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ATTORNEY FOR APPELLANT:

ERNEST P. GALOS
Public Defender
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROBERT A. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1012-CR-672
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R.W. Chamblee, Jr., Judge
Cause Nos. 71D08-1003-FD-157 & 71D01-0810-FB-136

September 8, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Robert A. Johnson (Johnson), appeals his conviction for Count I, resisting law enforcement, a Class A misdemeanor, Ind. Code § 35-44-3-3; and Count II, possession of marijuana, a Class D felony, I.C. § 35-48-4-11(1). In addition, he also appeals the trial court's determination that he violated his probation in a separate cause.

We affirm.

ISSUES

Johnson raises four issues on appeal, which we restate as follows:

(1) Whether the trial court abused its discretion when it admitted the evidence seized by the police officers as a result of a pat-down search;

(2) Whether the trial court erred by denying Johnson's motion for a directed verdict;

(3) Whether the State presented sufficient evidence to support his convictions beyond a reasonable doubt; and

(4) Whether the State presented sufficient evidence to support his probation violation.

FACTS AND PROCEDURAL HISTORY

On the afternoon of February 27, 2010, Johnson and his girlfriend, Tonya Towne (Towne), had an argument in their Park Jefferson apartment in South Bend, Indiana. Johnson left the apartment and began to walk away from the residence. Towne followed Johnson in her car. At that time, South Bend Police Officer Kelly Waite (Officer Waite) was patrolling the area around 26th Street and Jefferson Boulevard when he received a report that officers had been dispatched to a domestic call at the Park Jefferson apartments, three-quarters of a

mile from his location. On his way to assist, Officer Waite noticed a vehicle turn onto 27th street and blocking a man, later identified as Johnson, who was walking on the sidewalk. Johnson took off, running across the street. Officer Waite pulled up behind the car, exited his police vehicle, and asked the driver, later identified as Towne, what had happened. Towne, who was crying, told Officer Waite that she and Johnson had an argument at the Park Jefferson apartments.

Meanwhile, Johnson crossed the street again and walked towards Officer Waite. Officer Waite instructed Johnson to stop; he complied. When Officer Rafino Gayton (Officer Gayton) arrived to assist, Officer Waite requested him to obtain Johnson's information. As he approached Johnson, Officer Gayton observed that Johnson looked very nervous. Johnson attempted to walk away from the officers, but Officer Gayton blocked his path, asking him what was going on. Because of Johnson's nervous behavior and because Johnson kept his hands in his pockets, Officer Gayton decided to perform a pat-down search to ensure Johnson was not concealing a weapon. Officer Gayton asked Johnson to take his hands out of his pockets; Johnson refused. Eventually, Johnson pulled out his left hand but refused to take his right hand out of his pocket. Fearing that Johnson had a weapon, Officer Gayton pulled Johnson's hand about three-quarters of the way out and noticed a plastic bag with green leafy substance in Johnson's hand. Johnson shoved his hand back into his pocket and the Officer again attempted to pull his hand out. When Officer Gayton pulled out his hand a second time, Johnson took off running.

A pursuit ensued. Officer Gayton pursued Johnson for approximately fifty yards

when, all of a sudden, Johnson turned towards the Officer with his fists raised. Officer Gayton, believing that Johnson intended to fight him, hit Johnson with a closed fist, knocking him unconscious. Officer Waite ran to Officer Gayton's aid and, as the Officers rolled Johnson over to handcuff him, Officer Waite noticed a plastic bag in Johnson's clinched hand. After Johnson was placed under arrest, Officer Gayton conducted a search of Johnson's coat pockets and discovered a second bag with a green leafy substance packaged the same way as the first bag. Officer Gayton field-tested the substance from one of the bags and found it to test positive for marijuana. The two bags together weighed approximately forty grams.

Evidence technician, Kathy Fulnecky (Fulnecky) weighed the content of the bags and noted their weight to be approximately 36.1 grams. Because she did not have a scale weight to calibrate the scale prior to using it, she placed a nickel on the scale. From previous experience, Fulnecky knew a nickel weighed five grams and the nickel did register at five grams. After weighing the marijuana, Fulnecky again weighed the nickel, which again registered at five grams.

On March 2, 2010, the State filed an Information charging Johnson with Count I, resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3 and Count II, possession of marijuana, a Class D felony, I.C. § 35-48-4-11. Subsequently, on March 11, 2010, the State filed a petition to revoke Johnson's probation in an earlier case. Prior to trial, Johnson filed a motion to suppress the evidence resulting from the search of his coat pocket. On June 30, 2010, after hearing evidence, the trial court denied Johnson's motion.

On October 14, 2010, a jury trial was conducted. After the State rested its case, Johnson moved for a directed verdict on the State's evidence claiming that Officer Gayton had only tested one of the bags for marijuana and that the method used by Fulnecky to calibrate the scale "was extremely weak." (Transcript p. 141). The trial court denied the motion. At the close of the evidence, the jury found Johnson guilty as charged.

