

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.

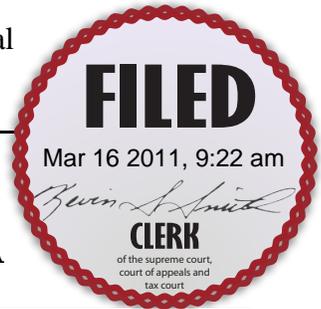
ATTORNEY FOR APPELLANT:

JON P. PHILLIPS
Herr & Phillips, LLC
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

BRIAN REITZ
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

DUNCAN DILLARD,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 37A03-1007-CR-376

APPEAL FROM THE JASPER CIRCUIT COURT
The Honorable John D. Potter, Judge
Cause No. 37C01-0911-FB-391

March 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Duncan Dillard appeals his conviction, following a bench trial, for possession of cocaine¹ as a Class C felony. Dillard raises one issue on appeal, which we restate as, whether the evidence seized during the search of the automobile that Dillard was driving violated his rights under the Fourth Amendment to the United States Constitution and Article I, section 11 of the Indiana Constitution.

We reverse.

FACTS AND PROCEDURAL HISTORY

Detective Ed Kabella, a member of the Highway Interdiction Unit of the Lake County Sheriff's Department, was on duty the morning of November 4, 2009, when he saw a Ford Explorer speeding southbound on Interstate 65 through Jasper County, Indiana. Radar revealed that the Explorer was traveling seventy-seven miles-per-hour in a zone posted for seventy-miles-per-hour. Detective Kabella followed the vehicle for a couple of miles and observed the driver, later identified as Dillard, throw something from the vehicle.

At 10:42 a.m., Detective Kabella initiated a traffic stop and asked Dillard for his license and registration.² He observed that Dillard's hands were shaky and that he had trouble taking his license out of his wallet. From the vehicle registration, Detective Kabella noted that Dillard was not the owner of the Explorer and requested that Dillard move to the police vehicle. As he returned to his police vehicle, the officer looked back and saw Dillard place something in the Explorer's overhead sunglasses compartment.

¹ See Ind. Code § 35-48-4-6.

² This court has reviewed the time-stamped video of Detective Kabella's stop of Dillard, which was admitted into evidence as *State's Exhibit 2*. We use the times identified in that video.

Detective Kabella told Dillard that he had been speeding and had been seen throwing something from his vehicle. During the ensuing conversation, Detective Kabella learned that Dillard was returning from Chicago, where he had dropped off his son, and that Dillard worked for Caterpillar and had been an electrician with that company for nine years. While the men were talking, Detective Kabella noticed that Dillard was nervous; Dillard was sweating a lot in his face, and his legs were bouncing.

Dillard's "record was good" and "the registration [while not Dillard's] was valid," so three minutes after initiating the stop, Detective Kabella told Dillard, "I'm just going to give you a warning." *Tr.* at 12. The two men continued to talk for five more minutes as Detective Kabella completed the paperwork. During that conversation, Detective Kabella learned that Dillard was off work that day, but that "he worked midnights at the Caterpillar plant." *Id.* Detective Kabella interpreted that to mean that Dillard worked from 11:00 p.m. to 7:00 a.m. Dillard stated, "you get real tired at about seven, when you've gotta go in." *Id.* at 14. Detective Kabella testified, "I would take that, that he's speaking from personal experience that he goes in at seven in the morning, or seven at night, which doesn't make sense with a midnight shift to me at all." *Id.* At trial, Detective Kabella testified that Dillard's nervousness seemed to increase even after being told he was being given only a warning; he was sweating more and his legs were bouncing more rapidly. *Id.* at 12.

