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IN THE
COURT OF APPEALS OF INDIANA

OMAR MCINTOSH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0610-CR-928
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Barbara Collins, Judge
Cause No. 49F08-0506-CM-95244

August 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a bench trial, Omar McIntosh appeals his convictions of possession of marijuana and possession of paraphernalia, both Class A misdemeanors. McIntosh raises two issues: whether evidence admitted against him was discovered pursuant to a search warrant that was not supported by probable cause; and whether the procedure through which the police obtained the evidence against him was reasonable under the totality of the circumstances. Concluding that probable cause existed to support the warrant and that the police acted reasonably, we affirm.

Facts and Procedural History

On June 5, 2006, Officers Raif Szczepanski and Glenn Hollandsworth, of the Indianapolis Police Department, were dispatched to 1317 ½ South Kappes Street, in Marion County, Indiana, in response to an anonymous tip reporting the sale and use of narcotics. Officers Szczepanski and Hollandsworth arrived at 1317 Kappes Street,[1] and observed a man later identified as McIntosh sitting on the porch. When McIntosh observed the officers, he "turned his head to the right and looked, made eye contact with [Officer Szczespanski], his eyes widen[ed] and he immediately jumped up from his chair and tried to get in his front door frantically." Transcript at 17. Upon observing this behavior, Officer Szczepanski, who was dressed in a full police uniform yelled, "police, stop" several times. McIntosh "continued to fumble with his keys trying to get in the door," and before the officers could reach McIntosh, he had entered his residence and locked the door. Id. The officers beat on

his door and walked around the residence, yelling at McIntosh to come outside, but received no response. Officers Szczepanski and Hollandsworth then summoned Sergeant William Clarke, who soon arrived on the scene and determined that the best course of action would be to obtain a search warrant. The officers observed plastic baggies and pieces of baggies on the front porch. Sergeant Clarke testified that he observed a small piece of cellophane with "some type of powder residue in it [that] could've been white, could've been light brown." Id. at 92. Officer Szczepanski testified at one point that "[t]o the naked eye the baggies didn't appear to have any residue or any substance inside them," id. at 86, and at another point that he recalled seeing residue in a single baggie, id. at 88. The officers then called Detective Lloyd Walker, who prepared a probable cause affidavit based on the information relayed to him by Officers Szczepanski and Hollandsworth. The probable cause affidavit contains the following information:

> On June 5, 2005, at 10:38 AM, Officers Raif Szczepanski and Glenn Hollandsworth were dispatched to 1317 S. Kappes Street on a report of a black man and white man selling narcotics on the front porch. On arrival, Officer Szczepanski observed a black male, 6' tall, dark complexion, heavy build, short hair, some facial hair, wearing a thin checked shirt over a white T-shirt and dark shorts and high-top basketball shoes, sitting in a chair on the porch. Officer Szczepanski approached the man and stated that he needed to talk to him. The man got up produced a key to the house from his pocket and opened the front door. Officer Szczepanski, in full police uniform, shouted "Stop, Police!" several times as he ran to intercept the man, who continued [to] run inside the house and then slammed the door shut, locking it behind him. The key remained stuck in the outside lock, however.
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> On the front porch the Officers found two plastic ziplock bags, one sandwich-sized, the other much smaller and containing a white powder residue. These small plastic bags are the type often used to package narcotics for sale, and the

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[1] There was some dispute as to the precise proximity of 1317 to 1317 ½ Kappes Street. However, the two locations seem to be relatively close to each other.

> white powder appeared to the officers from their training and experience to likely be narcotics. Officers immediately surrounded the house and have monitored it closely since that time. . . .

Appellant's Appendix at 33. After examining the affidavit, the magistrate issued a search warrant authorizing officers to enter the residence and "diligently search for . . . a black male, 6'tall . . . wearing a thin checked shirt over a white t-shirt . . . [and] to seize such person." Id. at 32.

After receiving the search warrant, the officers entered the residence and found McIntosh in the kitchen. While in the kitchen, Officer Szczepanski observed and seized a pipe containing a substance that later testing revealed to be marijuana. The State charged McIntosh with possession of marijuana and possession of paraphernalia.

Prior to trial, McIntosh filed a motion to suppress the pipe and marijuana, claiming that the search warrant was not supported by probable cause as required by Indiana Code section 35-33-5-2. The trial court denied this motion, and the case proceeded to trial, at which the trial court found McIntosh guilty of both charges and sentenced him to 165 days of home detention on each count.[2] McIntosh now appeals.

