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IN THE
COURT OF APPEALS OF INDIANA

URIAH I. DAVIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0811-CR-1045
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Barbara A. Collins, Judge
Cause No. 49F08-0807-CM-177118

July 7, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Uriah I. Davis ("Davis") was convicted in Marion Superior Court of Class A misdemeanor driving while suspended. He was sentenced to a term of 365 days in jail with 359 days suspended and six days of jail time credit. Davis appeals and argues that the trial court abused its discretion in denying his motion to suppress evidence culled from his traffic stop and that the trial court erred in rejecting Davis's defense of extreme emergency.

We affirm.

Facts and Procedural History

On July 27, 2008, the Indianapolis Metropolitan Police Department ("IMPD") received an emergency call that a man had pulled a gun on the caller and a small child. IMPD Officer Jeffery Newlin ("Officer Newlin") responded and was notified that the man had left the initial location and was now driving a white Oldsmobile Cutlass and that the person making the emergency call was following the car.

Officer Newlin soon sighted a pair of cars matching the description given by the 911 operator. The 911 operator told the caller to move out of the way and Officer Newlin stopped the vehicle. Officer Newlin later met and spoke with the caller, Keith Phillips. After stopping the vehicle, Officer Newlin determined that the driver, Davis, was driving with a suspended license and arrested Davis at that time.

On July 27, 2008, the State charged Davis with Class A misdemeanor driving while suspended. The trial court held a bench trial on October 8, 2008. At trial, Davis testified that he had been at the location where the 911 call had originated and that he had been attacked by his child's mother's boyfriend, Keith Phillips ("Phillips"), and other

men. Davis stated that Phillips had struck him on the head and that Davis had fled in his child's mother's car, fearful that he would have received a beating. Davis also testified that Phillips and the other men chased Davis in another car. He admitted that he knew that his license was suspended. Davis testified that he stopped the car as soon as he saw the police officer and that he informed the officer of the events involving Phillips.

Officer Newlin testified on rebuttal that Davis drove twenty-two blocks and did not stop for two blocks after Officer Newlin initiated the traffic stop. He also testified that Davis did not tell him that Davis was driving because of his fear of being attacked by Phillips and others and the officer did not see any injuries on Davis. Officer Newlin did state that Davis had told him that Davis was being followed. Officer Newlin stated that there was only one person in the vehicle following Davis.

The trial court found Davis guilty as charged and sentenced him to 365 days in jail with 359 days suspended and credit for six days. Davis now appeals.

Discussion and Decision

Davis argues that the trial court abused its discretion when it denied his oral motion to suppress the traffic stop because Officer Newlin did not have reasonable suspicion to stop Davis. The admission and exclusion of evidence lies within the sound discretion of the trial court; therefore we review admission of testimony for abuse of that discretion. State v. Lloyd, 800 N.E.2d 196, 198 (Ind. Ct. App. 2003). Such an abuse occurs when the "decision is clearly against the logic and effect of the facts and circumstances." Id.

In Terry, the United States Supreme Court created an exception to the Fourth Amendment's requirement that a police officer have probable cause or a warrant before stopping a person. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Pursuant to Terry, a police officer may detain a person briefly for investigation if the officer has reasonable suspicion, based on specific and articulable facts, "that criminal activity may be afoot." Id. at 30, 88 S.Ct. at 1868. Reasonable suspicion consists of "a minimal level of objective justification for making a stop" that is "more than an inchoate and unparticularized suspicion or hunch." State v. Belcher, 725 N.E.2d 92, 94 (Ind. Ct. App. 2000), trans. denied. Whether the officer's suspicion was reasonable is determined on a case-by-case basis by engaging in a fact-sensitive analysis of the totality of the circumstances. Id.

Here, Davis asserts that Officer Newlin did not have reasonable suspicion to conduct a Terry stop of his car. Davis supports this assertion by citation to Washington, 740 N.E.2d 1241. In Washington, a citizen called the police to report a possible drunk driver. Id. at 1243. The informant, whose identity and reliability remained unknown, informed police that a black Cadillac with a white top and a specific license plate number was heading southbound on Interstate 65. Id. A police officer, who located the Cadillac and verified the license plate number, pulled the car over without personally observing any evidence of drunk or erratic driving. Id. Relying on a United States Supreme Court decision, Florida v. J.L., we held that the officer did not have reasonable suspicion to stop the car because the anonymous tip was not corroborated by evidence of the informant's reliability or by independent observation of the officer. Washington, 740 N.E.2d at 1246

(citing Florida v. J.L., 529 U.S. 266, 271-272, 120 S.Ct. 1375, 1379, 146 L.Ed.2d 254 (2000)).

However, we do not agree with Davis's assertion that Washington should control the facts before us because, unlike Washington and J.L. where the informant was completely anonymous, the informant in this case was not anonymous. Quite to the contrary, the tip came from Phillips, a motorist who willingly informed the 911 operator of his name and the description of his car. Additionally, Phillips followed Davis and stayed in contact with the 911 operator until told to move over to allow Officer Newlin to stop Davis's vehicle. Officer Newlin testified that he personally observed Phillips following Davis's car and saw that Phillips's car followed the instructions of the 911 operator. Officer Newlin also spoke with Phillips following Davis's arrest.

This case is very similar to State v. Eichholtz, 752 N.E.2d 163 (Ind. Ct. App. 2001). In Eichholtz, the tip came from a motorist, who willingly identified himself and his car to the 911 operator. Also, the motorist, Thatch, followed Eichholtz until the officer arrived to pull Eichholtz over. The officer testified that he "did verify that there was, in fact, Mr. Thatch there in the described car, and that he was following this vehicle." Id. at 166.

