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IN THE
COURT OF APPEALS OF INDIANA

RAYMOND RODERICK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 41A01-0812-CR-579
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Cynthia S. Emkes, Judge
Cause No. 41D02-0707-FD-138

April 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Raymond Roderick appeals his conviction for Class D Felony Possession of Marijuana,[1] claiming that the trial court abused its discretion in admitting certain marijuana evidence, the procurement of which allegedly violated his rights under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. The State disputes Roderick's claim on this point but urges this court to remand to the trial court for revision of the habitual offender portion of the sentencing statement. We affirm in part and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On the afternoon of July 15, 2007, Franklin Police Officer Edgar Lucas was dispatched to the Franklin Place Apartments in Johnson County because a possibly intoxicated man was preparing to drive away from a parking lot near the apartment complex's pool in a red Chevrolet Camaro. Upon arriving at the parking lot, Officer Lucas observed Roderick standing near a red Camaro. Officer Lucas spoke to Roderick, who informed him that he had been at the swimming pool and that he had consumed six beers. Roderick smelled of alcohol and exhibited slurred speech and unsteady balance. Officer Lucas also observed several empty beer cans in Roderick's vehicle, as well as one open can of beer. Based on these observations, Officer Lucas arrested Roderick for public intoxication. Officer Lucas notified Roderick that he was under arrest, placed him in

[1] Ind. Code § 35-48-2-1 (2007).

handcuffs, and searched him for weapons.

At some point before Officer Lucas transported Roderick to the Johnson County Jail, Roderick asked a female friend standing nearby to hand him his wallet so he could take it to the jail with him. The female friend retrieved Roderick's wallet from her car which was parked nearby and handed it to Officer Lucas. Officer Lucas informed Roderick that "if [he] wanted to take his wallet with him to the jail it would have to be searched, again for Officer safety reasons, [to] make sure there is no weapon, no blades in it, no contraband that can't be taken to the jail." Tr. p. 12. Roderick did not object to Officer Lucas's searching his wallet. Officer Lucas searched Roderick's wallet and discovered marijuana which Roderick stated he had purchased for five dollars.

On July 19, 2007, the State charged Roderick with Class D felony possession of marijuana and a habitual substance offender enhancement. The State amended the charges on November 9, 2007, to include Class B misdemeanor public intoxication. On November 26, 2007, Roderick filed a motion to suppress the marijuana recovered from his wallet. The trial court conducted a hearing on that date and subsequently denied Roderick's motion.

Following a jury trial on November 27, 2007, Roderick was convicted of the possession of marijuana charge but acquitted of the public intoxication charge. Roderick subsequently admitted to being a habitual substance offender. On January 3, 2008, the trial court sentenced Roderick to three years on the possession of marijuana conviction with one and one-half years executed in the Department of Correction and the remainder to be served on work release. The trial court also imposed a three-year executed sentence due to

Roderick's habitual substance offender status. Roderick requested permission to file a belated notice of appeal on September 18, 2008. The trial court granted Roderick's request, and this appeal follows.

DISCUSSION AND DECISION

I. Admission of Evidence

Roderick contends that the trial court abused its discretion in admitting the marijuana recovered from his wallet into evidence at trial. Specifically, Roderick claims that the admission of the marijuana found inside his wallet violated his right against unreasonable searches and seizures under both the federal and the Indiana Constitutions.[2]

On appeal, we review de novo a trial court's ruling on the constitutionality of a search or seizure. *Campos v. State*, 885 N.E.2d 590, 596 (Ind. 2008). "However, we give deference to a trial court's determination of the facts, which will not be overturned unless clearly erroneous." *Id*. "Thus, we do not reweigh the evidence, but consider conflicting evidence most favorably to the trial court's ruling." *Id*.

> The Fourth Amendment to the United States Constitution … protect[s] against unreasonable searches and seizures and, as a general rule, require[s] a judicially issued search warrant as a condition precedent to a lawful search. However, there are a number of carefully limited exceptions, one of which being a search conducted incident to a lawful arrest. Incident to a lawful arrest, the arresting officer may conduct a warrantless search of the arrestee's

[2] While Roderick separately identifies the Search and Seizure Clause of the Indiana Constitution, Article 1, Section 11, and its reasonableness requirement, he does not present any claim or argument that Section 11 requires a different analysis or yields a different result than that produced under the federal Fourth Amendment. Because Roderick cites no separate argument specifically treating and analyzing a claim under the Indiana Constitution distinct from his Fourth Amendment analysis, we resolve his claim on the basis of federal constitutional doctrine only. *See Myers v. State*, 839 N.E.2d 1154, 1158 (Ind. 2005).

> person and the area within his or her immediate control. Evidence resulting from a search incident to a lawful arrest is admissible at trial.