On November 9, 2010, the trial court held a combined sentencing and probation revocation hearing. First, the trial court found that Johnson had violated his probation in Cause No. 71D01-0810-FB-136 and ordered his previously suspended four-year sentence executed. Then, the trial court proceeded to sentencing in the instant cause and sentenced Johnson to concurrent sentences of one year suspended on the resisting arrest charge and one and one-half years on the possession of marijuana charge, with twelve months suspended. The trial court ordered Johnson to serve the sentence on his instant conviction consecutively to the sentence imposed on the probation violation.

Johnson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admission of Evidence*

Johnson first contends that the trial court abused its discretion when it admitted the evidence resulting from the pat-down search. Specifically, he claims that the seized items were entered into evidence in violation of the Fourth Amendment to the United States Constitution as the Officers has no probable cause to stop him. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Payne v. State*, 854 N.E.2d

7, 17 (Ind. Ct. App. 2006). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. However, if a trial court abused its discretion by admitting the challenged evidence, we will only reverse for that error if the error is inconsistent with substantial justice or if a substantial right of the party is affected. *Id*.

The Fourth Amendment to the United States Constitution provides all citizens with the "right . . . to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . ." U.S. Const. Amend. IV. In *Terry v. Ohio*, 392 U.S. 1, 30 (1968), the Supreme Court held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when, based on the totality of the circumstances, the officer has a reasonable, articulable suspicion that criminal activity is afoot even if the officer lacks probable cause to make an arrest. In determining whether a *Terry* stop is reasonable, we apply a two-part test: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the inference in the first place." *Id*. at 19-20. The reasonableness of a *Terry* stop is judged against an objective standard because "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id*. at 21-22. Consideration of the totality of the circumstances necessarily includes a determination of whether the defendant's own actions were suspicious. *Crabtree v. State*, 762 N.E.2d 241, 246 (Ind. Ct. App. 2002).

The record reflects that Officer Gayton was originally dispatched to the Park Jefferson apartments to assist with a verbal dispute between a boyfriend and a girlfriend. While en route, Officer Gayton was informed that Officer Waite had requested assistance with "some fight on Jefferson and 27th." (Tr. p. 101). Officer Gayton advised dispatch that he would assist Officer Waite instead of attending to the "verbal domestic." (Tr. p. 101). When he arrived on the scene, Officer Waite instructed Officer Gayton to deal with Johnson and to obtain Johnson's information. Officer Gayton testified that Johnson was extremely nervous. "[Johnson] was looking around and he paced back and forth and then attempted to cross the street." (Tr. p. 102). At that point, Officer Gayton "cut him off" and asked him to step back on the sidewalk. (Tr. p. 103). Based on these circumstances, Officer Gayton had a reasonable suspicion that criminal activity was afoot and was justified to stop Johnson. *See Terry*, 392 U.S. at 30.

When a police officer makes a *Terry* stop, if he has reasonable fear of danger, he may conduct a carefully limited search of the outer clothing of the suspect in an attempt to discover weapons that might be used to harm him. *Williams v. State*, 754 N.E.2d 584, 588 (Ind. Ct. App. 2001), *trans. denied*. Here, in addition to being very nervous, Johnson wore a large winter coat and held both of his hands in his pockets. When Officer Gayton, asked Johnson to take his hands out of his pockets, he refused. When the Officer ordered him again, Johnson only took his left hand out of his pocket but refused to pull out his right hand. Johnson's repeated refusal combined with Officer Gayton's information that he was assisting Officer Waite in the investigation of "a fight," resulted in a reasonable belief that

Johnson might be armed. (Tr. p. 101). Therefore, we conclude that Officer Gayton properly conducted a pat-down search of Johnson.

II. *Directed Verdict*

Next, Johnson asserts that the trial court erred when it denied his motion for a directed verdict. He maintains that the State failed to establish the weight of the marijuana at trial. In order for a trial court to appropriately grant a motion for a directed verdict, there must be a total lack of evidence regarding an essential element of the crime, or the evidence must be without conflict and susceptible only to an inference in favor of the innocence of the defendant. *Edwards v. State*, 862 N.E.2d 1254, 1262 (Ind. Ct. App. 2007), *trans. denied*. If the evidence is sufficient to sustain a conviction on appeal, then a motion for a directed verdict is properly denied. *Id*. Thus, our standard of review is essentially the same as that upon a challenge to the sufficiency of the evidence. *Id*. We neither reweigh evidence nor judge witness credibility, but consider only the evidence that supports the conviction and the reasonable inferences to be drawn therefrom in order to determine whether there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.*

In his motion for a directed verdict, Johnson focused on the weight of the marijuana which must be at least thirty grams for a Class D felony. *See* I.C. § 35-48-4-11. To prove the weight of drugs or controlled substances, the State must either offer evidence of its actual, measured weight or demonstrate that the quantity of the drugs or controlled substances is so

large as to permit a reasonable inference that the element of weight has been established. *Halsema v. State*, 823 N.E.2d 668, 674 (Ind. 2005).