Noting that Dillard was not in his work clothes, Detective Kabella estimated the amount of time it would have taken Dillard to change, pick up his son, drive up to Chicago and back, and be on Interstate 65 at the time Detective Kabella stopped him. *Id.*

at 12-13. Detective Kabella found that Dillard's version of the events did not match his estimation of the time frame required to make the trip. Dillard's nervousness, the fact that he was driving another's vehicle, and the fact that parts of his story seemed inconsistent, were, for Detective Kabella, "common indicator[s] for trafficking [drugs]." *Id.* at 13. Detective Kabella concluded, "my training and experience, le[d] me to believe that I had reasonable suspicion." *Id.* at 15.

The officer finished writing his warning citation and advised Dillard to go to the front of the police vehicle. It was there that Detective Kabella handed Dillard the written warning as well as all of his documents. The officer finished the encounter by saying, "either have a good day or have a good morning or you're free to go, I can't remember exactly, but those are usually the three statements that I'll use." *Id.* Detective Kabella testified that using one of those three statements indicates that the stop is over, "[b]ecause I always like to go for a consensual encounter." *Id.* As Dillard was walking toward the driver's side door of his car, the officer asked him if there were any weapons in the Explorer. Dillard said there were not. Dillard did not consent to the officer's request for a consensual search of the car. Thereafter, Detective Kabella ordered Dillard to again sit in the police vehicle. The time was 10:50 a.m. At trial, Detective Kabella explained that he placed Dillard in the police vehicle for "officer's safety." *Id.* at 16.

Two minutes later, Detective Kabella approached the police vehicle and asked Dillard, who was sitting inside, if he had any weapons on his person. When Dillard again responded that he did not, Detective Kabella told Dillard to "sit tight" because he was requesting a canine unit. *State's Ex. 2.* Dillard was cooperative and remained in the

vehicle. Backup arrived more than ten minutes later. At that time, Detective Kabella told Dillard he was free to leave because “the vehicle was the only thing being detained.” *Tr.* at 17. Dillard asked whether he had to walk home; Dillard’s home was about thirty miles away in Lafayette. *Id.* Although Detective Kabella stated that Dillard could wait for the canine unit, Dillard retrieved his house key off of his key ring and walked to a nearby gas station. *Id.* at 17-18.

The canine unit arrived at 11:42 a.m., more than one hour after the initial stop and almost forty-five minutes after Detective Kabella had informed Dillard that he was free to leave but that he was holding the Explorer. *State’s Ex. 2.* The canine walked around the Explorer and “indicated on the vehicle.” *Tr.* at 20. With that information, Detective Kabella searched the vehicle and located a substance in the overhead sunglasses compartment, which was later tested and determined to be 61.66 grams of cocaine.³

Dillard was charged with Class B felony dealing in cocaine and Class C felony possession of cocaine in the aggregate weight of three grams or more. Following a bench trial, the trial court allowed the parties to file a brief or memorandum regarding their respective positions. On May 17, 2010, the State filed a Memorandum of Law, and Dillard filed a “Memorandum of Law in Support of Defendant’s Motion to Suppress Evidence.” *Appellant’s App.* at 2. The trial court found Dillard not guilty of dealing in cocaine, but guilty of possession of cocaine as a Class C felony.

Dillard was sentenced on June 22, 2010 to six years in the Department of

³ Detective Kabella testified that he found two ounces of cocaine. *Tr.* at 20. However, the Certificate of Analysis, which was introduced as *State’s Exhibit 1*, provided that the substance found in Dillard’s vehicle was 61.66 grams of cocaine.

Correction, three years of which were suspended. The trial court ordered Dillard to serve the executed portion of his sentence at Tippecanoe Community Corrections. Dillard now appeals.

DISCUSSION AND DECISION

Dillard appeals his conviction for possession of cocaine, contending that the cocaine was inadmissible because it was discovered in the Explorer during a search and seizure that violated Dillard's rights under the Fourth Amendment to the United States Constitution.⁴ Specifically, he contends that he and the Explorer were detained by Detective Kabella, without reasonable suspicion of criminal activity, and longer than was necessary to effectuate the purpose of the traffic stop. The State counters that Dillard's nervousness, furtive movements, and contradictory stories constituted reasonable suspicion to detain Dillard long enough to obtain a canine sweep, and that once the canine indicated on the vehicle there was probable cause under the Fourth Amendment to search the Explorer. *Appellee's Br.* at 6.

