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.

ATTORNEY FOR APPELLANT:

MICHAEL E. CAUDILL
Caudill and Associates
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

FILED
Aug 14 2009, 8:35 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF: P.T.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0902-JV-163
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Scott Stowers, Magistrate
Cause No. 49D09-0810-JD-3192

August 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent P.T. appeals the juvenile delinquency adjudication that he committed an act that would have been resisting law enforcement,[1] a class A misdemeanor, had it been committed by an adult. Specifically, P.T. argues that the adjudication must be set aside because the arresting officer lacked reasonable suspicion or probable cause to effectuate the stop and that Indiana Code section 35-44-3-3 (resisting statute) is unconstitutional. Concluding that P.T. has waived his constitutional challenge and finding that P.T.'s adjudication was proper, we affirm the judgment of the juvenile court.

FACTS

On October 12, 2008, Indianapolis Metropolitan Police Department (IMPD) Officer Christopher Shaw was dispatched to East 42nd Street and Brentwood Drive to look for Thomas Alexander, who was a suspect in a shooting. When Officer Shaw, who was in uniform and driving his marked police vehicle, approached a residence, he saw Alexander sitting on a porch with seventeen-year-old P.T. and two other individuals. All four men stood up when Officer Shaw parked his vehicle. After Officer Shaw identified himself as a police officer and ordered the men to "stop," all four quickly proceeded into the residence, shut the door, and wedged a log into the sliding glass door. Tr. p. 4, 6. Other officers arrived on the scene, and one of the residents permitted them to enter. The officers saw Alexander and noticed cocaine and firearms in "plain view." Id. at 18. All four men were

[1] Ind. Code § 35-44-3-3.

arrested, and the State alleged that P.T. was a delinquent child for committing resisting law enforcement, a class A misdemeanor, if committed by an adult.

At the January 2, 2009, denial hearing, P.T. moved to suppress the testimony regarding the act of fleeing because Officer Shaw did not have the right to "tell [P.T.] to stop or . . . order him to stop." Id. at 6-7. The juvenile court denied the motion and P.T. argued at the hearing that he could not be adjudicated a delinquent for the offense because he did not actually run from Officer Shaw. The juvenile court denied the motion and entered a true finding. The juvenile court subsequently entered an order discharging P.T. because he was eighteen years old. P.T. now appeals.

DISCUSSION AND DECISION

In addressing P.T.'s claim that the resisting statute is unconstitutional, we initially observe that he did not challenge the constitutionality of the statute in the lower court. Thus, P.T.'s claim is waived. See Baumgartner v. State, 891 N.E.2d 1131, 1135-36 (Ind. Ct. App. 2008) (holding that the failure to challenge the constitutionality of a statute through a motion to dismiss generally waives the issue on appeal).

Waiver notwithstanding, we note that the determination of whether a statute is unconstitutional on its face is a question of law. State v. Moss-Dwyer, 686 N.E.2d 109, 110 (Ind. 1997). When a statute is challenged on constitutional grounds, we will presume that the statute is constitutional. Glover v. State, 760 N.E.2d 1120, 1123 (Ind. Ct. App. 2002). The party challenging the statute has the burden of proving otherwise. Brady v. State, 575 N.E.2d 981, 984 (Ind. 1991).

In this case, P.T. argues that his adjudication must be set aside because a stop under the resisting statute "must either implicate Fourth Amendment and Indiana constitutional rights or be deemed unconstitutional. In either case, the true finding against [P.T.] for fleeing law enforcement must be reversed." Appellant's Br. p. 8.

The resisting statute provides that a person who "flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop," commits resisting law enforcement. I.C. § 35-44-3-3(a)(3). In construing this statute, we have determined that an individual may not flee from a police officer who has ordered the person to stop, regardless of the apparent or ultimate lawfulness of the officer's order. Cole v. State, 878 N.E.2d 882, 886 (Ind. Ct. App. 2007). In other words, the resisting statute does not condition the offense upon a lawful order. Alspach v. State, 755 N.E.2d 209, 211 (Ind. Ct. App. 2001). Therefore, individuals have a duty to stop if ordered to do so by a police officer. Yowler v. State, 894 N.E.2d 1000, 1003 (Ind. Ct. App. 2008).

