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IN THE
COURT OF APPEALS OF INDIANA

SERGIO O. NUNEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0809-CR-781
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
The Honorable Peggy Hart, Commissioner
Cause No. 49G23-0708-FA-174555

May 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Sergio Nunez was convicted of dealing in cocaine, a Class A felony, and sentenced to thirty-two years executed with the Indiana Department of Correction. For our review on appeal, Nunez raises a single issue, which we restate as whether the trial court abused its discretion when it admitted into evidence a cell phone and cocaine seized during a traffic stop. Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

On August 23, 2007, two Indiana State Police troopers, Trooper Shane Cunningham and Trooper John DuPont, had a vehicle pulled over to the right side of Interstate 70 in Marion County.[1] Both police vehicles had their emergency lights activated. As DuPont conducted the traffic stop, Cunningham observed Nunez drive his vehicle in the right lane past the police vehicles without slowing down or attempting to change lanes. Cunningham also noted that he had seen Nunez passing a vehicle in the center lane as Nunez approached the police cars.

Cunningham pursued Nunez and initiated a traffic stop. In response to Cunningham's request for a driver's license, Nunez produced a state-issued identification card and volunteered that he did not have a license. After checking Nunez's driving record, Cunningham confirmed that Nunez did not have a driver's license and had a prior driving-without-a-license infraction. Cunningham also learned that Nunez had a prior drug-related conviction and that there was an outstanding warrant in California for Mario

[1] The troopers purposely used two vehicles for the traffic stop in order to crack down on motorists failing to yield to stationary police vehicles engaged in traffic stops.

Herrera, the passenger in Nunez's vehicle. At that point, Cunningham ordered Nunez and Herrera out of the vehicle and hand-cuffed them.

By now, DuPont had arrived at the scene to assist Cunningham. DuPont conducted a pat down search of Nunez and discovered two bulges in his front pockets. In response to DuPont's inquiry, Nunez volunteered that he had around $1,000 in his pockets that he was taking to his sister. DuPont asked Nunez if he had any more money or anything else in his vehicle, and Nunez responded, "I do not believe so. You may search the vehicle. You may check the vehicle if you want." Transcript at 241.

Cunningham, having decided to impound the vehicle because neither Nunez nor Herrera had a valid driver's license, began an inventory search of the vehicle. Just as Cunningham began his search, Trooper William Etter arrived on the scene with his narcotics detection dog, Max. Etter had been only ten miles away from the scene and offered his assistance to Cunningham. Etter and Max conducted a free air sniff around the exterior of the vehicle and Max alerted on the driver's side of the vehicle between the front and rear doors. Etter then searched the rear passenger area of the vehicle and discovered a plastic bag containing a white powder substance that turned out to be cocaine. Upon further search of the vehicle, Cunningham discovered two cell phones, one of which contained pictures, including photos of Nunez, a brick of cocaine, and other drug-related items.

On August 24, 2007, the State charged Nunez with dealing in cocaine, a Class A felony, possession of cocaine, a Class C felony, and operating a vehicle without a license, a Class A misdemeanor. Prior to trial, Nunez filed a motion to suppress evidence

obtained from the search of his vehicle. The trial court denied the motion after a hearing. A jury trial was held on July 22, 2008 on the cocaine related charges only because the State dismissed the charge of driving without a license. The jury found Nunez guilty of both charges, but the trial court entered a judgment of conviction on the dealing charge only finding the possession charge to be a lesser included offense. Following a sentencing hearing, the trial court sentenced Nunez to thirty-two years executed. Nunez now appeals.

Discussion and Decision

I. Standard of Review

Where, as here, the defendant does not appeal the denial of a motion to suppress[2] and the trial court admits the evidence over the defendant's objection at trial, we review the admission of evidence for an abuse of discretion. Cochran v. State, 843 N.E.2d 980, 982-83 (Ind. Ct. App. 2006), cert. denied, 127 S. Ct. 943 (2007). 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. at 983. In making this determination, we do not reweigh the evidence, and we consider 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, we may consider evidence from the trial as well as evidence from the 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).

[2] Nunez filed a motion to certify the order denying his motion to suppress for interlocutory appeal; however, the trial court did not rule on the motion. Pursuant to Appellate Rule 14(B)(1)(e), the motion is deemed denied if the trial court fails to rule on it within thirty days after it is filed or after a hearing on the motion.

