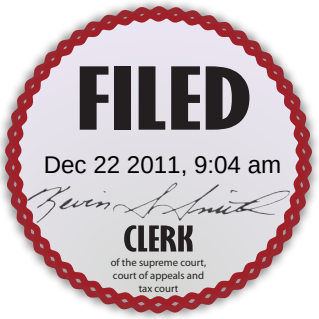


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| STEPHEN N. KOHLMEYER, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 29A02-1105-CR-399 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Gail Z. Bardach, Judge
Cause No. 29D06-1006-CM-2647

**December 22, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Stephen N. Kohlmeyer (Kohlmeyer), appeals his conviction for operating a vehicle with an ACE of .08 or more, a Class C misdemeanor, Ind. Code § 9-30-5-1(a).

We affirm.

## ISSUES

Kohlmeyer raises three issues on appeal, which we restate as:

(1) Whether the trial court abused its discretion by admitting evidence resulting from a traffic stop;

(2) Whether the trial court abused its discretion when it quashed a subpoena to the special assistant with the department of toxicology; and

(3) Whether the trial court properly concluded that Kohlmeyer refused to submit to a chemical test.

## FACTS AND PROCEDURAL HISTORY

On September 16, 2009, at approximately 11:05 p.m., Indiana State Police Trooper Jason Williamson (Trooper Williamson) observed Kohlmeyer's vehicle on Allisonville Road, north of 116th street, in Hamilton County, Indiana. Trooper Williamson noticed that the vehicle had stopped at a flashing yellow light and remained there for three to five seconds. When the vehicle began to move again, it veered toward the median, approaching it "fairly close" before the car "jerked" back into its own lane. (Transcript p. 73). Trooper Williamson began following Kohlmeyer's vehicle and

observed that the car was weaving within its own lane. He noticed that it continued to do "slow, steady weaves within its own lane." (Tr. p. 76). Trooper Williamson stated that

> [i]t caught my attention because I suspected [the driver] may be impaired because when someone drops their cell phone or is texting, they'll weave over, but then sometimes—a lot of times—they'll make sudden jerk back into their lane if they do start to weave because they realize they're starting to go out of lane and people respond like that. An impaired driver, they tend to make slower steadier weaves because they don't know they're weaving.

(Tr. p. 76).

Trooper Williamson conducted a traffic stop. When the Trooper approached Kohlmeyer he "noticed the strong odor of alcoholic beverage emitting from the vehicle" and observed that Kohlmeyer's "eyes were a little glassy and bloodshot." (Tr. p. 78). Kohlmeyer denied having had anything to drink that night. Trooper Williamson conducted three standardized field sobriety tests. Kohlmeyer failed all three tests. Kohlmeyer refused to take the portable breath test. When Trooper read Indiana's implied consent advisement to Kohlmeyer, Kohlmeyer responded by questioning the Trooper and disputing that probable cause existed to take a chemical breath test. Kohlmeyer was evasive and argued with Trooper Williamson for about thirty seconds. When Trooper Williamson determined that Kohlmeyer would not give a yes or no answer, he handcuffed Kohlmeyer and transported him to a local hospital. After obtaining a warrant for a blood draw, it was determined that Kohlmeyer's blood alcohol level was .13 grams of alcohol in 100 milliliters of blood.

On June 1, 2010, the State filed an Information charging Kohlmeyer with Count I, operating a vehicle while intoxicated endangering a person, a Class A misdemeanor, I.C.

§ 9-30-5-2(a); -2(b); and Count II, operating a vehicle with an ACE of .08 or more, a Class C misdemeanor, I.C. §9-30-5-1(a). On August 24, 2010, Kohlmeyer filed a motion to suppress the evidence resulting from the traffic stop. After a hearing, the trial court denied the motion. On December 17, 2010, after Kohlmeyer moved to certify the trial court's order for interlocutory appeal, the trial court denied his request.

On April 19, 2011, a jury trial was conducted. At the close of the evidence, the jury returned a verdict of not guilty on Count I but guilty on Count II. On May 6, 2011, during a sentencing hearing, the trial court sentenced Kohlmeyer to sixty days suspended and probation for one year.