Discussion and Decision

Before addressing the merits, we note that in its appellate brief, the State has conceded that the warrant was not supported by probable cause. However, "[w]hen the State concedes error, we are nonetheless duty bound to review the facts and apply the law correctly." Gardner v. State, 591 N.E.2d 592, 593 (Ind. Ct. App. 1992). "Were we to

accept a concession as dispositive of an issue, we would effectively abdicate our judicial function in favor of a party." Id. Therefore, even though the State and McIntosh both argue that we should reverse, we will still review the record to determine whether reversal is proper.

I. The Search Warrant

A. Standard of Review

When reviewing a challenge to the existence of probable cause, we must determine whether the magistrate who issued the warrant had a "substantial basis" from which he or she could conclude that probable cause existed. State v. Spillers, 847 N.E.2d 949, 953 (Ind. 2006). We will review de novo the trial court's determination that such a substantial basis existed. Id. However, we will afford the magistrate's initial determination significant deference and will "focus on whether reasonable inferences drawn from the totality of the evidence support that determination." Id. We will resolve doubtful cases in favor of upholding the warrant. Redden v. State, 850 N.E.2d 451, 461 (Ind. Ct. App. 2006), trans. denied.

B. Probable Cause to Support the Warrant

When deciding whether to issue a search warrant, the issuing magistrate should "'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" Spillers, 847 N.E.2d at 953 (quoting Illinois v. Gates, 462 U.S.

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[2] The record is not clear as to whether the trial court ordered these sentences to run consecutively or

213, 238 (1983)).

McIntosh and the State both argue that the warrant lacked probable cause because at the time Officers Szczepanski and Hollandsworth initially encountered McIntosh and instructed him to stop, the officers lacked the reasonable articulable suspicion necessary to conduct an investigatory stop under Terry v. Ohio, 392 U.S. 1 (1968). However, no investigatory stop occurred, as McIntosh failed to comply with the officers' demands to stop, and instead fled into the residence. Murphy v. State, 747 N.E.2d 557, 559 (Ind. 2001) ("[S]eizure does not occur when the suspect fails to yield to law enforcement authority." (citing California v. Hodari D., 499 U.S. 621 (1991))). Therefore, the initial encounter between McIntosh and the officers did not implicate the Fourth Amendment. Wilson v. State, 670 N.E.2d 27, 31 (Ind. Ct. App. 1996) ("[T]here can be no violation of the Fourth Amendment until a physical seizure of the person has been accomplished."); see Gooch v. State, 834 N.E.2d 1052, 1055 (Ind. Ct. App. 2005), trans. denied (where defendant did not yield to police officer's instruction to stop, evidence of cocaine abandoned by defendant was not the product of an illegal seizure).

McIntosh argues that the anonymous tip that led police to McIntosh's residence in the first place was not enough to support a finding of probable cause. We recognize that uncorroborated hearsay from a source of unknown credibility, standing alone, is insufficient to support a finding of probable cause and issuance of a search warrant. Gates, 462 U.S. at 227; Ind. Code § 35-33-5-2(b) (requiring that probable cause affidavits based on hearsay

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concurrently.

either establish the credibility of the source or that the totality of the circumstances corroborate the informant's statements). Had officers seized McIntosh solely on the basis of the anonymous tip, we would have a different situation. Cf. Wilson, 670 N.E.2d at 31 ("Ironically, then, had [the defendant] remained and not fled, his argument against a reasonable suspicion may have been enhanced."). However, as discussed above, no seizure was effected until after the police had secured a warrant.

Moreover, the warrant application in this case did not rely on the initial anonymous tip, and instead relied on the observation of the police officers. See Redden, 850 N.E.2d at 462 (uncorroborated hearsay was included to explain the investigation, but was not crucial to the determination of probable cause). Although the anonymous tip clearly did not provide probable cause to support the warrant, the warrant application was based on the police officers' observations of McIntosh's unprovoked flight, refusal to stop after being directed to by uniformed police officers, and the presence of baggies on the front porch.

McIntosh argues that this basis contained in the warrant application included "false or misleading information . . . namely the description of someone on the porch and the presence of baggies with cocaine residue also on the porch." Appellant's Br. at 9. When a party alleges that a warrant application contains false or misleading information that was not the result of an innocent mistake, that party "must make a substantial showing that the facts were included in reckless disregard for the truth." Redden, 850 N.E.2d at 462 n.11. Although the officers' testimony was not entirely consistent, Sergeant Clarke testified that he observed residue in a baggie, and Officer Szczepanski at one point testified that he saw residue in a

single baggie. We conclude that McIntosh has failed to make a substantial showing that the information in the warrant application disregarded the truth.

