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ATTORNEY FOR APPELLANT:

BRUCE W. GRAHAM
Graham Law Firm P.C.
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOSEPH GARDNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-1011-CR-1286
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy J. Williams, Judge
Cause No. 79D01-0804-FA-11

September 9, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Joseph Gardner appeals from his convictions after a jury trial of Dealing in a Narcotic Drug[1], as a class A felony, Possession of a Narcotic Drug[2], as a class C felony, Possession of Marijuana[3], as a class A misdemeanor, and Maintaining a Common Nuisance[4] as a class D felony. Gardner presents the following restated issues for our review:

1. Was the evidence obtained from Gardner's vehicle obtained in violation of the Fourth Amendment to the Federal Constitution and article 1, section 11 of the Indiana Constitution?

2. Did the State commit fundamental error by using evidence that Gardner refused to consent to a search of his vehicle?

We affirm.

On April 17, 2008, Deputy Shane Howard of the Tippecanoe County Sheriff's Department was monitoring traffic on Interstate 65. At 2:17 a.m. Deputy Howard observed a blue Toyota Camry traveling southbound at approximately seventy-five miles per hour in a sixty-five mile-per-hour zone. After pulling behind and following the car southbound for some time, he also observed that the speed of the car varied and the car was weaving within its lane and over the fog line at the edge of the road. Deputy Howard then initiated a traffic stop.

The vehicle came to a stop in the paved "wedge" between an exit ramp and the interstate and Deputy Howard exited his vehicle and approached the passenger. *Transcript* at 46. Deputy Howard asked Gardner, who was the driver of the vehicle, to move the Camry

[1] Ind. Code Ann. § 35-48-4-1(b) (West, Westlaw current through 2011 1st Reg. Sess.).
[2] I.C. § 35-48-4-6(b) (West, Westlaw current through 2011 1st Reg. Sess.).
[3] I.C. § 35-48-4-11 (West, Westlaw current through 2011 1st Reg. Sess.).
[4] I.C. § 35-48-4-13(b) (West, Westlaw current through 2011 1st Reg. Sess.).

from that location and onto the far side of the exit ramp for safety purposes. During this conversation, Deputy Howard noted that Gardner appeared nervous and avoided making eye contact with Deputy Howard. The officer recalled later that when he glanced into the interior of the vehicle during that conversation, he observed "a thick cigar, cigarette, blunt type characteristic . . . often purchased only to remove the contents and fill them with contraband." *Suppression Transcript* at 11.

After one failed attempt at moving his Camry per the officer's direction, Gardner moved the vehicle to the designated location and Deputy Howard followed. Deputy Howard contacted Tippecanoe County Sheriff's Deputy Andrew Heath and asked him to travel to the scene of the traffic stop with his police dog, which had been trained to detect the odor of illegal drugs.

After the vehicles were relocated, Deputy Howard approached the Camry and asked Gardener to produce his driver's license, vehicle registration, and proof of financial responsibility. Gardner produced a pile of documents, which were examined at the front of Deputy Howard's cruiser. As Gardner sorted through the papers to find the requested ones, Deputy Howard asked Gardner where he was going. Gardner indicated that he had been visiting his brother in Chicago and then later indicated that he was traveling to Indianapolis to visit his brother. Gardner also told to the officer that he had been to a casino earlier that day. Deputy Howard detected the odor of an alcoholic beverage on Gardner's breath, and asked Gardner if he had been drinking. Gardner told the officer that he had consumed a beer earlier that day or evening.

Deputy Howard checked Gardner's registration and driver's license through a computer link with the Indiana Bureau of Motor Vehicles. Deputy Heath then arrived and spoke briefly with Deputy Howard. Deputy Howard approached Gardner's vehicle and asked the passenger of the vehicle, Christy Harris, to exit the vehicle. Harris told Deputy Howard that she had been raped in Chicago and that Gardner was giving her a ride to Indianapolis. As Harris exited the car, Deputy Howard noticed that Harris' pants were unfastened.

After the occupants had exited the vehicle, Deputy Heath walked his dog around the Camry and the dog alerted to the passenger's side door of the car. Deputy Heath told Deputy Howard that the dog had alerted to the presence of illegal drugs, and Deputy Howard asked Gardner for his consent to search the vehicle. Gardner refused consent to the search and the officers searched the vehicle due to the dog's alert. The traffic stop was recorded in its entirety on video equipment in Deputy Howard's cruiser. During the search of the car, the officers found 70.12 grams of heroin packaged for sale, marijuana, and four cellular phones in the car. The officers found that Gardner was carrying $3,040 in cash in his pockets.

