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IN THE
COURT OF APPEALS OF INDIANA

PHILLIP ROBERTSON,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 49A02-0903-CR-241
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael Jensen, Magistrate
Cause No. 49G20-0705-FB-95329

October 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Phillip Robertson appeals from his conviction for Class B felony Cocaine Possession,[1] contending that the record does not establish a valid waiver of his right to trial by jury and that the trial court abused its discretion in admitting evidence found on his person. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On May 28, 2007, members of the Indianapolis Metropolitan Police Department ("IMPD") were investigating possible drug dealing at the Always Inn Motel. IMPD Detective Trimble purchased $140 of cocaine from Debra Gales, who was staying in Room 228. Gales had left briefly after Detective Trimble gave her the money, returning after "a couple of minutes" with the cocaine. Tr. p. 11. After Gales was arrested, she told IMPD Detective Scott Wolfe that she had retrieved the cocaine from Room 221. Gales told Detective Wolfe that an older black female named Ruth had given her the cocaine and that Ruth, in turn, had obtained the cocaine from a tall stocky black male in his twenties who was having his hair braided by another woman.

Detective Wolfe, along with fellow IMPD Detectives Dennis Wilkes and James Smith, walked to Room 221, and Detective Wilkes knocked on the door. Ruth Bradley, an "older black female," opened the door and verified, when asked, that her name was indeed "Ruth." Tr. p. 16. Also in the room were Robinson, who was seated and having his hair braided; a Ms. Finch, who was braiding Robinson's hair; and a Mr. Stokes. Detective Wilkes could tell that Robinson "was a taller black male and he was stocky built[.]" Tr. p. 16.

[1] Ind. Code § 35-48-4-6(b)(2)(B)(iii) (2006).

Detective Wolfe observed that Robinson "stood up real quick[.]" Tr. p. 48.

The three detectives identified themselves as police officers, and when Detective Wilkes asked Bradley if they could enter, she allowed them in. When one of the detectives told Room 221's occupants that they had been told there were narcotics in the room, Stokes said that if any drugs were in the room, "Ruth probably brought them there." Tr. p. 18. The detectives determined that Stokes had rented Room 221. The officers performed pat-downs of the room's four occupants, and Detective Wilkes's pat-down of Robertson yielded 1.69 grams of a cocaine-containing substance from his coin pocket.

On May 29, 2007, the State charged Robertson with Class B felony cocaine possession. On November 9, 2007, Robertson filed a motion to suppress the evidence found on his person, which motion the trial court denied on February 15, 2008. On December 16, 2008, Robertson was tried to the bench, and the following facts were stipulated for purposes of trial:

> 1. That on May 28, 2007 the defendant was arrested on the premises of 7410 E. 21st Street, commonly known as the Always Inn motel.
> 2. That 1.69 grams of cocaine were found in the pocket of [Robertson's] pants upon a search incident to said arrest.
> 3. That [Robertson] knew said cocaine was in his pocket.
> 4. That 7410 E. 21st Street is located in Marion County, State of Indiana.

State's Exhibit 2.

After a trial only on the issue of whether the Always Inn qualified as a "family housing complex" for purposes of Indiana Code section 35-48-4-6(b)(2)(B)(iii), the trial court concluded that it did and found Robertson guilty as charged. The trial court sentenced

Robertson to a six-year sentence to be served through Marion County Community Corrections.

DISCUSSION AND DECISION

We note at the outset that the State has not filed an Appellee's brief in this case. The obligation of controverting arguments presented by the appellant properly remains with the State. *Bovie v. State*, 760 N.E.2d 1195, 1197 (Ind. Ct. App. 2002). Thus, when the appellee does not submit a brief, the appellant may prevail by making a *prima facie* case of error, *i.e.*, an error at first sight or appearance. *Id*. We are nevertheless obligated to correctly apply the law to the facts of the record to determine if reversal is required. *Id*.

I. Whether Robertson Validly Waived his Right to a Jury Trial

Indiana law dictates that

> a knowing, voluntary, and intelligent waiver of the right to a jury trial requires assent to a bench trial "by defendant personally, reflected in the record before the trial begins either in writing or in open court. The record reflection must be direct and not merely implied. It must show the personal communication of the defendant to the court that he chooses to relinquish the right."

Kellems v. State, 849 N.E.2d 1110, 1113 (Ind. 2006) (quoting *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)).

Robertson correctly contends that the record does not contain any indication that he personally waived his right to trial by jury. Consequently, Robertson's conviction must be reversed and the cause remanded for a new trial.