Even if the information regarding the residue was included with reckless disregard of the truth, McIntosh has failed to show that the remainder of the information in the application does not support a finding of probable cause. See Jones v. State, 783 N.E.2d 1132, 1136 (Ind. 2003) (defendant claiming warrant application contained perjured information must also show that "the rest of the affidavit does not contain materials sufficient to constitute probable cause" (citing Franks v. Delaware, 438 U.S. 154, 171-72 (1978))). As discussed above, the warrant application contained information that officers had observed McIntosh flee into his residence upon seeing the officers, and refuse to stop after being ordered to by uniformed police officers. Such behavior strongly suggests come sort of criminal behavior. See Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (recognizing that nervous or evasive behavior is relevant to a finding of reasonable suspicion, and that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion"); Hardister v. State, 849 N.E.2d 563, 570-71 (Ind. 2006) (anonymous tip, along with suspect's unprovoked flight from law enforcement in an area known for narcotics trafficking, gave officers reasonable suspicion to conduct an investigatory stop); Platt v. State, 589 N.E.2d 222, 226 (Ind. 1992) (where police officer pulled up behind a stopped motorist and motorist immediately fled, "[t]hese facts alone were sufficient to give rise to a reasonable suspicion in the mind of a trained police officer that some further investigation was warranted").

Also, whether or not the baggies contained residue, officers observed baggies and

pieces of baggies on McIntosh's front porch. Officer Szczepanski testified that "it's common knowledge [such baggies are] used for storage and distribution of narcotics." Tr. at 84. Officer Hollandsworth also testified that the remnants of plastic bags are usually indicative of narcotics sales.

The circumstances of McIntosh's unprovoked flight, his refusal to stop after being directed to by uniformed police officers, and the presence of baggies, with or without residue, on the front porch constitute a substantial basis from which the magistrate could have found probable cause to issue a search warrant. We conclude that the search of McIntosh's residence did not violate the Fourth Amendment.

II. Indiana Constitution

Although the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution are textually indistinguishable,[3] analysis under Article 1, Section 11 is distinct from that under the United States Constitution. Holder v. State, 847 N.E.2d 930, 940 (Ind. 2006). "[W]e frequently find Indiana judicial precedent, history or other factors to dictate a different result under the state provision, even where the federal and state constitutions are textually similar or even identical." Richardson v. State, 717 N.E.2d 32, 63 (Ind. 1999) (Boehm, J., concurring in result). When determining whether a search and seizure is unreasonable under the Indiana Constitution, we must determine whether the

[3] The Fourth Amendment to the United States Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." Article 1, Section 11, of the Indiana Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated . . . ."

procedure was reasonable under the totality of the circumstances. Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005). In making this determination, we engage in a three part balancing test considering: "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. at 361.

Here, officers went to McIntosh's residence in response to an anonymous tip reporting narcotics use and dealing. Officers may reasonably approach the subject of an anonymous tip to ask consensual questions. See Clarke v. State, 868 N.E.2d 1114, 1118 (Ind. 2007). Officer Szczepanski testified that when the officers arrived on the scene, McIntosh "turned his head to the right and looked, made eye contact with me, looked at me, his eyes widen[ed] and he immediately jumped up from his chair and tried to get in his front door frantically. . . ." Tr. at 17. As discussed previously, McIntosh's immediate flight into the residence upon seeing the officers is suggestive of criminal activity. See Wardlow, 528 U.S. at 124; Hardister, 849 N.E.2d at 570-71; Platt, 589 N.E.2d at 226.

After the officers instructed McIntosh to stop, McIntosh continued his attempt to flee and succeeded in locking himself inside the residence. Whether the officers would have acted reasonably in stopping McIntosh based solely upon his flight and the anonymous tip is immaterial,[4] as no stop was actually effected at this point. Instead, the officers decided to secure a search warrant based upon the combined circumstances of the anonymous tip,

[4] See Michigan v. Chesternut, 486 U.S. 567, 576 (1988) (Kennedy, J., concurring) ("[R]espondent's unprovoked flight gave the police ample cause to stop him."); Platt, 589 N.E.2d at 226-27 (defendant's

McIntosh's unprovoked flight, McIntosh's refusal to stop after being directed to by uniformed police officers, and their observation of baggies on the porch. The fact that the police in this case obtained a valid warrant is a consideration in favor of finding the police action reasonable. See Sowers v. State, 724 N.E.2d 588, 591 (Ind. 2000), cert. denied, 531 U.S. 847 (2000).