We begin by noting that nowhere in the chronological case summary or the transcript of the bench trial do we find that Dillard filed a motion to suppress the evidence or that he made an objection to the admission of the cocaine evidence. Our Supreme Court has held that “[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.” *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010).

⁴ Dillard also contends that his rights were violated pursuant to Article I, Section 11 of the Indiana Constitution. However, because we reverse on Fourth Amendment grounds, we need not conduct a separate state constitutional analysis.

“The purpose of this rule is to allow the trial judge to consider the issue in light of any fresh developments and also to correct any errors. *Id.*

Here, we are presented with a unique situation. At trial, notwithstanding the lack of an objection to introduction of the drug seizure, each party focused on the timing of the stop and the search, and addressed whether Detective Kabella had “reasonable suspicion of criminal activity” to constitutionally detain Dillard’s vehicle following the completion of the traffic stop—all factors relevant to the question of whether the evidence seized violated Dillard’s rights under the Fourth Amendment to the United States Constitution. The trial judge apparently shared the parties’ understanding of the issue before the court and, at the close of trial, summarized that issue as follows:

All right, I assume, obviously, by the way this was done, is I was to take it under advisement, and obviously, review this tape. Counsel, do either of you want to present any kind of a trial brief? Obviously, I understand the issue is, we have a traffic stop. Then we have it’s over [sic]. And then we have reasonable suspicion to a Terry stop [sic] and then, at some point in time does the Terry stop become probable cause, if the dog . . . does anybody want to submit a law or brief . . . a trial brief or anything on the issues? I’ll give you that opportunity if you want to do that.

Tr. at 33. Defense counsel’s understanding of the proceedings was also reflected in the fact that, following trial, he filed with the court a document titled, “Defendant’s Memorandum of Law in Support of Defendant’s Motion to Suppress Evidence.” *Appellant’s App.* at 65.

The above evidence suggests that, notwithstanding the absence of a pre-trial motion to suppress and an objection contemporaneous to the admission of the cocaine evidence at trial, the parties and the trial court believed that the sole issue before the court

was whether the seizure of the cocaine found during the search of the Explorer violated Dillard's rights under the Fourth Amendment to the United States Constitution and Article I, section 11 of the Indiana Constitution. This seems true, especially in light of the fact that the State made no claim at trial and makes no claim on appeal that Dillard has waived this issue. Additionally, we note that the purpose of the rule requiring a contemporaneous objection—"to allow for the trial judge to consider the issue in light of any fresh developments"—was satisfied here. While we have concerns about the lack of a contemporaneous objection to the admission of the cocaine evidence, it appears the trial court and the parties agreed that the issue would be decided on the basis of post-trial submissions, and merely failed to place such agreement on the record. Accordingly, we will decide this case on its merits.

When we review a trial court's ruling on the admissibility of evidence resulting from an allegedly illegal search, we do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Reinhart v. State*, 930 N.E.2d 42, 45 (Ind. Ct. App. 2010) (citing *Meredith v. State*, 906 N.E.2d 867, 869 (Ind. 2009)). We also defer to the trial court's factual determinations unless clearly erroneous. *Id.* "However, we consider 'afresh any legal question of the constitutionality of a search or seizure.'" *Id.* (quoting *Meredith*, 906 N.E.2d at 869).

The Fourth Amendment to the United States Constitution protects an individual's privacy and possessory interests by prohibiting unreasonable searches and seizures. *Harper v. State*, 922 N.E.2d 75, 79 (Ind. Ct. App. 2010) (citing *Howard v. State*, 862 N.E.2d 1208, 1210 (Ind. Ct. App. 2007)), *trans. denied*. The federal protection against

unreasonable searches and seizures has been extended to the States through the Fourteenth Amendment. *Thayer v. State*, 904 N.E.2d 706, 709 (Ind. Ct. App. 2009). Evidence obtained in violation of the Fourth Amendment may not be used against a defendant at trial. *Rice v. State*, 916 N.E.2d 296, 301 (Ind. Ct. App. 2009), *trans. denied* (2010).

