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IN THE
COURT OF APPEALS OF INDIANA

TIERRE MOORE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0806-CR-511
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick Murphy, Commissioner
Cause No. 49G23-0711-FA-241316

January 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Tierre Moore appeals his conviction and sentence for possession of cocaine as a class C felony. We affirm.

Issues

I. Did the trial court abuse its discretion by admitting evidence obtained following a police search of Moore's person?

II. Is Moore's sentence inappropriate in light of the nature of his offense and his character?

Facts and Procedural History

Late in the evening on November 12, 2007, Moore was driving on southbound Interstate 65 and exited at Pennsylvania Street in downtown Indianapolis. Indianapolis Metropolitan Police Department officer Steven Brinker observed that Moore made two lane changes on Pennsylvania Street without signaling, reentered the highway and merged from southbound I-65 to eastbound I-70, and then changed lanes on I-70 without signaling. Officer Brinker initiated a traffic stop. Moore took an unusually long time to pull over, and Officer Brinker called for backup because he thought there might be some "officer safety issues[.]" Tr. at 27. At trial, Moore testified that while driving that night, he had been snorting cocaine. He said that when he saw Officer Brinker's lights, he snorted the rest of the contents of one baggie and then bit off the corner of the baggie and swallowed it because he was scared.

After Moore stopped his vehicle and identified himself, Officer Brinker ran a driver's license check and discovered that Moore's license was suspended. Officer Brinker placed

Moore under arrest, handcuffed him, and walked him to his police vehicle. Moore testified that as he got out of the car that night, he placed another baggie of cocaine in the waistline of his pants.

Officer Brinker performed a search of Moore's person by the side of the highway. He reached into Moore's pants pockets and found a baggie with one corner cut off. From his training and experience, Officer Brinker knew that drug dealers typically package drugs in baggie corners. *Id*. at 30-31. He also noticed that Moore's boxer shorts were pulled up above his waistband in a way that looked like "it wouldn't be comfortable" and suspected that he might be hiding narcotics in his "crotchal" or anal area. *Id*. at 31. Officer Brinker searched around Moore's crotch and buttocks "through his pants." *Id*. at 44-45. He then grabbed the waistband of Moore's pants, pulled it out and looked down into his pants. He pulled Moore's underwear back also and shined a flashlight into his underwear. He also shook Moore's pants. During the course of the search, Officer Brinker did not pull Moore's pants down.

Shortly after Officer Brinker finished searching Moore, he turned away from him and began to do paperwork on the hood of his vehicle. When he turned back toward Moore a short time later, he noticed two baggies on the ground between Moore's feet. One baggie contained marijuana, and the other contained what police later determined was 27.74 grams of cocaine. Moore asked to call his girlfriend, and Officer Brinker retrieved Moore's cellular phone from his car. It was ringing, and Officer Brinker allowed Moore to answer the call. He held the phone to Moore's ear and heard Moore tell his girlfriend, "They got me, they got

me. I'm done." *Id*. at 33. Another officer heard Moore say, "[T]hey got me with an ounce." *Id*. at 60.

On November 13, 2007, the State charged Moore with class A felony dealing in cocaine, class C felony possession of cocaine, and class A misdemeanor driving while suspended. On January 10, 2008, Moore filed a motion to suppress evidence. Following a suppression hearing, the trial court denied Moore's motion. On April 29, 2008, a jury convicted Moore of possession of cocaine and driving while suspended and acquitted him of dealing in cocaine. On May 9, 2008, the trial court sentenced Moore to eight years for his cocaine conviction and 177 days—time served—for driving while suspended. Moore now appeals.

Discussion and Decision

I. Admission of Evidence

Moore contends that Officer Brinker's discovery of the cocaine resulted from a search that violated his rights pursuant to the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Although Moore filed a motion to suppress, he proceeded to trial after denial of that motion. Therefore, his claim now is properly framed as whether the trial court erred by admitting the cocaine into evidence. *See Kelley v. State*, 825 N.E.2d 420, 425 (Ind. Ct. App. 2005).