We recognize that McIntosh did indeed have a right to go about his business when the officers approached his residence on the basis of an anonymous tip. However, McIntosh did not merely go about his business, and instead fled into his residence, even after officers ordered him to stop. McIntosh did not have the right to flee. See Lashley, 745 N.E.2d at 261. "Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite." Bridgewater v. State, 793 N.E.2d 1097, 1100 (Ind. Ct. App. 2003), trans. denied (quoting Wardlow, 528 N.E.2d at 125). We emphasize that McIntosh fled from the officers, even before he was ordered to stop, and did not merely ignore the officers or casually continue with his business. See Tom v. Voida, 963 F.2d 952, 958 (7th Cir. 1992) ("In the present case, Tom did not simply depart; he threw down the bicycle and fled" (emphasis in original)). "We have differentiated between situations in which some person makes an abrupt, hasty attempt to avoid contact with law enforcement and ones in which the alleged flight consists of nothing more than turning and walking in another direction." Burkett v. State, 736 N.E.2d 304, 307 (Ind. Ct. App. 2000). Here, McIntosh's behavior demonstrated his fear of encountering the police, as upon seeing them he leapt from his chair and hastened

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unprovoked flight from uniformed police officer gave rise to reasonable suspicion); Wilson, 670 N.E.2d at 30

to put a locked door between himself and officers; he was clearly fleeing from the officers, and not merely going about his business. Compare Carter v. State, 692 N.E.2d 464, 467 (Ind. Ct. App. 1997) (defendant did not "flee" where officer was not in uniform, did not identify himself, and could not remember if he made eye contact with the defendant before defendant walked away) and Tumblin v. State, 664 N.E.2d 783, 785 (Ind. Ct. App. 1996) (defendant did not "flee" where he "did nothing more than turn and walk in the direction that he came from") with Hailey v. State, 521 N.E.2d 1318, 1319-20 (Ind. 1988) (officer had reasonable suspicion to stop defendant where officer noticed defendant acting suspiciously and when defendant "noticed that the officer was watching him, he changed direction and increased his speed") and Wilson, 670 N.E.2d at 29 (reasonable suspicion existed where defendant "turned and walked toward the vacant house and appeared to be hiding between two houses," and then ran after police exited vehicle and commanded defendant to stop). McIntosh certainly could have remained on his porch and disregarded officers' questions. However, his unprovoked flight and failure to obey the officers' demand that he stop reasonably led the officers to believe that further investigation was warranted. See Bridgewater, 793 N.E.2d at 1100 ("Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning." (quoting Wardlow, 528 N.E.2d at 125)).

We conclude that, given the totality of the circumstances, the police acted reasonably in this case. Upon arriving at a residence that was the subject of a tip regarding drug use and

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("Flight from properly identified law enforcement officers is sufficient to justify an investigatory stop.")

trafficking, the officers observed McIntosh attempt to flee into his house. When the officers ordered McIntosh to stop, he disregarded them and locked himself in the residence. While the officers were on the porch, they observed baggies, which the officers found indicative of narcotics use or trafficking. Faced with a tip indicating that narcotics use had been occurring at the residence, McIntosh's flight upon seeing the officers, McIntosh's disregard of the officers' order to stop, and the presence of baggies on the front porch, the officers secured a valid search warrant before entering the residence to arrest McIntosh. This course of conduct was reasonable, and the police action did not violate McIntosh's rights under the Indiana constitution.

Conclusion

We conclude that the warrant was supported by probable cause and that the police acted reasonably considering the totality of the circumstances.

Affirmed.

VAIDIK, J., concurs.

SULLIVAN, SR. J., concurs with opinion.

IN THE
COURT OF APPEALS OF INDIANA

OMAR MCINTOSH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0610-CR-928
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

SULLIVAN, Senior Judge, concurring

In concurring, I note that the State, conceding that there was an absence of probable cause for issuance of the search warrant, relies upon Greeno v. State, 861 N.E.2d 1232 (Ind. Ct. App. 2007). This Court, in Greeno, reversed a conviction, concluding that the police had no reasonable suspicion that the defendant had or was about to engage in criminal activity when they approached him. In Greeno, as here, the police were responding as a result of an anonymous phone call, and in addition, when the defendant saw the police approach, he arose from where he was sitting and quickly walked toward a building. He ignored the officer's demand to "stop" and entered the building although the officer was in pursuit.

In this light it is understandable that the Deputy Attorney General who filed the State's concessionary brief in this case did so because he was also the Deputy Attorney General who failed to convince this court in the Greeno appeal.

Nevertheless, I agree with the majority that our case differs from Greeno. Here, although the defendant fled the front porch into the house, before seeking the search warrant and without pursuing McIntosh, the officers observed on the front porch baggies and pieces of baggies. At least one such baggie contained a residue of a white or brown powdery substance.

This differentiating factor provided the probable cause to support the warrant.