in the police database, he exited his patrol vehicle and began writing Kluger a warning ticket. (Tr. Vol. II, p. 10). During this time, Officer Schalburg discovered that Kluger had changed residences and that Kluger had not updated her address on her driver's license, which was another traffic violation. Following that disclosure, Officer Schalburg returned to his vehicle, logged into his computer, and received notification from the radio that a K-9 officer was enroute. After advising dispatch of his exact location through the radio, Officer Schalburg exited his vehicle.

[5] At around 10:30 a.m., while Officer Schalburg was issuing Kluger warning tickets, one for an improper lane change and another for not updating her driver's license, the K-9 officer arrived. The K-9 officer conducted an open-air

sniff around Kluger's vehicle and alerted to the presence of narcotics inside the car. During the search of Kluger's vehicle, 0.78 grams of crack cocaine was discovered in the center console, as well as two pipes used to smoke crack cocaine on the driver's side door panel. The entire stop lasted seventeen minutes.

[6] On September 19, 2019, the State filed an Information, charging Kluger with Level 6 felony possession of cocaine and Class C misdemeanor possession of paraphernalia. Afterward, Kluger filed a pretrial motion to suppress the evidence obtained during the traffic stop, in which he asserted that the drugs and paraphernalia were obtained illegally and in violation of the United States Constitution and the Indiana Constitution. The trial court conducted a hearing on Kluger's motion, and Officer Schalburg's testimony matched the above stated set of facts. The trial court found no violation of Kluger's rights under our state or federal constitutions following the hearing. On November 23, 2021, the trial court held Kluger's bench trial. The record from the suppression hearing was admitted into evidence and Kluger sought to renew her motion to suppress the evidence collected from the traffic stop, but the trial court denied her request. At the end of the bench hearing, the trial court found Kluger guilty as charged. On March 22, 2022, the trial court conducted Kluger's sentencing hearing and sentenced Kluger to concurrent terms of 545 days with 535 days suspended for the Level 6 felony possession of cocaine conviction, and 60 days with 50 days suspended for Class C misdemeanor possession of paraphernalia conviction.

[7] Kluger now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

A. *Standard of Review*

[8] Kluger contends that the trial court erred when it did not grant her motion to suppress the evidence obtained during the traffic stop. While Kluger frames her issue as an appeal from a denial of a motion to suppress evidence, because she appeals after a trial, “the question of whether the trial court erred in denying a motion to suppress is no longer viable.” *Clark v. State*, 994 N.E.2d 252, 259 (Ind. 2013) (citation and quotations omitted). Appeals relating to the admissibility of evidence are limited to cases in which the trial court abused its discretion. *Id.* at 259-60. A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts before the court or if it misapplies the law. *Heaton v. State*, 984 N.E.2d 614, 616 (Ind. 2013). “[W]hen a challenge to an evidentiary ruling is predicated on the constitutionality of a search or seizure of evidence, it raises a question of law that is reviewed *de novo*.” *Curry v. State*, 90 N.E.3d 677, 683 (Ind. Ct. App. 2017) (citations omitted), *trans. denied* “The State has the burden to demonstrate that the measures it used to seize information or evidence were constitutional.” *Id.*

[9] Kluger claims that Officer Schalburg’s stop was prolonged and that her rights under the Fourth Amendment of the United States Constitution and Article 1, section 11 of the Indiana Constitution were violated. While both provisions preserve the right of people to be secure in their persons, houses, papers, and

effects, from unreasonable search and seizure, they are analyzed independently. *Duran v. State*, 930 N.E.2d 10, 17 (Ind. 2010).

1. *Fourth Amendment*

[10] The Fourth Amendment to the United States Constitution protects the privacy and possessory interests of individuals by forbidding unreasonable searches and seizures. *Sugg v. State*, 991 N.E.2d 601, 607 (Ind. Ct. App. 2013). It provides:

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.

U.S. Const. amend. IV. According to Kluger, Officer Schalburg extended the traffic stop by ordering her to exit her car, asking whether she had drugs in her car, and searching her pockets for drugs. She adds that Officer Schalburg's second return to his patrol vehicle, also prolonged the stop.

