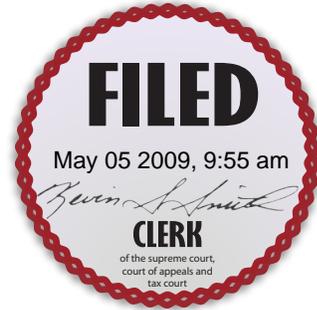


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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SHARMAN MARLON PEARSON, II, )

Appellant-Defendant, )

vs. )

No. 79A02-0807-CR-620

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE TIPPECANOE SUPERIOR COURT  
The Honorable Thomas H. Busch, Judge  
Cause No. 79D02-0707-FB-27

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May 5, 2009

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issues

Following a bench trial, Sharman Pearson appeals his conviction and sentence for possession of a firearm by a serious violent felon, a Class B felony. On appeal, Pearson raises four issues, which we restate as 1) whether the trial court properly concluded that the seizure of a handgun during a search of Pearson's vehicle did not violate the Fourth Amendment of the United States Constitution; 2) whether the trial court properly admitted into evidence several incriminating statements made by Pearson; 3) whether sufficient evidence supports Pearson's conviction; and 4) whether Pearson's sentence is inappropriate in light of the nature of the offense and his character. We affirm, concluding that the search of Pearson's vehicle did not violate the Fourth Amendment, that the trial court properly admitted Pearson's incriminating statements into evidence, that sufficient evidence supports Pearson's conviction, and that Pearson's sentence is not inappropriate.

### Facts and Procedural History

In the late afternoon of July 7, 2007, the Lafayette Police Department dispatch received an anonymous call that a possible drug transaction had occurred in a vehicle at a Speedway gas station on State Road 26 in Tippecanoe County. The caller described the vehicle as a green Buick Park Avenue and also gave the license plate number. A computer check of the license plate number indicated the vehicle was registered to Pearson and his wife.

Several minutes after the anonymous call, Officer Aaron Lorton arrived at the gas station and observed a green Buick Park Avenue parked next to one of the pumps. The

vehicle was unoccupied, so Officer Lorton looked through a window to see if he could observe any evidence of drug activity. Finding none, Officer Lorton located Pearson and his wife inside the gas station. Officer Lorton explained to Pearson that dispatch had received an anonymous call that a drug transaction occurred in his vehicle. Pearson denied involvement in any drug activity, and Officer Lorton told Pearson he was free to leave, but first requested consent to search the vehicle. Pearson refused and shortly thereafter received a call on his cellular phone. During the phone call, Officer Lorton heard Pearson tell the caller “that the police were detaining him,” but Officer Lorton reminded Pearson he was free to leave. Transcript of Trial at 15. After the call, Pearson asked Officer Lorton, “you said I’m free to leave[?],” and Officer Lorton responded, “yes.” Id. Instead of leaving, however, for the next several minutes, Pearson stayed at the gas station talking on his cellular phone, and later walked over to and returned from a nearby gas station to purchase spray-on wax for his vehicle.

Around the time Officer Lorton was talking with Pearson, Officer Albert Demello and his canine were en route to the gas station, having also received the report from dispatch. When Officer Demello arrived, he met with Officer Lorton. According to Officer Demello, Officer Lorton “was pretty much through with the call” because there was no evidence of criminal activity inside the vehicle and Pearson had refused consent to search. Id. at 51. Officer Demello observed the vehicle was still unoccupied, so he decided to have his canine sniff around the outside of the vehicle.

By the time Officer Demello and his canine arrived at the vehicle, Pearson was standing alongside it pumping gas. When Officer Demello began the canine sniff at the

front of the vehicle, Pearson told him, “the other officer said I was free to go,” *id.* at 78, and Officer Demello reiterated, “yes, you are free to go,” *id.* at 79. Pearson then continued pumping gas, but several seconds later, the canine alerted near the front passenger-side wheel. Based on the alert, Officer Demello told Pearson he was no longer free to go. Pearson again refused consent to search the vehicle, so Officer Demello obtained a search warrant. Execution of the warrant resulted in the seizure of a flake-size amount of marijuana located on the front-seat floor and a handgun and loaded magazine located in separate parts of the trunk.