II. Whether the Trial Court Abused its Discretion in

Admitting Evidence Seized from Robertson[2]

Recognizing that the question may well arise again in future proceedings, in the interest of judicial economy we address Robertson's additional claim that the trial court should have excluded evidence found on his person. "A trial court has broad discretion in ruling on the admissibility of evidence." *Barrett v. State*, 837 N.E.2d 1022, 1026 (Ind. Ct. App. 2005), *trans. denied*. "Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abused its discretion." *Id*. "An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court." *Id*. "[O]ur standard of review when reviewing a trial court's ruling on the validity of a search and seizure [is that] we consider the evidence most favorable to the ruling and any uncontradicted evidence to the contrary to determine whether there is sufficient evidence to support the ruling. *Callahan v. State*, 719 N.E.2d 430, 434 (Ind. Ct. App. 1999) (citing *Melton v. State*, 705 N.E.2d 564, 566 (Ind. Ct. App. 1999)). "If the evidence is conflicting, we consider only the evidence favorable to the ruling and will affirm if the ruling is supported by substantial evidence of probative value." *Id*. (citing *Melton*, 705 N.E.2d at 566).

The Fourth Amendment to the United States Constitution provides that "[t]he 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

[2] Robertson does not present a cogent argument based on the Indiana Constitution. Consequently, we address this issue only in the context of the Fourth Amendment.

cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). "Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure." *Callahan*, 719 N.E.2d at 434. "In cases involving a warrantless search, the State bears the burden of proving an exception to the warrant requirement." *Id*. (citing *State v. Farber*, 677 N.E.2d 1111, 1116 (Ind. Ct. App. 1997)). Robertson contends that both the initial entry by the police and the pat-down of all of the motel room's occupants were improper.

A. Entry into Room 221

Hotel guests enjoy the same constitutional protection against unreasonable search and seizure as do occupants of private residences. *Norwood v. State*, 670 N.E.2d 32, 35 (Ind. Ct. App. 1996). An occupant of a motel room (such as Robertson) has standing to challenge a search even when he or she has not paid for the room. *Ceroni v. State*, 559 N.E.2d 372, 373 (Ind. Ct. App. 1990), *trans. denied*. One exception to the warrant requirement occurs when consent is given to the search. *Sellmer v. State*, 842 N.E.2d 358, 362 (Ind. 2006). A valid consent to search may be given by the person whose property is to be searched or a third party who has common authority or an adequate relationship to the premises to be searched. *Norris v. State*, 732 N.E.2d 186, 188 (Ind. Ct. App. 2000). Robertson does not dispute that Bradley had the authority to consent to the police entry into Room 221, but argues,

essentially, that her consent was involuntary in that the police "basically forced the occupants to abandon their right to keep the officers out." Appellant's Br. p. 10.

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. The voluntariness of a consent to search is a question of fact to be determined from a totality of the circumstances. A consent to a search is valid except where it is procured by fraud, duress, fear, intimidation, or where it is merely a submission to the supremacy of the law. Though consent may constitute a waiver of Fourth Amendment rights, to be valid a waiver must be an intelligent relinquishment of a known right or privilege. Such a waiver cannot be conclusively presumed from a verbal expression of assent. The Court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld. Knowledge of the right to refuse a search is one factor which indicates voluntariness.

Thurman v. State, 602 N.E.2d 548, 552 (Ind. Ct. App. 1992) (citations omitted), *trans. denied*.

> The "totality of the circumstances" from which the voluntariness of a detainee's consent is to be determined includes, but is not limited to, the following considerations: (1) whether the defendant was advised of his *Miranda* rights prior to the request to search; (2) the defendant's degree of education and intelligence; (3) whether the defendant was advised of his right not to consent; (4) whether the detainee has previous encounters with law enforcement; (5) whether the officer made any express or implied claims of authority to search without consent; (6) whether the officer was engaged in any illegal action prior to the request; (7) whether the defendant was cooperative previously; and (8) whether the officer was deceptive as to his true identity or the purpose of the search.

Callahan v. State, 719 N.E.2d 430, 435 (Ind. Ct. App. 1999) (citing *State v. Scheibelhut*, 673 N.E.2d 821, 824 (Ind. Ct. App. 1996)).

The circumstances of Bradley's consent give us no indication that it was the result of fraud, duress, fear, intimidation, or merely a submission to the supremacy of the law. First and, in our view, foremost, there is no indication whatsoever of any coercion by the police. There is no evidence of threats, raised voices, raised or visible weapons, or any other form of intimidation. Moreover, Police identified themselves before obtaining Bradley's consent, engaged in no illegal activity, and did not claim or imply that they could search Room 221 without a warrant. It is also worth noting that there is no evidence that Bradley or any of the other occupants felt any pressure to submit to the officers' request. The record indicates that Bradley simply opened the door and allowed the detectives in, knowing them to be police officers, when requested.[3] We acknowledge that Bradley was not advised that she could refuse consent and was not *Mirandized* before giving it. In the end, though, we do not believe that these omissions render Bradley's consent involuntary when one takes into account the complete lack of evidence of any type of coercion by the police.

