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IN THE COURT OF APPEALS OF INDIANA

CECIL DOWELL FREEMAN,
Appellant-Defendant,
vs.
STATE OF INDIANA,
Appellee-Plaintiff.

No. 42A01-1102-CR-102

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable Jim R. Osborne, Judge
Cause No. 42D02-0806-CM-619

October 24, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Cecil Dowell Freeman appeals his conviction for operating a vehicle with an alcohol concentration of at least .15 gram of alcohol as a class A misdemeanor.[1] Freeman raises two issues, which we revise and restate as whether the trial court abused its discretion in admitting certain evidence. We affirm.

The relevant facts follow. At approximately 2:30 a.m. on June 13, 2008, Vincennes City Police Officers Corey Decker and Jeremy Rasico, who had been patrolling in their fully-marked police car, received a dispatch indicating that a caller had observed a man who "was staggering, appeared to be intoxicated, in and around the houses in the area of Ritterskamp . . . ." Transcript at 21. While the officers were on their way to the area, they received further information that the man was entering a vehicle and leaving the area. The caller had "told dispatch it [sic] was unsure at the time if that vehicle belonged to that male subject" and that the vehicle "was a[n] old style vehicle, appeared beat up, light or white in color." Id. at 22. While driving to the area, Officer Decker observed a vehicle matching the description approximately one block from the location identified in the original dispatch coming towards them. The vehicle was the only vehicle the officers observed in the area. After the vehicle passed the officers' patrol vehicle, it pulled over to the side of the road. Officer Decker turned around, pulled up behind the vehicle, and then activated the emergency lights of his police vehicle.

[1] Ind. Code § 9-30-5-1 (2004).

Officer Decker approached the vehicle, told Freeman, who was the driver and the only occupant of the vehicle, about the information related to the officers by dispatch, and then asked for Freeman's information. Officer Decker "immediately detect[ed] an odor of alcohol or alcoholic beverage coming from [Freeman's] exhaled breath." Id. at 38. After talking to Freeman, the officer had Freeman exit his vehicle. As Freeman did so, he was staggering and his balance was poor. Officer Decker ran a check through dispatch and confirmed that the vehicle Freeman had been driving was not stolen. Officer Decker asked Freeman several questions including whether he had been drinking, and Freeman stated that he had been drinking. Officer Decker administered field sobriety tests, read an implied consent, and offered a chemical test, which could be either a blood draw or a breath test. Freeman agreed to take a breath test. Officer Decker transported Freeman to the Knox County jail for a chemical breath test, which was the breathalyzer, and the test revealed an alcohol reading of .18 grams of alcohol per 210 liters of breath.

On June 23, 2008, the State charged Freeman with operating a vehicle with an alcohol concentration equivalent ("ACE") of .15 or more as a class A misdemeanor. On January 2, 2009, Freeman filed a motion to suppress any evidence obtained by the State "for the reason that the search is violative of Amendment 4 of the United States Constitution and . . . in addition the search is unreasonable in that it is contrary to the protections of the Indiana Constitution." Appellant's Appendix at 25. On June 23, 2009, the court held a hearing on Freeman's motion. On August 17, 2009, the court denied Freeman's motion to suppress and found that Officer Decker had reasonable suspicion to stop Freeman's vehicle. The court also found: "Further, in this instance, the vehicle was

not pulled over by the police, but in fact, [Freeman] pulled over himself and exited the vehicle before the police could pull him over, even though that was their intention. By the time the police pulled up behind the vehicle, the driver had already parked and exited the vehicle." Transcript at 41-42. At Freeman's bench trial, the State introduced evidence of the results of the breath test. The court found Freeman guilty of the charged offense and sentenced him to one year, all of which, except for time served, was ordered suspended to supervised probation.

The issue is whether the trial court abused its discretion in admitting certain evidence. The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for an abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs "where the decision is clearly against the logic and effect of the facts and circumstances." Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001). Freeman argues that the court abused its discretion in admitting: (A) evidence obtained from a traffic stop; and (B) the results of his chemical breath test.

A. Alleged Constitutional Violations

Freeman first cites to the Fourth Amendment and to Article 1, Section 11 of the Indiana Constitution and argues that the officers' initial approach towards his vehicle constituted an investigatory stop without reasonable suspicion rendering any evidence obtained also illegal.