Kohlmeyer now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### I. *Traffic Stop*

First, Kohlmeyer contends that the trial court erred when it denied his motion to suppress the evidence resulting from the traffic stop. We note however that Kohlmeyer's motion for interlocutory appeal was unsuccessful, and instead he now appeals his conviction after a jury trial. As such, his argument is more properly framed as whether the trial court abused its discretion in the introduction of the evidence obtained as a result of the challenged stop. *Jackson v. State*, 890 N.E.2d 11, 15 (Ind. Ct. App. 2008). Our standard of review on rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection: we do not reweigh the evidence, and we consider the conflicting evidence most favorable to the trial court's ruling. *Id*.

Nevertheless, Kohlmeyer failed to preserve his claim of error by failing to object to the evidence he now claims was improperly admitted. It is well established that a motion to suppress is insufficient to preserve error for appeal. *Id.* A defendant must instead reassert his objection at trial contemporaneously with the introduction of the evidence to preserve the error for appeal. *Id.* Because he failed to object, Kohlmeyer waived his argument on appeal.

Waiver notwithstanding, we will address the merits of Kohlmeyer's claim. Kohlmeyer asserts that Trooper Williamson conducted a traffic stop in violation of the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Indiana Constitution. In *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1969), the United States Supreme Court held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when, based on the totality of the circumstances, the officer has a reasonably, articulable suspicion that criminal activity is afoot. A *Terry* stop is a lesser intrusion on the person than an arrest and may include a request to see identification and inquiry necessary to confirm or dispel the officer's suspicions. *Hardister v. State*, 849 N.E.2d 563, 570 (Ind. 2006). Reasonable suspicion entails some minimal level of objective justification for making a stop, something more than an unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause. *Wilson v. State*, 670 N.E.2d 27, 29 (Ind. Ct. App. 1996). To evaluate the validity of a stop, the totality of the circumstances must be considered. We have interpreted the protections provided by Article I, § 11 of the Indiana Constitution regarding investigatory stops to be consistent with federal interpretation of protections

provided by the Fourth Amendment to the United States Constitution. *Washington v. State*, 740 N.E.2d 1241, 1246 (Ind. Ct. App. 2000), *trans. denied*. Therefore, we will not undertake a separate Indiana constitutional analysis.

Kohlmeyer specifically claims that the traffic stop was illegal because Trooper Williamson was mistaken when he determined that Kohlmeyer had committed a traffic violation immediately prior to conducting the traffic stop. In *Potter v. State*, 912 N.E.2d 905, 908 (Ind. Ct. App. 2009) (citing *State v. Campbell*, 905 N.E.2d 51 (Ind. Ct. App. 2009), *trans. denied*), we noted that

> a traffic violation is not a condition precedent to a stop otherwise supported by the facts. Specifically, an officer may make a *Terry* stop of a vehicle to investigate an offence other than a traffic violation, as long as the officer has reasonable, articulable suspicion that a crime is being or has been committed.

*See also Meredith v. State*, 906 N.E.2d 867, 870 (Ind. 2009) (police may not initiate a stop for any conceivable reason, but must possess at least reasonable suspicion that a traffic law has been violated or that other criminal activity is taking place).

Here, Trooper Williamson had reasonable suspicion of Kohlmeyer's impairment to justify the traffic stop. During trial, Trooper Williamson testified that when Kohlmeyer started driving again after having stopped for the yellow flashing lights, Kohlmeyer swerved to the median and then jerked the wheel back. He noticed that the car continued to do "slow, steady weaves within its own lane." Trooper Williamson explained that he suspected Kohlmeyer may be impaired because an "impaired driver [] tends to make slower steadier weaves because they don't know they're weaving." (Tr. p. 76). Based on the totality of the circumstances, Trooper Williamson had a reasonable

articulable suspicion that criminal activity was afoot. Therefore, we conclude that the trial court did not abuse its discretion by admitting the evidence resulting from the valid traffic stop.