DeLong v. State, 670 N.E.2d 56, 57-58 (Ind. Ct. App. 1996) (quotations and citations omitted). "Two historical rationales for the search incident to arrest exception to the warrant requirement include: (1) the need to disarm the suspect in order to take him into custody; and (2) the need to preserve evidence for later use at trial." *Gibson v. State*, 733 N.E.2d 945, 953 (Ind. Ct. App. 2000). The scope of a search incident to a lawful arrest is generally limited to a search of the person of the arrestee and the area within his immediate control to which he could reach for weapons or to destroy evidence. *Gibson*, 733 N.E.2d at 954. Thus, a search going beyond the immediate control of the arrestee is unlawful unless accompanied by a valid search warrant. *Id*.

It is undisputed that Roderick's arrest for public intoxication was lawful. Therefore, because Roderick was lawfully arrested, he was subject to a warrantless search incident to his arrest. Roderick claims, however, that Officer Lucas's search of his wallet violated the Fourth Amendment because it was outside of the scope of a search incident to his arrest. Specifically, Roderick argues that because his wallet was not initially located on his person, the wallet was outside the scope of the search incident to his arrest. In making this argument, Roderick disputes the trial court's factual determination that he requested his wallet, claiming rather that it was Officer Lucas who requested the wallet.

In support of his claim that his wallet did not fall within the scope of a search incident to his arrest, Roderick relies upon the United States Supreme Court's determination in

Chimel v. California, 395 U.S. 752 (U.S. 1969), that the search of the defendant's home, which included desk drawers and other concealed areas, was outside of the scope of a search incident to a lawful arrest because the areas searched were outside of the defendant's immediate control. 395 U.S. at 763. Again, in *United States v. Griffith*, 537 N.E.2d 900 (7th Cir. 1976), the Seventh Circuit determined that the search of the defendant's sack was outside the scope of the search incident to arrest exception to the Fourth Amendment warrant requirement because at the time the search was conducted, the sack was lying on the bed and either "was not within the area of the defendant's immediate control or was within that area only because the officers had deliberately chosen to allow defendant to move near the sack." 537 F.2d at 904. Similarly this court determined in *Ceroni v. State*, 559 N.E.2d 372 (Ind. Ct. App. 1990), *trans. denied*, that the search of certain drawers in the hotel room where the defendant was apprehended were outside of the scope of a search incident to the defendant's arrest because he was confined to a particular area and the drawers were outside of his immediate control. 559 N.E.2d at 374-75.

In none of the above cases, however, did the defendant request that the object at issue be placed in his possession. Officer Lucas testified that after Roderick requested his wallet, he informed Roderick that Roderick could take his wallet with him to the jail, but that it would have to first be searched for contraband as well as for officer safety purposes. Roderick, having already indicated that he wished to take his wallet with him to the jail, did not object to this search. Once Officer Lucas granted Roderick's request for his wallet, the wallet was in Roderick's immediate control.

While Roderick's wallet may have initially been outside of the scope of the search incident to his arrest, his request for his wallet mere moments after his arrest brought the wallet within the scope of Officer Lucas's search. Given the officer-safety and preservation-of-evidence purposes of searches incident to lawful arrest, we are unpersuaded that the mere absence of the wallet at the moment of defendant's arrest exempts it from the search, especially when it is returned to the defendant's immediate control, at his request, mere moments later. Indeed, it is unreasonable to expect an officer attempting to comply with a defendant's request to forgo otherwise standard procedures in doing so. Thus, we conclude that the search of Roderick's wallet by Officer Lucas did not violate the Fourth Amendment to the United States Constitution. Accordingly, the trial court acted within its discretion in admitting into evidence the marijuana found in Roderick's wallet.

To the extent that Roderick claims that the wallet was placed in his possession as a result of Officer Lucas's initiative rather than his own, Officers Lucas and Mary Helms testified otherwise, and the trial court was within its fact-finding discretion to credit the officers' testimony. Roderick's request that this court instead credit the testimony of his friend, Mandy Jo Roth, that it was Officer Lucas who requested Roderick's wallet amounts to an invitation to reweigh the evidence presented at the sufficiency hearing, which we decline.

II. Habitual Offender Sentence Enhancement

"Sentencing for habitual substance offenders is governed by Indiana Code section 35-50-2-10(f), which provides that '[t]he court shall sentence a person found to be a habitual substance offender to an additional fixed term of at least three (3) years but not more than

eight (8) years imprisonment, to *be added to the term of imprisonment* imposed under IC 35-50-2 or IC 35-50-3.'" *Bauer v. State*, 875 N.E.2d 744, 747 (Ind. Ct. App. 2007) (emphasis in original), *trans. denied*. In its sentencing order, the trial court treated Roderick's habitual substance offender finding as a separate conviction with a separate sentence. This was error. "A habitual substance offender finding is not a separate crime but an enhancement of the sentence for the underlying crime to which it is attached." *Id*. Thus, we remand to the trial court with instructions to amend the sentencing order to show that Roderick's habitual offender finding is attached to his underlying possession-of-marijuana conviction and enhances the sentence for that conviction.

The judgment of the trial court is affirmed in part and remanded in part with instructions.

CRONE, J., and BROWN, J., concur.