1. The Fourth Amendment

The Fourth Amendment to the United States Constitution guarantees the right to be secure against unreasonable search and seizure. Powell v. State, 912 N.E.2d 853, 859 (Ind. Ct. App. 2009) (citing State v. Calmes, 894 N.E.2d 199, 202 (Ind. Ct. App. 2008))). In order to determine whether the officer impinged upon Freeman's Fourth Amendment rights, we must analyze what level of police investigation occurred. See id.

There are three levels of police investigation, two of which implicate the Fourth Amendment and one of which does not. Id. (citing Calmes, 894 N.E.2d at 202 (citing Overstreet v. State, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), reh'g denied, trans. denied)). First, the Fourth Amendment requires that an arrest or detention that lasts for more than a short period of time must be justified by probable cause. Id. Second, pursuant to Fourth Amendment jurisprudence, the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based upon specific and articulable facts, the officer has a reasonable suspicion that criminal activity has or is about to occur. Id. The third level of investigation occurs when a police officer makes a casual and brief inquiry of a citizen, which involves neither an arrest nor a stop. Id. This is a consensual encounter in which the Fourth Amendment is not implicated. Id.

"Not every encounter between a police officer and a citizen amounts to a seizure requiring objective justification." Id. (citing Overstreet, 724 N.E.2d at 663). A person is "seized" only when, by means of physical force or a show of authority, his or her freedom of movement is restrained. Id. at 859-860 (citing State v. Lefevers, 844 N.E.2d 508, 513 (Ind. Ct. App. 2006) (citing United States v. Mendenhall, 446 U.S. 544, 553, 100 S. Ct. 1870 (1980), reh'g denied), trans. denied). It is not the purpose of the Fourth

Amendment to eliminate all contact between police and the citizenry. Id. at 860 (citing Mendenhall, 446 U.S. at 553). What constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary depending upon the particular police conduct at issue and the setting in which the conduct occurs. Id. (citing Michigan v. Chesternut, 486 U.S. 567, 573, 108 S. Ct. 1975, 1979 (1988)). "Examples of circumstances that might indicate a seizure where the person did not actually attempt to leave the scene would be 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." Id. (citing Mendenhall, 446 U.S. at 553). If such evidence is lacking, otherwise inoffensive contact between a member of the public and the police does not amount to a seizure of that person. Id. Further, "Mendenhall establishes that the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." Id. (citing California v. Hodari D., 499 U.S. 621, 628, 111 S. Ct. 1547, 1551 (1991)). In determining whether a contact between a citizen and a police officer is a stop, "the crucial consideration is whether the citizen was under a reasonable impression that he was not free to leave the officer's presence." Calmes, 894 N.E.2d at 205 (citations omitted). "The test for whether such a reasonable impression existed is what a reasonable person, innocent of any crime, would have thought had he been in the citizen's shoes." Id.

In Finger v. State, an officer with the Butler University Police Department received a dispatch "relaying the report by a concerned citizen of a suspicious vehicle" at an intersection. 799 N.E.2d 528, 530 (Ind. 2003). The officer found the vehicle parked near the intersection and two people inside. Id. After placing his police car behind the vehicle and activating his emergency lights, the officer approached the vehicle and found Finger sitting in the driver's seat. Id. The officer asked the occupants "what was happening" and whether Finger needed assistance. Id. Finger responded that the car was out of fuel. Id. After observing that the fuel gauge was not at empty and that Finger seemed nervous, the officer requested Finger's driver's license. Id. at 531. The officer had not returned the license when he observed a knife in the back seat and ammunition in the front seat. Id. Upon hearing a report of an armed robbery in the area, the officer asked Finger and his passenger to exit the vehicle and later placed them under arrest after a witness to the robbery identified Finger's passenger as having committed the robbery. Id. Finger later argued that the officer's initial encounter was unjustified as an investigative stop under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Id. Other than obtaining and retaining Finger's driver's license, the Indiana Supreme Court found that the officer's "actions, taken together, would not lead a reasonable person to feel that he was not free to leave." Id. at 533. The Court determined that parking behind a vehicle, activating emergency lights, and asking questions of the occupants were "all things a police officer would be expected to do upon finding a stranded motorist and do not indicate to a reasonable motorist that the officer intends to detain him." Id.

