

Appellant-Defendant Terrance Tindall appeals following his conviction for Class D felony Dealing in Marijuana.¹ Upon appeal, Tindall claims that the use of certain evidence against him violated his rights under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. We affirm.

FACTS AND PROCEDURAL HISTORY

Between approximately 3:00 and 3:30 a.m. on February 21, 2009, Indianapolis Metropolitan Police Officer William Payne observed a vehicle pull into the parking lot of a twenty-four-hour Marathon Gas Station at 922 Delaware Street. Officer Payne, who was patrolling the lot because people routinely congregate there when bars close, remained there until 3:30 a.m. when the lot cleared out, at which point he left. Upon leaving, Officer Payne observed a person sitting “slumped over” in the driver’s seat of the vehicle. Tr. p. 10. The vehicle was running, and its headlights were illuminated.

At approximately 4:48 a.m., Officer Payne returned to find the vehicle in the same spot, with its engine still running and lights still illuminated. The driver remained in his same “slumped over” position. Tr. p. 13. No one else was in the parking lot at the time.

Officer Payne parked his patrol car behind, but not directly behind, the vehicle. Officer Payne’s patrol car was parked at an angle behind the vehicle, approximately ten to fifteen feet away. According to Officer Payne, it would have been possible for the

¹ Ind. Code § 35-48-4-10 (2008).

driver to back his vehicle up and leave. Officer Payne activated his spotlight and approached the vehicle to ascertain the status of the occupant.²

Officer Payne was in police uniform as he approached the driver's side, before knocking on the window and identifying himself as a police officer. Officer Payne asked the driver to roll his window down several times, but the driver did not immediately respond. For several minutes, as Officer Payne knocked and pounded on the window, the driver would intermittently look at Officer Payne and appear to fall back asleep. Eventually, the driver, later identified to be Tindall, sat up, opened his eyes, looked at Officer Payne, and rolled down his window. Immediately, Officer Payne detected a strong odor of raw marijuana.

After Tindall opened the window, he reached for the gearshift, causing Officer Payne to tell him not to place his hand on the gearshift. Officer Payne asked for identification, and Tindall complied. Officer Payne called for back-up. Officer Christopher Smith arrived shortly thereafter and watched Tindall as Officer Payne checked his identification. As Officer Smith was watching, Tindall reclined his seat and began rummaging in the backseat of his vehicle.

Officer Smith screamed at Tindall to sit up and place his hands in the air. The officers then removed Tindall from the vehicle and searched the vehicle. Officer Payne discovered an open yellow plastic bag on the backseat in the area where Tindall had been rummaging. The bag contained a baggie with approximately 140 grams of

² Officer Payne first indicated that his spotlight was on but later equivocated on that point. Tindall testified that the spotlight was on. At oral argument the State did not dispute that the spotlight was on.

marijuana inside. The bag additionally contained a box of plastic baggies and an electronic measuring scale. Upon patting Tindall down, officers found \$2700 in his pocket wrapped in three bundles in \$20, \$50, and \$100 denominations.

On February 22, 2009, the State charged Tindall with Class D felony possession of marijuana (Count 1) and Class A misdemeanor dealing in marijuana (Count 2). On June 30, 2009, the State amended Count 2 to a Class D felony on the basis that the amount of marijuana at issue was greater than, instead of less than, thirty grams.

Prior to trial, Tindall moved to suppress evidence on the basis that it was procured in violation of his Fourth Amendment and Article 1, Section 11 rights. The trial court denied the motion. Following a bench trial, the trial court found Tindall guilty as charged, and entered judgment of conviction on Class D felony dealing in marijuana only. The trial court sentenced Tindall to 730 days in the Department of Correction to be served on home detention.

On May 14, 2010, Tindall filed a petition seeking to file a belated notice of appeal, which the trial court granted. This appeal follows.