Here, Phillips called 911 to give information to the police regarding his car, the defendant's car, and their location, all of which Officer Newlin was able to confirm when he arrived at the scene. In addition, Phillips identified himself to the 9-1-1 operator in such a manner that he could be held legally responsible if Officer Newlin's investigation indicated that Phillips filed a false police report. See Ind. Code § 35-44-2-2 (2004).

While this information by itself would not have been sufficient to arrest Davis for driving while suspended, this information was sufficient to justify Officer Newlin's stop of Davis to briefly investigate the situation further. See, e.g., United States v. Sierra-Hernandez, 581 F.2d 760, 762-764 (9th Cir. 1978) (holding that reasonable suspicion existed to pull over the defendant's truck based on the circumstances surrounding an anonymous informant stopping his car to tell an officer via a face-to-face conversation that the defendant's truck had been involved in criminal activity), cert. denied, 439 U.S. 936, 99 S.Ct. 333, 58 L.Ed.2d 333 (1978); see also J.L., 529 U.S. at 274-276, 120 S.Ct. at 1380-1381 (Kennedy, J., concurring). Officer Newlin's request for identification, including a driver's license, was a permissible result of the permissible stop. For all of the foregoing reasons, we conclude that the trial court did not abuse its discretion in denying Davis's motion to suppress.

Davis also argues that the trial court improperly rejected his defense of extreme emergency to explain why he had been driving while he knew that his license had been suspended. Indiana code section 9-24-19-2 (2004) states: "A person who operates a motor vehicle upon a highway when the person knows that the person's driving privilege, license, or permit is suspended or revoked, when less than ten (10) years have elapsed between: (1) the date a judgment was entered against the person for a prior unrelated violation of section 1 of this chapter, this section, IC 9-1-4-52 (repealed July 1, 1991), or IC 9-24-18-5(a) (repealed July 1, 2000); and (2) the date the violation described in subdivision (1) was committed; commits a Class A misdemeanor."

Davis raises the statutory defense of extreme necessity on appeal yet failed to raise the statutory defense at the trial court level and instead raised the common law defense of necessity. Tr. p. 47. On appeal, Davis has failed to raise the issue of common law defense of necessity. It is well settled that a party may not raise one ground before the trial court and a different ground on appeal. Wurster v. State, 715 N.E.2d 341, 347-48 (Ind. 1999).

Waiver notwithstanding, Davis raises the statutory defense of extreme necessity pursuant Indiana Code § 9-30-10-18 (2004) which states: "In a criminal action brought under section 16 or 17 of this chapter, it is a defense that the operation of a motor vehicle was necessary to save life or limb in an extreme emergency. The defendant must bear the burden of proof by a preponderance of the evidence to establish this defense." However, Davis was not charged under Ind. Code section 9-30-10-16 or 17, therefore, this statutory defense is unavailable to Davis.

Even if Davis had properly raised the issue of common law defense of necessity on appeal, the facts of this case would not support the defense. In order to prevail on a claim of necessity, Davis must show (1) the act charged as criminal must have been done to prevent a significant evil, (2) there must have been no adequate alternative to the commission of the act, (3) the harm caused by the act must not be disproportionate to the harm avoided, (4) the accused must entertain a good faith belief that his act was necessary to prevent greater harm, (5) such belief must be objectively reasonable under all the circumstances, and (6) the accused must not have substantially contributed to the creation of the emergency. Toops v. State, 643 N.E.2d 387, 390 (Ind. Ct. App. 1994).

In Dozier v. State, we noted:

> In order to negate a claim of necessity, the State must disprove at least one element of the defense beyond a reasonable doubt. The State may refute a claim of the defense of necessity by direct rebuttal, or by relying upon the sufficiency of the evidence in its case-in-chief. The decision whether a claim of necessity has been disproved is entrusted to the fact-finder. Where a defendant is convicted despite his claim of necessity, this court will reverse the conviction only if no reasonable person could say that the defense was negated by the State beyond a reasonable doubt.

709 N.E.2d 27, 29 (Ind. Ct. App. 1999) (citations omitted).

When reviewing whether the State presented sufficient evidence to negate a defendant's claim of necessity, we apply the same standard of review used for all sufficiency of the evidence questions. We neither reweigh the evidence nor judge the credibility of witnesses. Johnson v. State, 671 N.E.2d 1203, 1209 (Ind. Ct. App. 1996), trans. denied. Rather, we examine only the evidence most favorable to the State along with all reasonable inferences to be drawn therefrom. Id. If there is substantial evidence of probative value to sustain the conviction, then it will not be set aside. Id.

The trial court determined that Davis did not drive out of necessity. Officer Newlin's testimony on rebuttal directly contradicts Davis's version of events. Officer Newlin stated that Davis drove twenty-two blocks and did not stop for two blocks after Officer Newlin initiated the traffic stop. He also testified that Davis did not tell him that Davis was driving because of his fear of being attacked by Phillips and others and the officer did not see any injuries on Davis. Officer Newlin did state that Davis had told him that Davis was being followed. Officer Newlin stated that there was only one person in the vehicle following Davis. This testimony alone provides the trial court a sufficient

base for determining that Davis did not operate a motor vehicle while suspended out of necessity.

Conclusion

The trial court did not abuse its discretion when it denied Davis's motion to suppress his traffic stop. The evidence was sufficient to support Davis's conviction for driving while suspended, and Davis failed to sustain his burden of proof that he drove while suspended out of statutory or common law necessity.

Affirmed.

RILEY, J., and KIRSCH, J., concur.