Similarly, in R.H. v. State, a police officer received a dispatch late at night from a concerned citizen regarding a report of a suspicious vehicle parked on the street. 916 N.E.2d 260, 264 (Ind. Ct. App. 2009), trans. denied. Apparently, the car was parked in front of the nervous 911-caller's residence. Id. When the officer arrived at the scene, he found a vehicle matching the description given already stopped and parked. Id. at 264-265. The officer then proceeded to park his police vehicle and activate his emergency lights in order to alert others of his presence. Id. at 265. He then approached R.H.'s vehicle to ask the occupants some questions or request their identification. Id. On appeal this court found that "these are all procedures that an officer would be expected to do upon finding an occupied vehicle parked on the street late at night, and do not indicate to a reasonable motorist that the officer intends to detain him." Id. (citation and internal quotation marks omitted). This court also stated that "[i]n fact, given that the [o]fficer [] was investigating a concerned citizen's call at a very late hour, we would think he, or any other officer, would be remiss in not activating his or her emergency lights," that "[t]o fail to do so would put other drivers at risk," and that "[i]n addition, it clearly would put the officer at risk to approach a vehicle late at night without first alerting the unknown occupants that he or she is a safety enforcement officer." Id. The court also noted that while the officer activated his lights, he in no way hindered traffic or R.H.'s vehicle and displayed no force. Id. at 265-266. Thus, in both Finger and R.H., the police officer did not have to possess reasonable suspicion of wrongdoing to first start talking to the defendants. See also Manigault v. State, 881 N.E.2d 679, 685 (Ind. Ct. App. 2008) (concluding that a trooper's approach and initial contact with the defendant did not

amount to a seizure of the defendant where the trooper observed the defendant loitering near a vehicle belonging to an individual with an outstanding arrest warrant, followed the defendant into a hotel lobby, and asked the defendant for his identification).

In this case, the record reveals that shortly after 2:30 a.m. Officers Decker and Rasico observed Freeman's vehicle, which matched the description of a vehicle described by a caller, coming towards them. Officer Decker testified that he observed Freeman pull his vehicle to the side of the street, that he then turned his police vehicle around, that he pulled his vehicle behind Freeman's vehicle, and that he then activated the emergency lights of the police vehicle as a safety measure. Officer Decker approached Freeman's vehicle and immediately detected the odor of an alcoholic beverage on Freeman's breath. There is no evidence that Officer Decker approached the vehicle occupied by Freeman in a manner that would be considered aggressive or intimidating. The record does not reflect that Officer Decker displayed a weapon as he approached Freeman's vehicle or that he used any language or spoke in a tone of voice which indicated that Freeman was not free to leave.

Given these facts and in light of the preceding cases, we determine that the initial encounter here was consensual and thus fell outside the ambit of the Fourth Amendment's guarantee against unreasonable searches and seizures. Under the circumstances, Officer Decker did not have to possess reasonable suspicion of wrongdoing in order to park behind or approach Freeman's vehicle. See R.H., 916 N.E.2d at 264-266; Powell, 912 N.E.2d at 862 (concluding that an officer's initial approach to the defendant's parked vehicle did not constitute an investigatory stop or

seizure under the Fourth Amendment, that the initial encounter was consensual, and therefore that the officer did not have to possess reasonable suspicion of wrongdoing in order to park behind or approach the defendant's vehicle); see also Manigault, 881 N.E.2d at 685 (finding that police did not need to possess reasonable suspicion to initially approach the defendant); Overstreet, 724 N.E.2d at 664 (holding that an interaction between an officer and the defendant was a consensual encounter and thus the officer was not required to possess reasonable suspicion of wrongdoing to approach the defendant); United States v. Dockter, 58 F.3d 1284, 1287 (8th Cir. 1995) (concluding that the defendants were not seized within the meaning of the Fourth Amendment where a police officer pulled his vehicle behind the defendants' parked car and activated his amber warning lights).

To the extent Freeman argues that Officer Decker's request for his driver's license and for Freeman to exit the vehicle violated the Fourth Amendment, we note that "[a] brief investigative stop may be justified by reasonable suspicion that the person detained is involved in criminal activity." Finger, 799 N.E.2d at 532 (citing Terry v. Ohio, 392 U.S. 1, 31, 88 S. Ct. 1868 (1968)). We determined above that Officer Decker's approach and initial contact was consensual. After he approached Freeman, Officer Decker detected an odor of alcohol or alcoholic beverage coming from Freeman's exhaled breath. This court has held that the odor of alcohol provides the requisite reasonable suspicion sufficient to justify an OWI investigation. See State v. Whitney, 889 N.E.2d 823, 829 (Ind. Ct. App. 2008). After detecting the alcoholic odor, Officer Decker

detained Freeman and commenced an investigation by conducting field sobriety tests. We conclude there was reasonable suspicion to justify the investigation.