A. *Removal from the Vehicle*

[11] "Law enforcement officers may, as a matter of course, order the driver and passengers to exit a lawfully stopped vehicle." *Tumblin v. State*, 736 N.E.2d 317, 321 (Ind. Ct. App. 2000), *trans. denied*. When a vehicle has been lawfully stopped, the added intrusion of requesting the driver and passengers to exit the vehicle is viewed as a mere inconvenience and is therefore legal. *Id.* That said, this *per se* rule does not entail the right to detain a passenger during the traffic

stop. *Id.* A police officer is generally prohibited from routinely ordering the passenger of a motor vehicle who has not been observed to be engaged in any illegal activity to remain at the scene of a traffic stop. *Id.* at 321-22. That said, “[i]f probable cause or reasonable suspicion develops during the assessment, the officer may be justified in detaining the individual longer to further investigate.” *Id.* at 322. Besides Officer Schalburg’s observation of Kluger frantically touching her face, following the stop, he continued to observe more nervous behaviors from Kluger and an ink cartridge on her lap. Based on his training and experience, he suspected Kluger was using the ink cartridge to administer drugs into her body, and he suspected that there were drugs inside the vehicle. At that point, Officer Schalburg was justified in ordering Kluger to exit her vehicle so that he could investigate possible drug-related activity. Here, we hold Officer Schalburg did not unduly delay the stop because he was justified in ordering Kluger to exit her vehicle in order to further investigate.

B. *Questions Asked During the Traffic Stop*

[12] Kluger also claims that Officer Schalburg prolonged the stop when he asked her if she had drugs in the vehicle. We disagree. An officer can ask the driver whether there are any weapons or drugs in a vehicle. *State v. Washington*, 898 N.E.2d 1200,1202-05 (Ind. 2008). Since questions are neither searches nor seizures, the Seventh Circuit has ruled that an officer need not demonstrate justification for each inquiry. *United States v. Childs*, 277 F.3d 947, 949 (7th Cir. 2002). “[Q]uestions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable

detention.” *Id.* at 949. Officer Schalburg’s brief question, unrelated to Kluger’s failure to signal upon his encounter with Kluger, did not unreasonably extend the duration of the stop or otherwise violate the Fourth Amendment.

C. Search of her Person

[13] To the extent that Kluger claims that the stop was prolonged when Officer Schalburg searched her pockets, the State argues that Kluger gave her non-verbal consent and permitted the search. “[C]onsent may be manifested in a non-verbal as well as a verbal manner.” *McIlquham v. State*, 10 N.E.3d 506, 512 (Ind. 2014) (citing *United States v. Walls*, 225 F.3d 858, 863 (7th Cir.2000)). A defendant’s consent to search is valid except where it is procured by fraud, duress, fear, or intimidation or where it is merely a submission to the supremacy of the law. *Buckley v. State*, 797 N.E.2d 845, 849 (Ind. Ct. App. 2003). Since it falls within an established exception to the Fourth Amendment warrant requirement, the scope of the authority to search is strictly limited to the consent given, and a consensual search is reasonable only if it is kept within the bounds of that consent. *Id.* The standard for measuring the extent of a suspect’s consent under the Fourth Amendment is that of objective reasonableness. *Id.* Along with objective reasonableness, the scope of a consensual search is measured by the expressed object to be searched and the imposed limitation by the subject. *Id.* Thus, the scope of a consent search is factually sensitive and does not depend only on the express object to be searched. *Id.* We have held before that express consent is not a requirement for a valid consent search. *Melton v. State*, 705 N.E.2d 564, 567 (Ind. Ct. App.

1999). Instead, the circumstances of the search may show that the party involved implicitly gave consent, by word or deed. *Id.* The record shows that after Kluger exited her vehicle, she did not hesitate in giving Officer Schalburg her non-verbal consent to search her pockets for drugs, and we find that her Fourth Amendment rights were not violated.

D. *Delays by Officer Schalburg*

- [14] Kluger claims that Officer Schalburg had all the information he needed to issue her warning tickets, however, she maintains that he returned to his vehicle a second time and thereby prolonged the stop. Duties that “an officer may undertake related to the traffic stop typically ‘involve checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.’” *Browder v. State*, 77 N.E.3d 1209, 1214 (Ind. Ct. App. 2017) (quoting *Rodriguez v. United States*, 575 U.S. 348, 355 (2015)), *trans. denied*. “[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s ‘mission’—to address the traffic violation that warranted the stop, and attend to related safety concerns.” *Rodriguez*, 575 U.S. at 354 (citations omitted). “Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose.” *Id.* (quotation marks and brackets omitted). “Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.” *Id.*

- [15] The dispositive issue before us is whether Officer Schalburg’s actions of returning to his vehicle for a second time, impermissibly extended the traffic

stop beyond the time needed to complete his mission. After Officer Schalburg “conducted [his] standard license, warrants check, [and] address check”, he walked back to where Kluger was and proceeded to issue a single ticket for failing to signal properly during a lane change. At that point, however, he learned that Kluger had recently moved, and that she had not updated her address on her driver’s license. Not only was the scope of Officer Schalburg’s investigation broadened by the possibility of drugs in Kluger’s vehicle, but also because she had committed another traffic offense by failing to update her home address on her driver’s license. As shown by the dash camera, and undertaking his duties relating to the stop, Officer Schalburg had a reason to return to his vehicle to process the second ticket on his computer. We find that Kluger’s arguments on appeal are a request for us to reweigh the evidence, which we will not do. *See Meredith v. State*, 906 N.E.2d 867, 869 (Ind. 2009).