II. Admission of Evidence

Nunez argues that Cunningham did not have an "objectively justifiable reason" to stop him, and, thus, any evidence seized was the fruit of a bad stop and should not have been admitted. Cunningham testified that he stopped Nunez for failing to yield to a stopped emergency vehicle. Indiana Code section 9-21-8-35(b) states:

> Upon approaching a stationary authorized emergency vehicle, when the authorized emergency vehicle is giving a signal by displaying alternately flashing red, red and white, or red and blue lights, a person who drives an approaching vehicle shall:
>
> (1) proceeding with due caution, yield the right-of-way by making a lane change into a lane not adjacent to that of the authorized emergency vehicle, if possible with due regard to safety and traffic conditions, if on a highway having at least four (4) lanes with not less than two (2) lanes proceeding in the same direction as the approaching vehicle; or
>
> (2) proceeding with due caution, reduce the speed of the vehicle, maintaining a safe speed for road conditions, if changing lanes would be impossible or unsafe.

Violation of the statute is a Class A infraction. Ind. Code § 9-21-8-54(a).

Cunningham testified at both the suppression hearing and the trial that Nunez did not slow down as he approached the emergency vehicles. Cunningham also testified that Nunez failed to change lanes although he "had plenty of room. There were no other cars around. He had room to get over but did not. And [sic] stayed in the right lane." Tr. at 44. A police officer may initiate a traffic stop if he has a good faith belief that the person has committed an infraction or ordinance violation. Ind. Code § 34-28-5-3; Ransom v. State, 741 N.E.2d 419, 421 (Ind. Ct. App. 2000) ("A police officer may stop a vehicle when he observes a minor traffic violation."), trans. denied. In addition, "[a] stop is lawful if there is an objectively justifiable reason for it, and the stop may be justified on less than probable cause." Id. The statute gives a motorist approaching a stationary

emergency vehicle two options, either to change lanes or to reduce speed. Cunningham did not observe that Nunez did either, therefore, he had an objectively justifiable reason for stopping him.

However, Nunez argues that the statute is too vague to support an objectively justifiable reason.[3] Nunez asserts that the statute does not provide an objective standard for the terms "due caution," "safe speed for road conditions," "unsafe," "reduce," or "due regard to safety or traffic conditions." Appellant's Brief at 9-10. We disagree. Although the statute does not provide specific objective criteria, it certainly provides more than sufficient instruction to motorists of how to approach a stationary emergency vehicle: by either changing lanes if that can be done safely, or by reducing speed while passing the emergency vehicles. Cunningham had a good faith belief that Nunez did neither. Therefore, the traffic stop was valid.

Nunez does not challenge any other aspect of the seizure of the cell phone and cocaine in his appellant's brief. His concession is well taken. Once Cunningham determined that Nunez had committed the Class C misdemeanor crime of driving without a license, he had authority to arrest and detain Nunez. See Ind. Code §§ 35-33-1-1(a)(4); 9-24-18-1. The search and seizure of the cocaine was in response to the narcotics detection dog's alert following a free air sniff around the vehicle. A canine sweep around the exterior of a vehicle does not require the officer's reasonable, articulable suspicion because it does not intrude upon a Fourth Amendment privacy interest. Myers v. State,

[3] To the extent that Nunez wishes to argue the statute is unconstitutionally vague, we note that he failed to raise such an argument at the trial court and does not provide this court with cogent reasoning and citations to authority to support such an argument. Therefore, Nunez has waived any constitutional challenge to the statute. See Wooley v. State, 716 N.E.2d 919, 927 (Ind. 1999) (argument not supported by citations to authority is waived); Spuznar v. State, 783 N.E.2d 1213, 1219 (Ind. Ct. App. 2003) (claim not properly raised in the trial court is waived).

839 N.E.2d 1146, 1149 (Ind. 2005). The alert of the dog provided probable cause for a search, and this combined with the ready mobility of the vehicle permits police to conduct a warrantless search of the vehicle. Id. at 1151. In addition, prior to the arrival of the narcotics detection dog, Nunez had consented to a search of his vehicle. Therefore, the trial court did not abuse its discretion when it admitted the cell phone and cocaine into evidence.

Conclusion

The trial court did not abuse its discretion when it admitted the cell phone and cocaine into evidence. As a result we affirm Nunez's conviction and sentence.

Affirmed.

DARDEN, J., and BAILEY, J., concur.