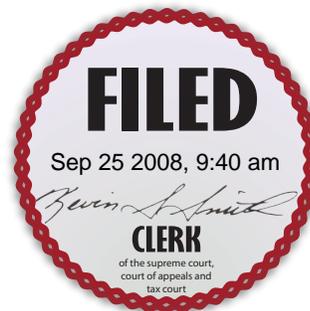


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

BRIAN MAY
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DASHAWN WORKS,)
)
Appellant-Defendant,)
)
vs.) No. 71A05-0802-CR-63
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D02-0206-FA-34

September 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After a bench trial, DaShawn Murice Works¹ was convicted of Class D felony resisting law enforcement, Class A misdemeanor resisting law enforcement, and Class A felony dealing in cocaine. On appeal, Works contends that he did not sign a necessary jury trial waiver and that the court abused its discretion by admitting drug evidence obtained during a traffic stop. Concluding that there is sufficient evidence that Works signed a jury trial waiver and that Works failed to timely object to the admission of the evidence at trial, and that, in any case, reasonable suspicion existed to support the stop, we affirm the judgment of the trial court.

Facts and Procedural History

On June 8, 2002, at approximately 3:30 a.m., Roseland Police Sergeant Jack Tiller was exiting the south entrance of a Roseland motel when he observed a vehicle driving at a high rate of speed on State Road 933. Sergeant Tiller later discovered that Works was driving the vehicle. Sergeant Tiller pulled out behind Works and activated his radar, which reported that Works was driving sixty-seven miles per hour in a thirty mile per hour zone. Sergeant Tiller accelerated to stay close to Works' vehicle. As Works approached the intersection of State Road 933 and Cleveland Road, Sergeant Tiller activated his emergency lights. Works continued through the intersection against a red light and began driving west in the eastbound lanes of Cleveland Road. Sergeant Tiller followed in the westbound lanes and activated his siren. Works then drove over a

¹ At some places in the record and in the charging information, DaShawn's first name appears as Deshawn. However, according to the Notice of Appeal, which DaShawn himself penned, his first name is spelled DaShawn. Therefore, we refer to him as DaShawn.

concrete median divider and entered the westbound lanes. Works drove another quarter mile before swerving to the right side of the road and stopping the vehicle.

Sergeant Tiller turned on his spotlight and overhead lights. He observed Works moving in the vehicle and ducking down into the passenger side. Sergeant Tiller drew his weapon and exited the car, ordering Works to put his hands out of the driver's side window. Works initially complied, but then he pulled his right hand back into the vehicle. Sergeant Tiller ordered him to put his hand back out of the window. Works complied, but he again pulled his right hand back inside the vehicle. Sergeant Tiller approached, opened the driver's door, and ordered Works to exit.

After Works exited the car, Sergeant Tiller led him between the car and the side of the road and ordered Works to put his hands on the guardrail. Sergeant Tiller began patting Works down for weapons, and during the pat down Sergeant Tiller saw white powder falling down from Works' shorts. As Sergeant Tiller tried to handcuff Works, Works began to struggle and tried to escape. Kevin Davis, a civilian friend of Sergeant Tiller who had been riding along with him, stopped Works from fleeing and helped take Works to the ground so Sergeant Tiller could handcuff him.

Sergeant Tiller then found next to Works a large, clear plastic bag with a hole in it that contained what appeared to be crack cocaine. When Sergeant Tiller and Works stood up, two more bags containing what appeared to be crack cocaine fell out of Works' shorts. Later analysis revealed that the substance in the bags was crack cocaine weighing in total 112.81 grams. The street value of the cocaine was over \$10,000.

The State charged Works with Count I, resisting law enforcement as a Class D felony (by fleeing in his vehicle);² Count II, resisting law enforcement as a Class A misdemeanor (by resisting after exiting the vehicle);³ Count III, possession of cocaine as a Class C felony;⁴ and Count IV, dealing in cocaine as a Class A felony.⁵

At a status hearing on June 17, 2004, Works orally expressed his desire to waive a jury trial. The trial court informed Works that he needed to make the request in writing and sign it. According to the Chronological Case Summary, the waiver was filed that day, and the next day the State filed a response indicating no objection to the waiver.

