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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY JACKSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0902-CR-175
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jose Salinas, Judge
Cause No. 49G14-0807-FD-175567

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Timothy P. Jackson appeals his conviction for Possession of Paraphernalia,[1] a class D felony. Jackson presents the following restated issue for review: Did the trial court err in admitting evidence discovered during a stop of Jackson's vehicle?

We affirm.

The facts favorable to the conviction are that on July 24, 2008, Indianapolis Metropolitan Police Department Officer Michael Leepper was on patrol in his squad car near the intersection of Hamilton Avenue and New York Street in Indianapolis, Indiana. Officer Leepper was stopped when he observed Jackson's vehicle driving toward and eventually past him in the opposite direction on the same street. The officer noted that Jackson and his passenger were acting strangely. Accustomed to people staring at him as a police officer, Officer Leepper nonetheless noted that Jackson's vehicle came to "almost a dead stop in the middle of the road." *Transcript* at 88. He described their behavior specifically as follows:

> They were – appeared to be very nervous, had stopped in the middle of the roadway and were turned around completely in their seats to see which direction I was going to go, whether I was going to turn to go on New York Street or go straight on Hamilton which is not common.

Id. at 90. As they passed him, Officer Leepper observed that there were four to six bullet holes in the back of Jackson's vehicle. The occupants' "extremely nervous" behavior, *id*. at 91, including their close monitoring of Officer Leepper's movements and location, the fact that they stopped their car in the middle of the street, and the bullet holes in the trunk, caused Officer Leepper to form the opinion that criminal activity was afoot. Therefore, he decided

[1] Ind. Code Ann. § 35-48-4-8.3 (West, PREMISE through 2009 1st Regular Sess.).

to initiate a stop of the vehicle and investigate further.

Officer Leepper activated his emergency lights, made a u-turn and fell in behind Jackson's vehicle. Jackson did not stop immediately. Instead, he turned onto Michigan Street and then onto Tecumseh Street before pulling into a driveway and stopping. When he exited his vehicle, Officer Leepper observed Jackson "[i]mmediately dove underneath of the seat and started making furtive movements with his hand underneath the seat." *Id.* at 97. Officer Leepper alerted another officer that Jackson was reaching under the seat, and drew his firearm. Officer Leepper ordered Jackson and his passenger to put up their hands. The passenger immediately complied, but Jackson continued to reach under his front seat for a moment. After ignoring Officer Leepper's command several times, Jackson finally put his hands in the air.

Officer Leepper directed Jackson to exit his vehicle and placed Jackson in handcuffs. After Jackson was thus restrained, the officer looked under the driver's seat and saw a crack pipe in plain view inside a cigarette box. He placed Jackson under arrest for possession of paraphernalia. A subsequent driver's license check revealed that Jackson had a suspended license and a prior conviction for possession of paraphernalia.

On July 25, 2008, the State charged Jackson with possession of paraphernalia as a class A misdemeanor, enhanced in this case to a class D felony because of a previous conviction for possession of paraphernalia, and driving while suspended as a class A misdemeanor. Jackson filed a motion to suppress the evidence resulting from the vehicle search. The trial court denied the motion after a hearing. Following a bench trial, the trial

court found Jackson guilty of possession of paraphernalia as a class D felony and not guilty of driving while suspended. At trial, the trial court overruled Jackson's objection to the admission of the crack pipe found during the vehicle search.

Jackson contends the trial court erred in denying his motion to suppress because the search was conducted in violation of the Fourth Amendment of the United States Constitution, which guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures", and article 1, section 11 of the Indiana Constitution. With respect to the latter argument, Jackson's claim is unaccompanied by argument in support thereof. Therefore, the claim is waived. *See* Ind. Appellate Rule 46(A)(8).

Our Supreme Court has recently summarized the standard for reviewing claims of this sort that arise under the Fourth Amendment of the United States Constitution, as follows:

> The [United States] Supreme Court has declared that its "protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrests." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (citing *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Still, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "may be afoot." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); *see also United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity").
>
> We review trial court determinations of reasonable suspicion de novo rather than for abuse of discretion, and "give due weight to inferences drawn from [the] facts by resident judges...." *State v. Bulington*, 802 N.E.2d 435, 438 n. 1 (Ind. 2004) (citing *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)). We look at the " 'totality of circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Id*. at 438 (citations

> omitted). The State has the burden to show that under the totality of the circumstances its intrusion was reasonable. *Id*.

Bannister v. State, 904 N.E.2d 1254, 1255-56 (Ind. 2009).

Jackson cites *Polk v. State*, 739 N.E.2d 666 (Ind. Ct. App. 2000) and *Tumblin v. State*, 664 N.E.2d 783 (Ind. Ct. App. 1996) in support of the uncontroversial proposition that turning away from police while being in an area of high crime does not support a finding of reasonable suspicion. Jackson continues that what he did here was the rough equivalent of walking away from the police. We cannot agree. Whether an investigatory stop is justified is determined on a case-by-case basis by looking at the totality of the circumstances. *Ross v. State*, 844 N.E.2d 537 (Ind. Ct. App. 2006). In this case, Jackson asks us to focus our inquiry on the facts that he looked at Officer Leepper as their vehicles passed and that he moved away from the officer after doing so. Indeed, speaking very generally, these circumstances are also present in *Polk* and *Tumblin*. A meaningful examination of the *totality* of the circumstances, however, necessarily incorporates a consideration of each and every fact or factor that might be relevant.