## II. *Subpoena*

Next, Kohlmeyer contends that the trial court erred when it quashed his subpoena addressed to the I.U. Department of Toxicology and Scott Newman (Newman), as Special Assistant in charge of the Department, in violation of the Compulsory Process Clause of the U.S. Constitution and the Indiana Constitution. The right of a criminal defendant to compulsory process for obtaining witnesses in his behalf is guaranteed by both the federal and Indiana constitutions. *Ferguson v. State*, 670 N.E.2d 371, 375 (Ind. Ct. App. 1996). When a defendant claims that his right to compulsory process has been unconstitutionally limited, two inquiries must be made: (1) whether the trial court arbitrarily denied the Sixth Amendment rights of the person calling the witness, and (2) whether the witness was competent to testify and his testimony would have been relevant and material to the defense. *Id*. The defendant must show how the witness' testimony would have been both material and favorable to his defense. *Id*.

Kohlmeyer issued a subpoena under his signature to Newman addressed to the I.U. Department of Toxicology. The subpoena sought discovery of documents regarding general testing procedures and testimony with respect to laboratory procedures, including the production of documents

> concerning or impugning the viability of blood test samples submitted to the Indiana Department of Toxicology during the months of September through December 2009, including the case at issue. In addition, you will

> be asked to explain delays in testing and reporting of results, and to reveal any knowledge of which you are privy concerning inaccuracies, improper procedure, deliberate manipulation, or any additional information which compels you to question the reliability or feasibility of blood sample results in criminal cases.

(Appellant's App. p. 148).

The requirements for a valid subpoena are enumerated in Indiana Trial Rule 45(A)(2) which states, in pertinent part, that

> [t]he clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it or his or her attorney, who shall fill it in before service. An attorney admitted to practice law in this state, as an officer of the court, may also issue and sign such subpoena . . .

Here, the subpoena was signed by Kohlmeyer, "Defendant pro se." (Appellant's App. p. 148). Although Kohlmeyer appeared to be a law student at the time of trial, it is clear that when issuing the subpoena, Kohlmeyer was not an attorney admitted to practice law in this state. *See* T.R. 45(A). Therefore, the trial court properly quashed the subpoena.

## III. *Refusal to Submit to Chemical Test*

Lastly, Kohlmeyer contends that the record lacks any evidence indicating that he refused to submit to the chemical test, when offered. The implied consent law seeks to keep Indiana highways safe and protect the public by removing the threat posed by the presence of drunk drivers on the highways. *Brown v. State*, 774 N.E.2d 1001, 1004 (Ind. Ct. App. 2002), *trans. denied*. It is aimed at providing law enforcement officers with implied consent to perform chemical tests on drivers who are thought to be intoxicated. *Id*.

The implied consent law provides that a person who operates a vehicle in Indiana impliedly consents to such a chemical test. I.C. § 9-30-6-1. If driver refuses to submit to a chemical test, the arresting officer must inform the driver that a suspension of driving privileges will result upon the refusal to submit to a chemical test. I.C. §9-30-6-7(a).

After failing the three standardized field sobriety tests, Trooper Williamson read Kohlmeyer the implied consent law. Instead of explicitly responding to Trooper Williamson when asked if he would submit to the chemical test, Kohlmeyer started questioning whether probable cause existed to take the chemical test. Trooper Williamson testified that Kohlmeyer was evasive and argued with him. After Trooper Williamson determined that he "wasn't going to get a yes or no answer out of [Kohlmeyer]," he handcuffed Kohlmeyer and transported him to a local hospital. (Tr. p. 93-94). Kohlmeyer does not dispute Trooper Williamson's recitation of events. We conclude that Kohlmeyer's evasiveness amounted to a refusal to consent to the chemical test. Therefore, we affirm the trial court's suspension of Kohlmeyer's driving license.

## CONCLUSION

Based on the foregoing, we conclude that (1) the trial court properly admitted the evidence resulting from a traffic stop; (2) the trial court properly quashed the subpoena; and (3) the trial court properly concluded that Kohlmeyer refused to submit to a chemical test.

Affirmed.

FRIEDLANDER, J. and MATHIAS, J. concur