

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:

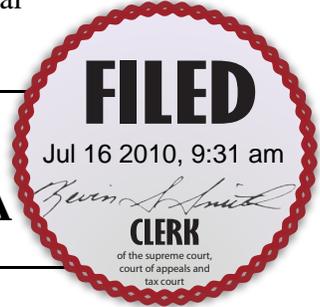
KURT A. YOUNG
Nashville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



AARON R. ROSS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)

No. 49A05-0911-CR-637

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G20-0902-FA-27646

July 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Aaron Ross appeals his convictions for Class A felony dealing in cocaine, Class C felony possession of cocaine and a firearm, Class C felony carrying a handgun without a license, and three counts of Class D felony possession of a controlled substance. We affirm.

Issue

Ross raises one issue, which we restate as whether the trial court properly admitted evidence obtained following a canine sniff of his vehicle.

Facts

Shortly after midnight on February 24, 2009, Ross was driving a pickup truck in Marion County. There were two passengers in Ross's truck. Officer Michael O'Day of the Indianapolis Metropolitan Police Department was driving behind Ross when he saw Ross go left of center for approximately five to ten seconds two times. Officer O'Day conducted a traffic stop. Ross did not have his registration or driver's license. Officer O'Day noticed Ross smelled like alcoholic beverages and his speech was slow. During the stop, Officer O'Day learned Ross's driver's license was suspended. Officer O'Day requested assistance from a K-9 unit and began conducting field sobriety tests. Officer David Harper arrived at the scene with his dog, Bad, while Officer O'Day was conducting the field sobriety tests. During a canine sniff of Ross's vehicle, Bad "made a positive indication" at the rear of Ross's truck. Tr. p. 24.

The bed of Ross's truck was covered. Police opened the tailgate and conducted a search where they discovered five guns, cocaine, digital scales, hydrocodone, clonazepam, and alprazolam. Ross had \$2300 in cash in his pocket.

The State charged Ross with Class A felony dealing in cocaine, Class C felony possession of cocaine, Class C felony possession of cocaine and a firearm, Class A misdemeanor carrying a handgun without a license, which was elevated to a Class C felony based on a prior conviction, and three counts of Class D felony possession of a controlled substance. At some point, Ross filed a motion to suppress the evidence obtained following the canine sniff. The trial court considered Ross's motion during the bench trial. The trial court overruled Ross's objection to the admission of the evidence and admitted it. The trial court found Ross guilty as charged.¹ Ross now appeals.

Analysis

Ross argues that the canine sniff was improper, and the evidence obtained during the subsequent search of his truck should not have been admitted.² In reviewing a trial court's ruling on the admissibility of evidence from an allegedly illegal search, we do not reweigh the evidence. Meredith v. State, 906 N.E.2d 867, 869 (Ind. 2009). We defer to the trial court's factual determinations unless clearly erroneous, view conflicting

¹ The trial court merged the Class C felony possession of cocaine charge with the Class A felony dealing in cocaine charge.

² Ross also appears to argue that the search of his truck was an unlawful warrantless search. As the State points out, however, Ross did not raise the issue of the warrantless search at trial. Because a defendant may not raise one ground for objection at trial and argue a different ground on appeal, this issue is waived. See Small v. State, 736 N.E.2d 742, 747 (Ind. 2000).

evidence most favorably to the ruling, and consider afresh any legal question of the constitutionality of a search or seizure. Id.

Regarding Ross's challenge to the canine sniff under the Fourth Amendment, the United States Supreme Court has declared, "the use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view,'—during a lawful traffic stop, generally does not implicate legitimate privacy interests." Illinois v. Caballes, 543 U.S. 405, 409, 125 S. Ct. 834, 838 (2005) (citation omitted). Although the use of a drug-detection dog does not amount to a search, it might amount to an unlawful seizure. For example, "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." Id. at 407, 125 S. Ct. at 837. "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." Id., 125 S. Ct. at 837.

Because the canine sniff did not amount to a search under the Fourth Amendment, Ross's argument is limited to whether the seizure was unlawful. It was not. The record shows that Officer O'Day was still conducting the field sobriety tests when the canine sniff occurred. Thus, Ross has not established that his Fourth Amendment rights were violated. See Myers v. State, 839 N.E.2d 1146, 1150 (Ind. 2005) (concluding no Fourth Amendment violation occurred where the record supported the trial court's determination that the canine sniff test occurred while the traffic stop was ongoing).

Ross also argues that the canine sniff violated Article 1, Section 11 of the Indiana Constitution. “To determine whether a search or seizure violates the Indiana Constitution, courts must evaluate the ‘reasonableness of the police conduct under the totality of the circumstances.’” Id. at 1153 (quoting Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005)). Our supreme court has explained:

[A]lthough we recognize there may well be other relevant considerations under the circumstances, we have explained reasonableness of a search or seizure as turning on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizens’ ordinary activities, and 3) the extent of law enforcement needs.

Id. (quoting Litchfield, 824 N.E.2d at 361).

In State v. Gibson, 886 N.E.2d 639 (Ind. Ct. App. 2008), a canine sniff was conducted while the investigating officer checked on the status of Gibson’s license and wrote a warning ticket. At issue, in part, in Gibson was whether the canine sniff violated Gibson’s Indiana Constitutional rights. The record in Gibson did not suggest that the investigating officer had any suspicion or knowledge that Gibson possessed drugs or paraphernalia. Gibson, 886 N.E.2d at 643. Nevertheless, the investigating officer did not intrude on Gibson’s freedom because the canine sniff was conducted while Gibson was still being detained for the lawful traffic stop. Id. Regarding the extent of law enforcement needs, we noted that the trafficking of illegal drugs is frequently associated with violence and that no simpler method exists for detection of hidden drugs than a dog sniff. Id. Given the totality of the circumstances, we concluded that the canine sniff was not unreasonable under Article 1, Section 11 of the Indiana Constitution.

As in Gibson, Officer O’Day did not suspect Ross of illegally possessing guns or drugs. In fact, Officer O’Day apparently initially suggested that Ross would be permitted to allow someone to recover his truck instead of having it towed. Nevertheless, the canine sniff was conducted less than fifteen minutes after Officer O’Day initiated the traffic stop and occurred while Officer O’Day was still in the process of lawfully conducting the field sobriety tests. Because the canine sniff did not prolong the investigation, it did not intrude on Ross’s freedom. Finally, as the Gibson court recognized, the trafficking of illegal drugs is often associated with violence—Ross, in fact, had five handguns in his truck—and a canine sniff is a simple procedure for detecting illegal drugs. Given the totality of the circumstances, Ross has not established that the canine sniff violated his rights under the Indiana Constitution.

Conclusion

Ross has not established that the trial court abused its discretion by admitting evidence obtained as a result of a canine sniff. We affirm.

Affirmed.

BAILEY, J., and MAY, J., concur.