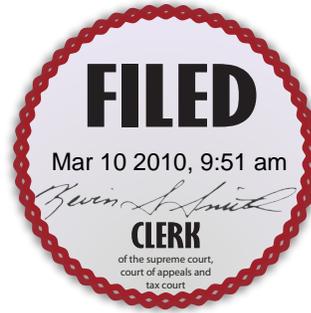


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**IN THE
COURT OF APPEALS OF INDIANA**

J.H.,)
)
Appellant,)
)
vs.) No. 49A05-0907-JV-382
)
STATE OF INDIANA,)
)
Appellee.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Geoffrey Gaither, Magistrate
Cause No. 49D09-0903-JD-770

March 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

J.H., a minor, appeals from his adjudication as a juvenile delinquent after the juvenile court found that he committed acts that would be class A misdemeanor carrying a handgun without a license and class A misdemeanor dangerous possession of a handgun if committed by an adult.

We affirm.

ISSUE

Whether the juvenile court erred in denying J.H.'s motion to suppress evidence that was allegedly obtained in violation of the Fourth Amendment to the United States Constitution and article 1, section 11 of the Indiana Constitution.

FACTS

On March 13, 2009, Cumberland Police Department ("CPD") dispatch received a telephone call regarding three or four masked black males, who were dressed in black hoodies and matching pants, and who were raising their hoodies and flashing a handgun in a threatening manner. The informant advised that the males were accompanied by several females and were walking north toward 10th Street in the vicinity of Woodlawn Drive, which is located within a residential apartment complex.

Officer Vince Semona was the first officer to arrive at the scene. He immediately observed the group of black males wearing black hoodies sitting on top of a large utility box. As he parked his squad car near the group and exited his squad car, J.H. jumped from the utility box and hid behind it. Semona could still see J.H.'s torso, however, and

observed J.H. making movement(s) with his right hand. Semona later testified that as a result of J.H.'s behavior, he became concerned that J.H. had hidden behind the box to get "cover" to fire the handgun. (Tr. 6). Semona drew his service weapon, pointed it at the group of males, and ordered them to raise their hands. Initially, all of the males, with the exception of J.H., complied. J.H. remained crouched behind the utility box, and Semona radioed dispatch for backup assistance.

Several other CPD officers soon arrived at the scene. By that time, Semona had the group of males, including J.H., lying on the ground. The police patted the subjects down for officer safety. The pat down search of J.H. yielded one gun -- a black Davis Industries P32-32 caliber handgun in the right front pocket of his jeans. Police also found J.H. and another male subject were wearing scraps from torn t-shirts around their necks. The t-shirt remnants were damp, leading officers to believe that the remnants were worn as masks over the subjects' noses and mouths. During the ensuing police investigation, the subjects were separated and questioned independently. When J.H. asked what was going on, an officer advised him about the informant's allegations. J.H. denied carrying or flashing a gun and identified another one of the subjects as the individual who had done so.

In the meantime, Officer Semona contacted dispatch and learned that dispatch had information regarding the identity of the informant. When he contacted the informant, she provided a description of the male who had flashed the handgun; the description was consistent with J.H.'s appearance. Semona transported J.H. to CPD headquarters.

On March 13, 2009, a probable cause affidavit was filed. On March 16, 2009, the juvenile court issued an order to file a delinquency petition against J.H. At the denial hearing on April 14, 2009, J.H. moved to dismiss the petition, which motion was denied. The juvenile court heard evidence and found the allegations to be true. On May 7, 2009, the juvenile court held a disposition hearing, wherein the court, *inter alia*, imposed a commitment to the Department of Correction, which was ordered suspended to probation. Among the special conditions of J.H.'s probation were participation in court-ordered programs, counseling, curfew restrictions, and random drug screens. He now appeals.

DECISION

J.H. argues that the juvenile court erred in denying his motion to suppress and admitting the handgun into evidence because the handgun was obtained pursuant to an illegal search and seizure which violated the Fourth Amendment to the United States Constitution and article 1, section 11 of the Indiana Constitution. We disagree.

J.H. seeks to challenge the juvenile court's denial of his motion to suppress; however, he is appealing from a completed trial; thus, the standard of review for the admission of evidence governs his appeal. *Buckley v. State*, 886 N.E.2d 10, 13 (Ind. Ct. App. 2008). Our standard of review for the admissibility of evidence is well settled. The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). We consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id.* We reverse only for an abuse of

discretion, which occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* We will affirm the trial court's ruling if it is supported by substantial evidence of probative value. *Buckley*, 886 N.E.2d at 13-14.

