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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 24A01-1009-CR-454
	)	
AARON R. LIMBURG,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable Clay M. Kellerman, Judge
Cause No. 24C02-1004-FD-178

May 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

The State appeals from the trial court's grant of Aaron Limburg's motion to suppress evidence obtained as the result of a warrantless search of his vehicle. Following dismissal of the case against Limburg, the State initiated the instant appeal. The State presents the following restated issue for our review: Did the trial court err by finding that the warrantless search of the vehicle violated Limburg's constitutional right to be free from unreasonable search and seizure both under the Fourth Amendment to the United States Constitution and article 1, section 11 of the Indiana Constitution?

We reverse and remand.

On the afternoon of April 15, 2010, Reserve Deputy Darren Redpath of Union County was off duty driving his private vehicle on SR 101 in Franklin County when he observed a truck being driven "all over the road" into a ditch and then swerving across the centerline and almost hitting another vehicle head on. *Transcript* at 4. The driver, later identified as Limburg, then made a u-turn and drove northbound. Deputy Redpath followed while reporting the driver to Union County dispatch. Dispatch requested assistance from both Franklin and Union County officers, as Limburg was approaching the county line.

Limburg stopped short of the county line at a small business in Franklin County, which officers later learned was Limburg's place of employment. He abruptly parked his truck and ran into the business, leaving the driver's side door open. Deputy Redpath waited in the parking lot, and Officer Day of the Union County Sheriff's Office arrived shortly thereafter. After speaking with Redpath, Officer Day approached the business. A woman exited and asked Day what was going on. He asked for the driver of the vehicle and then saw Limburg inside and asked him to step outside. Due to the weather, the two went inside

Officer Day's vehicle to talk. Day spoke with Limburg for only two to three minutes, asking "real basic questions", until another officer arrived on the scene. *Id*. at 8. Officer Day did not smell the odor of alcohol during his brief encounter with Limburg, nor did he observe signs of intoxication.

When Conservation Officer Corey Norrod arrived, Officer Day informed Limburg that Norrod would be taking over, as Officer Day was late for a meeting and was outside his county. Limburg then jumped out of Officer Day's vehicle and hurriedly approached Officer Norrod. Limburg apologized and indicated he was embarrassed that Norrod had to respond to a call like this. Limburg was "real fidgety and…kind of over the top." *Id*. at 16. He explained to Officer Norrod, as he had to Officer Day, that he had run off the road while looking for his cell phone that he thought had fallen under the seat. At that time, Deputy John Roberts of the Franklin County Sheriff's Department arrived and began speaking with Limburg, so Officer Norrod went over to speak with Deputy Redpath.

After obtaining a report from Redpath and speaking with Limburg, Officer Norrod went inside the business and spoke with Limburg's employer, who did not provide "a whole lot of cooperation". *Id*. at 16. The employer reported that Limburg had left work and returned shortly thereafter and went back to his toolbox, supporting Limburg's statement that he had returned to work to look for his cell phone. On his way back over to speak with Limburg, Officer Norrod glanced through the open door of Limburg's truck and observed a small pill bottle on the console of the floor. Deputy Roberts was in the process of running Limburg's personal information through dispatch.

Although Limburg's story had been verified to some extent by his employer, both

Officer Norrod and Deputy Roberts had observed signs of intoxication/impairment indicating a need for further investigation. Specifically, Limburg lacked focus and was confused with respect to the time and he was fidgety, talking fast, and swaying back and forth.

The officers asked Limburg for permission to search his vehicle. When Limburg refused, Deputy Roberts immediately retrieved his canine and walked around the truck while Norrod stood with Limburg. The canine sweep took place no more than eight to ten minutes after Officer Norrod first came onto the scene and took over the investigation from Officer Day. When the canine indicated on the vehicle, Limburg stated to Norrod, "well I have xanax in the truck."[1] *Id*. at 19. The officers then proceeded to search the truck finding, inter alia, a pill bottle on the floor console that contained seven pills and another one of these pills on the backseat floorboard under the driver seat. The pills were a generic form of Xanax, a schedule IV controlled substance. Test results later confirmed that Limburg had "a Benzo such as Xanax, a depressant" in his system. *Appendix* at 12.

