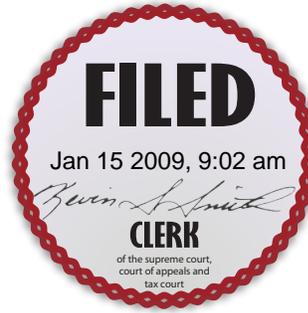


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**RONALD K. SMITH**  
Muncie, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**ARTHUR THADDEUS PERRY**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

JAMES RAY BURGESS, JR., )

Appellant-Defendant, )

vs. )

No. 18A05-0805-CR-292

STATE OF INDIANA, )

Appellee-Plaintiff. )

---

APPEAL FROM THE DELAWARE CIRCUIT COURT  
The Honorable Marianne L. Vorhees, Judge  
Cause No. 18C01-0709-FD-119

---

**January 15, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

James Burgess appeals his conviction and sentence for Class D felony theft. We affirm.

### **Issues**

Burgess raises three issues, which we consolidate and restate as:

- I. whether the trial court properly admitted certain evidence; and
- II. whether his sentence is appropriate.

### **Facts**

At approximately 5:00 p.m., on August 22, 2007, Burgess entered a liquor store in Muncie. While he was there he took a bottle of alcohol from the counter without paying for it. The store clerk, Tracy Rice, noticed the bottle was missing and reported it to his manager, Chris Hatcher. Hatcher came into the store, he and Rice watched the surveillance video, and he reported the theft to the police. Officer David Porter of the Muncie Police Department responded to the report, reviewed the surveillance video, and conducted an investigation.

At approximately 8:20 p.m. that same night, another Muncie Police Officer, Michael Nickens, was on duty when he noticed an occupied van parked outside of a house he knew to be associated with illegal activity. Officer Nickens eventually reported that he was going to approach the vehicle. He got out of his car and began talking to the woman sitting in the passenger seat of the van. During this conversation, Officer Porter approached the area to assist Officer Nickens. Officer Porter parked his car behind

Officer Nickens, got out of his car, and approached the driver's side of the van. Officer Porter recognized the driver as the person he had seen taking the bottle of alcohol in the liquor store surveillance video. Officer Porter asked the driver if he had been to the liquor store, and the driver said that he had. The driver, identified as Burgess, was arrested. Officer Nickens conducted a search of the van where he found a bottle of alcohol matching the kind that had been taken from the liquor store.

On September 10, 2007, the State charged Burgess with Class D felony theft. The State also filed an habitual offender allegation. On January 4, 2008, Burgess filed a motion to suppress evidence associated with the bottle of alcohol obtained during the search and statements he made to the police. Following a hearing, the trial court denied the motion. A jury convicted Burgess as charged. The trial court sentenced Burgess to three years on the theft conviction, which was enhanced by two years for being an habitual offender, for a total sentence of five years. Burgess now appeals.

## **Analysis**

### ***I. Admission of Evidence***

Burgess argues that the trial court improperly admitted evidence of the bottle of alcohol found in the van and statements he made to police. He also claims that the trial court improperly admitted photographs of the bottle and the surveillance video into evidence. The trial court has inherent discretionary power on the admission of evidence, and its decisions are reviewed only for an abuse of that discretion. Jones v. State, 780 N.E.2d 373, 376 (Ind. 2002).

#### ***A. Motion to Suppress***

Burgess argues that the trial court improperly denied his motion to suppress and admitted evidence recovered during the search of the van and Burgess's statements to the police. Although Burgess originally challenged the admission of this evidence in a motion to suppress, he appeals following the admission of the evidence at trial. Accordingly, the issue is framed as whether the trial court abused its discretion by admitting the evidence at trial. Cole v. State, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007). "Our standard of review for rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by an objection at trial." Id. We do not reweigh the evidence, and we consider conflicting evidence in the light most favorable to the trial court's ruling. Id. We also consider uncontroverted evidence favoring Burgess. Id.

To the extent that Burgess argues that the initial encounter between Officer Nickens and the passenger was a stop or a seizure, we cannot conclude that the detention was unlawful. A person may be detained on less than probable cause if the officer has a justifiable suspicion the suspect has committed a crime, providing the intrusiveness and nature of the seizure is reasonably related in scope to the justification for its initiation. Manigault v. State, 881 N.E.2d 679, 685 (Ind. Ct. App. 2008) (quoting Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)). The investigating officer must be able to point to specific and articulable facts that reasonably warrant the intrusion upon the individual's right of privacy. Id. This inquiry is fact-sensitive and thus must be determined on a case-by-case basis. Id. Although an officer must have more than an

inchoate and unparticularized suspicion or hunch, the officer need not have the level of suspicion necessary for probable cause. Id. at 685-86.

Here, Officer Nickens testified that the house the van was parked in front of was a known drug house where he had made several arrests. He also testified that the passenger of the van was a known drug user and that he knew her as an inmate in the jail when he worked there. This information taken with the fact that the three occupants remained seated in the parked van for at least ten minutes is a sufficient basis for a brief detention of the occupants of the van. Under these circumstances, Officer Nickens's actions were appropriate.

Further, Officer Porter's immediate recognition of Burgess from the surveillance video at the very least provided him reasonable suspicion to question Burgess about his presence at the liquor store. Burgess's answers gave Officer Porter probable cause to arrest him. See Clark v. State, 808 N.E.2d 1183, 1192 (Ind. 2004) ("Probable cause to arrest exists when, at the time of the arrest, the officer has knowledge of facts and circumstances that would warrant a reasonable person to believe that the suspect has committed the criminal act in question.").

