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IN THE
COURT OF APPEALS OF INDIANA

TERRY PROCTOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0810-CR-589
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah Pierson-Treacy, Judge
The Honorable Shatrese Flowers, Master Commissioner
Cause No. 49F19-0806-CM-133279

June 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Terry Proctor appeals his conviction for Class A misdemeanor carrying a handgun without a license. We affirm.

Issue

Proctor raises one issue, which we restate as whether the trial court properly admitted evidence of and his statements about the gun during trial.

Facts

At approximately 3:15 a.m., on June 1, 2008, Officer Andrew Sheler of the Indianapolis Metropolitan Police Department ("IMPD") observed a car being operated without its headlights on and repeatedly changing lanes without using a turn signal. Officer Sheler initiated a traffic stop. The car, occupied by three people, slowed and eventually came to a stop. While Officer Sheler was waiting for the car to stop, he noticed the driver, later determined to be Proctor, reaching under his seat. As Officer Sheler approached the driver's side of the car, he smelled marijuana. Proctor did not have identification, and Officer Sheler asked him to get out of the car and placed him in handcuffs. Proctor then gave Officer Sheler two false names and two false birthdates.

Officer Sheler patted down Proctor and felt what he thought was a large sum of money in Proctor's left pocket. Officer Sheler continued to smell marijuana, and Proctor admitted that he had smoked it. Officer Sheler then discovered marijuana in Proctor's front left pocket.

During this time, another IMPD officer, Matthew Spalding, arrived to assist Officer Sheler. Officer Spalding asked the passengers to get out of the car and patted them down. The two passengers provided identification and were permitted to sit down.

Officer Sheler asked Officer Spalding to look in the front driver's side of car. Officer Spalding found a handgun under the driver's seat. After the gun was found, the two other passengers were handcuffed. Although the occupants were not Mirandized, they were questioned regarding ownership of the gun, and all three denied the gun was theirs. At some point, Proctor admitted that the gun belonged to him.

The State charged Proctor with Class A misdemeanor carrying a handgun without a license and Class A misdemeanor possession of marijuana. At the September 4, 2008 bench trial, Proctor moved to suppress the marijuana, the gun, and his statements to the police officers. The trial court suppressed the marijuana and Proctor's first statement that the gun was not his. The trial court found Proctor guilty of the handgun charge and not guilty of the marijuana charge. Proctor now appeals.

Analysis

Proctor argues that his statement and the evidence of the gun should not have been admitted because it violated his rights under the United States Constitution and the Indiana Constitution. We first observe that Proctor did not make a pre-trial motion to suppress; instead, he objected to the admission of evidence during trial. Nevertheless, our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. Jackson v. State, 890 N.E.2d 11, 15 (Ind. Ct. App. 2008). We do not reweigh the

evidence, and we consider conflicting evidence most favorable to the trial court's ruling. Id. "However, we must also consider the uncontested evidence favorable to the defendant." Id.

As for the search of the car,[1] as a general rule, the Fourth Amendment prohibits warrantless searches, but there are exceptions to the warrant requirement. Myers v. State, 839 N.E.2d 1146, 1150 (Ind. 2005). One of those exceptions is the automobile exception. See id. Our supreme court has observed:

> The automobile exception was first applied in Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925). This exception was originally based on ready mobility and exigent circumstances. See Coolidge v. New Hampshire, 403 U.S. 443, 459-60, 91 S. Ct. 2022, 2034-35, 29 L. Ed. 2d 564, 579 (1971). The United States Supreme Court later made clear that separate exigent circumstances are not required for the automobile exception to apply because "[t]he mobility of automobiles ... 'creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.' " California v. Carney, 471 U.S. 386, 391, 105 S. Ct. 2066, 2069, 85 L. Ed. 2d 406, 413 (1985) (quoting South Dakota v. Opperman, 428 U.S. 364, 367, 96 S. Ct. 3092, 3096, 49 L. Ed.2d 1000, 1004 (1976)); see also Maryland v. Dyson, 527 U.S. 465, 466-67, 119 S. Ct. 2013, 2014, 144 L. Ed. 2d 442, 445 (1999) ("[T]he 'automobile exception' has no separate exigency requirement .... [I]n cases where there [is] probable cause to search a vehicle 'a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained.' ") (quoting United States v. Ross, 456 U.S. 798, 809, 102 S. Ct. 2157, 2164-65, 72 L. Ed. 2d 572, 584 (1982)); Pennsylvania v. Labron, 518 U.S. 938, 940, 116 S. Ct. 2485, 2487, 135 L.

[1] We agree with Proctor that this encounter with the police cannot be classified as consensual. Nevertheless, it is undisputed that Officer Sheler's initiation of a traffic stop was proper. To the extent Proctor suggests he was improperly seized prior to Officer Sheler establishing "reasonable suspicion" to search the car, he has not supported this assertion with cogent argument as required by Indiana Appellate Rule 46(A)(8)(a). Appellant's Br. p. 9. This argument is waived.