Fourth Amendment

J.H. argues that the handgun was improperly obtained pursuant to an illegal seizure which precipitated the pat down search and, therefore, should not have been admitted into evidence. Specifically, he argues that he was improperly seized and effectively under arrest when Officer Semona held him at gunpoint; that Semona lacked sufficient probable cause to arrest him based solely upon an anonymous informant's tip for which he lacked either independent indicia of reliability or corroboration that the informant's tip indicated that criminal activity had or was about to occur. Thus, he argues that Semona lacked probable cause to arrest him.

The Fourth Amendment protects citizens against unreasonable searches and seizures. *State v. Calmes*, 894 N.E.2d 199, 202 (Ind. Ct. App. 2008). However, police may, without violating the Fourth Amendment, briefly detain an individual without a warrant or probable cause for investigatory purposes if, based upon specific and articulable facts, the officer has a reasonable suspicion that criminal activity "may be afoot." *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). "Accordingly, limited investigatory stops and searches on the street 'involving a brief question or two and a possible frisk for weapons' can be

justified by mere reasonable suspicion.” *Briggs v. State*, 873 N.E.2d 129, 132 (Ind. Ct. App. 2007) (quoting *id.*).

Reasonable suspicion exists where the facts known to the officer, and reasonable inferences therefrom, would cause an ordinarily prudent person to believe that criminal activity has occurred or is about to occur. *J.D. v. State*, 902 N.E.2d 293, 295 (Ind. Ct. App. 2009). Reasonable suspicion is determined on a case-by-case basis by examining the totality of the circumstances. *Person v. State*, 764 N.E.2d 743 (Ind. Ct. App. 2002). The requirements of the Fourth Amendment are satisfied if the facts known to the officer at the moment of the stop are such that a person of reasonable caution would believe that the action taken was appropriate. *J.D.*, 902 N.E.2d at 295.

Under the totality of the circumstances as they unfolded, Officer Semona had reasonable suspicion to conduct a brief *Terry* stop; and subsequently, to conduct a limited pat down search in order to determine whether J.H. and his friends had been involved in criminal behavior alleged by the informant. J.H. correctly asserts that before an officer may use information relayed from an anonymous informant to form a reasonable and articulable suspicion to make an investigatory stop, there must be some independent indicia of reliability or the officer must have observed confirmation of the informant’s prediction of the defendant’s future behavior. *Johnson v. State*, 766 N.E.2d 426, 430 (Ind. Ct. App. 2002) (citing *Florida v. J.L.*, 529 U.S. 266 (2000)). However, the informant in this case cannot properly be characterized as an anonymous informant.

Rather, the informant falls within a second class of informants upon which police may properly rely. *Johnson v. State*, 766 N.E.2d 426, 430 (Ind. Ct. App. 2002) (citing *Pawloski v. State*, 380 N.E.2d 1230, 1232-33 (1978)). “Cooperative citizens include victims of crime and eyewitnesses. Informants of this type are considered to be reliable for the purpose of determining probable cause unless incriminating circumstances exist which cast suspicion upon the informant’s reliability.” *Id.*

At the denial hearing, Officer Semona testified that after backup officers arrived at the scene and the subjects were secured, he radioed dispatch and inquired as to the identity of the informant. He testified, “I asked dispatch if they [could] find the witness[’] information so that I could contact [her].” (Tr. 8). Apparently, the informant had provided dispatch with sufficient personal information such that police could contact her again in the future, because Semona testified that he knew the informant’s identity within “a matter of minutes” of the stop and search. (Tr. 8). Because nothing in the record suggests that there was a reason to question the informant’s motives, we conclude that the informant herein was not an anonymous informant, but rather, was a cooperative citizen informant upon whom the police could properly rely. *See Johnson*, 766 N.E.2d at 430 (finding sufficient indicia of reliability in informant’s tip and, thereby, sufficient probable cause to arrest defendant where eyewitnesses, who did not want their identities disclosed to the prosecutor for fear of being called to testify, identified themselves to the officer and provided sufficient information that he could contact them in the future, indicating that they were not “hiding their identities in order to protect themselves from

the repercussions of fabricating a story or reporting false information but rather were cooperative citizens upon which police could rely” in order to determine whether probable cause existed to arrest defendant).

Semona also had reasonable suspicion that J.H. or one of the other subjects may be armed and that his own personal safety might be in danger when he initially stopped the subjects and, subsequently, performed the pat down searches, which yielded the handgun on J.H.’s person. Police may undertake a “reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing” with an armed person, and the officer need not be absolutely certain that the individual is armed. *A.M. v. State*, 891 N.E.2d 146, 149 (Ind. Ct. App. 2008) (citing *Terry*, 392 U.S. at 27)).

