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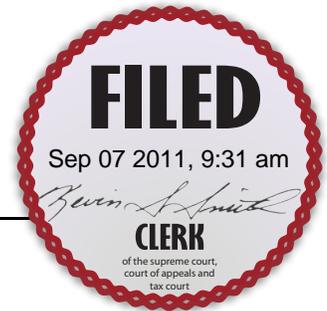
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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA)
)
 Appellant-Plaintiff,)
)
 vs.) No. 18A05-1102-CR-55
)
 DAVID G. BRUNO, Jr.)
)
 Appellee-Defendant.)

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0906-FD-85

September 7, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Plaintiff, the State of Indiana, appeals the trial court's grant of Appellee-Defendant's, David G. Bruno, Jr. (Bruno), motion to suppress evidence pursuant to Ind. Code § 35-38-4-2(5).

We affirm.

ISSUE

The State raises one issue for our review, which we restate as following: whether the trial court erred when it granted Bruno's motion to suppress evidence.

FACTS AND PROCEDURAL HISTORY

On April 30, 2009, Muncie Police Officer Allen Williams (Officer Williams), together with other officers, arranged a controlled cocaine purchase from David Hanyard (Hanyard) through a confidential informant (CI). Right before the purchase, officers searched the CI, fitted the CI with electronic listening equipment, and provided the CI with photocopied money. The CI was then driven to the location of the scheduled purchase, a residence on South Shipley Street in Muncie, Indiana, and dropped off. Officer Williams parked east of the house and was able to hear and see the CI enter the house. Through the recording device, Officer Williams heard the conversation between the CI and Hanyard and also an unidentifiable third voice. The third voice "would speak up every once in a while and say some items that were pretty much irrelevant to what was being talked about." (Transcript p. 12). In fact, Officer Williams did not hear the third voice talk about the actual cocaine purchase.

Approximately nine minutes later, Officer Williams observed the CI leave the house and return to another officer where the CI was searched for drugs. Then, Officer Williams observed Hanyard and Bruno walk out of the house, lock the door, and enter a truck that was parked outside of the house. Officer Williams followed the two men for two blocks and then another officer initiated a traffic stop. After Officer Williams left the residence to follow the truck, there was about a five minute gap in which there was not an officer securing the residence and monitoring those coming in and out. During the traffic stop, Hanyard was arrested for dealing cocaine while Bruno was arrested for visiting a common nuisance. A search of Bruno incident to arrest revealed marijuana on his person.

On June 10, 2009, the State filed an Information charging Bruno with Count I, possession of marijuana, a Class A misdemeanor, Ind. Code § 35-48-4-11(1) and Count II, visiting a common nuisance, a Class B misdemeanor, I.C. § 35-48-4-13(a). The State also filed a notice of intent to seek enhanced penalty for Count I due to a previous conviction for possession of marijuana in 2007. On July 15, 2009, the State filed an Information for an Amended Count I.

On March 3, 2010, Bruno filed a motion to suppress evidence, claiming that the evidence obtained was the result of an illegal stop and search. On January 5, 2011, the trial court conducted a hearing on the motion. On January 24, 2011, the trial court granted Bruno's motion to suppress on the basis that the officers could not lawfully arrest Bruno because the offense of visiting a common nuisance was not committed in the officers' presence. Based on this decision, the State filed a motion to reconsider on January 31, 2011,

which the trial court denied. That same day, the State filed a motion to dismiss the cause which the trial court granted.

The State now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

The State argues that the trial erred when it granted Bruno's motion to suppress evidence. Specifically, the State argues that the police officers had probable cause, "based on their audio and visual observations, and reasonable inferences drawn from those facts to believe that [Bruno] committed visiting a common nuisance." (Appellant's Br. p. 3).

The State appeals pursuant to I.C. § 35-38-4-2(5), which provides that the State may appeal from "an order granting a motion to suppress evidence, if the ultimate effect of the order is to preclude further prosecution." When reviewing a trial court's ruling on a motion to suppress evidence, we must determine whether substantial evidence of probative value supports the trial court's decision. *State v. Seidl*, 939 N.E.2d 679, 683 (Ind. Ct. App. 2010), *reh'g denied*. Where a trial court grants a motion to suppress, the State appeals from a negative judgment and must show that the trial court's grant of the motion was contrary to law. *Id.* 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.* We will not reweigh the evidence nor judge witnesses' credibility, and will consider only the evidence most favorable to the trial court's ruling. *Id.*

Indiana Code § 35-33-1-1(a)(4) permits a law enforcement officer to arrest a person without a warrant when the officer has “probable cause to believe the person is committing or attempting to commit a misdemeanor in the officer’s presence.” The existence of probable cause is determined on the basis of collective information, of which the observance of the misdemeanor may be part of that collective information. *Garrett v. Bloomington*, 478 N.E.2d 89, 92 (Ind. Ct. App. 1985).

Here, Bruno was charged with visiting a common nuisance, I.C. § 35-48-4-13(a), which provides in relevant part that “[a] person who knowingly or intentionally visits a building [or] structure ... that is used by any person to unlawfully use a controlled substance commits visiting a common nuisance.” Therefore, to execute a warrantless arrest for this crime, the officers would have to have had probable cause to believe Bruno knowingly or intentionally visited a structure used by a person to unlawfully use a controlled substance in the Officer Williams’ presence.

The State contends probable cause was sufficiently established because only three voices were heard over the hidden microphone and Hanyard locked the door when he left the apartment with Bruno, suggesting that no one remained inside the apartment that could have contributed the third voice. We disagree. The State’s logic in concluding that Bruno was the owner of the third voice may, in fact, be correct. However, the State misunderstands the question at issue here, i.e., the offense must have occurred within the officer’s presence, whether or not their reasoning is correct as to the identity of the third voice. *See* I.C. § 35-33-1-1(a)(4).

In *Garrett*, we found that a police officer may use what he hears to arrest a person for a misdemeanor without a warrant. *Id.* The defendant in *Garrett* made harassing phone calls to a police dispatcher. *Id.* The dispatcher locked the phone line open and identified the harassing caller as the defendant. *Id.* The dispatcher relayed this information to other officers, who were able to corroborate the dispatcher's information when they arrived at Garrett's apartment by observing him make the phone calls and harass the dispatcher. *Id.* We held probable cause existed because the offense occurred in the presence of the dispatcher, it became part of the collective information known to the police department as a whole, and therefore, the arrest was valid. *Id.*

Two main facts of this case distinguish it from *Garrett*. First, unlike *Garrett*, the identity of the third voice was never identified at any point during the drug buy. Second, after Officer Williams left the house to follow Hanyard and Bruno as they drove away, the house was unsecure for about five minutes. Therefore, the collective knowledge of Officer Williams at the time was that he had heard an unidentified voice inside an apartment, and that an unidentified man entered a truck with the target of his investigation. By leaving the scene unsecure for even a short period of time, Officer Williams could not be sure that someone else was not inside of the apartment during the drug buy. In contrast, in *Garrett*, the dispatcher identified the defendant, and the arresting officers visually corroborated that information before making the arrest. By never attempting to identify the third voice and

leaving the area unsecure for around five minutes, Officer Williams could not reasonably state that the offense occurred within his presence as provided by I.C. § 35-33-1-1(a)(4). Therefore, we conclude that the trial court did not err when it granted Bruno's motion to suppress evidence.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not err when it granted Bruno's motion to suppress evidence.

Affirmed.

NAJAM, J. and MAY, J. concur