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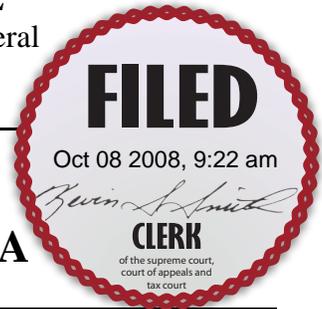
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IN THE
COURT OF APPEALS OF INDIANA



DAVID SCRUBY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 29A04-0802-CR-94

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable J. Richard Campbell, Judge
Cause No. 29D04-0607-CM-4630

October 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Defendant-Appellant David Scruby (“Scruby”) appeals from his conviction after a jury trial for operating a vehicle while intoxicated,¹ a Class C misdemeanor. Scruby raises the following restated issue for our review: whether the trial court erred by admitting evidence obtained after his vehicle was stopped for an investigative welfare check.

We affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 4:00 a.m. on June 17, 2006, officers from the Carmel Police Department and the Hamilton County Sheriff’s Department responded to a dispatch regarding a disturbance at 1014 Deerlake Drive. When the officers arrived at the address, they encountered an intoxicated woman, who indicated that she had been arguing with her eighteen-year-old son, Michael Scruby, who had left the residence on foot ten minutes earlier. Mrs. Scruby indicated that her son was autistic and had other mental challenges and that she wanted her son to come back. The officers then relayed the information to the dispatchers to attempt to locate, or for a welfare check on, Michael Scruby.

Officer Scott Morrow of the Carmel Police Department heard the dispatch for officers to be on the lookout for a “young, white male who may have some mental issues.” *Appellant’s App.* at 151-52. At the intersection of Spring Mill Road and Dorset Road, Officer Morrow noticed a vehicle stopped, facing southbound. Officer Morrow noticed that the vehicle remained stopped for five to ten seconds and, as he approached the intersection, he flashed his lights to indicate the driver should move. The car eventually proceeded through the intersection.

¹ See Ind. Code §9-30-5-2(a).

Officer Morrow observed two white males in the car, one older male in the driver's seat, and one younger male in the passenger's seat. Officer Morrow testified that his suspicions were heightened by the vehicle remaining stopped at the intersection for a longer period of time than the officer thought was appropriate and by the presence of a young white male in the vehicle. The officer followed the vehicle for almost five miles and observed no traffic infractions. Nonetheless, the officer ran the license plate of the car and discovered that the vehicle was registered to Scruby. Scruby is the father of Michael Scruby.

Officer Morrow initiated an investigative stop, or welfare check, because he was looking for a "lost young man." *Tr.* at 41. Officer Morrow identified the driver as Scruby and the passenger as Michael Scruby, and he confirmed that Michael was fine. However, Officer Morrow noted that Scruby's eyes were blood shot, he had slurred speech, and smelled of alcohol. The officer then commenced his investigation of Scruby, ultimately leading to Scruby's arrest for operating a vehicle while intoxicated.

The State charged Scruby with operating a vehicle while intoxicated as a Class C misdemeanor, and operating a vehicle with a BAC of .08 or more. Scruby filed a motion to suppress in which he alleged that the stop violated the rights afforded him by the Fourth Amendment of the United States Constitution, and Article 1, Section 11 of the Indiana Constitution. After a hearing, the trial court denied the motion and also denied Scruby's request to have the issue certified for interlocutory appeal.

A jury trial was held, at the conclusion of which Scruby was found guilty of operating a vehicle while intoxicated as a Class C misdemeanor. Scruby now appeals.

DISCUSSION AND DECISION

Scruby asks this Court to review the trial court's denial of his motion to suppress, which challenged the constitutionality of the traffic stop that resulted in the operating while intoxicated investigation. However, the motion to suppress was denied, as was Scruby's request that the trial court certify the issue for interlocutory appeal. The evidence was admitted at trial over objection. "Thus, the issue is . . . appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial." *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003).

Generally, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Norfolk S. Ry. Co. v. Estate of Wagers*, 833 N.E.2d 93, 100 (Ind. Ct. App. 2005). We reverse a trial court's decision to admit or exclude evidence only if that decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* at 101. Further, the trial court's decision will not be reversed unless prejudicial error is clearly shown. *Id.*

Scruby challenges the constitutionality of the traffic stop arguing that it amounted to an illegal seizure. Scruby maintains that the trial court erred by admitting evidence, over his objection, that was obtained as a result of the traffic stop.

I. Article 1, Section 11

The purpose of Article 1, Section 11 is "to protect from unreasonable police activity those areas of life that Hoosiers regard as private." *Brown v. State*, 653 N.E.2d 77, 79 (Ind. Ct. App. 2007). Article 1, Section 11 provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be

violated” *Taylor v. State*, 842 N.E.2d 327, 333-34 (Ind. 2006). Automobiles are among the “effects” protected by Article 1, Section 11. *Brown*, 653 N.E.2d at 79.

Although the language of Article 1, Section 11 mirrors the language of the Fourth Amendment, we conduct a different form of analysis. *See Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). On review, courts must consider the circumstances presented in each case to determine whether the police behavior was reasonable. *Washington*, 875 N.E.2d at 282. We place the burden on the State to show that under the totality of the circumstances its intrusion was reasonable. *Id.* Our supreme court has held that the totality of the circumstances analysis requires consideration of both the degree of intrusion into the subject’s ordinary activities and the basis upon which the officer selected the subject of the search or seizure. *See Litchfield*, 824 N.E.2d at 360.

