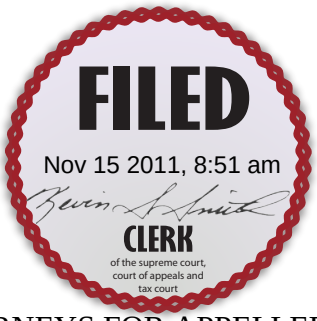

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IN THE
COURT OF APPEALS OF INDIANA

WILSON MAKORI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1103-CR-103
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0808-FD-790

November 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

While investigating a burglary, officers heard a crashing sound that they later determined was caused by Wilson Makori hitting a trash can with his car. When they approached Makori's car, one of the officers saw a bottle of vodka on his lap. Makori initially tried to flee in the vehicle, but eventually stopped and was arrested. Makori was charged with resisting law enforcement, criminal recklessness, and operating while intoxicated. Before trial, he moved to suppress the evidence obtained from the stop, arguing that it violated the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution. Makori's motion was denied, and counsel did not object to the evidence at trial. Makori was found guilty as charged. On appeal, he argues that counsel was ineffective because he did not preserve the suppression issue and that the trial court's ruling was an abuse of discretion. Finding that the officers clearly had reasonable suspicion to stop Makori, we conclude that Makori cannot show that he was prejudiced by counsel's failure to preserve the issue, and therefore, we affirm.

Facts and Procedural History

In the early morning hours of August 2, 2008, Officer John Cox was dispatched to investigate a burglary on North Adams Street in South Bend. During his investigation, Officer Cox noticed that a nearby house had a door that was standing open. Believing that the home might have been burglarized as well, Officer Cox called for backup to clear the home. Officer Jonathon Gray arrived to assist Officer Cox, and as they were about to enter the house, they heard a loud sound that they characterized as a "boom," "crash," or "bang"

coming from behind the house. Suppression Tr. at 10, 25; Trial Tr. at 92, 109. Both officers initially believed that someone was attempting to flee out the back of the house, so they ran to the back yard.

When they reached the back yard, the officers saw Makori driving down the alley that runs behind the properties on North Adams Street. The officers noticed that the mirror and front fender on the passenger side of Makori's car were damaged. The officers believed that the noise they had heard was Makori crashing into something with his car. Makori backed into a driveway and parked his car soon after the officers spotted him.

The officers approached Makori's vehicle because they believed that he had left the scene of an accident. Officer Cox approached the front passenger-side window, and Officer Gray approached the rear-passenger side window. From that position, Officer Cox saw a bottle of vodka on Makori's lap. The officers told Makori to get out of the car, but he started to drive off. Officer Cox jumped into the window to try to stop him. Makori stopped after traveling a short distance down the alley.

The officers placed Makori in handcuffs, and he became "extremely belligerent," "screaming and yelling" at the officers. Trial Tr. at 115. Makori's eyes were "red and glazed," and his breath smelled of alcohol. *Id*. Officer Cox ordered Makori to stay on the ground while Officer Gray retrieved a police car, but Officer Cox had to tase Makori to get him to comply. After Makori was secured in a police car, Officer Cox searched the alley and concluded that Makori had hit a trash can because it was positioned in such a way that he could not have driven through the alley without hitting it. Makori would not consent to a

chemical test, so he was taken to the hospital for a blood draw after Officer Cox obtained a warrant.

Makori was charged with operating while intoxicated as both a class A misdemeanor and a class D felony, resisting law enforcement, and criminal recklessness. Prior to trial, Makori filed a motion to suppress the evidence obtained from the stop of his vehicle, arguing that the officers should not have approached his car because they did not have reasonable suspicion to believe that he had committed a criminal offense or traffic violation. At the hearing on the motion, the officers testified that they initially thought the noise that they heard was someone trying to flee the house that they were about to investigate, but then concluded that Makori had crashed into something with his car. Both officers testified that the reason they approached Makori's car was because they thought he had left the scene of an accident, and once Officer Cox saw the vodka bottle, they believed that he had also been operating while intoxicated.

Makori claimed that he did not hit anything, that the car he was driving had been damaged before that night, that a trash can could not have caused that much damage to the car, and that another car had passed through the alley shortly ahead of him. He further claimed that he drove off after the officers approached because he could not see that they were police officers and that he could not hear them because his music was playing. He was afraid because it was a bad neighborhood and he had previously been robbed, so he started driving away without waiting to ascertain who was approaching him.

The trial court denied the motion to suppress, and the case proceeded to jury trial.

Makori did not renew his objection to the evidence obtained from the stop of his vehicle. The officers offered essentially the same testimony as at the hearing on the motion to suppress. In addition, Officer Cox testified that he believed that the damage to Makori's car was recent because the places where the paint had been scratched off were not rusty. The State also introduced the evidence from Makori's blood draw, which showed that his blood alcohol level was 155 mg/dL. Makori's testimony also was essentially the same as at the suppression hearing.

