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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)
)
 Appellant-Plaintiff,)
)
 vs.) No. 02A05-1001-CR-44
)
 WILLIE M. BROWN,)
)
 Appellee-Defendant.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0906-FD-607

June 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Pursuant to Indiana Code Section 35-38-4-2(5), the State of Indiana appeals following the trial court's grant of Willie M. Brown's motion to suppress evidence.¹ The sole issue presented for our review is whether the trial court erred when it granted Brown's motion. We affirm.

Facts and Procedural History

On June 20, 2009, at approximately 3:30 a.m., Fort Wayne Police Officers Cory Troyer and Michael McEachern were dispatched to a South Park Drive address on a suspicious person call. The resident called dispatch to complain that someone had been knocking on her door for twenty minutes. She relayed that the knocking had ceased but that she could see individuals walking northbound on South Park toward Oxford Street. Officers Troyer and MacEachern were on patrol in a fully marked police vehicle and dressed in police uniform. Upon arriving at the scene, Officers Troyer and MacEachern observed three individuals walking northbound on Southpark approximately one block from the address. The individuals were walking in the street despite the availability of a sidewalk. The officers observed that, by walking in the street, the individuals were committing an infraction of a city ordinance which prohibits pedestrians from traveling in the street when a sidewalk is provided.

¹ The initiation of an appeal by the State pursuant to Indiana Code Section 35-38-4-2(5) constitutes a judicial admission that prosecution cannot proceed without the suppressed evidence. *State v. Aynes*, 715 N.E.2d 945, 948 (Ind. Ct. App. 1999). Therefore, if the trial court's suppression order is affirmed on appeal, the State is precluded from further prosecution of that cause. *Id.*

The officers exited their police vehicle and ordered the three individuals to stop. The individuals ignored the officers' order and, as the officers approached, two of the individuals headed west while Brown continued east. Officer Troyer followed Brown and ordered him to stop. Brown stopped, dropped a brown paper bag, raised his hands in the air, and turned around toward Officer Troyer. Officer Troyer then escorted Brown "to where the other two were." Tr. at 10. After escorting Brown to the location of the other individuals, Officer Troyer asked Brown if he possessed any weapons on his person. Brown denied having any weapons. Officer Troyer then asked Brown if "he'd mind" if Officer Troyer conducted a search of his person. *Id.*² Brown stated that he did not mind, and Officer Troyer conducted a patdown search of Brown's clothing. Officer Troyer immediately recognized by feel what he believed, based upon his experience and training, to be a crack pipe in Brown's left rear pocket. Officer Troyer removed the object, confirmed that it was a crack pipe, and formally arrested Brown for possession of paraphernalia. During a search subsequent to the formal arrest, officers also discovered cocaine in Brown's possession.

The State charged Brown with possession of cocaine as a class D felony and possession of paraphernalia as a class A misdemeanor. Brown filed a motion to suppress evidence obtained prior to, at the time of, or subsequent to his arrest. Following a hearing on August 31, 2009, the trial court granted Brown's motion to suppress. The State subsequently

² Officer Troyer testified that he made the request to search Brown's person for weapons despite the fact that Brown did not behave in any manner which would suggest he was armed. Tr. at 19.

filed its motion to dismiss without prejudice on September 2, 2009, and the trial court dismissed the case. This appeal ensued.

Discussion and Decision

The State contends the trial court erred when it granted Brown's motion to suppress. We review a trial court's decision to grant a motion to suppress as a matter of sufficiency. *State v. Moriarity*, 832 N.E.2d 555, 557-58 (Ind. Ct. App. 2005). We neither reweigh the evidence nor judge witness credibility. *Id.* at 558. Because the State here appeals from a negative judgment, the State must show that the trial court's ruling on the suppression motion was contrary to law. *State v. Lucas*, 859 N.E.2d 1244, 1248 (Ind. Ct. App. 2007), *trans. denied*. We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that of the trial court. *Id.*

During the motion to suppress hearing, Brown argued that the search of his person by Officer Troyer was illegal because he was entitled to a *Pirtle* advisement prior to consenting to a valid search. Specifically, our supreme court has stated:

[A] person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent. This right, of course, may be waived, but the burden will be upon the State to show that such waiver is explicit, and, as in *Miranda*, the State will be required to show that the waiver was not occasioned by the defendant's lack of funds.

Pirtle v. State, 263 Ind. 16, 29, 323 N.E.2d 634, 640 (1975). Indeed, the court has more recently explained that “[u]nder the Indiana Constitution, ‘a person in custody must be informed of the right to consult with counsel about the possibility of consenting to search before a valid consent can be given.’” *Joyner v. State*, 736 N.E.2d 232, 241 (Ind. 2000)

(quoting *Jones v. State*, 655 N.E.2d 49, 54 (Ind. 1995) (citing *Pirtle*, 263 Ind. at 28, 323 N.E.2d at 640)).

It is undisputed that Officer Troyer did not advise Brown of his right to consult with counsel before conducting a patdown search of his person. Thus, we must determine whether Brown was “in custody” when Officer Troyer conducted the search. “Whether a defendant is in custody for purposes of the Fourth Amendment ... is governed by an objective test.” *Ackerman v. State*, 774 N.E.2d 970, 978 (Ind. Ct. App. 2002) (quoting *West v. State*, 755 N.E.2d 173, 178 (Ind. 2001)), *trans. denied* (2003). “Ultimately, the question is whether a reasonable person under the same circumstances would have believed that he was under arrest or not free to resist the entreaties of the police.” *West*, 755 N.E.2d at 178-79. The test to determine when a person has been seized is whether, considering all the circumstances surrounding the police-citizen encounter, the defendant entertained a reasonable belief that he was not free to leave. *See Bentley v. State*, 779 N.E.2d 70, 74 (Ind. Ct. App. 2002) (citation and quotation marks omitted). This Court has provided examples of circumstances under which a reasonable person would have believed that he was not free to leave, including “the threatening presence of several officers, the display of a weapon by the officer, some physical touching of the person ..., or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *Overstreet v. State*, 724 N.E.2d 661, 664 (Ind. Ct. App. 2000), *trans. denied*.

Here, two police officers driving a fully marked police vehicle and dressed in police uniform approached Brown and the two other individuals and ordered them to stop. Officer

Troyer then followed Brown and ordered him specifically to stop. Brown immediately stopped, dropped what was in his hands, and raised his hands in the air. This is the behavior of a citizen who has submitted to the supremacy of the law rather than a citizen who feels free to leave of his own accord. Officer Troyer then physically “escorted” Brown to the location of the other two individuals before then asking Brown for consent to search.³ The objective circumstances presented lead us to agree with the trial court that a reasonable person in Brown’s position would not feel free to leave or resist Officer Troyer’s directives. Accordingly, Brown was “in custody” at the time his consent to search was given and was entitled to an advisement of his right to consult with counsel prior to giving such consent. Because he was not so advised, the search of Brown’s person was unlawful, and evidence obtained as a result was the fruit of the unlawful search. The trial court properly granted Brown’s motion to suppress.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.

³ The State ignores *Pirtle* and instead relies on our decision in *Pinkney v. State*, 742 N.E.2d 956 (Ind. Ct. App. 2001), *trans. denied*, to argue that Brown’s consent to search was voluntarily given. However, the defendant in *Pinkney* did not assert that he was in police custody at the time of the search or that the circumstances otherwise indicated that he was not free to leave. Accordingly, *Pirtle* was not implicated.