Generally, a search must be reasonable and conducted pursuant to a properly issued warrant. When a search is conducted without a warrant, the State bears the burden of proving the search was justified under one of the limited exceptions to the warrant requirement. Pursuant to *Terry v. Ohio*, [392 U.S. 1] (1968), police may - without a warrant - stop an individual for investigatory purposes if, based upon specific, articulable facts, the officer has a reasonable suspicion that criminal activity “may be afoot.” Such reasonable suspicion must be comprised of more than an officer’s general “hunches” or unparticularized suspicions. We consider the totality of circumstances in determining whether the police had reasonable suspicion to believe there was criminal activity afoot.

D.K. v. State, 736 N.E.2d 758, 761 (Ind. Ct. App. 2000) (quoting *Webb v. State*, 714 N.E.2d 787, 788 (Ind. Ct. App. 1999)) (internal citations omitted).

“This court has recognized that stopping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention is quite brief.” *Harper*, 922 N.E.2d at 79 (citing *Thayer*, 904 N.E.2d at 709); *see Delaware v. Prouse*, 440 U.S. 648, 653 (1979). An ordinary traffic stop, which also interrupts a suspect’s freedom, is allowed as a *Terry* investigatory stop. *Harper*, 922 N.E.2d at 79 (citing *D.K.*, 736 N.E.2d at 761). Nevertheless, where a stop is justified, reasonable suspicion only allows the officer to temporarily freeze the situation for inquiry and does not give him all of the rights attendant to an arrest. *State v. Campbell*, 905 N.E.2d 51, 54 (Ind. Ct. App.

2009), *trans. denied*. “Therefore, once the purpose of the initial stop has been completed, an officer cannot further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention.” *Harper*, 922 N.E.2d 79 (citing *D.K.*, 736 N.E.2d at 761) (internal quotations omitted).

Here, Dillard concedes that the initial traffic stop was a valid investigatory stop; Dillard was speeding. Dillard argues, however, that once the purpose of the traffic stop was complete, and Dillard was free to leave, Detective Kabella did not have reasonable suspicion to justify detaining him a second time. Dillard contends that without reasonable suspicion, Detective Kabella’s act of holding him for ten minutes until backup arrived and holding the Explorer for an additional forty-five minutes until the canine unit arrived was an unconstitutional seizure,⁵ which resulted in an unconstitutional search of the Explorer. Our analysis, therefore, turns on whether Detective Kabella had reasonable suspicion to detain the Explorer after the initial purpose of the traffic stop had been satisfied.

The State concedes that Dillard’s nervousness alone was insufficient to comprise reasonable suspicion to detain the Explorer beyond the original purpose of the traffic stop. *See Wells v. State*, 922 N.E.2d 697, 701 (Ind. Ct. App. 2010) (quoting *State v. Quirk*, 842 N.E.2d 334, 341 (Ind. 2006)) (““Because it is not at all unusual that a citizen

⁵ We note that Dillard does not contend that he was “seized” merely because, immediately after being told he was free to go, Detective Kabella stopped him and asked him whether he had weapons in the Explorer. Therefore, our Supreme Court’s decision in *State v. Washington* is not implicated. *See State v. Washington*, 898 N.E.2d 1200 (Ind. 2008) (officer’s brief questioning as to whether defendant had any weapons, drugs, or anything else that could harm officer was not itself a search or seizure and thus was not prohibited by Fourth Amendment).

