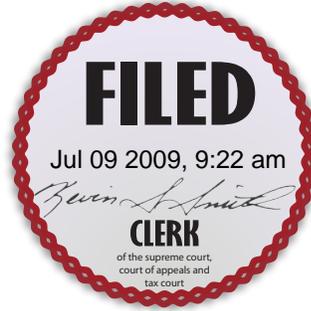


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN STOUT,)

Appellant-Defendant,)

vs.)

No. 82A04-0901-CR-47

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0807-FD-640

July 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Kevin Stout appeals his conviction for Possession of Cocaine, as a Class D felony.¹ We affirm.

Issue

Stout questions whether it was an abuse of discretion for the trial court to admit into evidence the cocaine discovered during the traffic stop.

Facts and Procedural History

On July 17, 2008, Evansville Police Officers Michael Ward and Michael Evans observed a grey S-10 pickup truck leave Savannah Gardens at a high rate of speed and subsequently speed and make abrupt lane changes. The officers initiated a traffic stop of the vehicle. Upon discovering that neither occupant of the vehicle had a valid driver's license, the officers decided to have the vehicle towed. As Officer Evans was writing a citation for the driver, Officer Ward ordered the driver, Michael Kemper, out of the vehicle, conducted a pat down search and then did the same to the passenger, Stout.

For the pat down, Officer Ward instructed each person to interlace their hands, place them on their head and stand with their legs apart. While conducting the pat down search on Stout just outside the passenger door of the truck, Officer Ward asked Stout if he could reach into Stout's pants pockets to verify that the items in his pockets were not weapons. Stout agreed, and Officer Ward verified that one pocket contained a pack of cigarettes. Officer Ward then directed Stout to stand next to Kemp at the front of the squad car. After seeing

¹ Ind. Code 35-48-4-6(a).

Stout reach the squad car, Officer Ward turned to conduct a vehicle inventory. As he walked along the passenger side of the vehicle where Stout had been standing, Officer Ward observed a plastic baggie of an off-white powdery substance six to twelve inches from the truck. Officer Ward picked up the bag and asked Stout about its contents. Stout replied, “Probably cocaine.” Trial Transcript at 75. After being read his Miranda rights² and being questioned, Stout admitted that Kemper had purchased the cocaine at Savannah Gardens and that Kemper gave him the cocaine to hide as they were being pulled over. After further search, another baggie of cocaine was recovered from Stout’s sock.

The following day the State charged Stout with possession of cocaine, as a Class D felony. Stout filed a Motion to Suppress, arguing that the cocaine was found during a pat down search that was in violation of his Fourth Amendment³ right against unreasonable searches and seizures. After a hearing, the trial court denied the motion. At the conclusion of a bench trial, Stout was found guilty as charged and sentenced to three years imprisonment with two and one half years suspended.

Stout now appeals.

² See Miranda v. Arizona, 384 U.S. 436, 479 (1966) (“He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”).

³ Stout’s motion also mentioned the Indiana constitutional counterpart to the federal Fourth Amendment. However, he does not challenge his conviction on this basis.

Discussion and Decision

I. Standard of Review

Stout argues that the cocaine seized when he was detained should not have been admitted as evidence because the bag of cocaine was found after an unlawful pat down search that violated the Fourth Amendment. Admission of evidence is within the sound discretion of the trial court. Amos v. State, 896 N.E.2d 1163, 1167 (Ind. Ct. App. 2008), trans. denied. We consider any conflicting evidence most favorable to the trial court's ruling and any uncontested evidence favorable to the defendant. Taylor v. State, 891 N.E.2d 155, 158 (Ind. Ct. App. 2008), trans. denied, cert. denied, 129 S. Ct. 1008 (Jan. 21, 2009), reh'g denied, 129 S. Ct. 1665 (Mar. 23, 2009). We will only reverse a decision of the trial court to admit evidence if there is an abuse of such discretion. Amos, 896 N.E.2d at 1167. An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before the court. Id. at 1168.