We cannot focus only on those facts that Jackson highlights and thereby ignore other critical facts that were apparent to Officer Leepper and therefore crucial in evaluating the reasonableness of his suspicion. We refer, of course, to the facts that (1) Jackson and his passenger were at the time traveling in a car, (2) they brought the car nearly to a stop while on a public street as they turned almost completely around in their seats to monitor Officer Leepper's movements behind them, (3) they took what appeared to be evasive maneuvers based upon his location, and (4) there were multiple bullet holes in the trunk of the car in

which they were traveling. These facts reveal a totality of circumstances entirely dissimilar from those considered by the courts in *Polk* and *Tumblin*. In light of these additional facts, it can hardly be said that Officer Leepper's suspicion was based merely on "an inchoate and unparticularized suspicion or a hunch." *Beverly v. State*, 801 N.E.2d 1254, 1261 (Ind. Ct. App. 2004), *trans. denied*. Instead, they represent "objective manifestation[s] that the person stopped is, or is about to be, engaged in criminal activity." *Bannister v. State*, 904 N.E.2d at 1255 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

Considered in their totality, the facts known to Officer Leepper at the time were sufficient to create a reasonable suspicion that criminal activity was afoot, thus justifying an investigatory stop. *See United States v. Sokolow*, 490 U.S 1. The stop was not a violation of Jackson's Fourth Amendment rights and therefore the trial court did not err in admitting evidence seized during the search of Jackson's vehicle.

Judgment affirmed.

BAKER, C.J., concurs.

RILEY, J., dissents with a separate opinion.

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	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

RILEY, Judge, dissenting with separate opinion

I respectfully dissent from the majority's decision to affirm Jackson's conviction by concluding that the trial court did not err in admitting evidence which was seized after the Officer made an investigatory stop of Jackson's vehicle. In essence, Jackson contends that Officer Leepper did not possess any particularized suspicion that he was engaged in, about to engage in, or had engaged in criminal activity when he stared at the Officer while driving a car with bullet holes in the trunk. I agree.

While the facts before us might raise an inference that Jackson behaved weirdly by staring continuously at the Officer, I disagree with the Majority's conclusion that the combined facts rise to a level of reasonable suspicion of criminal activity necessary to justify

an investigatory stop. Instead, I believe Jackson was stopped because of the Officer's hunch that Jackson's staring at him and then turning and driving away while driving a damaged car signified the presence of criminal activity.

I analogize the current situation to a wealth of case law which established that an individual turning and walking away from approaching law enforcement, or similar actions, in a high crime area does not establish reasonable suspicion. *See Williams v. State*, 477 N.E.2d 96 (Ind. 1985), *reh'g denied* (finding the officer lacked reasonable suspicion to make an investigatory stop where defendant was walking in a high crime area at 1:30 a.m. carrying a package); *Tumblin v. State*, 664 N.E.2d 783, 785 (Ind. Ct. App. 1996) (holding that "the color of one's skin, the neighborhood one happens to be in, and the fact that one turns away from police are not sufficient, individually or collectively, to establish a reasonable suspicion of criminal activity."); *Webb v. State*, 714 N.E.2d 787 (Ind. Ct. App. 1999) (holding that defendant's action of turning away from police and appearing to put something down his pants was not sufficient to justify an investigatory stop); *Polk v. State*, 739 N.E.2d 666 (Ind. Ct. App. 2000) (finding that defendant walking in a high crime area and turning and walking away from police as they passed him did not rise to the level of reasonable suspicion).

In its opinion, the majority refers to other critical facts which must necessarily be taken into account to evaluate the reasonableness of Officer Leepper's suspicion. Specifically, the majority refers to "evasive maneuvers based upon [Jackson's] location." Slip op. p. 5. I understand this to be a reference to the State's argument that Jackson's "failure to stop immediately and refusal to obey Officer Leepper's commands once stopped,

and reaching under the driver's seat supported Officer Leepper's search of the vehicle and admission of the paraphernalia."

However, reasonable suspicion must exist at the time of the stop. Here, after Officer Leepper perceived Jackson's behavior to be sufficiently suspicious to stop him, Officer Leepper had to turn his vehicle around and close the distance between him and Jackson's vehicle while Jackson continued driving. The record establishes that by the time Officer Leepper had turned around and switched on his emergency lights, Jackson had already turned onto Michigan Street. At that point, Officer Leepper still had to catch up with Jackson. I do not consider these facts to amount to a refusal to stop. Furthermore, Jackson's movements after he was stopped—reaching under his seat—cannot be taken into account to justify the stop as these took place *after* the stop ensued.

Based on the facts before me, I conclude that if the Fourth Amendment is to provide any protection against unreasonable governmental intrusion it should prevent the kind of investigatory stop made here. As a result, I find that Officer Leepper lacked reasonable suspicion to conduct an investigatory stop. Therefore, I hold that the trial court abused its discretion in admitting the evidence resulting from an unlawful investigatory stop.