may become nervous when confronted by [a] law enforcement official[], other evidence that a person may be engaged in criminal activity must accompany nervousness before the nervousness will evoke suspicion necessary to support detention.”). The State contends that other factors, when considered in combination with the nervousness, support Detective Kabella’s reasonable suspicion that Dillard was involved in criminal activity. *Appellee’s Br.* at 5. The State cites to Dillard’s fast trip to Chicago in a vehicle not registered to him, his inconsistent answers, his furtive movements, and his contradictory stories. Additionally, the State notes that Dillard threw something from his moving vehicle, “surreptitiously placed something in an overhead compartment, and made several other covert movements.” *Id.*

We consider these facts in turn. First, Detective Kabella saw Dillard speed and throw something from the Explorer, and noted that Dillard was not driving his own vehicle. Although these facts were known to the officer in the course of the traffic stop, Dillard received no citation for littering and was given only a warning for speeding because his “record was good” and “the registration [while not Dillard’s] was valid.” *Tr.* at 12. The officer then indicated that the stop was complete and Dillard was free to go.

Second, Detective Kabella testified that he found Dillard’s answers inconsistent and stories contradictory because Dillard said he worked the midnight shift, yet apparently “was used to sleeping at night” and made the trip from Lafayette to Chicago and back in less time than Detective Kabella thought possible. *Appellee’s Br.* at 5. As to these factors, we find no blatant contradiction or inconsistent answers. Detective Kabella assumed what Dillard meant when he said he worked the midnight shift, stating,

“Midnights to me is eleven to seven. Eleven p.m. to seven a.m.” *Tr.* at 12. He did not ask Dillard what he meant by the midnight shift or otherwise confirm his understanding of what he implied. It is quite possible that Dillard’s account of the trip was consistent with his statement and that he worked the four p.m. to midnight shift, not eleven p.m. to seven a.m. Moreover, if Detective Kabella’s implication was correct and Dillard’s work shift was eleven p.m. to seven a.m., Dillard had told the officer that he was off work that day. This statement may have meant that he did not work his shift that morning. Again, the officer failed to inquire further.

At trial, Detective Kabella testified that the timing of the trip also added to his suspicion of criminal activity:

Mr. Dillard wasn’t in his working clothes. I’ve worked in . . . with unions . . . I know OSHA and you’ve got to have certain clothing to work in a factory. So, this would mean to me that he took the time . . . he had to take the time . . . to probably drive home, if not to change clothes but at least to pick up his son and then start the trip to Chicago. So, the timeframe was just a little . . . a little quick to make this trip.

Id. at 13. Detective Kabella did not seek any further information regarding the trip; for instance, he did not ask Dillard whether he worked in a uniform, whether he brought a change of clothes to work, whether his son was dropped off at work or had to be picked up, or even how far the trip was to drop off his son. In the absence of such information, Detective Kabella’s inferences regarding the timing of Dillard’s trip to Chicago were speculation.

None of the factors offered by the State are sufficient to give rise to reasonable suspicion of criminal activity. Indeed, all of these facts were known by Detective

Kabella when he informed Dillard he was just being issued a warning and was free to go. We find nothing here that could have “generated the necessary reasonable suspicion to justify a further detention.” *Harper*, 922 N.E.2d at 79; *see D.K.*, 736 N.E.2d at 762 (juvenile defendant’s nervousness, failure to initially roll down window, failure to make eye contact with officer, and possession of police radio, plus fact that passengers turned around to look at officer, considered together, were insufficient to create reasonable suspicion for continued detention).

After telling Dillard he was free to go, the only new circumstance that could have led Detective Kabella to have a reasonable suspicion of criminal activity sufficient to detain Dillard and the Explorer long enough to conduct the canine search was Dillard’s reaction to being questioned about weapons. Detective Kabella did, in fact, consider this factor. At trial, Detective Kabella testified:

Mr. Dillard approached me and as he approached me, I asked him if he had any weapons in the vehicle. And this is another huge indicator to me. Not the fact that he stated “no,” but . . . the fact that he broke eye contact and looked at his vehicle. That’s a huge indicator which I was trained . . . most of the time they look right at the substance or particular criminal activity where it’s at in the car. A lot of time, they’ll tell you right where it is by where they’re looking.