The State argues that Moore waived his objection to the admission of this evidence because he failed to object during Officer Brinker's testimony about the search and discovery of the cocaine. Also, the State contends that an inquiry into the legality of the search is

irrelevant because Moore has failed to prove that the cocaine, which was found on the ground between Moore's feet a short time after Officer Brinker finished searching his person, was discovered as a result of the search. While the State's point is well taken, our analysis is premised on the assumption that the cocaine fell out of Moore's pants as a result of the search.

Trial courts have broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only for an abuse of discretion. *Bennett v. State*, 883 N.E.2d 888, 890 (Ind. Ct. App. 2008), *trans. denied*. An abuse of discretion occurs when the trial court's ruling is clearly against the logic and effect of the facts and circumstances. *Id*.

The purpose of the Fourth Amendment is to protect citizens from unreasonable searches and seizures. *Rush v. State*, 881 N.E.2d 46, 50 (Ind. Ct. App. 2008). Generally, warrantless searches are prohibited. *Id*. If a warrantless search is conducted, however, the burden is on the State to prove that an exception to the warrant requirement applies. *Id*. Whether a particular warrantless search violates the guarantees of the Fourth Amendment depends upon the facts and circumstances of each case. *Id*.

One exception to the warrant requirement is a search incident to a lawful arrest. *White v. State*, 772 N.E.2d 408, 411 (Ind. 2002). Moore concedes that his arrest was lawful. In *Chimel v. California*, 395 U.S. 752 (1969), the Supreme Court held,

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. … In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. … There is ample justification, therefore, for a search of the arrestee's person and the

> area within his immediate control.

Id. at 762-63 (quotations omitted). The search incident to arrest may involve "'a relatively extensive exploration of the person.'" *United States v. Robinson*, 414 U.S. 218, 227 (1973) (quoting *Terry v. Ohio*, 392 U.S. 1, 25 (1968)). Nonetheless, such a search might be unreasonable and therefore in violation of the Fourth Amendment if it had "extreme or patently abusive" characteristics. *Id*. at 236.

Moore claims that Officer Brinker's search of his buttocks and "crotchal" area was extreme and patently abusive. More specifically, he contends that pursuant to the relevant balancing test set out by the Supreme Court, Officer Brinker's search was unreasonable.

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559 (1979). Moore claims that the search in this case demonstrates a "great invasion" of his personal rights that outweighs any justification the State has offered, and he contends that the manner and location of the search were "unnecessarily embarrassing." Appellant's Br. at 8. We disagree.

As for the scope of the intrusion in this case, the evidence indicates that Officer Brinker performed a fairly discreet search of Moore's "crotchal" area, pulling his pants and underwear back and shining a flashlight down them so that only Officer Brinker could see his buttocks. He patted down Moore's genital area from outside his clothes, and he shook Moore's pants. Moore was standing along the side of the interstate while the search took

place, but it was late at night, and there is no evidence that Moore was "exposed" publicly, as he suggests in his brief. *See id*. ("Had Moore similarly exposed himself, Moore's actions could have been considered public nudity.")

As for Officer Brinker's decision to conduct the search when and where he did, he testified that he was suspicious of Moore's very slow stop when he pulled him over and called backup for safety reasons. He was also concerned when he found the baggie in Moore's pocket, as he had been trained that baggie corners were often used in drug dealing activities. He also noticed that Moore's underwear waistband was pulled up unusually high, which reminded him of prior experiences where he had "found narcotics in crotchal areas and anal areas of individuals as they were trying to hide their narcotics from me." In our view, Officer Brinker's justification for performing the search outweighs the intrusion of Moore's personal rights under the Fourth Amendment. *Cf. Edwards v. State*, 759 N.E.2d 626, 629-30 (Ind. 2001) (holding that routine, warrantless strip searches of misdemeanor arrestees are not reasonable without reasonable suspicion that weapons or contraband may be introduced into jail); *Rochin v. California*, 342 U.S. 165, 174 (1952) (concluding that search violated Fourth Amendment where police officers used force that was "brutal and … offensive to human dignity" in attempting to extract capsules that suspected drug dealer swallowed and then transporting him to hospital and directing physician to perform a forced stomach pumping procedure to induce vomiting and recover capsules).