The State charged Limburg with class D felony possession of a controlled substance and class A misdemeanor operating a vehicle while intoxicated. Limburg filed a motion to suppress on May 12, 2010, followed by a motion for judicial review of the suspension of his driving privileges. After a consolidated hearing, the trial court ordered as follows on August

[1] Although not admitted into evidence at the suppression hearing, Norrod's report indicates that Limburg explained to Norrod that a relative had given the Xanax to him to help him sleep after a suicide in the family.

18, 2010:

> [A]ny evidence obtained by the State of Indiana during the search of Defendant and his vehicle are suppressed as they were obtained in violation of the Defendant's State and Federal Constitutional rights. It is also Ordered that the police officers in this action did not have probable cause to believe the defendant was operating a motor vehicle while intoxicated and therefore his license should not have been suspended by the Bureau of Motor Vehicles. The Bureau of Motor Vehicles is Ordered to reinstate the Defendant's driving privileges.

Id. at 28. As a result of this ruling, the State filed a motion to dismiss and a notice of appeal.

On appeal, the State argues that the trial court erred in suppressing evidence found during the investigation. In light of Limburg's highly erratic driving and his quick flight into the business as Deputy Redpath followed, the State argues the officers had reasonable suspicion to initiate an investigatory stop. Further, despite Limburg's explanation of his actions, the State contends that the officers had reasonable suspicion to continue the investigation upon observing multiple signs of intoxication. Finally, the search of the truck was proper, according to the State, based upon the canine alert and Limburg's admission that there was Xanax in the truck.

In the appellate review of a trial court's motion to suppress, we determine whether the record discloses "'substantial evidence of probative value that supports the trial court's decision.'" *State v. Washington*, 898 N.E.2d 1200, 1203 (Ind. 2008) (quoting *State v. Quirk*, 842 N.E.2d 334, 340 (Ind. 2006)). We will not reweigh the evidence. *State v. Washington*, 898 N.E.2d 1200. "The State, appealing from a negative judgment, must show that the trial court's ruling on the suppression motion was contrary to law." *Id.* at 1203.

We first turn to whether the officers' conduct in this case violated the Fourth

Amendment to the U.S. Constitution. It is well established that an officer may briefly detain an individual for investigatory purposes if the officer has a reasonable suspicion that the person detained is involved in criminal activity. *Finger v. State*, 799 N.E.2d 528 (Ind. 2003) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). To justify an investigatory stop, an officer must be able to point to specific and articulable facts giving rise to reasonable suspicion of criminal activity. *Id*.

In the instant case, the officers clearly had reasonable suspicion to detain Limburg for a brief investigative period given his erratic driving. Limburg does not dispute this on appeal. Rather, he seems to argue that once he gave officers a reasonable explanation for his behavior, which was verified at least in part by his employer, the investigatory stop should have ended.

It is well established that an investigatory detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Id*. *See also State v. Hobbs*, 933 N.E.2d 1281, 1286 (Ind. 2010) ("[o]fficers are not authorized to detain a person stopped under reasonable suspicion for a crime for a longer period than is required to resolve the suspicion"). The record in this case reveals that the canine sweep took place within eight to ten minutes of Officer Norrod arriving on the scene and taking over the investigation from Officer Day.[2] In this time, Officer Norrod spoke with Limburg, Limburg's employer, and Redpath, while Deputy Roberts also spoke with Limburg and ran his information through

[2] Prior to Officer Norrod's arrival, Limburg had been stopped for only two to three minutes. Officer Day, who was outside his county and in a hurry, quickly handed off the investigation to Officer Norrod and left.

dispatch. Although Limburg provided an explanation for his erratic driving, Officer Norrod and Deputy Roberts both observed signs of impairment[3] indicating that further investigation was necessary, especially in light of the fact Officer Norrod saw a pill bottle on the floor of Limburg's truck. The subsequent canine sweep[4] did not extend the length of the detention by any appreciable amount of time, as the canine was already at the scene in Deputy Roberts's vehicle.

Under the circumstances of this case, the trial court erred in determining that the detention was unreasonable. The investigatory detention here lasted no longer than was necessary to effectuate the purpose of the stop. Further, during the canine sweep, the officers obtained probable cause to search the vehicle because when the dog alerted, Limburg admitted to Officer Norrod that he had Xanax in the truck.[5] *See State v. Hobbs*, 933 N.E.2d 1281 (under the automobile exception, no warrant is required to search a vehicle if the officers have probable cause to believe it contains evidence of a crime). While it is certainly

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[3] The fact that Officer Day testified that he did not smell alcohol or observe signs of intoxication during his two to three minutes with Limburg does not dispel the subjective observations made by the subsequent investigating officers.

