

STATEMENT OF THE CASE

Anthony L. Smith appeals from his convictions for Possession of Cocaine, as a Class C felony, and Possession of Marijuana, as a Class A misdemeanor, following a bench trial. Smith raises two issues for our review, which we restate as the following single issue: whether the trial court abused its discretion when it admitted into evidence the seized contraband.

We affirm.

FACTS AND PROCEDURAL HISTORY

On February 17, 2008, Officer George Nicklow, a four-year veteran of the Fort Wayne Police Department, was on patrol in the area of Suttentfield and Calhoun streets. At about 6:20 p.m., Officer Nicklow witnessed Smith “walking in the middle of the street” despite the presence of a sidewalk. Transcript at 4. Officer Nicklow pulled his vehicle near Smith and approached Smith on foot. As Officer Nicklow approached Smith, Smith “appeared nervous. . . . He was looking back and forth[;] rocking back and forth.” Id. at 6.

As Officer Nicklow began to speak to Smith, Smith placed his left hand in his left front pants pocket. Knowing the community he was in to be a high crime area, Officer Nicklow asked Smith to remove his hand from his pocket, which Smith did. Officer Nicklow asked Smith to identify himself, but before Smith did so he again attempted to place his left hand in his left front pocket. Officer Nicklow was concerned that Smith “was trying to retrieve a weapon” and conducted a patdown of Smith. Id. at 8. In the course of that patdown, Officer Nicklow “felt in [Smith’s] left front pocket a plastic

baggie that had a semi-hard rock substance inside” Id. Officer Nicklow “immediately knew from training[,] experience and numerous arrests that what [he] was feeling was crack cocaine.” Id. at 9. Officer Nicklow removed the baggie with the crack cocaine from Smith’s pocket and placed Smith under arrest. The whole encounter lasted “[l]ess than a minute.” Id. at 10.

Officer Nicklow then transported Smith to the police department. There, “a more thorough search . . . into his clothing was performed.” Id. at 27. As a result of that second search, “a small amount of marijuana was found inside [Smith’s] left shoe.” Id. at 28.

On February 22, the State charged Smith with possession of cocaine, as a Class C felony, and possession of marijuana, as a Class A misdemeanor. The trial court held Smith’s bench trial on August 7, and Smith objected to the State’s admission of the seized cocaine and marijuana on the grounds that they were the fruits of an illegal seizure of Smith’s person. See id. at 13-27, 39-40.¹ The trial court overruled Smith’s objections and found him guilty as charged. The court then ordered Smith to serve an aggregate term of four years in the Department of Correction. This appeal ensued.

DISCUSSION AND DECISION

Smith contends that the State’s evidence, namely, the contraband, was obtained in violation of his right to be free from unreasonable searches and seizures under the Fourth

¹ The State asserts, incorrectly, that Smith has waived his appeal on the grounds that he failed to object at trial. We do not address that contention.

Amendment of the U.S. Constitution.² Smith is appealing from the trial court's admission of that evidence following a completed trial. A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only upon a showing of an abuse of discretion. Washington v. State, 784 N.E.2d 84, 587 (Ind. Ct. App. 2003). An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id. We will not reweigh the evidence, and we consider conflicting evidence in the light most favorable to the trial court's ruling. Cole v. State, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007).

In Terry v. Ohio, 392 U.S. 1, 30 (1968), the United States Supreme Court held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when, based on a totality of the circumstances, the officer has a reasonable, articulable suspicion that criminal activity is afoot. Hardister v. State, 849 N.E.2d 563, 570 (Ind. 2006). A Terry stop is a lesser intrusion on the person than an arrest and may include a request to see identification and inquiry necessary to confirm or dispel the officer's suspicions. Id. (citing Hiibel v. Sixth Judicial Dist. Ct. of Nev., 542 U.S. 177, 185-89 (2004)). Reasonable suspicion entails some minimal level of objective justification for making a stop, something more than an unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause. Wilson v. State, 670 N.E.2d 27, 29 (Ind. Ct. App. 1996) (citing United States v. Sokolow, 490 U.S. 1, 7 (1989)). Even if the stop is justified, a reasonable suspicion only allows the officer to