As for the Indiana Constitution, we apply a different analysis, focusing on the specific facts of each case and considering whether police conduct was reasonable in light of the

totality of the circumstances. *Trowbridge v. State*, 717 N.E.2d 138, 144 (Ind. 1999). Assessing the totality of the circumstances "requires consideration of both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search or seizure." *Litchfield v. State*, 824 N.E.2d 356, 360 (Ind. 2005). The determination of the reasonableness of a search or seizure under Section 11 often "turn[s] on a balance of: 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.

First, Officer Brinker clearly knew that Moore had violated the law by changing lanes without signaling and driving without a license. Moreover, he was suspicious when Moore took an unusually long time to pull over, and he became particularly concerned that Moore possessed drugs when he discovered the baggie in Moore's pocket. Second, as discussed above, Officer Brinker's search was not overly intrusive. He looked down the back of Moore's pants and underwear and patted down his genital area over his clothing. He did not expose Moore to other officers or to the highway traffic. Third, another officer who was present during the search testified that searches incident to arrest are commonly performed as a way to "guarantee the safety of the people who work in the processing center and the jail." Tr. at 57. This, as well as Officer Brinker's specific concern that Moore might be concealing drugs on his person, were valid law enforcement needs. Balancing these three factors, we conclude that the search was reasonable in light of the totality of the circumstances.

As such, the trial court did not abuse its discretion by admitting the cocaine into

evidence.

II. Appropriateness of Sentence

Moore asks us to revise his sentence pursuant to Indiana Appellate Rule 7(B), which provides: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We must exercise deference with regard to a trial court's sentencing decision, and the defendant bears the burden of persuading us that his sentence is inappropriate. *See Stewart v. State*, 866 N.E.2d 858, 865-66 (Ind. Ct. App. 2007) (clarifying that appellate court's review of sentences need not exercise "great restraint" nor be "*very* deferential" to the trial court, as often stated in earlier cases).

The trial court sentenced Moore to eight years, the maximum sentence allowable by statute, for his class C felony possession of cocaine conviction. *See* Ind. Code § 35-50-2-6(a) ("A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years.") We note that the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Moore claims that there was nothing "exceptional" about his crime that would justify a sentence in excess of the advisory term. Appellant's Br. at 12. As the State points out, however, class C felony cocaine possession requires possession of at least three grams of cocaine. Moore had approximately twenty-seven grams of cocaine in his possession at the time of his arrest, nine times the legal threshold.

As for his character, the State directs us to Moore's criminal history. Moore's juvenile record includes a true finding for child molestation, a felony if committed by an adult, and two true findings for operating without a license. As an adult, Moore was convicted of two class C felonies and two misdemeanors. Moore has also been arrested on eight occasions unrelated to these crimes. While in prison in 2004 and 2005, Moore received eight written reprimands for poor conduct. Moore admitted that at the time of his arrest, he was snorting "about three grams a day" of cocaine. *See* Presentence Investigation Report at 9. Clearly, Moore has little respect for the law.

Moore asks that his young age be considered in his favor; however, we see that his criminal record is fairly substantial for a twenty-six-year-old man. At trial, he admitted that he borrowed money regularly from his family members, including his mother, and even used his fiancée's engagement ring to pay for drugs. He also stated that his habit had increased in severity, and that he had started to buy drugs "on credit" from his drug dealer. Tr. at 144. Finally, Moore testified that on the night of his arrest, he was driving around "jus [sic] trying to burn some time" and snorting cocaine while he was driving. *Id*. at 134. We are not impressed by Moore's character. In sum, Moore has failed to meet his burden; we are not persuaded that his sentence is inappropriate.

Affirmed.

ROBB, J., and BROWN, J., concur.