The State charged Gardner with dealing in a narcotic drug, possession of a narcotic drug, possession of marijuana, and maintaining a common nuisance. Gardner's pretrial motion to suppress the evidence found during the search of his vehicle was denied by the trial court. At the conclusion of his jury trial, Gardner was found guilty of all counts. The trial court merged Gardner's convictions of possession of a narcotic drug and imposed an aggregate sentence of forty-four years executed in the Department of Correction. Gardner now appeals.

1.

Gardener contends that the trial court erred by denying his pretrial motion to suppress the evidence found during the vehicle search, claiming that the search violated his rights under the Fourth Amendment of the Federal Constitution and article 1, section 11 of the Indiana Constitution. This is, however, an appeal after a completed trial. Once a matter proceeds to trial the issue of the propriety of the trial court's ruling on a motion to suppress is no longer viable. *Kelley v. State*, 825 N.E.2d 420 (Ind. Ct. App. 2005). The issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. *Bentley v. State*, 846 N.E.2d 300 (Ind. Ct. App. 2006).

A trial court has broad discretion in ruling on the admissibility of evidence. *Scott v. State*, 855 N.E.2d 1068 (Ind. Ct. App. 2006). We will consider the 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 (Ind. Ct. App. 2008). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id*. We will not reweigh the evidence or reassess witness credibility. *Kelley v. State*, 825 N.E.2d 420.

The Fourth Amendment protects persons from unreasonable search and seizure, and this protection has been extended to the states through the Fourteenth Amendment. U.S. Const. amend. IV; *Krise v. State*, 746 N.E.2d 957 (Ind. 2001). Generally a search warrant is a prerequisite to a constitutionally proper search and seizure. *Halsema v. State*, 823 N.E.2d 668 (Ind. 2005). When a search or seizure is conducted without a warrant, the State bears the

burden of proving that an exception to the warrant requirement existed at the time of the search or seizure. *Id*.

Gardner concedes that Deputy Howard had a valid reason for detaining him for his violations of Indiana's traffic laws. Indeed, police officers may stop a vehicle when they observe minor traffic violations. *State v. Quirk*, 842 N.E.2d 334 (Ind. 2006). Gardner further concedes that Deputy Heath's use of his dog in order to conduct a canine sweep of the exterior of his vehicle was not improper. A canine sweep of the exterior of a vehicle does not intrude upon a Fourth Amendment privacy interest. *Myers v. State*, 839 N.E.2d 1146 (Ind. 2005). Additionally, probable cause is not a prerequisite to using a canine sniff investigative technique. *Id*. Conducting a canine sniff does not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner. *Illinois v. Caballes*, 543 U.S. 405 (2005). Gardner claims that the initially lawful stop became unlawful, thus tainting the subsequent search of his vehicle, because the stop was unduly prolonged in order for Deputy Heath to arrive with his dog.

Gardner notes that Deputy Howard engaged in light conversation with him during the traffic stop. While detained, however, it is not improper for police to question a defendant so long as the nature and duration of the stop remained reasonable. *U.S. v. Martin*, 422 F.3d 597 (7th Cir. 2005). A seizure that is only justified by the need to issue a traffic citation can become unlawful if it is prolonged past the time reasonably required to complete that task. *Illinois v. Caballes*, 543 U.S. 405. Information lawfully obtained during that period of time, however, may provide the officer with reasonable suspicion of criminal conduct that justifies prolonging the stop in order to engage in a reasonable investigation. *United States v. Muriel*,

418 F.3d 720 (7th Cir. 2005). "What the Constitution requires is that the entire process remain reasonable." *United States v. Childs*, 277 F.3d 947, 954 (7th Cir. 2002). The evaluation of the reasonableness of a seizure should not include second-guessing. *United States v. Sharpe*, 470 U.S. 675 (1985).

In the present case, the videotape of the traffic stop shows that nineteen minutes elapsed from the time that Deputy Howard activated his signal lights to the time Deputy Heath's dog alerted to the presence of illegal drugs in Gardner's car. The first four minutes of the stop were spent attempting to reposition Gardner's car for safety reasons. Additional time was spent while Gardner attempted to sort through his papers in order to find the requested information. Deputy Howard confirmed Gardner's identity and that of his passenger, and verified that the car was registered to Gardner. These are all legitimate issues that relate to the traffic stop. An officer may identify a vehicle's passengers during a traffic stop. *Campos v. State*, 885 N.E.2d 590 (Ind. 2008). Further, an officer may determine the driver's identity, the validity of the vehicle registration and the driver's license to operate the vehicle. *Harper v. State*, 922 N.E.2d 75 (Ind. Ct. App. 2010).