We conclude the trial court did not abuse its discretion in denying Freeman's motion to suppress the evidence under the Fourth Amendment.

2. Article 1, Section 11 of the Indiana Constitution

Freeman also cites to Article 1, Section 11 of the Indiana Constitution, which provides for the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure . . . ." Despite the fact that the text of Article 1, Section 11 is nearly identical to the Fourth Amendment, Indiana courts interpret and apply it "independently from federal Fourth Amendment jurisprudence." Mitchell v. State, 745 N.E.2d 775, 786 (Ind. 2001). In conducting analysis under this provision, we focus on whether the officer's conduct "was reasonable in light of the totality of the circumstances." Holder v. State, 847 N.E.2d 930, 940 (Ind. 2006). In making this determination, we balance: (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.

As stated, the record reveals that Officer Decker parked his police vehicle behind the vehicle in which Freeman was seated, activated the police vehicle's emergency lights for safety purposes, and approached the vehicle on foot. Officer Decker did not display a weapon as he approached Freeman's vehicle or otherwise indicate that Freeman was not free to leave. Under these circumstances, we conclude that Officer Decker's approach

and initial contact with Freeman constituted a consensual encounter which did not violate Freeman's rights against unreasonable search or seizure under Article 1, Section 11 of the Indiana Constitution. See Powell, 912 N.E.2d at 863 (concluding that an officer's approach and initial contact with the defendant constituted a consensual encounter which did not violate Article 1, Section 11 of the Indiana Constitution); Taylor v. State, 891 N.E.2d 155, 160 (Ind. Ct. App. 2008) (holding that a police encounter where officers asked the defendant a few simple questions about his identification was consensual and minimally intrusive and therefore did not violate Article 1, Section 11).

Similarly, with respect to Officer Decker's request for Freeman's license and to step out of the vehicle, the fact that Officer Decker detected the odor of an alcoholic beverage coming from Freeman's breath provided reasonable suspicion, and also satisfies the requirements of the Indiana Constitution because it could lead an ordinarily prudent person to believe that criminal activity was afoot. See Finger, 799 N.E.2d 528, 535 (Ind. 2003) (noting that "the factors leading to reasonable suspicion, discussed earlier, also satisfy the requirements of the Indiana Constitution because they could lead an ordinarily prudent person to believe that criminal activity was afoot"). The trial court did not abuse its discretion in denying Freeman's motion to suppress the evidence based upon Article 1, Section 11 of the Indiana Constitution.

B. Admission of Chemical Test Result

Freeman next argues that the trial court erred in admitting the results of the breath test. Freeman specifically argues that the State "did not introduce any evidence as what the approved method for administering a breath test is." Appellant's Brief at 11.

Freeman asserts that there "was no evidence setting forth the approved techniques for administering the test." Id. at 12. The State argues that Freeman has waived this argument.

"In order to preserve a claim of trial court error in the admission or exclusion of evidence, it is necessary at trial to state the objection together with the specific ground or grounds therefor at the time the evidence is first offered." Mullins v. State, 646 N.E.2d 40, 44 (Ind. 1995) (citations omitted). "Failure to state the specific basis for objection waives the issue on appeal." Id.

Here, Officer Decker testified regarding his certification to operate the breath test instrument, that he followed the guidelines approved for the use of the Datamaster, and the result from the test, and Freeman's counsel stated: "I would object that a proper foundation has not been laid." Transcript at 48. The court overruled the objection. Freeman did not present timely and specific objections that the State offered no evidence of the approved procedure for administering a breath test or that Officer Decker had not followed a specific part of the prescribed procedure. As a result, Freeman has waived this argument on appeal. See Mullins, 646 N.E.2d at 47 (noting that the defendant argued that the State offered no evidence of what the approved procedures were for administering a breath test or that the officer followed the approved procedures and that, while the defendant objected at trial, he did so on other grounds, holding that the defendant's arguments were waived, and stating that "absent a timely objection by [the defendant] that [the officer] had not followed a specific part of the procedure, the

foundation laid by the State was sufficient to support the trial court's decision to admit the breath-test results").

For the foregoing reasons, we affirm Freeman's conviction for operating a vehicle with an alcohol concentration of at least .15 gram of alcohol as a class A misdemeanor.

Affirmed.

BAKER, J., and KIRSCH, J., concur.