[4] A dog sniff is not a search protected by the Fourth Amendment and, therefore, no degree of suspicion is needed to conduct a canine sweep of the exterior of a vehicle. *State v. Hobbs*, 933 N.E.2d 1281.

[5] On appeal, Limburg also challenges the reliability of the canine's alert, arguing that the State presented no evidence regarding the training and reliability of this particular canine. We initially observe that such evidence was not needed to establish probable cause for the search given Limburg's admission to Officer Norrod during the canine sweep. Furthermore, our review of the record reveals that Limburg quickly cut off the State's questioning when it was presenting evidence regarding the canine sweep and specifically the fact that Xanax and marijuana were ultimately recovered from the truck. Limburg objected, "this isn't relevant for the purpose of today's hearing, or beyond the scope of what we are trying to determine here." *Transcript* at 19-20. As a result, the State did not further develop the evidence regarding the canine sweep.

not per se illegal to possess Xanax, it is illegal to operate a vehicle while intoxicated.[6] Given Limburg's admission coupled with his erratic driving and signs of intoxication, the officers clearly had probable cause to believe that the truck contained evidence of a crime. In sum, we find no Fourth Amendment violation.

Limburg also claims that the warrantless search violated article 1, section 11 of the Indiana Constitution. Although the text of this provision is identical to the Fourth Amendment, the two have been given somewhat different interpretations. *State v. Hobbs*, 933 N.E.2d 1281. "Conformity of a search to the Indiana Constitution turns on an evaluation of the 'reasonableness' of the conduct of the law enforcement officers, not on the expectation of privacy commonly associated with Fourth Amendment analysis." *Id*. at 1287.

"Relevant considerations in evaluating reasonableness of a search under all the circumstances include the degree to which the search or seizure disrupts the suspect's normal activities, and those facts and observations that support the officer's decision to initiate the search and seizure." *Id*. In determining whether police behavior was reasonable under section 11, courts "must consider each case on its own facts and construe the constitutional provision liberally so as to guarantee the rights of people against unreasonable searches and seizures." *Taylor v. State*, 842 N.E.2d 327, 334 (Ind. 2006). "Rather than looking to federal requirements such as warrants and probable cause when evaluating Section 11 claims, we place the burden on the State to show that under the totality of the circumstances its intrusion was reasonable." *State v. Bulington*, 802 N.E.2d 435, 438 (Ind. 2004).

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[6] Intoxicated is statutorily defined to include being under the influence of a controlled substance. *See* Ind. Code Ann. § 9-13-2-86 (West, Westlaw through 2011 Pub. Laws approved & effective through 4/6/2011).

The totality of the circumstances here supports the officers' actions in detaining and conducting a brief investigation of Limburg. As set forth above, Limburg was detained by officers for a total of ten to thirteen minutes while they questioned him, his employer, and Redpath. The investigation began as the result of Limburg's dangerous and erratic driving, followed by his abrupt stopping of his vehicle and running into a business while leaving the door to his truck open. Although Limburg provided a plausible explanation for his erratic driving, under the circumstances the officers were not bound to accept that explanation and let him drive away. In light of what they believed to be "obvious signs of impairment", as well as Officer Norrod's observation of a pill bottle in Limburg's truck, further investigation was reasonable. *Transcript* at 24. Moreover, as set forth above, the brief detention was not appreciably prolonged by the canine sweep. Once the canine alerted and Limburg simultaneously made his admission to Officer Norrod, the officers had "a high degree of confidence that the vehicle contained evidence of a crime, and the same considerations underlying the federal automobile exception support permitting the officers to secure the evidence without delay." *State v. Hobbs*, 933 N.E.2d at 1287.

The trial court erred in finding that the search violated the Fourth Amendment to the U.S. Constitution and article 1, section 11of the Indiana Constitution. Therefore, we reverse the trial court's suppression of the fruits of the search.

Judgment reversed and remanded.

BAILEY, J., concurs in result.

BROWN, J., concurs.