Here, the record reveals that the informant reported and described that a group of three or four black males, dressed in black hoodies and matching black pants, and accompanied by a group of females, were flashing a gun menacingly in the vicinity of the Woodland Lark apartment complex. Moments later, when Officer Semona responded to the scene, he encountered a group of three or four black males, dressed exactly as the informant had stated and accompanied by a small group of females. When Semona approached the group, J.H. “ducked behind” a large metal utility box and crouched there, making a perceptible movement with his right hand. (Tr. 5). As a result of J.H.’s behavior, Semona then drew his service weapon, pointed it at the group, and ordered them to raise their hands. All of the subjects complied, except J.H., who remained

crouched behind the large metal utility box. Semona later testified that he believed himself to be in danger because he had received information from dispatch regarding a

person with a gun call and we didn't know who [actually had the gun] . . . and everyone [had] . . . responded to me except for the one who was taking cover behind a large metal object that would obviously provide cover for him, [and] you could see his arm motion coming up

(Tr. 6).

Under the foregoing circumstances, an ordinarily prudent person would be warranted in the belief that criminal activity had or was about to occur; and that he was dealing with a potential armed person and that his safety was in danger. *See A.M.*, 891 N.E.2d at 149. Thus, we conclude that Officer Semona's brief pat down search for officer safety, which yielded the gun on J.H.'s person, was warranted. The trial court, therefore, did not abuse its discretion when it admitted the handgun into evidence.

2. Indiana Constitution

Next, J.H. argues that Officer Semona's seizure and search of his person were not reasonable under the totality of the circumstances, and, therefore, violated article 1, section 11 of the Indiana Constitution. Article 1, section 11 of the Indiana Constitution provides, "[t]he right of the people to be secure in their persons, houses, papers and effect, against unreasonable search or seizure, shall not be violated." Although the language of Article 1, Section 11 is similar to the Fourth Amendment, we employ a separate and distinct analysis, wherein we consider the reasonableness of the officer's conduct under the totality of the circumstances. *Holder v. State*, 847 N.E.2d 930, 940 (Ind. 2006). "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." *State v. Lefevers*, 844 N.E.2d 508, 515 (Ind. Ct. App. 2006) (quoting *Litchfield v. State*, 824 N.E.2d 356, 359-60 (Ind. 2005)).

"Article 1, section 11 guarantees the rights of liberty, privacy, and free movement[,] and investigatory stops constitute a seizure, invoking the protections of that provision." *J.D.*, 902 N.E.2d at 296 (citing *Taylor v. State*, 639 N.E.2d 1052 (Ind. Ct. App. 1994)). "These rights are not absolute, however, but must be balanced against society's right to protect itself." *Id.* Specifically, 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." *Litchfield*, 824 N.E.2d at 361.

Here, with respect to the first factor, Officer Semona had a high degree of concern, suspicion, or knowledge that a violation had occurred. While he was investigating a call to police regarding a person with a gun, he encountered subjects who matched the physical descriptions provided by the informant. When he approached the group, J.H. hid behind a large metal utility box, made a movement with his right hand, and disregarded an order to raise his hands. Under these circumstances, we find that at that moment, Semona reasonably had an extremely high degree of concern and suspicion that a violation had occurred.

As to the second factor, the degree of intrusion was not excessive under the circumstances. After J.H. concealed himself behind a large metal utility box, made a

movement with his right hand, and defied an order to raise his hands, Officer Semona drew his service weapon. Subsequently, he conducted a pat-down search of the subjects in furtherance of his investigation regarding an armed individual. Officer Semona's degree of intrusion was minimal, given the potential threat to the public and his own personal safety.

Regarding the final factor, we find that the extent of law enforcement needs was significant. The informant's information alleged that a group of males displayed and flashed a handgun in a menacing manner within the confines of a residential apartment complex. The potential for harm to innocent individuals was significant. *See Trimble v. State*, 842 N.E.2d 798, 803 (Ind. 2006) ("Where a police officer has received a timely tip concerning a possibly dangerous situation, the privacy interest is diminished)."

Under the instant facts and circumstances, we conclude that Officer Semona's conduct was reasonable and permissible under Article 1, Section 11 of the Indiana Constitution. The trial court did not abuse its discretion when it admitted into evidence the handgun that was obtained pursuant to Officer Semona's brief stop and pat down of J.H.'s person.

Affirmed.

MAY, J., and KIRSCH, J., concur.