The record reflects that the two bags of marijuana seized from Johnson were submitted to the evidence technician for analysis. Upon weighing the content of the bags, Fulnecky noted a combined weight of 36.1 grams. Prior to weighing, Fulnecky calibrated the scale by weighing a nickel, which she knew from "previous experience" to weigh five grams. (Tr. p. 134). We have previously held that in a weight dispute case, the State must prove that the scales were tested before and after their use. *Robinson v. State*, 634 N.E.2d 1367, 1374 (Ind. Ct. App. 1994). However, the question of accuracy is ultimately a question for the trier of fact. *Id*.

Fulnecky testified that

> Being that I didn't have an actual weight to calibrate the scale we used a nickel which is five grams. [I] [p]ut the nickel in the scale before we actually did the weight and when the nickel came up it registered the five grams. I weighed the marijuana, got the weight and once I removed the marijuana I put the nickel on the scale again and it still showed five grams.

(Tr. pp. 130-31).

Based on Fulnecky's testimony that she knew a nickel to weigh five grams, a reasonable inference can be made that the nickel she used this time also weighed five grams. Furthermore, even if the nickel's weight was not exactly five grams, it would not change our conclusion on this issue. This is not a close case where the weight of the marijuana must be obtained with absolute certainty as the weight here was 6.1 grams higher than that required for a Class D felony. Therefore, we conclude that the State carried its burden and the trial

court properly denied Johnson's motion for a directed verdict.

III. *Sufficiency of the Evidence*

Johnson contends that the State failed to present sufficient evidence to establish beyond a reasonable doubt that he possessed marijuana and resisted law enforcement. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. at 213. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

A. *Possession of Marijuana*

In order to convict Johnson of a Class D felony, possession of marijuana, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally possessed marijuana weighing more than thirty grams. *See* I.C. § 35-48-4-11. Here, Johnson initially had the bags of marijuana in his coat pocket and later, when Officer Gayton attempted to get Johnson's hands out of his pockets, held them in his clinched fist. After arresting Johnson, Officer Gayton seized two bags of a green leafy substance from Johnson's coat pockets. Officer Gayton field-tested one of the bags and established that it tested positive for marijuana. Even though Officer Gayton tested only one of the bags, both bags looked identical in packaging and content. As such, the trier of fact could reasonably infer

that the results of any field-test would be the same. As pointed out above, Fulnecky weighed the contents of both bags, which weighed in at 36.1 grams. Consequently, we find that the State presented sufficient evidence to support Johnson's conviction for possession of marijuana, a Class D felony.

B. *Resisting Law Enforcement*

Resisting law enforcement, as a Class A misdemeanor, is defined in I.C. § 35-44-3-3 as:

> A person who knowingly or intentionally:
>
> (3) 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, a Class A misdemeanor[.]

The record indicates that when Officer Gayton started the pat-down search, Johnson refused to comply and eventually took off running. At that time, Officer Gayton was in uniform, which clearly identified him as a police officer. Moreover, Johnson admitted at trial that the Officer had told him to "just stay put." (Tr. p. 146). We conclude that the State's evidence is sufficient to sustain Johnson's conviction of resisting law enforcement.

IV. *Probation Violation*

Lastly, Johnson contends that the State failed to present sufficient evidence of probative value to prove by a preponderance of the evidence that he had violated his probation in an earlier cause. A probation revocation is civil in nature and the State need only prove the alleged violation by a preponderance of the evidence. *Cox v. State*, 706

N.E.2d 547, 551 (Ind. 1999), *reh'g denied*. If there is substantial evidence of probative value to support the trial court's decision that the probationer is guilty of any violation, revocation of probation is appropriate. *Williams v. State*, 695 N.E.2d 1017, 1018 (Ind. Ct. App. 1998). Generally, violation of a single condition of probation is sufficient to revoke probation. *Brabandt v. State*, 797 N.E.2d 855 (Ind. Ct. App. 2003). The requirement that a probationer obey federal, state and local laws is automatically a condition of probation by operation of law. *Williams*, 695 N.E.2d at1019. A criminal conviction is *prima facie* evidence of a violation and alone will support a revocation of probation.

At the time Johnson committed the instant charges, he was on probation in an earlier case, Cause No. 71D01-0810-FB-136 (Cause No. 136). When Johnson was charged with possession of marijuana and resisting law enforcement, the State also filed a petition to revoke his probation in Cause No. 136. After Johnson was found guilty of the new charges, the trial court did not abuse its discretion by finding that Johnson had violated his probation in Cause No. 136 and by subsequently revoking his probation. *See id*.

CONCLUSION

Based on the foregoing, we hold that (1) the trial court did not abuse its discretion when it admitted the evidence seized by the police officers as a result of a pat-down search; (2) the trial court properly denied Johnson's motion for a directed verdict; (3) the State presented sufficient evidence to support Johnson's convictions beyond a reasonable doubt; and (4) the trial court properly revoked Johnson's probation.

Affirmed.

DARDEN, J. and BARNES, J. concur