Works failed to appear for his January 21, 2005, trial, and the court proceeded to hold the trial without him. Works was convicted of Counts I, II, and IV, with Count III merging into Count IV. The trial court issued a bench warrant for his arrest, and Works appeared with counsel on May 3, 2007, to set a sentencing date. Works moved to set aside the trial because his case file had gone missing and no copy of the jury trial waiver could be located. The court denied the motion because the trial court judge, Judge Frese, remembered the waiver and there was sufficient evidence on the record elsewhere that Works did file a jury trial waiver.

After an unsuccessful search for the missing file, the court later sentenced Works to two months on Count I, two months on Count II, and thirty years on Count IV, with the sentences served concurrently. Works now appeals.

² Ind. Code § 35-44-3-3(b).

³ I.C. § 35-44-3-3(a).

⁴ Ind. Code § 35-48-4-6(b).

⁵ Ind. Code § 35-48-4-1(b).

Discussion and Decision⁶

Works raises two issues on appeal: (1) whether there was sufficient evidence to show that he did file a written waiver of jury trial and (2) whether the court abused its discretion by admitting the drug evidence obtained during the traffic stop.

I. Waiver of Jury Trial

Works contends that there was insufficient evidence on the record to establish that he waived his right to a jury trial in writing. Specifically, Works argues that he does not remember signing the waiver and that “a knowing waiver cannot be inferred without the Defendant’s signature on the minute.” Appellant’s Amended Br. p. 9. We disagree.

The United States and Indiana Constitutions guarantee the right to trial by jury. *Poore v. State*, 681 N.E.2d 204, 206 (Ind. 1997). A person charged with a felony has an automatic right to a jury trial. *Id.* at 207. A defendant is presumed not to waive this right unless he acts affirmatively to do so. *Id.* To constitute a valid waiver of the right to a jury trial, the defendant’s waiver must be made knowingly, voluntarily, and intelligently with sufficient awareness of the relevant circumstances surrounding its entry and consequences. *O’Connor v. State*, 796 N.E.2d 1230, 1233 (Ind. Ct. App. 2003). “The defendant must express his personal desire to waive a jury trial and such a personal desire

⁶ We note that counsel for Works included a copy of the PSI on white paper in the Appellant’s Appendix. *See* Appellant’s Supp. App. p. 13-24. We remind counsel that Indiana Appellate Rule 9(J) requires that “[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).” Administrative Rule 9(G)(1)(b)(viii) states that “all pre-sentence reports pursuant to Ind. Code § 35-38-1-13” are “excluded from public access” and “confidential.” The inclusion of the PSI printed on white paper in the Appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part: “Every document filed in a case shall separately identify documents that are excluded from public access pursuant to Admin. R. 9(G)(1) as follows: (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked ‘Not for Public Access’ or ‘Confidential.’”

must be apparent from the court's record, whether in the form of a written waiver or a colloquy in open court." *Jones v. State*, 810 N.E.2d 777, 779 (Ind. Ct. App. 2004) (internal citation omitted); *see also O'Connor*, 796 N.E.2d at 1234. A defendant's filing of a signed jury trial waiver adequately reflects a personal desire to waive this act and constitutes the affirmative act necessary to do so. *Poore*, 681 N.E.2d at 207; *see also O'Connor*, 796 N.E.2d at 1234.

Here, the record shows that during a status hearing on June 17, 2004, the trial court advised Works that he had the right to a trial by jury. Judge Frese asked Works if he was giving up this right, and Works personally responded that he was. At the hearing, the trial court informed Works that it required a written waiver and the State's written agreement before it would proceed with a bench trial. The CCS reflects that on that same day "Defendant file[d] minute indicating he waives trial by jury and requests that trial of this cause be had to the bench. State to respond if they agree by writing by 6-18-04." Appellant's Supp. App. p. 221. According to the CCS, the State filed its response the next day, indicating no objection to a bench trial.