B. Pat-Down

Robertson contends that even if Bradley's consent to the entry was valid, the subsequent pat-down was illegal. "[Another] exception to the warrant requirement is an investigatory stop whereby a police officer can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion, supported by articulable

[3] Some of the factors listed in *Callahan* cannot be considered, based on the record before us. For instance, we do not know Bradley's education level or whether she had had previous encounters with the police. On the other hand, however, there is no indication that a lack of education or experience with law enforcement played any role in her decision to give her consent.

facts, that criminal activity may be afoot, even if the officer lacks probable cause." *Santana v. State*, 679 N.E.2d 1355, 1359 (Ind. Ct. App. 1997) (citations omitted). "In such a case the officer may briefly detain [a suspect] to conduct a limited 'non-invasive' search such as a 'pat down' for weapons, a license and registration check, or field sobriety tests." *Snyder v. State*, 538 N.E.2d 961, 963 (Ind. Ct. App. 1989), *trans. denied*. A pat-down search allows the officer to pursue his investigation without fear for his safety or the safety of others. *State v. Joe*, 693 N.E.2d 573, 575 (Ind. Ct. App. 1998), *trans. denied*.

> The purpose of a limited search for weapons after an investigative stop is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear for his safety or the safety of others. An officer may only conduct a limited search for weapons when he has a reasonable belief that the suspect is armed and dangerous. The police officer need not be absolutely certain that the individual is armed. The issue is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his safety or that of another was in danger. In determining whether the police officer acted reasonably under the circumstances, due weight must be given, not to the officer's inchoate and unparticularized suspicions, but to the specific reasonable inferences which the officer is entitled to draw from the facts in light of his experience.

Id. (citations omitted).

Although the record is not entirely clear which of the three detectives first decided that a pat-down of Room 221's occupants was in order, we conclude that that decision was reasonable under the circumstances. Detective Wolfe testified that the Always Inn had been the subject of prior narcotics and prostitution investigations. (Tr. 8). The fact that the Always Inn was a known location of past criminal activity is relevant to this inquiry. *See, e.g.*, *Ill. v. Wardlow*, 528 U.S. 119, 124 (2000) ("[W]e have previously noted the fact that the

stop occurred in a 'high crime area' among the relevant contextual considerations in a *Terry* analysis.") (citation omitted)). Moreover, the three detectives in Room 221 unexpectedly found themselves outnumbered four to three. We agree with those courts who have concluded that "[t]he fact that an officer may be outnumbered is certainly a factor to be considered when determining whether an officer's safety is at risk[.]" *Commonwealth v. Mack*, 953 A.2d 587, 591 (Pa. Super. Ct. 2008); *see also, e.g.*, *People v. Limon*, 21 Cal. Rptr. 2d 397, 402 (Cal. Ct. App. 1993) (recognizing that officers being outnumbered is a relevant factor in *Terry* analysis).

Finally, Robertson does not dispute that police reasonably believed that Room 221's occupants were dealing illegal drugs, and Detective Wolfe testified at the suppression hearing that "people who deal drugs are known to carry guns." Tr. p. 30. Robertson argues that a "generalized belief that drugs and guns are often together" is insufficient to justify the pat-down. Several courts, however, have recognized that "drug dealers and weapons go hand in hand[.]" *State v. Richardson*, 456 N.W.2d 830, 836 (Wis. 1990) (citing *U.S. v. Pajari*, 715 F.2d 1378 (8th Cir. 1983); *U.S. v. Post*, 607 F.2d 847 (9th Cir. 1979); and *U.S. v. Oates*, 560 F.2d 45 (2d Cir.1977)); *see also, e.g.*, *U.S. v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991) (noting that the officers in question were "sufficiently experienced to know that narcotics dealers frequently carry weapons"); *U.S. v. Gilliard*, 847 F.2d 21, 25 (1st Cir. 1988) (concluding that frisk was justified where "officers … suspected Gilliard of having participated in a narcotics sale and knew that firearms are 'tools of the trade[]'"). While we do not necessarily believe that any of the factors mentioned above, standing alone, would have justified the pat-down,

all of them together provided the officers with ample reasonable suspicion. As such, the trial court properly declined Robertson's invitation to suppress the evidence found on his person.

We reverse and remand for further proceedings consistent with this opinion.

BAILEY, J., and VAIDIK, J., concur.