In Cole, we set forth the following rationale for the rule:

> "[A]ny flight from police detention is fraught with the potential for violence because flight will incite a pursuit, which in turn will endanger the suspect, the police, and innocent bystanders. Cases about in which a suspect's flight from the police set in motion an ensuing chase that resulted in death or serious injury either to a police officer, a suspect, or a bystander. For practical and public-policy-based reasons, constitutional decisionmaking cannot be left to a suspect in the street, even one who has done no wrong; a suspect cannot be the judge of his own cause and take matters into his own hands and resist or take flight. This reasoned approach encourages persons to avail themselves of judicial remedies, and signals that if a person peaceably submits to an

> unconstitutional stop the result will be suppression of the evidence seized from him."

878 N.E.2d at 886 (quoting State v. Williams, 926 A.2d 340, 347 (N.J. 2007)).

In light of these cases, P.T.'s argument that the adjudication determination must be set aside because Officer Shaw did not have probable cause or reasonable suspicion to stop him is unavailing. In other words, P.T. cannot successfully claim that a stop pursuant to the resisting statute is subject to Fourth Amendment protections. And the lawfulness of Officer Shaw's order to stop does not affect a resisting law enforcement conviction.

However, P.T. argues that this court's opinion in Bovie v. State, 760 N.E.2d 1195 (Ind. Ct. App. 2002), necessarily requires the reversal of his adjudication. In Bovie, the evidence showed that an Anderson Police Department Detective was observing a house, based upon information he had received that drugs were sold and used at the location. Later that evening, the detective witnessed two men walk from the residence, get into a vehicle, and leave. The detective, in an unmarked vehicle, followed the car that Bovie was driving. After observing that a headlight was out on Bovie's vehicle, he radioed for a uniformed officer in a marked car to make a traffic stop. Before the marked car arrived, Bovie pulled into a gas station and parked. The detective approached the vehicle and showed his badge in order to stop Bovie. The passenger, a known drug user and dealer, told Bovie to "go" as the detective approached. Id. at 1197. As Bovie "took off," a marked police car pulled in behind him with lights flashing. Id. Bovie pulled forward to the entrance to the street before stopping. The detective and a uniformed officer approached Bovie and arrested him. A

subsequent search of Bovie's vehicle produced a burnt piece of wire mesh under the passenger seat, which tested positive for cocaine. Id. at 1198. Thereafter, Bovie was convicted of resisting law enforcement and possessing drug paraphernalia.

On appeal, Bovie claimed that the detective violated his Fourth Amendment right to be free from unreasonable search and seizure. In essence, Bovie maintained that the detective did not have reasonable suspicion to stop him in relation to any drug activity that was based upon the informant's tip. We reversed Bovie's convictions and held that "without a reasonable and articulable suspicion to uphold an investigatory stop based upon drug activity, the contact between Bovie and [the detective] was either a consensual encounter in which Bovie was free to leave without any legal repercussions or must be grounded in statutory authority to make a stop." Id.

As a result of that reversal, P.T. directs us to the additional observation in Bovie that "before an individual may actually resist enforcement by fleeing, the individual must have a duty to stop," id. at 1197, in support of his claim that his adjudication must be set aside. However, the Bovie court did not have the occasion to (1) construe the plain language of the resisting statute, which contains no requirement that a police officer's request to stop must be legal, or (2) consider whether the defendant has a duty to stop. And, unlike the circumstances in Bovie where the detective was driving an unmarked police vehicle, Officer Shaw was in uniform and driving a marked police vehicle when he ordered P.T. to stop. Thus, it was unambiguous that a police officer was engaged in his duties when he ordered the

stop. Moreover, it was not up to P.T. to evaluate the legality of Officer Shaw's actions before heeding the order to stop. Cole, 878 N.E.2d at 886.

Finally, we note that the Bovie court did not rely on any other authority for the proposition that an individual must have a duty to stop under the resisting statute. Moreover, a number of cases decided after Bovie have directly addressed the provisions of the resisting statute and specifically determined that an individual may not flee from a police officer who has ordered the person to stop, regardless of the apparent or ultimate lawfulness of the order. See Yowler, 894 N.E.2d at 1000; Cole, 878 N.E.2d at 882; Dandridge v. State, 810 N.E.2d 746, 749 (Ind. Ct. App. 2004); State v. Howell, 782 N.E.2d 1066, 1067 (Ind. Ct. App. 2003). As we observed in Cole: "The rule in our State is that even if a police officer does not have reasonable suspicion to stop a defendant, the defendant has no right to flee when the officer orders him to stop." 878 N.E.2d at 886. As a result, P.T.'s claim fails.

The judgment of the juvenile court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.