Tr. at 15. It was at that point that Detective Kabella told Dillard to again sit in the police vehicle. Thereafter, he detained Dillard for ten more minutes and the Explorer for forty-five more minutes.

In *D.K.*, our court found that facts similar to this were insufficient to constitute the reasonable suspicion necessary to continue detaining a juvenile driver after his traffic stop had completed. Police stopped *D.K.*, a juvenile driver, for speeding and

disregarding a stop sign. *D.K.*, 736 N.E.2d at 760. The officer thought D.K. and his passengers acted suspiciously, and D.K. initially refused to roll down his window. *Id.* The passengers avoided eye contact with the officer, and when the officer returned to his vehicle, both passengers repeatedly turned and looked back at him. *Id.* The officer advised D.K. that he would not cite him and gave him a verbal warning. Then, “want[ing] to see a response,” the officer asked D.K. if he had any illicit narcotics or weapons in the vehicle. *Id.* D.K. said no and refused the officer’s request for consent to search the car. *Id.* After D.K.’s refusal to consent, the officer, who was part of a canine unit, retrieved his dog from the patrol car and conducted a dog sniff around the vehicle. *Id.* The officer advised D.K. that the dog’s alerts “established probable cause for our entry into his vehicle without his consent or a search warrant due to the . . . exigent circumstances exception pertaining to vehicle stops because it was mobile.” *Id.* The search revealed a police radio. *Id.*

The *D.K.* court analyzed and rejected each of the factors that, according to the State, constituted reasonable suspicion for the continued detention of D.K.’s vehicle. As is true in the instant case, the purpose of the traffic stop was fulfilled at the time the officer gave D.K. his verbal warning; therefore, the only possible remaining basis for reasonable suspicion was that D.K. refused to consent to the search of his vehicle. *Id.* at 672. The *D.K.* court noted:

The refusal to consent voluntarily to a search cannot be “considered in determining reasonable suspicion.” . . . [A]ny other rule “would make mockery of the reasonable suspicion” requirement by letting a “citizen’s insistence that searches and seizures be conducted in conformity with

constitutional norms . . . create the suspicion or cause that renders their consent unnecessary.

D.K., 736 N.E.2d at 761 (internal citations omitted). We concluded that the facts articulated by the officer for detaining *D.K.* after giving him a verbal warning for the traffic offense, which was the purpose of the stop, consisted of no more than “unparticularized suspicions,” and the refusal to voluntarily consent to a search could not be considered to constitute grounds for suspicion. *Id.* at 762-63. The *D.K.* court held, “The facts articulated do not form the basis for *Terry*-level reasonable suspicion to detain *D.K.* further in order to conduct a canine sniff of his vehicle. Therefore, the sniff of *D.K.*’s vehicle was unreasonable.” *Id.* at 763. This court concluded that *D.K.*’s motion to suppress admission of the police scanner that was found as a result of the illegal detention should have been granted. *Id.* (internal citation omitted).

As Dillard notes, two other cases also support his position. *See Wells*, 922 N.E.2d at 700 (canine unit summoned only after officer obtained all information needed to write traffic ticket, and canine unit arrived “nearly twenty minutes after [defendant]’s traffic stop could have been completed and almost forty minutes after it began”); *Wilson v. State*, 847 N.E.2d 1064, 1066 (Ind. Ct. App. 2006) (warrant check was completed at 1:58 a.m., warning tickets were written at 2:06 a.m., and canine unit was summoned at 2:15 a.m., only after defendant declined consent to search car). “In both cases, this court concluded the canine sniff significantly prolonged the defendants’ detention, which, because it was unsupported by reasonable suspicion of criminal activity, violated the

Fourth Amendment.” *Bush v. State*, 925 N.E.2d 787, 790-91 (Ind. Ct. App. 2010), *decision clarified on reh’g*, 929 N.E.2d 897 (Ind. Ct. App. 2010).