Burgess also has not established that the search of the van was unlawful. "A search incident to arrest is a well-recognized exception to the Fourth Amendment's warrant requirement." Black v. State, 810 N.E.2d 713, 715 (Ind. 2004). Once a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest. Id. Burgess's lawful arrest permitted Officer

Nickens to search the passenger compartment of the van as a contemporaneous incident of arrest. See id.

Finally, Burgess summarily argues that the “intrusion upon his rights was unreasonable under The Indiana Constitution, Article 1, Section 11.” Appellant’s Br. p. 6. Under the Indiana Constitution, the reasonableness of a search or seizure as turns 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.” Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005). Here, given the officers’ degree of suspicion and knowledge of suspected criminal activity, the minimal intrusion on the occupants of the parked van, and the need for law enforcement to investigate suspicious behavior and reported crimes, renders the police officers’ actions reasonable.

Without addressing his specific statements, Burgess also claims that anything he said to Officer Porter was made in violation of his Miranda rights. It is undisputed that Officer Porter did not Mirandize Burgess. “Rights under Miranda apply only to custodial interrogation.” White v. State, 772 N.E.2d 408, 412 (Ind. 2002). To determine if a defendant is in custody, we apply an objective test, asking whether a reasonable person under the same circumstances would believe themselves to be under arrest or not free to resist the entreaties of the police. Id.

As for Burgess’s first statement to Officer Porter that he had been at the liquor store earlier in the day, Burgess was not in custody. As we have discussed, Burgess was not responding to the officers’ show of force. Nor was he physically restrained in

anyway—he was sitting in the driver’s seat of his parked van. This statement was not a product of custodial interrogation. Further, according to Officer Porter’s testimony, any statements Burgess made after he was handcuffed were spontaneously made by Burgess. In the absence of any evidence to the contrary, we cannot conclude that these statements were a product of custodial interrogation either.

Burgess has not established that his United States or Indiana constitutional rights were violated. As such, Burgess has not shown that the trial court abused its discretion in admitting evidence discovered during the search of the van or his statements to police.

### ***B. Photographs and Surveillance Video***

Burgess also argues that the two photographs of the bottle of alcohol were improperly admitted into evidence because the State did not establish a proper foundation. “Under a ‘silent witness’ theory, videotapes and photographic evidence may be admitted as substantive evidence, rather than merely as demonstrative evidence.” Edwards v. State, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002). For the admission of photographs offered as substantive evidence rather than demonstrative evidence under the “silent witness” theory there must be a strong showing of authenticity and competency including proof that the photograph has not been altered in any way. Id.

Assuming that the photographs were offered as substantive evidence, the proper foundation was established. At trial, the store manager testified that the two photographs of the bottle fairly and accurately depicted the bottle that was stolen. The fact that neither picture showed that the bottle was labeled with the name of the liquor store does not affect whether the photographs fairly and accurately depicted the stolen bottle. At the

most the lack of store identification goes to the weight of the evidence, not its admissibility.

As for the surveillance video, the store manager testified that when the clerk reported the theft to him, he came to the store to watch the surveillance video. To do so, he rewound the tape and watched it. He stated that he had put the tape into the machine that day and that it did not appear to be tampered with. He testified that he recognized the label on the tape. He also said that he watched the tape the morning of trial and it was in the same condition it was in on the day of the theft. This is a sufficient foundation to support the admissibility of the surveillance video. Burgess has not established that the trial court abused its discretion in admitting the photographs and the surveillance video.

## *II. Sentence*

Burgess also argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be “extremely” deferential to a trial court’s sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. “Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate.” Id. Burgess has not met this burden.<sup>1</sup>

---

<sup>1</sup> Burgess did not include in the record a copy of the pre-sentence investigation report. Such a report is extremely helpful to our review of an individual’s sentence.

Burgess argues that he should not have received the maximum three-year sentence for the theft because he is not the worst offender. To the contrary, however, Burgess faced a total sentence of seven and a half years because of the habitual offender enhancement and he was only sentenced to five years. He did not receive the maximum sentence.

As for the nature of the offense and the character of the offender, although we tend to agree that the nature of this offense is not particularly egregious, Burgess's character does support his sentence. As noted by the trial court, Burgess's criminal history is extensive and shows a pattern of involvement with the Indiana and Florida criminal justice systems since 1994. Burgess has at least one burglary conviction, one forgery conviction, two petit theft convictions, three theft convictions, and five conversion convictions. Burgess also has numerous drug-related convictions including possession of paraphernalia, possession of marijuana, public intoxication, and possession of cocaine. Burgess's criminal history also includes convictions for criminal trespass, driving while suspended, battery resulting in bodily injury, and disorderly conduct. Burgess was on parole at the time he committed this offense and had not availed himself of the numerous past attempts at rehabilitation. As the trial court observed, Burgess's criminal history shows "his absolute and total disregard for other person's property and for lawful authority." Tr. p. 160. Burgess has not established that his sentence is inappropriate.

### **Conclusion**

The trial court did not abuse its discretion in admitting certain evidence. Burgess has not established that his sentence is inappropriate. We affirm.

Affirmed.

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