Based on the seizure of these items, Officer Lorton placed Pearson and his wife under arrest. While he was being handcuffed, Pearson stated that anything in the vehicle was his and that his wife “knew nothing about it.” *Id.* at 30. Officer Lorton told Pearson if he “wanted to discuss things” he would first need to be “read . . . his rights,” so Officer Lorton gave Pearson a Miranda warning. *Id.* Pearson agreed to speak, denying any knowledge of drugs in his vehicle and explaining that he had permitted a friend who occasionally borrowed the vehicle to keep the handgun and magazine in the trunk.

On June 12, 2007, the State charged Pearson with unlawful possession of a firearm by a serious violent felon, a Class B felony, and possession of marijuana, a Class A misdemeanor. On December 13, 2007, Pearson filed a motion to suppress evidence seized during the search of his vehicle, as well as the statements he made to Officer Lorton following his arrest. At a February 25, 2008, suppression hearing, the trial court heard testimony from Officer Lorton, Officer Demello, and Pearson and admitted several exhibits into evidence, including a video of the canine sniff that was recorded by one of

the gas station's security cameras. Based on this evidence, the trial court denied Pearson's motion to suppress and, at a March 4, 2008, bench trial, found him guilty of possession of a firearm by a serious violent felon, but not guilty of possession of marijuana. On June 26, 2008, the trial court sentenced Pearson to twelve years with the Indiana Department of Correction. Pearson now appeals.

### Discussion and Decision

#### I. Fourth Amendment Violation<sup>1</sup>

Pearson argues the trial court improperly admitted into evidence the handgun that was seized during the search of his vehicle. In cases such as this one, where the defendant does not appeal the denial of a motion to suppress and the evidence is admitted over the defendant's objection at trial, the issue is framed as whether the trial court abused its discretion in admitting the evidence at trial. Cochran v. State, 843 N.E.2d 980, 982-83 (Ind. Ct. App. 2006), trans. denied, cert. denied, 127 S. Ct. 943 (2007). This court will reverse such a ruling if the trial court has abused its discretion. Id. at 983. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court. Id. In making this determination, this court does not reweigh evidence and considers conflicting evidence in a light most favorable to the trial court's ruling. Cole v. State, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007). Moreover, this court considers evidence from the trial as well as evidence from the

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<sup>1</sup> In conjunction with his Fourth Amendment argument, Pearson also claims the search of his vehicle violated Article I, Section 11, of the Indiana Constitution. Pearson has not, however, developed this claim in a manner that is distinct from his Fourth Amendment argument. Accordingly, Pearson's state constitutional claim is waived. See Hannibal v. State, 804 N.E.2d 206, 209 n.5 (Ind. Ct. App. 2004), trans. denied.

suppression hearing that is not in direct conflict with the trial evidence. Kelley v. State, 825 N.E.2d 420, 427 (Ind. Ct. App. 2005).

The Fourth Amendment states in relevant part, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” The purpose of this provision is to protect people from unreasonable search and seizure, and it applies to the states through the Fourteenth Amendment. Krise v. State, 746 N.E.2d 957, 961 (Ind. 2001) (citing Mapp v. Ohio, 367 U.S. 643, 650 (1961)). The remedy for a violation of the Fourth Amendment is to render inadmissible any evidence seized during the illegal search. Mapp, 367 U.S. at 654-55.

Pearson does not challenge the propriety of his detention as a result of the canine sniff or the search warrant that was obtained thereafter. Rather, Pearson claims he was detained without reasonable suspicion prior to the sniff. Reasonable suspicion is required for an officer to detain an individual, Overstreet v. State, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000) (citing Terry v. Ohio, 392 U.S. 1, 27 (1968)), trans. denied, and the State concedes such suspicion was lacking, but nevertheless argues reasonable suspicion is beside the point because Pearson was not detained prior to the sniff. The question therefore becomes whether the trial court abused its discretion when it concluded Pearson was not detained prior to the sniff.