Here, Detective Kabella initiated a traffic stop because Dillard was speeding. Detective Kabella initially did not inquire about weapons for officer safety but, instead, had Dillard sit in the passenger seat of the police vehicle. The two men talked while Detective Kabella checked Dillard’s license and the car’s registration. Detective Kabella gave Dillard a warning and told him he was free to go. It was only then that Detective Kabella inquired about weapons. Following our court’s reasoning in *D.K.*, we hold that Dillard’s reaction to Detective Kabella’s question regarding weapons was insufficient to provide him with reasonable suspicion that Dillard was engaging in criminal activity such that he could continue to detain Dillard or the Explorer. The delay in conducting the canine search was considerably longer than those conducted—and found to be unreasonable—in *Wells* and *Wilson*. We hold that the seizure of Dillard’s vehicle and the subsequent search were unreasonable and violated Dillard’s rights under the Fourth Amendment. The cocaine that was the result of that illegal search should not have been admitted at trial. We therefore reverse Dillard’s conviction.

Reversed.

CRONE, J., concurs.

BRADFORD, J., dissents with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

DUNCAN DILLARD,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 37A03-1007-CR-376
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

BRADFORD, Judge, dissenting.

I cannot agree with the majority’s conclusion that the State failed to produce sufficient evidence to establish that Detective Kabella had reasonable suspicion to detain and search Dillard’s vehicle. The record reveals evidence that easily supports a finding of reasonable suspicion. Consequently, I respectfully dissent.

While most would acknowledge that it is not unusual for a law-abiding citizen to become nervous during an encounter with police, Dillard’s nervousness seemed to go well beyond what one would expect an otherwise innocent person to exhibit. When Detective Kabella asked Dillard for his license and registration, Dillard’s hands were “very shaky [and i]t took him several times to get his ... license out of his wallet.” Tr. p. 9. Once Dillard was in Detective Kabella’s vehicle, “[h]e was sweating a lot in his face[,

h]is legs were bouncing[, and h]e really didn't make a lot of [eye] contact.” Tr. p. 11. More important, however, is the fact that not only did Dillard's nervousness not abate when Detective Kabella told him that he was only going to give him warnings, it intensified. This observation undercuts the notion that Dillard was only nervous about the prospect of receiving traffic tickets. Detective Kabella was fully justified in concluding that Dillard must have been nervous about something else.

The evidence regarding Dillard's furtive movements is also significant. After Detective Kabella initially told Dillard to come sit in his vehicle, he began walking back to his vehicle while “ke[eping] an eye on Mr. Dillard[.]” Tr. p. 10. Detective Kabella witnessed “one quick motion to the overhead[,] one quick arm movement, the lid dropped, and then I seen him place something in and close the lid.” Tr. p. 10. The nature and timing of Dillard's movement to the overhead compartment indicate that Dillard either believed or, at the very least hoped, that it would not be observed, rendering it suspicious. Moreover, Detective Kabella's testified that he saw Dillard “make several more covert movements” before he left his vehicle. Tr. p. 10.

Dillard's reaction when asked if he had a weapon in his vehicle would lead a reasonable person to believe that criminal activity was afoot. Detective Kabella testified that a “huge indicator” of criminal activity in his view was the fact that Dillard broke eye contact and looked at his vehicle when asked if he had weapons, “[n]ot the fact that he stated ‘no,’” or that he refused to consent to a search. Tr. p. 15. Detective Kabella's conclusion in this respect was much more than a hunch: “That's a huge indicator which I was trained ... most of the time they look right at the substance or particular criminal

activity where it's at in the car. A lot of times, they'll tell you right where it is by where they're looking." Tr. pp. 15-16. In other words, Detective Kabella's conclusion was based on specific observation, training, and experience, just the sort of objective, articulable basis on which reasonable suspicion must rest.

