

STATEMENT OF THE CASE

Appellant-Defendant, Gary C. Williams (Williams), appeals his conviction for possession with intent to deliver methamphetamine within 1000 feet of a family housing complex, a Class A felony, Ind. Code § 35-48-4-1.1(b)(3)(B)(iii).

We affirm.

ISSUES

Williams raises two issues on appeal, which we restate as follows:

- (1) Whether the trial court abused its discretion by admitting the methamphetamine found in the apartment after the lessee of the apartment gave consent to search the residence; and
- (2) Whether the State presented sufficient evidence to establish beyond a reasonable doubt that Williams possessed methamphetamine with intent to deliver.

FACTS AND PROCEDURAL HISTORY

In September of 2009, the Indiana State Police received an anonymous tip from an inmate at the Rockville Correctional Facility of possible methamphetamine activity at 325 West Hazel, Apartment 111, in Albion, Indiana. This specific apartment was Karen Stroup's (Stroup) residence where she lived with her twin five-year-old children and her boyfriend, Williams. Only Stroup's name was on the apartment's lease; Williams did not pay rent.

Around 2 p.m., on September 15, 2009, Sergeant Michael C. Toles (Officer Toles) and Trooper Lionel A. Smith (Officer Smith) of the methamphetamine suppression unit with

the Indiana State Police drove to Stroup's apartment complex to investigate the tip. After knocking on Stroup's apartment door and receiving no answer, the Officers walked to the apartment complex office only to find it closed. Believing they had exhausted their options, the Officers returned to their vehicle.

Before they could enter their vehicle, Stroup, who had been tanning in the apartment's upstairs den, came out of her apartment, approached the Officers in the parking lot, and asked them if they were looking for her. She confirmed her identity and her place of residence. The Officers informed her of the anonymous tip they had received and even showed it to her. Stroup stated that Williams was her boyfriend, that he stayed in her apartment sometimes but did not live there or contribute to the rent.

The Officers requested Stroup for permission to search her apartment. Stroup asked many questions, including what they were looking for, and she indicated that she was concerned for her children. The Officers explained that they were looking for items associated with the manufacture of methamphetamine which could be located "under the sink or in the shed or in the bedroom, [], closet, those sort of things." (Transcript p. 39). Because Stroup was "very cooperative," the Officers went out of their way to answer her questions. (Tr. p. 75).

After talking outside, Stroup invited the Officers in her apartment where they further discussed the situation. Eventually, Stroup permitted the Officers to search her apartment. When asked, Stroup did not identify any areas of the apartment where Williams had exclusive control.

During their search, the Officers located a piece of tubing, associated with the ingestion of methamphetamine, in plain view on a dresser in the master bedroom. When shown, Stroup commented that it was not hers, that it was Williams', and that she did not know that it was there. Upstairs, the Officers found the door to the den, which Stroup identified as Williams' private space, slightly ajar. Inside, they observed a computer stand with computer, a tanning bed, clothes, and a table. On and in the computer stand, the Officers located four individually packaged baggies of methamphetamine, glass pipes, a digital scale, hand scales, a spoon with residue, forceps, tubes and straws, and a ledger with names and prices. The Officers also found mail addressed to Williams at a different address on the computer stand. Stroup informed the Officers that Williams typically went in the den once a day, to use the computer and to be alone. Williams was not present during any part of the search.

The Officers left shortly after Stroup's children returned home from school. The Officers informed Stroup that they were not going to arrest her and asked her to tell Williams to call them within twenty-four hours. Williams contacted the Officers the next day and gave them a statement, which was videotaped.

On November 19, 2009, the State filed an Information charging Williams with possession with intent to deliver methamphetamine within 1000 feet of a family housing complex, a Class A felony, I.C. § 35-48-4-1.1(b)(3)(B)(iii). On March 22, 2010, Williams filed a motion to suppress arguing that the State had not obtained a valid consent to search Stroup's apartment, that the search of the den occupied by Williams was unlawful, and that

all items seized during this illegal search and Williams' subsequent statement should be suppressed as fruit of the poisonous tree. On April 27, 2010, after Williams waived his right to a jury trial, the trial court conducted a combined suppression hearing and bench trial. Thereafter, the parties submitted written memoranda on the suppression issue. On May 18, 2010, after hearing argument, the trial court denied Williams' motion to suppress and found him guilty as charged. On June 15, 2010, during the sentencing hearing, the trial court sentenced Williams to forty years, with thirty years executed and ten years suspended to probation.

Williams now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Search of the Apartment

Williams contends that the search of Stroup's apartment was illegal pursuant to the Fourth Amendment of the United States Constitution and pursuant to Article I, Section 11 of the Indiana Constitution.

A. Standard of Review

A trial court has broad discretion in ruling on the admissibility of evidence. *Bradshaw v. State*, 759 N.E.2d 271, 273 (Ind. Ct. App. 2001). Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abused its discretion.