² As many appellants do when raising such issues on appeal, Smith casually suggests that the State also violated his rights under Article I, Section 11 of the Indiana Constitution. But Smith does not present any legal analysis under the Indiana Constitution. He has therefore waived that argument. See Spranger v. State, 650 N.E.2d 1117, 1126 (Ind. 1995).

temporarily freeze the situation for inquiry and does not give him all the rights attendant to an arrest. Burkett v. State, 736 N.E.2d 304, 306 (Ind. Ct. App. 2000). To evaluate the validity of a stop, the totality of the circumstances must be considered. Id. Although the standard of review of a trial court's decision to admit evidence is whether there was an abuse of discretion, the determination of reasonable suspicion is a question of law that we review de novo. Id.

Further, here, Officer Nicklow discovered the cocaine while doing a patdown search of Smith for weapons. The seizure of contraband detected during a Terry search for weapons is permissible under the "plain feel doctrine." Barfield v. State, 776 N.E.2d 404, 407 (Ind. Ct. App. 2002). "If during the lawful patdown of 'the suspect's outer clothing,' the officer 'feels an object whose contour or mass makes its identity' as contraband 'immediately apparent' to that officer, a warrantless seizure may be executed." Id. (quoting Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993)).

Again, Smith challenges the State's seizure of the contraband found on his person. Specifically, and without any cogent reference to the scope of appellate review, Smith asserts that the evidence demonstrates each of the following propositions: Officer Nicklow detained Smith on the sidewalk in excess of twenty minutes; Smith placed his hands in his pockets because it was a cold February evening; Smith produced identification immediately upon request and before the patdown; Officer Nicklow's justification for the purportedly extended seizure of Smith "centered around [Smith's] shoes and coat that appeared . . . to be expensive," Appellant's Brief at 5; Officer Nicklow did not discover any weapons during the patdown; and Officer Nicklow could

not have possibly recognized crack cocaine by simply feeling Smith's blue jeans. Smith also suggests that Officer Nicklow may have been motivated by Smith's race and Smith's presence "in a bad neighborhood." Id. at 7. We cannot agree with Smith's arguments.

The scope of our review is limited to the facts most favorable to the trial court's judgment, and we will not reweigh the evidence as Smith suggests. See Cole, 878 N.E.2d at 885. Officer Nicklow testified that he witnessed Smith walking in the middle of a street despite the presence of a sidewalk. Such conduct by Smith was in violation of Indiana Code Section 9-21-17-12, which is a Class C infraction. Accordingly, Officer Nicklow's initial Terry stop of Smith for purposes of investigating that infraction was legitimate. See Hardister, 849 N.E.2d at 570.

However, once Officer Nicklow initiated the stop and before Smith could produce the requested identification, Smith began acting nervous and twice placed his hand in his pants pocket despite Officer Nicklow's request that Smith not do so. Officer Nicklow was not required to ignore Smith's subsequent acts. To the contrary, Smith's behavior "warranted the officer's reasonable fear for his safety and the subsequent [patdown] search" of Smith for weapons. Williams v. State, 754 N.E.2d 584, 588 (Ind. Ct. App. 2001), trans. denied. And, in the course of that lawful patdown search, Officer Nicklow plainly felt what he immediately recognized to be crack cocaine in Smith's pants pocket. The law is clear that Officer Nicklow was permitted to seize that discovered contraband. See Barfield, 776 N.E.2d at 407.

Thus, Officer Nicklow did not unreasonably or unlawfully seize either Smith or the crack cocaine. And, on appeal, Smith does not assert an alternative ground for having

the marijuana evidence suppressed. Thus, we affirm the trial court's admission of the contraband during Smith's bench trial and his subsequent convictions.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.