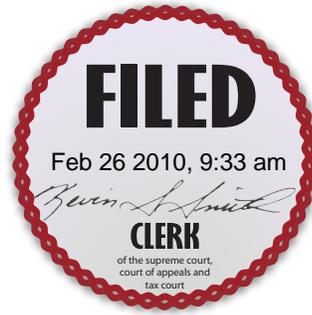


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

J.J.,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0906-JV-593
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Geoffrey A. Gaither, Magistrate
Cause No. 49D09-0902-JD-568

February 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

J.J. was adjudicated a juvenile delinquent for committing an act that would constitute the crime of class D felony possession of cocaine if committed by an adult. On appeal, J.J. argues that the trial court abused its discretion by admitting into evidence the cocaine seized during a warrantless search of his person.

We affirm.

Just before 5:00 a.m. on February 24, 2009, Officer Robert Lawson observed a vehicle approaching him with its “high beams on”, which is a moving violation. *Transcript* at 4. Officer Lawson made a u-turn and initiated a traffic stop at the intersection of 38th Street and Emerson Drive in Indianapolis. There was no license plate on the back of the vehicle. Rather, there was a temporary paper plate lying on the back speaker console inside the vehicle. Officer Lawson noted that the paper plate had an invalid expiration date of February 31. Other than the paper plate, there was nothing about the condition of the vehicle that raised Officer Lawson’s suspicions.¹

The vehicle was driven by Jorika Gee, and there were two seventeen-year-old male passengers, D.R. and J.J., as well as Gee’s baby in the car. Gee informed Officer Lawson that she did not have an operator’s license and that the car belonged to D.R., the front seat passenger. D.R. told the officer that he had recently purchased the vehicle and that the “paperwork” for the vehicle was at home. *Id.* at 9. J.J., who was sitting in the back behind Gee, stated that he was D.R.’s friend.

¹ Officer Lawson specifically testified that the driver was using a key and that there was no notable damage to the interior or exterior of the car.

Upon running a check on the VIN number, Officer Lawson learned that the vehicle had been reported stolen. Officer Lawson and another officer then placed Gee, D.R., and J.J. under arrest for theft. In a search incident to arrest, the officers recovered illegal drugs from J.J.'s person, specifically from a pocket on the sleeve of his coat.

The State subsequently filed a delinquency petition in juvenile court alleging that J.J. had committed possession of cocaine and possession of a legend drug, both class D felonies if committed by an adult. During the dispositional hearing on May 12, 2009, J.J. moved to suppress any testimony or evidence derived from the warrantless search of his person. The trial court overruled his objection. At the conclusion of the hearing, the trial court entered a true finding as to the possession of cocaine allegation. J.J. now appeals, claiming that the trial court abused its discretion by admitting the drug evidence over his objection.

The Fourth Amendment to the United States Constitution protects both privacy and possessory interests by prohibiting unreasonable searches and seizures. *VanPelt v. State*, 760 N.E.2d 218 (Ind. Ct. App. 2001), *trans. denied*. Searches and seizures that occur without prior judicial authorization in the form of a warrant are per se unreasonable, unless an exception to the warrant requirement applies. *Id.* The State bears the burden of proving that a warrantless search falls within one of the exceptions to the warrant requirement. *Black v. State*, 810 N.E.2d 713 (Ind. 2004)

One well-recognized exception to the warrant requirement is a search incident to arrest. *Id.* In order for a search incident to an arrest to be valid, the arrest itself must be lawful. *VanPelt v. State*, 760 N.E.2d 218. Therefore, probable cause must be present to

support the arrest. *Id.* Probable cause to arrest exists where the officer has knowledge of facts and circumstances that would warrant a person of reasonable caution to believe that a suspect has committed a criminal act. *Griffith v. State*, 788 N.E.2d 835 (Ind. 2003). The amount of evidence necessary to meet the probable cause requirement for a warrantless arrest is determined on a case-by-case basis. *Id.* Further, the officer's subjective belief as to whether he has probable cause to arrest the defendant has no legal effect. *VanPelt v. State*, 760 N.E.2d 218. Instead, the officer's actual knowledge of objective facts and circumstances is determinative. *Id.* See also *Sears v. State*, 668 N.E.2d 662, 667 n.8 (Ind. 1996) ("probable cause to arrest may exist even though a police officer's subjective evaluation leads the officer to conclude that the officer did not have enough information to establish probable cause at that particular time").