A detention has occurred within the meaning of the Fourth Amendment if, under the totality of the circumstances, a reasonable person would feel free to disregard the police and go about his business. Finger v. State, 799 N.E.2d 528, 532 (Ind. 2003) (citing California v. Hodari D., 499 U.S. 621, 628 (1991)). A reasonable person may not feel

free to leave if, for example, there is a threatening presence of several officers, one or more officers displays a weapon, an officer physically touches the individual, or the tone of the officer's voice indicates that compliance with the officer's request might be compelled. Overstreet, 724 N.E.2d at 664 (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

Pearson's argument that he was detained prior to the sniff is based in part on his own testimony, specifically that he attempted to leave but an officer directed him to halt, and in part on his claim that several officers, including Officer Demello, had "surrounded" his vehicle, making it impossible for him to drive away "without running over a police officer." Appellant's Brief at 9. Pearson's testimony that he was ordered to halt is contradicted by the testimony of Officers Lorton and Demello, which indicates the first time Pearson was told he was not free to leave was immediately after Officer Demello's canine alerted. Our standard of review does not permit us to second guess the trial court's resolution of such conflicting testimony.<sup>2</sup> See Cole, 878 N.E.2d at 885.

Pearson's second claim is correct to the extent the video recording shows two officers standing at the rear of his vehicle at the time Officer Demello initiated the canine sniff.<sup>3</sup> We also acknowledge that while the two officers were standing at the rear of the vehicle, Officer Demello passed in front of it for approximately two seconds. For a matter of seconds, then, one could accurately describe Pearson's vehicle as being

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<sup>2</sup> The video recording supports the officers' testimony. Beginning at 4:24:15 of the recording, several officers approach the vehicle behind Pearson, but there is no indication that any of them ordered Pearson to halt. Instead, the recording depicts Pearson standing between the gas pump and his vehicle with the person who sold him spray-on wax from the nearby gas station. See State's Exhibit 1 (March 4, 2008, bench trial).

<sup>3</sup> The first frame where both Officer Demello and Pearson can be seen is at 4:24:15 of the recording. See State's Ex. 1 (March 4, 2008, bench trial).

“surrounded” by officers. Nevertheless, we are not prepared to say that given the totality of the circumstances, a reasonable person would not have felt free to leave or, more to the point, that the trial court lacked discretion to conclude as it did. In that respect, of particular importance is that prior to the canine alert, Pearson did not heed the repeated statements from Officers Lorton and Demello indicating he was free to go. Indeed, just seconds prior to the alert, Pearson told Officer Demello, “the other officer said I was free to go,” tr. at 78, and Officer Demello reiterated, “yes, you are free to go.” Instead of leaving, however, Pearson continued pumping gas. We therefore conclude the totality of the circumstances does not necessarily establish that a reasonable person would not have felt free to leave, which means the trial court did not abuse its discretion when it concluded Pearson was not detained prior to the sniff. Accordingly, the trial court did not improperly admit the handgun into evidence.

## II. Admission of Incriminating Statements

Pearson argues the trial court improperly admitted incriminating statements he made to Officer Lorton because the statements violated the Fifth Amendment, which proscribes a person from being compelled as a witness against himself in a criminal case.<sup>4</sup> As is the case with the handgun that was admitted into evidence, Pearson challenged the admission of these statements initially through a motion to suppress, and later through an objection at trial. We therefore apply the same abuse-of-discretion standard of review articulated in Part I above.

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<sup>4</sup> Pearson also claims the trial court’s admission of incriminating statements violated Article I, Section 14, of the Indiana Constitution. As with his Fourth Amendment argument, however, Pearson has not developed this claim in a manner that is distinct from his Fifth Amendment argument. *See supra*, note 1. Accordingly, Pearson’s state constitutional claim is waived. *See Evans v. State*, 855 N.E.2d 378, 384 n.3 (Ind. Ct. App. 2006), *trans. denied*.