DISCUSSION AND DECISION³

I. Standard of Review

Tindall claims that he was seized in violation of the Fourth Amendment to the United States Constitution. Our standard of review on the admissibility of evidence is the same whether the challenge is made by a pretrial motion to suppress or by a trial

³ Pike High School hosted oral argument in this case, which was held on March 17, 2011 at the Pike Performing Arts Center. We wish to thank the faculty, students and staff of Pike High School for their hospitality and counsel for their fine advocacy.

objection. *Ackerman v. State*, 774 N.E.2d 970, 974 (Ind. Ct. App. 2002), *trans. denied*. We review de novo a trial court's ruling on the constitutionality of a search or seizure. *See Myers v. State*, 839 N.E.2d 1146, 1150 (Ind. 2005). However, we give deference to a trial court's determination of facts, which will not be overturned unless clearly erroneous. *Id.* Thus, we do not reweigh the evidence, but consider conflicting evidence most favorable to the trial court's ruling. *Id.*

II. Fourth Amendment

The parties dispute whether a seizure occurred. Tindall argues that he was seized when Officer Payne approached his vehicle and told him to lower his window. The State argues that this was merely a consensual encounter.

The Fourth Amendment to the United States Constitution protects persons from unreasonable searches and seizures, and this protection has been extended to the states through the Fourteenth Amendment. U.S. Const. amend. IV; *Mapp v. Ohio*, 367 U.S. 643 (1961). There are three levels of police investigation, two of which implicate the Fourth Amendment and one of which does not. *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), *trans. denied*. First, the Fourth Amendment requires that arrests or detentions for more than short periods of time be justified by probable cause. *Id.* at 663. Second, it is well-settled Fourth Amendment jurisprudence that police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based on specific and articulable facts, the officer has reasonable suspicion that criminal activity ““may be afoot.”” *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Accordingly, limited investigatory stops and seizures on the street involving a brief

question or two and a possible frisk for weapons can be justified by mere reasonable suspicion. *Id.* Finally, the third level of investigation occurs when a law enforcement officer makes a casual and brief inquiry of a citizen which involves neither an arrest nor a stop. *Id.* In this type of “consensual encounter,” no Fourth Amendment interest is implicated. *Id.*

In determining the existence of a seizure, this court looks to the totality of the circumstances on a case-by-case basis to determine whether a reasonable person would have believed that he was not free to leave. *See Campbell v. State*, 841 N.E.2d 624, 627-28 (Ind. Ct. App. 2006) (citing *Chappel v. State*, 591 N.E.2d 1011, 1014 (Ind. 1992)). In *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980), the Supreme Court listed the following circumstances which might indicate a seizure had occurred: the threatening presence of several officers, the display of a weapon by the 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. *See Overstreet*, 724 N.E.2d at 664. The Supreme Court has listed the following possible additional actions that an officer could take to cause a reasonable person to conclude he had been seized: use of a siren or flashers, a command that the person halt, display of weapons, or operation of a police vehicle in an aggressive manner to either block the person’s course or otherwise control the direction or speed of the person. *See Michigan v. Chesternut*, 486 U.S. 567, 575 (1988), *cited in Campbell*, 841 N.E.2d at 629.

Further, while a seizure may not occur from a police officer’s simple act of approaching an occupant of a parked car in a public place to ask a question, the situation

could escalate to seizure in cases where a police officer orders a suspect to freeze or get out of the vehicle. *State v. Carlson*, 762 N.E.2d 121, 126 (Ind. Ct. App. 2002). A seizure may also occur when “police ‘box in’ a suspect’s vehicle, approach the vehicle ‘on all sides by many officers,’ point a gun at the suspect, or order the suspect to place his hands on the wheel.” *Id.* (quoting 4 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.3(a), at 108).

Tindall concedes that Officer Payne’s shining a spotlight on his vehicle does not, by itself, constitute a seizure. *See Campbell*, 841 N.E.2d at 628. He argues, however, that Officer Payne’s spotlight, together with his positioning of the patrol car, demonstration of police authority, and orders to Tindall compelling his compliance to roll down his window and not use his gearshift demonstrate that Tindall was not free to leave.