The jury found Makori guilty of operating while intoxicated as a class A misdemeanor, resisting law enforcement, and criminal recklessness. Makori admitted that he had a previous conviction of operating while intoxicated, which enhanced the offense to a class D felony. Makori now appeals.

Discussion and Decision

Makori argues that he received ineffective assistance of trial counsel because counsel did not preserve the arguments raised in the motion to suppress by making an objection at trial.[1] *See Barrett v. State*, 837 N.E.2d 1022, 1026 n.1 (Ind. Ct. App. 2005) (a motion to suppress is not sufficient to preserve error for appeal; the defendant must make a contemporaneous objection at trial), *trans. denied*. Further, he argues that counsel should have made an objection because the trial court's ruling on the motion to suppress was an abuse of discretion. We conclude that the officers clearly had reasonable suspicion to stop

[1] We note that a defendant may raise a claim of ineffective assistance of counsel on direct appeal; however, the defendant is foreclosed from relitigating that claim in a petition for post-conviction relief. *Heyen v. State*, 936 N.E.2d 294, 303 (Ind. Ct. App. 2010), *trans. denied*.

Makori's vehicle; therefore, the trial court's ruling was not an abuse of discretion, and Makori was not prejudiced by counsel's failure to preserve the issue. *See Holtz v. State*, 858 N.E.2d 1059, 1063 (Ind. Ct. App. 2006) (to prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and a reasonable probability that the result of the proceeding would have been different; we need not evaluate counsel's performance if the defendant suffered no prejudice), *trans. denied*.

Had counsel preserved the suppression issue, we would have applied the following standard of review:

> We will reverse only if a trial court's decision is clearly against the logic and effect of the facts and circumstances. We will not reweigh the evidence, and we consider any conflicting evidence in favor of the trial court's ruling. However, we must also consider the uncontested evidence favorable to the defendant. Although a trial court's determination of historical facts is entitled to deferential review, we employ a *de novo* standard when reviewing the trial court's ultimate determinations of reasonable suspicion and probable cause.

Lindsey v. State, 916 N.E.2d 230, 238 (Ind. Ct. App. 2009) (citations omitted), *trans. denied*.[2]

"An investigatory stop of a citizen by a police officer does not violate that citizen's constitutional rights where the police officer has a reasonable articulable suspicion of criminal activity." *State v. Straub*, 749 N.E.2d 593, 598 (Ind. Ct. App. 2001). "Reasonable suspicion entails some minimum level of objective justification for making a stop; something more than an inchoate and unparticularized suspicion or hunch, but considerably less than

[2] Makori's motion to suppress alleged that the stop was unlawful under both the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution. On appeal, he does not explicitly mention either provision, but does discuss this standard of review. As Makori does not mention or apply the *Litchfield* test, we do not understand him to be raising an Article 1, Section 11 claim on appeal. *See Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005) (establishing applicable test for Article 1, Section 11 claims).

proof of wrongdoing by a preponderance of the evidence." *Id*. "The reasonable suspicion requirement is met where the facts known to the officer at the moment of the stop, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe criminal activity has occurred or is about to occur." *Moultry v. State*, 808 N.E.2d 168, 171 (Ind. Ct. App. 2004).

The facts favorable to the trial court's ruling are as follows. While in the process of investigating a possible burglary of a home, Officers Cox and Gray heard a loud crashing sound coming from the rear of the home. Both officers initially believed that someone was trying to flee. However, when they arrived in the back yard, they found Makori driving down the alley. Seeing damage to his vehicle, the officers then believed that he had crashed into something. The officers did not see any other vehicles in the alley. The officers approached Makori's vehicle after he parked to investigate whether he had left the scene of an accident. Once they approached, Officer Cox saw a bottle of vodka on Makori's lap. The noise that the officers heard, the damage to Makori's vehicle, and the fact that no other vehicles were in the alley at that time would lead a reasonably prudent person to believe that Makori had been in an accident, and the officers were clearly justified in approaching Makori's vehicle to investigate whether he had left the scene of an accident. *See* Ind. Code §§ 9-26-1-4 and -8(b) (failure to stop after an accident causing property damage is a class B misdemeanor). Once they approached, the bottle of vodka in plain view on Makori's lap further provided reasonable suspicion to investigate whether Makori had been operating while intoxicated.

See Ind. Code §§ 9-30-5-1 through -3 (penalties for operating while intoxicated range from a class C misdemeanor to a class C felony).

Although Makori disputed some of the officers' testimony, when the evidence is conflicting, we consider only the evidence favorable to the trial court's ruling. Makori's argument that the police could not have reasonably suspected that he was involved in the burglary is unavailing because the officers had other adequate grounds that justified the stop. Makori has not demonstrated that the trial court's ruling was an abuse of discretion, nor can he show that he was prejudiced by counsel's failure to preserve the issue. Therefore, we affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.