While the record was not sufficiently developed to make much out of Detective Kabella's conclusion that Dillard's story did not hold water,⁶ it still supports a finding that there was reasonable suspicion to search Dillard's vehicle. The record contains evidence of Dillard's extreme nervousness that only increased when told he was only getting a warning, his numerous furtive movements, and his incriminating reaction when asked if his vehicle contained weapons, evidence that would lead a reasonable person to a reasonable suspicion that criminal activity was afoot.

This case is distinguishable from *D.K. v. State*, 736 N.E.2d 758 (Ind. Ct. App. 2000), on the facts. Essentially, all the officer in *D.K.* had to go on was nervousness and refusal to consent to a search, which was found to be insufficient. Here, as previously mentioned, the record contains more. Detective Kabella witnessed extreme nervousness that only increased when an otherwise innocent person's would have abated, numerous furtive movements, and a reaction to Detective Kabella's question regarding firearms that, according to his training and experience, indicated the presence of contraband. *D.K.* does not dictate reversal here. Since there was ample reasonable suspicion to detain Dillard's vehicle, *Wells v. State*, 922 N.E.2d 697 (Ind. Ct. App. 2010), *trans. denied*, and

⁶ It may be that Dillard meant for it to be understood that he was claiming to have worked until 7:00 a.m. when he claimed to have worked the midnight shift before driving to Chicago, but there is no indication that Detective Kabella clarified this.

Wilson v. State, 847 N.E.2d 1064 (Ind. Ct. App. 2006), are also inapposite. The detentions in *Wells* and *Wilson* were improper, but those cases involved detention where no reasonable suspicion existed. So long as reasonable suspicion existed to detain Dillard's vehicle, reasonable detention for investigation was permissible.

Reasonable suspicion justifying a limited investigative stop gives police the right to "temporarily freeze the situation in order to make investigative inquiry." *Platt v. State*, 589 N.E.2d 222, 227 (Ind. 1992). "[T]here is [no] litmus paper test for ... determining when a seizure exceeds the bounds of an investigative stop." *Florida v. Royer*, 460 U.S. 491, 506 (1983). The United States Supreme Court has refused to adopt a "hard-and-fast time limit for a permissible Terry stop." *United States v. Sharpe*, 470 U.S. 675, 686, (1985). "Much as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria." *Id.* at 685.

In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

Id. at 686.

The forty-five minute detention of Dillard's vehicle was reasonable. Detective Kabella testified that he stopped Dillard near the 205 mile marker on Interstate 65, which is very near the southern border of Jasper County.⁷ Detective Kabella also testified that

⁷ *Highway Map of Jasper County*, INDIANA DEPARTMENT OF TRANSPORTATION (last visited February 17, 2011), <http://www.in.gov/indot/2670.htm>.

he attempted to locate a canine unit in “Jasper County, Rensselaer, [and] Remington[,]” but that none were available any closer than Lake County, whose southern border was approximately thirty miles to the north. Under the circumstances, the forty-five minute delay here was not unreasonable, given Detective Kabella’s attempts to secure a closer canine unit.⁸ The judgment of the trial court should be affirmed.⁹

⁸ Courts have upheld detentions of forty-five minutes, *United States v. Davies*, 768 F.2d 893 (7th Cir. 1985), fifty minutes, *United States v. Alpert*, 816 F.2d 958 (4th Cir.1987); sixty minutes, *United States v. Large*, 729 F.2d 636 (8th Cir.1984); *United States v. Campbell*, 627 F. Supp. 320 (D. Alaska 1985), *aff’d* 810 F.2d 206 (9th Cir.1987); and seventy-five minutes, *United States v. Borys*, 766 F.2d 304 (7th Cir. 1985). It is worth noting that each of the last four cited cases involved delays necessitated by efforts to obtain a narcotics dog.

⁹ Dillard does not make a separate cogent Indiana Constitutional argument.