In the present case, Officer Morrow stopped Scruby, once it was safe to pull over to determine if Michael Scruby was indeed the young white male in the car and to establish that Michael was fine. Once that was accomplished, Officer Morrow noticed that Scruby, the driver of the vehicle, exhibited signs of intoxication. Not only would that information be relevant to his assessment of Michael Scruby’s welfare, but evolved into the initiation of the criminal investigation against Scruby. Scruby was not stopped as a pretext to a criminal investigation. The warrantless seizure was proper under Article 1, Section 11 of the Indiana Constitution as it was a brief intrusion initially directed toward determining Michael’s safety.

II. Fourth Amendment

The Fourth Amendment to the United States Constitution also protects citizens from unreasonable searches and seizures. *Primus v. State*, 813 N.E.2d 370, 374 (Ind. Ct. App.

2004). The Fourteenth Amendment extended to state governments the Fourth Amendment's requirements for constitutionally valid searches and seizures. *Id.* Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure. *Id.* 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. *Matson v. State*, 844 N.E.2d 566, 570 (Ind. Ct. App. 2006).

Stopping a vehicle constitutes a seizure within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention brief. *See Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396 (1979). The United States Supreme Court went on to hold "that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers." *Id.* at 663. Here, Officer Morrow observed a car lingering at an intersection slightly longer than he thought appropriate. The officer followed the car and observed no traffic violations, but after running the license plate number, discovered that the car was registered to Scruby, a name matching the last name of the missing young man reported by the dispatcher.

In *State v. Acrey*, 64 P.3d 594 (Wash. 2003), the supreme court of the State of Washington addressed a challenge to the admissibility of evidence allegedly obtained in violation of the Fourth Amendment. There, a 911 call reported juveniles fighting in a commercial area. When officers arrived, they questioned the five male youths, who matched the description given by the caller, and discovered that the youths had not been fighting. After concluding that no criminal activity was underway, the officers asked the youths for

their names and home phone numbers because there were no residences nearby, and it was after midnight on a week night.

Acrey, who was twelve years old, gave the officers false identification, but provided the correct information regarding his telephone number and his mother's name. Acrey's mother provided the correct information and asked the officers to bring her son home because she had no automobile. One of the officers conducted a standard pat-down search for weapons prior to allowing Acrey to enter his patrol car. The officer felt something at the bottom of Acrey's pants leg, which was found to be coins, paper money, and two baggies of marijuana. A search incident to Acrey's arrest revealed more marijuana, money, and crack cocaine.

The evidence was admitted in Acrey's trial, he was convicted, and appealed his conviction. Acrey argued that he had been unconstitutionally seized when he was detained while officers telephoned his mother. The Washington Supreme Court noted as follows:

Local police have multiple responsibilities, only one of which is the enforcement of criminal law [M]any citizens look to the police to assist them in a variety of circumstances, including delivering emergency messages, giving directions, *searching for lost children*, assisting stranded motorists, and rendering first aid.

64 P.3d at 599 (emphasis supplied). The court further described the analysis involved in determining the reasonableness of Acrey's encounter with the officers.

When police officers are engaged in noncriminal, noninvestigative "community caretaking functions," "whether a particular stop is *reasonable* depends not on the presence of 'probable cause' or 'reasonable suspicion,' but rather on a balancing of the competing interests involved in light of all the surrounding facts and circumstances."

In determining whether an officer's encounter with a person is reasonable as part of a routine check on safety, we must balance the "individual's interest in freedom from police interference against the public's interest in having the police officers perform a community caretaking function." We must "cautiously apply the community caretaking function exception because of 'a real risk of abuse in allowing even well-intentioned stops to assist.'" Even a routine stop for a safety check, if it involves a 'seizure' by detaining, must be necessary and strictly relevant to performance of the noncriminal investigation. "The noncriminal investigation must end when reasons for initiating an encounter are fully dispelled."

Id. at 599-600.

We find this reasoning helpful to the resolution of the present case. Here, Officer Morrow was aware of the dispatch regarding Michael Scruby. While keeping lookout, he encountered a driver who was slow to proceed through an intersection. Consequently, he observed the driver for several miles and ran the car's license plate. Officer Morrow no longer was engaged in a criminal investigation when he made the stop, because he had observed no traffic violations. However, when the name "Scruby" came up on the license plate check, Officer Morrow stopped the vehicle as part of his community caretaking function. He testified that he was "looking for a lost young man." *Tr.* at 41. He verified that Michael indeed was fine in the custody of his father. Yet, the criminal investigation of Scruby began anew when Officer Morrow detected the odor of alcohol and noticed Scruby's bloodshot eyes.

Although under the Fourth Amendment, a warrantless "seizure" is presumed unreasonable, this presumption may be rebutted by a showing that a specific exception to the warrant requirement applies. One exception is the noncriminal, noninvestigative community caretaking function, which is used with caution in order to ensure that it is not used as a

pretext for a criminal investigation. *See Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). We find that the stop here was conducted as part of the community caretaking function and does not run afoul of Fourth Amendment concerns.

Affirmed.

VAIDIK, J., and CRONE, J., concur.