Judge Frese held a bench trial on January 21, 2005. At some point afterward, Works' case file was lost. On October 18, 2007, at a hearing to discuss a sentencing date, Works told the court he did not remember signing a jury waiver. Judge Frese responded that he was very confident that there was a signed waiver because it is always his practice to refuse proceeding with a bench trial until there is a signed waiver. *Id.* at 225. On these facts, there is sufficient evidence that Works effectively waived his right to a jury trial.

II. Admission of Drug Evidence

Works also contends that the trial court abused its discretion by admitting the drug evidence Sergeant Tiller found during and after patting down Works because there was no probable cause to make a traffic stop or reasonable suspicion for the pat down. Specifically, Works argues that “[t]here was no evidence to arrest the Defendant as the officer witnessed the Defendant doing 67 in a 30 zone, disregard a red light and drive briefly on the wrong side of a four lane highway.” Appellant’s Amended Br. p. 9. Works argues that he should have received a ticket instead of being arrested.

First, we note that Works’ argument is waived for failure to make a timely objection at trial. Although Works filed a pre-trial motion to suppress, he did not object to the admission of evidence at trial. In order to preserve error for appeal, the appealing party also must object to the admission of the evidence at the time it is offered, and the failure to object at trial to the admission of the evidence results in waiver. *Warren v. State*, 757 N.E.2d 995, 998 (Ind. 2001); *see also McCarthy v. State*, 749 N.E.2d 528, 537 (Ind. 2001). Works did not object at trial, and when the evidence was admitted Works’ counsel specifically stated he had no objection. Thus, Works has waived appellate review of any argument regarding the admissibility of the drugs.

Waiver notwithstanding, the trial court properly admitted the drugs into evidence. The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for abuse of discretion. *Hill v. State*, 825 N.E.2d 432, 435 (Ind. Ct. App. 2005). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

Works contends that there was no reasonable suspicion for Sergeant Tiller to arrest and frisk him instead of just writing a traffic citation. Without the arrest, he argues, the drugs would not have been found.

As a preliminary matter, there was probable cause for Sergeant Tiller to make the traffic stop. Police officers may stop a vehicle when they observe minor traffic violations. *See Black v. State*, 621 N.E.2d 368, 370 (Ind. Ct. App. 1993). Sergeant Tiller observed Works driving sixty-seven miles per hour in a thirty mile per hour zone, run a red light, and travel the wrong way on a four-lane highway.

The next question is whether Sergeant Tiller lawfully searched Works once he was stopped. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. As a general rule, the Fourth Amendment prohibits warrantless searches. *Black v. State*, 810 N.E.2d 713, 715 (Ind. 2004). However, there are exceptions to the warrant requirement. *Id.* One such exception is a *Terry* stop, or the “investigatory stop and frisk.” *Stalling v. State*, 713 N.E.2d 922, 924 (Ind. Ct. App. 1999). In *Terry v. Ohio*, the United States Supreme Court held that the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based upon specific and articulable facts, the officer has a reasonable suspicion that criminal activity “may be afoot.” 392 U.S. 1, 30 (1968). More specifically, “limited investigatory seizures or stops on the street involving a brief

question or two and a possible frisk for weapons can be justified by mere reasonable suspicion.” *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), *trans. denied*.

With regard to the reasonableness of a search, *Terry* permits a

reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Terry, 392 U.S. at 27.

First, we have held that law enforcement officers may order a driver to exit a lawfully stopped vehicle as a matter of course. *Tumblin v. State*, 736 N.E.2d 317, 321 (Ind. Ct. App. 2000), *trans. denied*. Additionally, in this case, Works attempted to flee from the officer. After stopping the car, Works began ducking down into the passenger side. Sergeant Tiller told Works to keep his hands outside of the car, but Works repeatedly brought his right hand back into the car. *See Trigg v. State*, 725 N.E.2d 446, 449 (Ind. Ct. App. 2000) (concluding that a pat down search was reasonable where the officer approached a vehicle after a traffic stop and the defendant became “very nervous and fidgeted in his seat as if trying to hide or retrieve something”). Under these circumstances, Sergeant Tiller had reasonable suspicion to conduct the pat down search, which led to the discovery of the drugs. The trial court did not abuse its discretion by admitting the cocaine into evidence.

Affirmed.

KIRSCH, J., and CRONE, J., conur.