As he was being placed in handcuffs following the execution of the search warrant, Pearson stated that anything in the vehicle was his and that his wife “knew nothing about it.” Tr. of Trial at 30. In response, Officer Lorton told Pearson if he “wanted to discuss things” he would first need to be “read . . . his rights.” Id. Officer Lorton then gave Pearson a Miranda warning, and Pearson agreed to speak, denying any knowledge of drugs in his vehicle and explaining that he had permitted a friend who occasionally borrowed the vehicle to keep the handgun and magazine in the trunk.

Although his argument is not entirely clear, Pearson appears to challenge both the pre- and post-Miranda statements on the ground that he invoked his right to an attorney during his initial encounter with Officer Lorton inside the gas station. There are at least two problems with this argument. First, the Fifth Amendment protects against statements that are made in response to police questioning during a custodial interrogation, Patterson v. State, 563 N.E.2d 653, 656 (Ind. Ct. App. 1990), but there is nothing in the record to indicate that Pearson’s first incriminating statement – that is, his statement while being handcuffed that anything in the vehicle was his and that his wife “knew nothing about it,” tr. of trial at 30 – was anything but voluntary. Second, even assuming the first statement was made in response to police questioning, Pearson’s claimed invocation of an attorney was a statement to Officer Lorton while the two were inside the gas station that he “should” call his attorney. Id. at 33. A proper invocation, however, requires a statement that can be reasonably construed as an expression of a desire for the assistance of an attorney, Alford v. State, 699 N.E.2d 247, 251 (Ind. 1998) (citing Davis v. United States, 512 U.S. 452, 459 (1994)), and Pearson’s statement that he “should” contact his attorney

cannot be reasonably construed as such, cf. Collins v. State, 873 N.E.2d 149, 156 (Ind. Ct. App. 2007) (concluding individual’s statement that he “probably need[ed] an attorney” did not constitute an unequivocal request for an attorney), trans. denied. Accordingly, we conclude the trial court did not improperly admit Pearson’s incriminating statements into evidence.

### III. Sufficiency of Evidence

Pearson argues insufficient evidence supports his conviction. Our supreme court has articulated the following standard of review to apply when faced with challenges to the sufficiency of evidence:

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court’s ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnote, and citations omitted) (emphasis in original).

To convict Pearson of possession of a firearm by a serious violent felon, the State had to prove beyond a reasonable doubt that he was a “serious violent felon” as defined by Indiana Code section 35-47-4-5(a) and (b) and that he knowingly or intentionally possessed a firearm. See Ind. Code § 35-47-4-5(c). Pearson’s sole challenge to the sufficiency of the evidence concerns the possession element.

This court has stated that possession of a firearm may be “actual” or “constructive,” with the former referring to a person having direct physical control over a firearm, and the latter referring to a person having the intent and capability to maintain dominion and control over a firearm. Causey v. State, 808 N.E.2d 139, 143 (Ind. Ct. App. 2004). Here, the State sought to prove Pearson’s guilt through constructive possession. Such possession “may be inferred from either exclusive dominion and control over the premises containing the firearm, or from evidence of additional circumstances indicating the defendant’s knowledge of the presence of the firearm.” Id. Additional circumstances include the following: “(1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) proximity of the firearm to the defendant; (4) location of the firearm within the defendant’s plain view; and (5) the mingling of a firearm with other items owned by the defendant.” Id.

The record indicates Pearson lacked exclusive dominion and control over the handgun because the vehicle was also registered to his wife. Nevertheless, Officer Lorton testified that while Pearson was being handcuffed, he stated that anything in the vehicle was his and that his wife “knew nothing about it,” tr. of trial at 30, and later explained that he had permitted a friend who occasionally borrowed the vehicle to keep the handgun and magazine in the trunk. Based on this testimony, a reasonable juror could have inferred Pearson was aware that there was a handgun in his vehicle, which permits the further inference that he constructively possessed it. Cf. Massey v. State, 816 N.E.2d 979, 989-90 (Ind. Ct. App. 2004) (concluding sufficient evidence supported a finding that the defendant constructively possessed several firearms because he told

police officers where such firearms were located in his home). We note in closing that Pearson's sole argument against Officer Lorton's testimony is that it "is simply not credible," appellant's br. at 11, but our standard of review requires us to disregard such an argument, Drane, 867 N.E.2d at 146. Accordingly, we conclude sufficient evidence supports Pearson's conviction for possession of a firearm by a serious violent felon.