II. Analysis

To narrow the scope of our analysis, we begin by noting that Stout does not challenge the validity of the traffic stop, the request for Stout's identification, the officers' decision to tow the vehicle, or the request that Stout exit the vehicle. All parties agree that the pat down search conducted once Stout exited the vehicle was an illegal search pursuant to the Fourth Amendment and that the cocaine was not found on Stout's person during that search. See Pearson v. State, 870 N.E.2d 1061, 1065 (Ind. Ct. App. 2007) ("An officer may conduct a limited search for weapons only when he has a reasonable belief that the suspect is armed

and dangerous.”), trans. denied. The issue before this Court is whether the discovery of the cocaine should have been excluded under the fruit of the poisonous tree doctrine as Stout contends that the cocaine was knocked out of his pocket when Officer Ward pulled items out of his pocket during the illegal pat down.

Although Stout testified at trial that he saw one bag of cocaine fall out of his pocket when Officer Ward reached into his pocket to retrieve his pack of cigarettes, Officer Ward testified that at the scene Stout told him that when Kemper handed him the cocaine that he had stuffed it in his sock. Officer Ward testified that he asked Stout why he tucked one of the baggies so far into his sock but not the other and that Stout replied that he did not realize that Kemper had handed him two bags. In light of this conflicting evidence, we consider the evidence most favorable to the trial court’s ruling, that Stout had attempted to stuff both bags of cocaine in his sock. See Taylor, 891 N.E.2d at 158. Considering this evidence, we must determine whether there is a sufficient causal connection between the illegal pat down of Stout and the discovery of the cocaine on the ground to warrant the application of the exclusionary rule.

“The exclusionary rule is a judicially created remedy, aimed at curbing overly zealous police action. It tells police that if they obtain evidence illegally, they will not ordinarily be allowed to use it against the suspect they are after.” United States v. Swift, 220 F.3d 502, 506-07 (7th Cir. 2000) (citing United States v. Leon, 468 U.S. 897 (1984)), cert. denied, 531 U.S. 1169 (Feb. 20, 2001). Most cases applying the exclusionary rule to traffic stops involve the issue of whether the initial stop was a violation of the Fourth Amendment. That is not the

case here. Instead, the facts before us involve a legal Terry stop,⁴ request for identification, decision to tow the vehicle, and request for the occupants to exit the vehicle. The only illegal police action here is the pat down of the occupants, which produced no evidence of criminal activity.

“[I]f the causal chain between the initial illegality and the evidence sought to be excluded is broken, the link to the evidence is sufficiently attenuated to dissipate the taint of illegal conduct.” United States v. Jones, 214 F.3d 836, 842 (7th Cir. 2000). Here, there is no causal chain, no but-for relation, between the illegal pat down and the discovery of the bag of cocaine beside the truck. The parties agree that the initial bag of cocaine was not recovered from Stout’s person during the illegal pat down search. Furthermore, the evidence most favorable to the trial court’s ruling is that Stout attempted to stuff both bags of cocaine in his sock when Kemper gave them to him to hide during the traffic stop.

This evidence does not provide a causal connection between the pat down and discovery. Rather, the reasonable inference is that even if the illegal pat down search had not occurred, the cocaine would have been discovered when Officer Ward properly directed Stout to exit the car so that an inventory search prior to towing could be performed. “Because the primary purpose of the exclusionary rule is to discourage police misconduct, application of the rule does not serve this deterrent function when the police action, although erroneous, was not undertaken in an effort to benefit the police at the expense of the

⁴ See Terry v. Ohio, 392 U.S. 1, 30 (1968) (An officer has the authority to stop a person for investigatory purposes without violating the Fourth Amendment if the officer has a reasonable suspicion of criminal activity.)

suspect's protected rights.” United States v. Green, 111 F.3d 515, 523 (7th Cir. 1997) (quoting United States v. Fazio, 914 F.2d 950, 958 (7th Cir. 1990)). Moreover, as the discovery of the cocaine was not causally connected to the pat down search but rather was obtained pursuant to a lawful Terry stop, the trial court did not abuse its discretion in admitting the cocaine into evidence.

Affirmed.

DARDEN, J., concurs.

ROBB, J., concurs in result without opinion.