2. *Article 1, section 11*

[16] The Fourth Amendment analysis centers on a criminal defendant’s expectation of privacy, but under Article 1, section 11 of the Indiana Constitution, the emphasis is upon the actions of the police officer and whether his or her actions were reasonable under the totality of the circumstances. *Austin v. State*, 997 N.E.2d 1027, 1034 (Ind. 2013). Rather than looking to federal requirements such as warrants and probable cause when evaluating section 11 claims, we place the onus on the State to prove that its intrusion was reasonable under the totality of the circumstances. *Collins v. State*, 822 N.E.2d 214, 219 (Ind. Ct. App. 2005), *trans. denied*. We consider three factors when evaluating

reasonableness of law enforcement actions: “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).

[17] Kluger argues that “nervous behaviors can neither support a finding of reasonable suspicion nor a finding that law enforcement had a high degree of suspicion that [she] was in possession of illegal drugs.” (Appellant’s Br. p. 16) (quotations omitted). As a result, she claims that “Officer Schalburg had a low degree of suspicion and should not have detained her beyond the time required to issue a warning ticket for the observed traffic violation.” (Appellant’s Br. p. 16). Contrary to her claim, we find that the level of concern, suspicion, or knowledge was significant, and favors the State. Officer Schalburg observed Kluger touching her face frantically, and based on his training as a narcotics interdiction officer, it was an indicator of Kluger’s participation in drug activity. *See State v. Quirk*, 842 N.E.2d 334, 339-40 (Ind. 2006) (“conduct, which would be wholly innocent to the untrained observer, might acquire significance when viewed by an officer who is familiar with the practices of drug smugglers and the methods used to avoid detection.”). When Officer Schalburg followed Kluger’s vehicle, Kluger committed a traffic infraction by failing to properly signal before changing lanes. Once Officer Schalburg observed the infraction and stopped Kluger, he also observed an ink cartridge on her lap, further

suggesting that Kluger was a drug user, and that there may be drugs in the vehicle.

[18] As for the degree of intrusion on her ordinary activities, Kluger contends that the intrusion was significant since she had to exit her vehicle following the stop, she was subjected to a search of her pockets, and she was questioned about the presence of drugs in her vehicle. A brief detention of a motorist during a traffic stop is reasonable and permitted under section 11 if the officer reasonably suspects that the motorist is engaged in, or about to engage in, illegal activity. *Baldwin v. Reagan*, 715 N.E.2d 332, 340 (Ind. 1999). In addition, our supreme court held that an officer's question during a traffic stop as to whether the defendant had any drugs or weapons on his person was reasonable under our state constitution. *State v. Washington*, 898 N.E.2d 1200, 1206-07 (Ind. 2008). Despite her assertions, Officer Schalburg had a right to stop Kluger's vehicle after he observed her commit a traffic violation. When Officer Schalburg observed the ink cartridge on Kluger's lap, it gave rise to further suspicion and corresponding intrusion. Thus, it was reasonable for Officer Schalburg to have engaged in a new investigation of an unrelated criminal matter. Kluger consented to the search of her pockets. Thus, we conclude that the intrusion Kluger experienced was no more than the ordinary level of intrusion a motorist would experience during a traffic stop.

[19] Lastly, Kluger argues that under the circumstances, Officer Schalburg's instinct that narcotics were present in her vehicle was speculative and the extent of law enforcement needs was low. We cannot agree. Officer Schalburg's action of

making the stop was appropriate for enforcing traffic laws. Further, Officer Schalburg's needed to investigate drug activity based on his suspicion that there were drugs in the vehicle was reasonable under the circumstances.

[20] Considering the totality of the circumstances and given the factors established in *Litchfield*, we conclude that Officer Schalburg acted reasonably to investigate a traffic infraction, and that his actions during the investigatory stop did not violate Kluger's rights under Article 1, section 11 of the Indiana Constitution.

CONCLUSION

[21] Based on the foregoing, we conclude that Officer Schalburg did not prolong the traffic stop and that Kluger's rights under the Fourth Amendment or Article 1, section 11, were not violated. Thus, we hold that the trial court did not abuse its discretion when it admitted into evidence the drugs and paraphernalia discovered during the warrantless search of Kluger's vehicle.

[22] Affirmed.

[23] Bailey, J. and Vaidik, J. concur