

STATEMENT OF THE CASE

Gregory Jones appeals his conviction for possession of cocaine as a class D felony.¹

We affirm.

ISSUE

Whether the trial court erred in admitting evidence.

FACTS

During the morning of October 19, 2007, several officers with South Bend's Metro Special Operations Section went to a residence to execute a search warrant for, among other things, cocaine. A canine unit was among the officers present.

Prior to executing the search warrant, officers conducted surveillance of the residence in order to secure it. During the surveillance, Jones drove up and parked his vehicle across the street from the residence. Cory Wright then exited the residence and approached Jones' vehicle. Wright and Jones briefly spoke before Jones exited the vehicle and shook hands with Wright. As Jones and Wright continued to talk, three officers approached. Jones and Wright both "kind of just froze, kind of with the deer-in-the-headlights look, and became very nervous." (Tr. 143). Wright then "threw a bag of white rock-like substance to the ground." (Tr. 144).

Officer Timothy Medich patted Jones down for weapons and had a female passenger exit Jones' vehicle. Suspecting drug activity, officers requested the canine unit

¹ Ind. Code § 35-48-4-6.

to conduct a sniff search of Jones' vehicle. Officer Charles Flanagan led his canine partner, Dixie, around the exterior of the vehicle. When Dixie approached the open driver's side window, she alerted to the presence of narcotics. A search of the vehicle revealed three baggies containing cocaine in the driver's side door pull. After officers advised Jones of his *Miranda* rights, Jones informed them that he had acquired the cocaine from Wright earlier that day.

On October 20, 2007, the State charged Jones with class D felony possession of cocaine. On October 20, 2009, Jones, by counsel, filed a motion to suppress the cocaine. On November 25, 2009, the trial court denied Jones' motion following a hearing.

The trial court held a jury trial on December 3, 2009. The State and Jones, by counsel, filed a stipulation with the trial court that an analysis of "the substance recovered, which is now contained in State's Exhibit #3," determined the substance to "contain[] cocaine." (App. 74). The jury found Jones guilty as charged. Following a sentencing hearing on January 6, 2010, the trial court sentenced Jones to two and a half years.

Additional facts will be provided as necessary.

DECISION

Jones asserts that the trial court improperly admitted evidence of the cocaine seized from his vehicle.² Generally, the admission or exclusion of evidence is within the

² Jones poses the issue as whether the trial court improperly denied his motion to suppress. He, however, did not seek an interlocutory appeal after the trial court denied his motion to suppress. Rather, he proceeded to trial. "Once the matter proceeds to trial, the question of whether the trial court erred in

sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of that discretion. *Redding v. State*, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006) (citations omitted), *reh'g denied*.

In this case, however, the record reveals that Jones failed to object to the admission of the cocaine. Specifically, Officer Paul Moring testified that he observed “[t]hree clear plastic bags, containing suspected crack cocaine” in Jones’ vehicle. (Tr. 178). Jones’ counsel did not object to this testimony. The State then introduced into evidence a photograph of the three baggies as they appeared inside the vehicle. Again, Jones’ counsel made no objection, affirmatively stating that he had “no objection.” (Tr. 179). Subsequently, the State introduced into evidence Exhibit 3, which consisted of a “South Bend Police evidence bag,” containing the “crack cocaine that was located in the vehicle.” (Tr. 179-80). Again, Jones’ counsel stated that he had “[n]o objection” to the admission of evidence. (Tr. 195).

By failing to object to the admission of the cocaine, Jones failed to preserve his challenge to its admissibility. *See Brown*, 929 N.E.2d at 206-07. “A contemporaneous objection at the time the evidence is introduced at trial is required to preserve the issue for appeal, whether or not the appellant has filed a pretrial motion to suppress.” *Id.* at 207.

denying a motion to suppress is no longer viable.” *Kelley v. State*, 825 N.E.2d 420, 424 (Ind. Ct. App. 2005). The issue therefore is “‘more appropriately framed’ as whether the evidence was admissible at trial.” *Brown v. State*, 929 N.E.2d 204, 206 n.1 (Ind. 2010) (quoting *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003)).

A claim that has been waived by a defendant's failure to raise a contemporaneous objection can be reviewed on appeal if the reviewing court determines that a fundamental error occurred. 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." The error claimed must either "make a fair trial impossible" or constitute "clearly blatant violations of basic and elementary principles of due process." This exception is available only in "egregious circumstances."

Id. (internal citations omitted). An error in ruling on a motion to exclude improperly seized evidence, however, is not per se fundamental error. *Id.* "Indeed, because improperly seized evidence is frequently highly relevant, its admission ordinarily does not cause us to question guilt." *Id.*

In *Brown*, the Indiana Supreme Court found that Brown's claimed error regarding the admission of evidence did not rise to the level of fundamental error where there was no claim of "fabrication of evidence"; "willful malfeasance on the part of the investigating officers"; or "that the evidence is not what it appears to be." *Id.* Our supreme court held that where a defendant makes no contention "that he did not receive a fair trial, other than his assertion that the evidence was the product of an unconstitutional search and seizure," fundamental error will not be found. *See id.* at 208 (finding no fundamental error where Brown failed to contend that he received an unfair trial based on grounds other than the admission of evidence).

In this case, Jones failed to object to the admission of the evidence at trial, does not assert fundamental error on appeal, and fails to raise any grounds to support a finding

of fundamental error. Accordingly, we decline to review his challenge to the admissibility of the cocaine.

Affirmed.

BRADFORD, J., and BROWN, J., concur.