Id. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

B. *Fourth Amendment*

First, Williams claims that his Fourth Amendment rights were violated because based on the conduct of the police, Stroup did not voluntarily consent to the search of the apartment but rather “felt like [she] was detained.” (Tr. p. 139) The Fourth Amendment to the Constitution of the United States protects citizens against unreasonable searches and seizures. *Trimble v. State*, 842 N.E.2d 798, 801 (Ind. 2006), *reh’g granted in part by* 848 N.E.2d 278 (Ind. 2006). A knock and talk investigation “involves officers knocking on the door of a house, identifying themselves as officers, asking to talk to the occupant about a criminal complaint, and eventually requesting permission to search the house.” *Hayes v. State*, 794 N.E.2d 492, 496 (Ind. Ct. App. 2003), *trans. denied*. Such knock and talk investigations do not per se violate the Fourth Amendment. *Id.*

“The prevailing rule is that, absent a clear expression by the owner to the contrary, police officers, in the course of their official business, are permitted to approach one’s dwelling and seek permission to question an occupant.” *Id.* “Only when the officer by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude ‘a seizure’ has occurred.” *Id.* (quoting *State v. Carlson*, 762 N.E.2d 121, 125 (Ind. Ct. App. 2002)). A seizure does not occur simply because a police officer approaches a person, asks questions, or requests identification. *Id.* Courts examining the Fourth Amendment implications of the knock and talk procedure have held that a seizure occurs when, “taking into account all of the circumstances surrounding the encounter, the police conduct would ‘have communicated to a reasonable person that he is not at liberty to

ignore the police presence and go about his business.” *Id.* (citing *Kaupp v. Texas*, 538 U.S. 626, 629, 123 S.Ct. 1843, 1845, 155 L.Ed.2d 814 (2003)).

According to Williams, the Officers’ knock and talk investigation violated these principles. Williams contends that Stroup was seized because she “testified that to induce her to let them search her house, the [O]fficers threatened that if she refused to consent to the search that they would get search dogs” and she “testified further that she was frightened[.]” (Appellant’s Br. p. 20).

While we have noted that a knock and talk investigation is “inherently coercive to some degree,” we cannot say that an illegal seizure occurred here. *Hayes*, 794 N.E.2d at 496. After not receiving an answer at Stroup’s apartment and finding the apartment complex’s office unattended, the Officers were about to leave when Stroup approached them outside, inquiring if they were looking for her. The Officers informed her of the anonymous tip, showed her the tip, and asked for permission to search the apartment. The Officers verbally advised her of her constitutional rights, that she had the right to talk to an attorney, and that she could stop the search at any time. The record reflects that Stroup wanted to know what the Officers would be looking for. They responded that they intended to search for chemicals used in the manufacture of methamphetamine, which could be located under a sink, in the shed, or in the bedroom.

After talking outside, Stroup invited the Officers into her apartment where they continued to discuss the situation in the kitchen. Eventually, after more questions on Stroup’s part and reassurances on the Officers’ part, Stroup consented to a search of the

apartment. Although Williams focuses on Stroup's testimony indicating that she felt detained and frightened, looking at the totality of the circumstances, we conclude that no illegal seizure occurred and that Stroup voluntarily consented to a search of her residence. It is clear that Stroup initially sought out the Officers and invited them into her apartment, the Officers informed her of her rights, she questioned them at length about the procedure and they responded to all her questions. *See Schlesinger v. State*, 811 N.E.2d 964, 966-67 (Ind. Ct. App. 2004) (one exception to the warrant requirement of the Fourth Amendment is consent which is knowingly and voluntarily given). Also, even though Williams references the testimony of Stroup's neighbor who testified that she was very nervous and distraught as support for his argument, his claim in essence amounts to a request to reweigh the credibility of witnesses, which we are not allowed to do. Under this evidence, we cannot say that a reasonable person would have felt that he was not at liberty to ignore the police presence and go about his business. *See Hayes*, 794 N.E.2d at 496.

Next, we turn to Williams' argument that Stroup had no authority to consent to the Officers' search of the den, which he considered his room, and which contained some of his private possessions. The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. *Gado v. State*, 882 N.E.2d 827, 831 (Ind. Ct. App. 2008), *trans. denied*. However, a physically present co-occupant may refuse to consent to the search, which renders the warrantless search unreasonable and invalid as to him or her. *Id.*

Here, Williams was not present in the apartment when Stroup consented to the search. Police are not required to take affirmative steps to find a potentially objecting co-tenant before acting on consent to search that they have already received. *Id.*

Authority to consent to a search can be either apparent or actual. Actual authority requires a sufficient relationship to or mutual use of the property by persons generally having joint access to or control of the property for most purposes. *Halsema v. State*, 823 N.E.2d 668, 677 (Ind. 2005). A consenting party with actual authority over property may permit the search in his or her own right; also, a defendant assumes the risk that a co-occupant may permit a search. *Lee v. State*, 849 N.E.2d 602, 606 (Ind. 2006), *cert. denied*, 549 U.S. 1211 (2007).