> Ed. 2d 1031, 1036 (1996) ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more."). Furthermore, the exception is based not only on ready mobility but also on the lesser expectation of privacy with respect to automobiles, so that even where an automobile is not immediately mobile, a warrantless search may still be justified. Labron, 518 U.S. at 940, 116 S. Ct. at 2487, 135 L. Ed. 2d at 1036.
>
> In Dyson, the United States Supreme Court held that police need not obtain a search warrant before searching a vehicle that they have probable cause to believe contains illegal drugs. The Court emphasized that the automobile exception "does not have a separate exigency requirement," id., 527 U.S. at 467, 119 S. Ct. at 2014, 144 L. Ed. 2d at 445, and that "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits police to search the vehicle without more." Id. (quoting Labron, 518 U.S. at 940, 116 S. Ct. at 2485, 135 L. Ed. 2d at 1035-36).

Id. at 1150-51. Thus, under the Fourth Amendment, a search falls within the automobile exception to the warrant requirement where (1) the vehicle was readily mobile or capable of being driven when the police first seized it; and (2) probable cause existed that the vehicle contained contraband or evidence or a crime. Cheatham v. State, 819 N.E.2d 71, 75-76 (Ind. Ct. App. 2004).

Proctor makes no argument that his car was not readily moveable. As for probable cause, probable cause to search exists where the facts and circumstances within the knowledge of the officer making the search, based on reasonably trustworthy information, are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed. State v. Hawkins, 766 N.E.2d 749, 751 (Ind. Ct. App. 2002), trans. denied.

We have held, "when a trained and experienced police officer detects the strong and distinctive odor of burnt marijuana coming from a vehicle, the officer has probable cause to search the vehicle." Id. at 752; see also Miller v. State, 846 N.E.2d 1077, 1082 (Ind. Ct. App. 2006) (concluding that probable cause to justify a warrantless search of a car existed where the police officer noticed a strong smell of marijuana coming from the car), trans. denied. Here, when Officer Sheler approached the car, he immediately smelled what through his training and experience he believed to be marijuana. Officer Spalding also smelled burnt marijuana coming from vehicle. Thus, the odor of burnt marijuana created probable cause to search the vehicle. Proctor has not established that the search violated his Fourth Amendment rights.[2]

Proctor also claims that the search of the car violated his rights under Article 1, Section 11 of the Indiana Constitution. The legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances. Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005). Although there may be other relevant considerations under the circumstances, the reasonableness of a search or seizure turns on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs. Id. at 361.

[2] Accordingly we need not address whether the search was a valid inventory search or a valid search incident to arrest. Also, because we do not affirm the search as a search incident to arrest we need not address the Supreme Court's recent decision in Arizona v. Gant, 556 U.S. --, --S. Ct -- (April 21, 2009), which limits the scope of the search of an automobile incident to arrest.

Here, Officer Sheler observed Proctor driving erratically and without headlights and saw Proctor reaching under his seat before he stopped the car. Proctor then gave Officer Sheler false names and birthdates. Moreover, both officers smelled marijuana when they approached the car. Given the totality of the circumstances, the degree of suspicion warranting the search of the car was high. Second, although "the interior search of the defendant's personal car was likely to impose an intrusion 'on the citizen's ordinary activities,'" the intrusion, in terms of public notice and embarrassment, was somewhat limited by the hour of the search. Myers v. State, 839 N.E.2d 1146, 1154 (Ind. 2005) (citation omitted). Also limiting the scope of the intrusion is that Officer Sheler instructed Officer Spalding to "look in the front portion, driver's side portion of the vehicle," where Officer Sheler had seen Proctor reaching. Tr. p. 15. Finally, in considering law enforcements needs, we recognize that the car was capable of being driven away. The limited search of the car permitted the officers to secure the contents without first obtaining a search warrant. Under the totality of the circumstances, we conclude that the search was reasonable and not in violation of Proctor's Indiana constitutional rights.

Proctor also argues that he was not advised of his Pirtle rights prior to the search. In Pirtle v. State, 263 Ind. 16, 29, 323 N.E.2d 634, 640 (1975), our supreme court held that under Article 1, Section 13 of the Indiana Constitution, "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." Although Proctor was not advised of his Pirtle rights, the police officers did not ask for his consent prior to

conducting the search. Thus, it was unnecessary to advise him of his Pirtle rights. See Ward v. State, 903 N.E.2d 946, 957 (Ind. 2009) (finding no Pirtle violation where defendant did not consent to the search, which was conducted upon a lawful arrest and independent probable cause).

To the extent that Proctor also argues that he was not Mirandized after he was handcuffed, it is undisputed that Proctor was in custody and not Mirandized. Nevertheless, "[r]ights under Miranda apply only to custodial interrogation." White v. State, 772 N.E.2d 408, 412 (Ind. 2002). "Under Miranda, 'interrogation' includes express questioning and words or actions on the part of the police that the police know are reasonably likely to elicit an incriminating response from the suspect." Id. "Volunteered statements do not amount to interrogation." Id.

Here, the trial court suppressed one of Proctor's statements because it was made in response to police questioning. As for Proctor's statement that the gun was his, as the trial court concluded, no question was posed to Proctor when he made the statement. See Tr. p. 24. Although Proctor testified otherwise, witness credibility was a question for the trial court. See Jackson, 890 N.E.2d at 15. Without more, Proctor has not established that the trial court erred in admitting his statement that the gun was his.

Conclusion

Proctor has not established that the trial court should have excluded evidence of or his statements about the gun. We affirm.

Affirmed.

BAKER, C.J., and MAY, J., concur.