#### IV. Appropriateness of Sentence

Pearson argues his sentence is inappropriate. This court has authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and recognize the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offenses and the character of the offender. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. In conducting this review, however, the burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).<sup>5</sup>

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<sup>5</sup> Quoting Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and Groves v. State, 787 N.E.2d 401, 410 (Ind. Ct. App. 2003), trans. denied, the State claims 7(B) review is "very deferential" to the trial court's sentencing decision and requires us to exercise "great restraint." Appellee's Brief at 16. We have since noted, however, that although 7(B) review affords deference to the trial court, terms such as "very deferential" and "great

The trial court sentenced Pearson to twelve years with the Indiana Department of Correction for his Class B felony possession of a firearm by a serious violent felon conviction. Indiana Code section 35-50-2-5 states, “A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.” Thus, Pearson’s twelve-year sentence is slightly in excess of the advisory term.

Regarding the nature of the offense, we agree with Pearson that nothing in the record indicates it was more egregious than is typical. Pearson’s character, however, is not exemplary. The pre-sentence investigation report<sup>6</sup> (the “PSI”) states that Pearson has a 1996 felony conviction for receiving stolen property, a 2002 misdemeanor conviction for battery, and a 2002 conviction for delivery of a controlled substance, which is the underlying felony supporting the instant offense. The PSI also states that Pearson violated probation in relation to his sentence for receiving stolen property and was ordered to serve five years with the Illinois Department of Correction as a result. In addition to his criminal history, the State also introduced evidence at the sentencing hearing concerning an incident where Pearson was disobedient during his confinement at

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restraint” are overstatements. See Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007); Stewart v. State, 866 N.E.2d 858, 865 (Ind. Ct. App. 2007).

<sup>6</sup> Pearson included in his appendix a copy of the presentence investigation report on white paper. Indiana Appellate Rule 9(J) requires that “[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).” Indiana Administrative Rule 9(G)(1)(b)(viii) states that “[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13” are “excluded from public access” and “confidential.” Pearson’s inclusion of the presentence investigation report printed on white paper in his appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:

- (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked “Not for Public Access” or “Confidential.”

We remind Pearson’s counsel that he should follow these rules in future filings with this court.

the Tippecanoe County Jail. Pearson's disobedience required jail officers to administer pepper spray, which resulted in Pearson grabbing one of the officers and pushing him against a wall.<sup>7</sup>

We acknowledge Pearson's criminal history is not particularly aggravating, as his prior offenses do not substantially relate to the instant offense in terms of their nature, number, or gravity. See Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999). But Pearson's criminal history is aggravating nonetheless, see Ind. Code § 35-38-1-7.1(a)(2) (stating that a trial court may consider a defendant's criminal history as an aggravating circumstance), and, when coupled with evidence of Pearson's disobedient behavior during confinement, does not convince us that his twelve-year sentence is inappropriate. Stated differently, Pearson's character is moderately negative, but that is accounted for by the fact that he received a sentence only slightly in excess of the advisory term.

### Conclusion

The search of Pearson's vehicle did not violate the Fourth Amendment, nor did the trial court improperly admit Pearson's incriminating statements into evidence. Moreover, sufficient evidence supports Pearson's conviction, and Pearson's sentence is not inappropriate in light of the nature of the offense and his character.

Affirmed.

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

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<sup>7</sup> The State charged Pearson with two counts of resisting law enforcement and one count of battery as a result of this incident. See Appellant's Appendix at 319. Those charges, along with unrelated charges in May 2007 for confinement, domestic battery, battery resulting in injury, and intimidation, are currently pending. See id.