During the traffic stop Deputy Howard asked Gardner about his destination and reason for driving that night. Gardner indicated that he had been visiting his brother in Chicago, and then that he was traveling to Indianapolis to visit his brother. Gardner also indicated to the officer that he had been to a casino earlier that day. Deputy Howard detected the odor of an alcoholic beverage on Gardner's breath, and asked Gardner if he had been drinking. Gardner told the officer that he had consumed a beer earlier that day or evening. Thus, additional factors—inconsistent stories and the odor of an alcoholic beverage—warranted additional

investigation. When Deputy Howard made similar inquiries of Harris, Gardner's passenger, she indicated that she had been the victim of a rape in Chicago and that Gardner was giving her a ride in his car to Indianapolis. As Harris exited the car, Deputy Howard noticed that Harris' pants were unfastened. This also warranted further investigation. This developing information coupled with Deputy Howard's own observations supported Deputy Howard's reasonable suspicion that criminal activity was afoot. It was not unreasonable to detain Gardner long enough for Deputy Heath to arrive and conduct the canine sweep of Gardner's vehicle to confirm or deny his suspicions. Once those suspicions were confirmed, the ensuing search was proper. We find no violation of the Fourth Amendment here.

Gardner also advances the argument that the search was conducted in violation of article I, section 11 of the Indiana Constitution. Because of the light treatment by Gardner of this separate analysis, the issue arguably is waived. *Francis v. State*, 764 N.E.2d 641 (Ind. Ct. App. 2002). Nonetheless, we address this contention.

"While almost identical to the wording in the search and seizure clause of the federal constitution, Indiana's search and seizure clause is independently interpreted and applied." *Baniaga v. State*, 891 N.E.2d 615, 618 (Ind. Ct. App. 2008). Under the Indiana Constitution, the legality of a governmental search turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances. *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005). Although other relevant considerations under the circumstances may exist, our Supreme Court has determined that the reasonableness of a search or seizure turns on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred; 2) the degree of intrusion the method of the search or seizure imposes on the citizens'

ordinary activities; and 3) the extent of law enforcement needs. *Baniaga v. State*, 891 N.E.2d 615. The burden is on the State to show that under the totality of the circumstances, the intrusion was reasonable. *Id*.

In this case Deputy Howard saw Gardner speeding, weaving within his lane of travel, and crossing the fog line on the side of the road. The degree of intrusion upon Gardner's rights was no greater than that imposed on any other citizen who has violated a traffic law. Further, Deputy Howard's conduct was in accordance with his concern for his safety and that of other citizens and his responsibility as a law enforcement officer to deter crime, intercept criminal activity and apprehend the perpetrators. We find that this search did not violate article I, section 11 of the Indiana Constitution.

2.

Gardner next argues that the prosecutor committed fundamental error by commenting on Gardner's failure to consent to a search of his vehicle as evidence of his guilt. The State contends that the error, if any, was of Gardner's own doing. We agree with the State.

The fundamental error exception permits an appellate court to review a "claim that has been waived by a defendant's failure to raise a contemporaneous objection." *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). "Fundamental error is defined as an error so prejudicial to the rights of a defendant that a fair trial is rendered impossible." *Perez v. State*, 872 N.E.2d 208, 210 (Ind. Ct. App. 2007), *trans. denied*. The fundamental error exception is "extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006).

During Gardner's jury trial, the State made no reference to Gardner's failure to give consent to a search of his vehicle. During the State's case-in-chief, State's Exhibit 1 was introduced into evidence without objection and was published for the jury. In that exhibit, Gardner was asked if he would consent to a search of his vehicle and he declines to consent to the search. No further comment was made by the State regarding Gardner's failure to consent to search at that time. During Gardner's testimony, his trial counsel twice elicited testimony from Gardner in which he indicated that he did not consent to a search of his vehicle when the officers made that request and that he was surprised when their search produced the seventy grams of heroin and marijuana. The record establishes that Gardner attempted to use the evidence in the video to bolster his claim that he was unaware of the drugs in his vehicle. Further comment was made by defense counsel in closing argument.

The State's only reference to Gardner's failure to consent to search was during closing argument. The State made one comment on the inference which could be drawn from Gardner's refusal to consent to the search, i.e., he was aware of the presence of the illegal drugs in his car. The State is allowed to make fair comments on the State's view of the case, based on inferences which can be made from the evidence adduced at trial. *Coleman v. State*, 946 N.E.2d 1160 (Ind. 2011). We find no fundamental error here.

Judgment affirmed.

DARDEN, J., and VAIDIK, J., concur.