We conclude that Stroup had actual authority to consent to a search of the den. Stroup was the official and only lessee of the apartment. Although Williams spent time in Stroup's apartment, he did not pay rent. Prior to searching the apartment, the Officers inquired whether there were any areas "that are solely [Williams'] that he doesn't permit [Stroup] or anyone else to go into and [Stroup] indicated at that time no." (Tr. p. 65). When the Officers approached the den, they noticed the door being ajar. Inside the room, they saw a tanning bed, a computer stand, Williams' clothes and papers. Stroup testified that she had been tanning in the den when the Officers knocked on the door of the apartment. Because it is clear that Williams did not exclusively use the den and Stroup had access to it, she could properly give consent to search that room.

C. *Indiana Constitution*

Williams also contends that the search of the apartment violated Article I, Section 11 of the Indiana Constitution. The purpose of Article I, Section 11 is “to protect from unreasonable police activity those areas of life that Hoosiers regard as private.” *Sowers v. State*, 724 N.E.2d 588, 591 (Ind. 2000). Under our State’s Constitution, the validity of a search by the government turns on an evaluation of the reasonableness of the officers’ conduct under the totality of the circumstances. *Tate v. State*, 835 N.E.2d 499, 508 (Ind. Ct. App. 2005), *trans. denied*. For the same reasons explained above, we hold that the search of Stroup’s apartment was reasonable. Stroup herself initiated the first contact with the Officers. After explaining to her fully the reason and purpose for which they were there, the Officers requested permission to search her apartment. They answered her numerous questions patiently and, after being invited into the kitchen of her apartment, the Officers were given permission to search the apartment without limitations. The apartment’s lease was in Stroup’s name and Williams did not pay rent. They jointly occupied the den. We conclude that the Officers acted reasonably under these circumstances.

In sum, we find that the search did not violate the Fourth Amendment of the United States Constitution or Article I, Section 11 of the Indiana State Constitution and therefore the trial court properly admitted the methamphetamine at trial.

II. *Sufficiency of the Evidence*

Williams contends that the State failed to present sufficient evidence to establish beyond a reasonable doubt that Williams possessed methamphetamine with intent to deliver.

In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* at 213. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

In order to convict Williams of a Class A felony, the State was required to prove beyond a reasonable doubt that he possessed methamphetamine with intent to deliver it to another person, and that the crime occurred within one thousand feet of a family housing complex. *See* I.C. § 35-48-4-1.1(b)(3)(B)(iii). Here, Williams only challenges his intent to deliver the methamphetamine. Specifically, he asserts that the amount of 1.27 grams of methamphetamine which was divided into four separate baggies was insufficiently large to support an inference that he intended to deal it. Indiana Code section 35-48-4-1.1(b)(3)(B)(iii) requires that the State prove that Williams possessed methamphetamine with intent to deliver and this crime occurred within 1000 feet of a family housing complex; the statute does not require that Williams possessed any particular amount of methamphetamine.

In his statement given to the police the day after the search of Stroup's apartment, Williams admitted to having sold methamphetamine to six or seven people. In addition, Officer Smith testified at the hearing that besides four individually packaged baggies of methamphetamine, the search of the den also uncovered scales and a ledger of sales.

According to Officer Smith, all these items taken together were indicative of dealing.¹ Based on this evidence, we conclude that there is sufficient evidence of probative value to support Williams' conviction.

CONCLUSION

Based on the foregoing, we conclude that the warrantless search of Stroup's apartment did not violate the Fourth Amendment of the United States Constitution or Article I, Section 11 of the Indiana Constitution. In addition, we find that the State presented sufficient evidence to establish beyond a reasonable doubt that Williams possessed methamphetamine with intent to deliver.

Affirmed.

ROBB, C.J., concurs.

BROWN, J., concurs in part and dissents in part with separate opinion.

¹ Insofar as Williams now contends that Officer Smith's testimony cannot be relied upon because he was not a "witness qualified as an expert" pursuant to Indiana Rule of Evidence 702(a), his challenge fails. Because Williams did not object to Officer Smith's testimony at trial, the issue is waived on appeal. *See Kubsch v. State*, 784 N.E.2d 905, 923 (Ind. 2003), *cert. denied*, 553 U.S. 1067 (2008).

**IN THE
COURT OF APPEALS OF INDIANA**

GARY C. WILLIAMS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 57A05-1007-CR-416
)	
STATE OF INDIANA)	
)	
Appellee-Plaintiff.)	

Brown, Judge, concurring in part and dissenting in part.

I concur with the majority as to the first issue but as to the second issue, I respectfully dissent as to the sufficiency of the evidence to sustain a class A felony conviction for possession of methamphetamine with intent to deliver in, on, or within 1,000 feet of a family housing complex. Williams challenges only his intent to deliver the methamphetamine, and I agree with the majority on this point and would find the evidence sufficient to sustain a class B felony conviction. However, I would *sua sponte* find the evidence insufficient to support the class A felony conviction as there was no evidence that Williams delivered or intended to deliver the drug from Stroup's apartment. In fact the only testimony regarding the location of

any dealing was Stroup's response on cross-examination that it did not occur at the apartment. As the statute requires that the delivery occur in, on, or within 1,000 feet of a family housing complex, I would reduce the class A felony conviction to a class B felony conviction and would remand for resentencing.