In support, Tindall contrasts his case with that in *Campbell*. In *Campbell*, this court determined that no seizure had occurred as a result of police shining a spotlight on a defendant. *Id.* at 630. In *Campbell*, the officers did not order the defendant to stop, nor did they physically touch him, display their weapons, or approach him. Here, argues Tindall, police shined a spotlight on him, positioned a patrol vehicle so as to impede any effort by him to leave, approached him, and ordered him to do or not do certain acts. Tindall contends that a reasonable person would not feel free to leave under those circumstances.

We cannot agree. Here, Tindall’s car was already parked and had been for over an hour, so Officer Payne’s efforts in approaching the car and checking on Tindall’s

status would not have been particularly disruptive. Officer Payne left a comfortable space between his and Tindall's vehicle when parking behind him, and apart from using a spotlight, he approached Tindall's vehicle in a peaceful, noncoercive manner, without the use of sirens or other aggressive action or loud noise. Such relatively benign steps do not rise to the level of "boxing in" a vehicle or demonstrate the aggressive show of authority associated with compelled compliance. To the extent Officer Payne's knocking on Tindall's window was persistent, his persistence would not have been especially intimidating given that its purpose was to awaken Tindall. Importantly, at no point did Tindall reject Officer Payne's entreaties or indicate that they were unwarranted or otherwise unwelcome. And while Tindall points to his gearshift maneuver as evidence of an attempt to leave, the record demonstrates that he attempted this maneuver, and was instructed not to, only *after* he had opened the window and permitted the odor of marijuana to escape, at which point Tindall concedes the officers were justified in seizing him.

Situations in which police officers approach parked or stopped vehicles in an unaggressive manner are often construed to be consensual encounters. *See Overstreet*, 724 N.E.2d at 663-64 (finding consensual encounter where officer followed individual to gas station, approached him after he exited his vehicle, asked about certain prior actions he had taken, and requested his identification); *see also Powell v. State*, 912 N.E.2d 853, 862 (Ind. Ct. App. 2009) (finding consensual encounter where officer approached parked vehicle in unaggressive manner). We must conclude that this is one such situation. Accordingly, Tindall's encounter with Officer Payne did not implicate

the Fourth Amendment. His rights under the Fourth Amendment, therefore, were not violated when evidence flowing from this consensual encounter was used to convict him of the instant offense.

III. Article 1, Section 11

Tindall also challenges his alleged seizure under the Indiana Constitution. Article 1, Section 11 provides, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated. . . .” The purpose of this article is to protect from unreasonable police activity those areas of life Hoosiers regard as private. *State v. Quirk*, 842 N.E.2d 334, 339 (Ind. 2006). The provision must receive a liberal construction in its application to guarantee the people against unreasonable search and seizure. *Id.* In resolving challenges asserting a Section 11 violation, courts must consider the circumstances presented in each case to determine “whether the police behavior was reasonable.” *Id.* (quoting *Brown v. State*, 653 N.E.2d 77, 79 (Ind. 1995)). We place the burden on the State to show that under the totality of the circumstances its intrusion was reasonable. *Id.*

Under the Indiana Constitution, the legality of a governmental search turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances. *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). Although there may well be other relevant considerations, the reasonableness of the search or seizure 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. *Id.* at 361.

With respect to the first factor, Tindall argues, and the State does not dispute, that the degree of concern, suspicion or knowledge that a violation had occurred was minimal. Tindall was inside a legally parked vehicle, and even Officer Payne, who regularly patrols the area, did not have suspicions of criminal activity, but simply a concern for Tindall's well-being.

The second and third factors, however, do not favor Tindall's position. Officer Payne merely asked Tindall to roll down his car window. Rolling down a car window is an action which regular citizens routinely take as a matter of course in their day, whether at the parking garage or the drive-thru restaurant, or even for a breath of fresh air. It does not represent a great intrusion into personal privacy. Law enforcement's interest in protecting the well-being of the citizenry, in contrast, is great, and would generally be welcomed, indeed, expected, by most Hoosiers. Here, Officer Payne had observed an individual sitting, slumped over in the same position, inside a running vehicle for over an hour in the middle of the night. His attempt to determine the status of that individual, including persisting until he could make a reliable assessment, was entirely reasonable. We find no Article 1, Section 11 violation.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.