The determination of probable cause is a mixed question of law and fact. *Moffitt v. State*, 817 N.E.2d 239 (Ind. Ct. App. 2004), *trans. denied*. When the relevant facts are undisputed, as they are in this case, probable cause is a question of law. *Id.* Accordingly, although we generally review a trial court's decision to admit evidence despite a motion to suppress under an abuse-of-discretion standard, the ultimate determination whether Officer Lawson had probable cause to initiate an arrest is reviewed de novo. *Id.*

In the instant case, prior to the search, Officer Lawson placed J.J. under arrest for auto theft. J.J. correctly observes that the mere presence as a passenger in a stolen automobile does not establish an exertion of control over the vehicle so as to support a *conviction* for theft. See *Irvin v. State*, 501 N.E.2d 1139 (Ind. Ct. App. 1986). We observe, however, that

the level of proof necessary to establish probable cause is less than that necessary to establish guilt beyond a reasonable doubt. *Lamagna v. State*, 776 N.E.2d 955, 958 (Ind. Ct. App. 2002) (“[p]robable cause requires only a fair probability of criminal activity, not a *prima facie* showing, and may be established by evidence that would not be admissible at trial”).

Further, we need not decide whether Officer Lawson had probable cause to arrest J.J. for theft because we conclude that the officer had probable cause to arrest J.J. for misdemeanor joyriding.² *See* Ind. Code Ann. § 35-43-2-2(a)(3) (West, PREMISE through 2009 1st Special Sess.) (defined as a person who accompanies another person in a vehicle, with knowledge that the other person knowingly or intentionally is exerting unauthorized control over the vehicle). The facts available to the officer at the time of the arrest would lead a person of reasonable caution to believe that J.J. was committing, at a minimum, the crime of joyriding. These facts include that J.J. was out riding around with D.R. (a friend and also a juvenile) and Gee³ at an unusual hour, and the car in which they were riding had been reported stolen. Moreover, Gee was not a licensed driver, D.R. (the alleged owner) had no registration or other documentation for the vehicle, and the temporary paper plate was not properly displayed⁴ and had an impossible expiration date. Under the totality of the circumstances, a fair probability of criminal activity existed with regard to the three

² A law enforcement officer may arrest a person when the officer has probable cause to believe the person is committing or attempting to commit a misdemeanor in the officer’s presence. Ind. Code Ann. § 35-33-1-1(a)(4) (West, PREMISE through 2009 1st Special Sess.).

³ Although not established at the dispositional hearing, we note that the record indicates Gee was eighteen years old at the time of the stop and, therefore, a contemporary of the young men in the vehicle.

⁴ *See Meredith v. State*, 906 N.E.2d 867 (Ind. 2009) (discussing proper display of temporary license plates).

occupants of the vehicle and, therefore, Officer Lawson had probable cause to arrest each of them. Contrary to J.J.'s apparent assertion on appeal, the officer was not required to determine J.J.'s knowledge regarding the stolen nature of the vehicle before the arrest.

Finally, we observe that it is of no moment that Officer Lawson placed J.J. under arrest for theft as opposed to joyriding because the subjective belief of the officer regarding probable cause has no legal effect. *VanPelt v. State*, 760 N.E.2d 218. *See also Barker v. State*, 695 N.E.2d 925 (Ind. 1998) (holding that we will affirm the trial court's decision to admit evidence if it is sustainable on any basis in the record); *Richardson v. State*, 848 N.E.2d 1097 (Ind. Ct. App. 2006), *trans. denied*.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.