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IN THE
COURT OF APPEALS OF INDIANA

TAMMY JO PABST,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0611-CR-542
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth Scheibenberger, Judge
Cause No. 02D04-0602-FD-101

June 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Tammy Jo Pabst appeals her conviction of possession of marijuana as a Class D felony.[1] She asserts the court erred when it admitted the marijuana seized from her car and her person because the search of her car violated her right to be free from unreasonable search and seizure under both the federal and state constitutions. We affirm.

FACTS AND PROCEDURAL HISTORY

On February 3, 2006, Fort Wayne Police Officer Steven Espinoza was working undercover when he saw Lawrence King enter a car and drive away. Because Officer Espinoza believed King had an outstanding arrest warrant, he followed the car and contacted a uniformed officer, Christopher Furge. After confirming King's outstanding arrest warrant, Officer Furge pulled over the car King was driving. As Officer Furge walked toward the car, he noticed the passenger, Pabst, was "furtively" handling her purse. (Tr. at 12.)

Officer Furge ordered both King and Pabst out of the car. After verifying King's identity, Officer Furge placed King under arrest. King acknowledged he did not have a driver's license and the car belonged to Pabst. Officer Furge asked Pabst if the car was hers, and she confirmed it was. He asked if there were any weapons in the vehicle, and she responded, "Search it. There are no weapons." (*Id*. at 15.) As Officer Furge quickly searched the car for weapons, he noticed two marijuana roaches in the open ashtray in the front of the vehicle. Officer Furge told Detective Engelman to search Pabst's purse

[1] Ind. Code § 35-48-4-11.

because he had probable cause to arrest her. Detective Engelman found two bags containing over thirty grams of marijuana.

The State charged Pabst with possession of marijuana. During trial, Pabst challenged the admissibility of the marijuana collected from her car and her purse. The court admitted all the evidence and found Pabst guilty of possession of marijuana.

DISCUSSION AND DECISION

Pabst challenges the admission of evidence.[2] We review the trial court's admission of evidence for an abuse of discretion. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). "An abuse of discretion in this context occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law." *Id.* at 703. When reviewing the denial of a motion to suppress, we do not reweigh evidence, but determine if substantial evidence of probative value supports the trial court's decision. *Meyers v. State*, 790 N.E.2d 169, 171 (Ind. Ct. App. 2003). "We look to the totality of the circumstances and consider all uncontroverted evidence together with conflicting evidence that supports the trial court's decision." *Id.*

[2] Pabst does not question that police could stop her vehicle to arrest King, for whom there was an outstanding arrest warrant. Nor does she challenge that police could order her from the passenger seat of her car for police safety as they were arresting King. *See Mitchell v. State*, 745 N.E.2d 775, 780 (Ind. 2001) ("due to the greater danger to an officer from a traffic stop when there are passengers present in addition to the driver of the stopped car, an officer making a traffic stop may order passengers to get out of the car pending completion of the stop"). Neither is there any question the police could search her purse incident to her arrest for possession of the marijuana roaches found in the open ashtray in the front of her vehicle. *See Meyers v. State*, 790 N.E.2d 169, 172-73 (Ind. Ct. App. 2003) ("Under the search-incident-to-arrest exception to the warrant requirement, a police officer may conduct a search of the defendant's person and the area within his control."). Rather, she challenges the validity of Officer Furge's search of her vehicle for weapons.

Pabst claims her consent to the search of the car was invalid under the Indiana Constitution because police failed to give her a *Pirtle* advisement[3] prior to obtaining her consent to search for weapons. "[A] person in custody must be informed of the right to consult with counsel about the possibility of consenting to search before a valid consent can be given." *Joyner v. State*, 736 N.E.2d 232, 241 (Ind. 2000).

To determine whether an individual was in custody, we ask whether a reasonable person in the same circumstances would believe he or she was under arrest and not free to resist the police. *Meyers*, 790 N.E.2d at 172. While Pabst was ordered to exit the car, that alone is insufficient to place her in police custody. *See Mitchell*, 745 N.E.2d at 780 ("A routine traffic stop is more analogous to a so-called *Terry* stop than to a formal arrest.") (internal quotations omitted). Officer Furge testified that before Pabst consented to the search he did not have a warrant for her arrest and had not even determined her identity.[4] Neither Detective Engelman nor Pabst testified; thus no evidence suggests they had any interaction between the time Pabst was removed from the car and the time he searched her purse. Under these facts, we cannot conclude Pabst was "in custody." Thus, no *Pirtle* advisement was required.

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[3] In *Pirtle v. State*, 263 Ind. 16, 28, 323 N.E.2d 634, 640 (1975), our Indiana Supreme Court held:

> A person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel, prior to making the decision whether to give consent. This right, of course, may be waived, but the burden will be upon the State to show that such waiver is explicit, and as in *Miranda*, the State will be required to show that the waiver was not occasioned by the defendant's lack of funds.

[4] Officer Furge testified he did not believe Pabst was free to leave during the arrest of King, because he wanted to check to see if she had any active warrants. However, neither Officer Furge nor anyone else testified he transmitted his belief to Pabst either verbally or non-verbally. Accordingly, we decline to place as much weight on his testimony as Pabst would, because the focus of our analysis is what a reasonable person in Pabst's situation would believe, not what the officer believed.

Pabst argues the search of her car was improper under the Fourth Amendment to the United States Constitution because no facts could have given police a reasonable belief they needed to search the car for weapons to maintain officer safety while arresting King. However, Pabst's argument ignores the fact she consented to the search of her car. "One well-recognized exception to the warrant requirement is a voluntary and knowing consent to search." *Meyers*, 790 N.E.2d at 172.

> When the State seeks to rely upon consent to justify a warrantless search, it has the burden of proving that the consent was freely and voluntarily given. The voluntariness of this consent to search is a question of fact to be determined from the totality of the circumstances. A consent to search is valid unless it is procured by fraud, duress, fear, or intimidation, or where it is merely a submission to the supremacy of the law. To constitute a valid waiver of Fourth Amendment rights, a consent must be the intelligent relinquishment of a known right or privilege. Such a waiver cannot be conclusively presumed from a verbal expression of assent unless the court determines, from the totality of the circumstances, that the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license the person knows may be freely and effectively withheld. Knowledge of the right to refuse a search is one factor that indicates voluntariness.
>
> 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 education and intelligence; (3) whether the defendant was advised of his right not to consent; (4) whether the defendant has had previous encounters with law enforcement; (5) whether the officer claimed 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.

Id. (internal citations omitted).

After applying these factors to Pabst's situation, we find her consent was knowing and voluntary. *Miranda* warnings were not required because Pabst was not in custody.

Pabst has a prior conviction, which indicates previous experience with law enforcement, and she apparently was cooperative with police throughout this encounter. The record does not indicate Officer Furge behaved illegally, claimed to have authority to search without consent, or was deceptive about his identity or the purpose of his search. Under these facts, we cannot say the trial court erred in finding Pabst's consent voluntary.

CONCLUSION

Officer Furge's sweep of Pabst's vehicle for weapons violated neither the Fourth Amendment to the United States Constitution or Article 1, Section 11 of the Indiana Constitution. The trial court did not abuse its discretion by admitting the evidence. Therefore, we affirm Pabst's conviction of possession of marijuana as a Class D felony.

Affirmed.

BAILEY, J., and SHARPNACK, J., concur.