

Ryan Armstrong appeals from his conviction after a bench trial of Operating a Vehicle While Intoxicated¹ as a class C misdemeanor, Possession of Marijuana² as a class A misdemeanor, and Possession of Paraphernalia³ as a class A misdemeanor, raising the following issues for our review:

1. Did a dog sniff of the exterior of Armstrong's vehicle conducted during a valid traffic stop violate Armstrong's rights under the Indiana Constitution such that the trial court abused its discretion by admitting the evidence discovered?
2. Is there sufficient evidence to support Armstrong's convictions of possession of marijuana and possession of paraphernalia?

We affirm.

On April 28, 2008, Indiana State Police Trooper Michael Krueger was parked near the 174 mile marker on I-65 at approximately 1:50 a.m. when he observed a vehicle pass that did not have the license plate illuminated. Trooper Krueger followed behind the vehicle and confirmed that there was no illumination of the license plate and initiated the traffic stop. Armstrong was the only occupant of the vehicle.

After the officer approached the vehicle, Armstrong stated that he had done nothing wrong and appeared to be extremely nervous. Trooper Krueger then explained the reason for the stop and observed that Armstrong's pulse was visible in his neck, his hands were shaking, his stomach was quivering, and he had difficulty producing his driver's license from his wallet. In part for safety reasons, as Armstrong had pulled over on top of a hill after a curve,

¹ Ind. Code Ann. § 9-30-5-1(c) (West, Westlaw through 2010 2nd Regular Sess.).

² Ind. Code Ann. § 35-48-4-11(1) (West, Westlaw through 2010 2nd Regular Sess.).

³ Ind. Code Ann. § 35-48-4-8.3 (West, Westlaw through 2010 2nd Regular Sess.).

and in part to further observe Armstrong, Trooper Krueger directed Armstrong to the front passenger seat of his unmarked police cruiser. Armstrong's eyes were red, bloodshot, and glassy, and his pupils were extremely dilated. The officer noted that Armstrong had a pungent body odor, but did not smell of the odor of alcoholic beverage. The trooper suspected that Armstrong was intoxicated on a narcotic.

Trooper Krueger ran computer checks, typed Armstrong's warning, and called for a drug-sniffing dog at 1:54 a.m. At approximately 2:00 a.m., Tippecanoe County Deputy Sheriff Jon Lendermon, who had brought his K-9 partner, Marko, to the location of the stop, told Trooper Krueger that Marko had alerted to the presence of narcotics on the passenger side of Armstrong's vehicle. Trooper Krueger and Deputy Lendermon then conducted an interior search of Armstrong's car and also searched the trunk. During the course of the search, Deputy Lendermon found marijuana shake, or residue of marijuana that falls when a joint is being rolled or is being placed in a bowl, on the driver's seat and in the crevice between the driver's seat and seat back. Trooper Krueger found the remnants of a marijuana cigarette and a soda can with a hole in its side that contained burnt residue and smelled of burnt marijuana in the trunk of the car.

Armstrong was arrested and transported to the Tippecanoe County Jail where he consented to a test of his blood and urine. The blood test confirmed that Armstrong had recently consumed THC, the active ingredient in marijuana. The State charged Armstrong with operating while intoxicated as a class C misdemeanor and as a class A misdemeanor, class A misdemeanor possession of marijuana, and class A misdemeanor possession of paraphernalia. The trial court denied Armstrong's motion to suppress evidence and the

matter proceeded to a bench trial. At the conclusion of the evidence the trial court found Armstrong guilty of operating while intoxicated, possession of marijuana, and possession of paraphernalia. The trial court sentenced Armstrong to 60 days for operating while intoxicated, 365 days for possession of marijuana, and 365 days for possession of paraphernalia, all to be served concurrently and all suspended to probation. Armstrong now appeals.

1.

Armstrong argues that the trial court abused its discretion by admitting the evidence recovered from his vehicle after the free-air sniff of his vehicle during his traffic stop. More specifically, Armstrong argues that the search violated his rights under article 1, section 11 of the Indiana Constitution because the use of the canine was unreasonable.

Although Armstrong asserts that the trial court erred by denying his motion to suppress, this is an appeal after a completed trial. Once a matter proceeds to trial the issue of the propriety of the trial court's ruling on a motion to suppress is no longer viable. *Kelley v. State*, 825 N.E.2d 420 (Ind. Ct. App. 2005). The issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. *Bentley v. State*, 846 N.E.2d 300 (Ind. Ct. App. 2006).

The admission of evidence is within the sound discretion of the trial court whose decision thereon will not be reversed absent a showing of manifest abuse of discretion resulting in the denial of a fair trial. *Johnson v. State*, 831 N.E.2d 163 (Ind. Ct. App. 2005). A decision is an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We consider the evidence in favor of the trial court's

ruling and any unrefuted evidence in the defendant's favor. *Id.* We will take into account the foundational evidence from the trial as well as the evidence from the motion to suppress hearing which is not in direct conflict with the trial testimony. *Kelley v. State*, 825 N.E.2d 420.

Article 1, section 11 provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated. . . ."

The purpose of this article is to protect from unreasonable police activity those areas of life that Hoosiers regard as private. The provision must receive a liberal construction in its application to guarantee the people against unreasonable search and seizure. In resolving challenges asserting a Section 11 violation, courts must consider the circumstances presented in each case to determine whether the police behavior was reasonable. We place the burden on the State to show that under the totality of the circumstances its intrusion was reasonable.

State v. Quirk, 842 N.E.2d 334, 339-40 (Ind. 2006).

To assess the reasonableness of an officer's actions under the totality of the circumstances, we must consider the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search or seizure. *State v. Gibson*, 886 N.E.2d 639 (Ind. Ct. App. 2008). That assessment includes a balancing of the following factors: 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.*

In *Gibson*, we concluded that the dog-sniff of the exterior of the defendant's vehicle during a valid traffic stop was not unreasonable under the Indiana Constitution. *Id.* Likewise, we conclude that under the totality of the circumstances in the present case, the

dog-sniff of the exterior of Armstrong's car was not unreasonable under article 1, section 11 of the Indiana Constitution. Here, Trooper Krueger suspected that Armstrong was intoxicated on narcotics, the canine arrived on the scene within a short period of time, and the use of the dog to detect hidden drugs involved a relatively simple process. The trial court did not abuse its discretion by admitting the evidence at trial.

2.

Armstrong argues that there is insufficient evidence to support his convictions of possession of marijuana and possession of paraphernalia. When reviewing claims challenging the sufficiency of the evidence we neither reweigh the evidence nor reassess the credibility of the witnesses. *Klaff v. State*, 884 N.E.2d 272 (Ind. Ct. App. 2008). We will affirm if there is sufficient evidence of probative value to support the conclusion of the trier of fact. *Trimble v. State*, 848 N.E.2d 278 (Ind. 2006).

In particular, Armstrong claims that because the officers testified they found marijuana "shake" in Armstrong's vehicle, and all of the "shake" was used in testing the substance, there is insufficient evidence of the part of the plant involved to prove that Armstrong possessed marijuana. He argues that the "shake" could have consisted of the stalks of the marijuana plant, which is not included in the statutory definition of marijuana. *See Ind. Code Ann. § 35-48-1-19* (West, Westlaw through 2010 2nd Regular Sess.).

The record here reveals that the officers testified that "shake" is the residue of marijuana that falls away when a joint is being rolled or marijuana is being placed in a bowl. The "shake" field-tested positive for marijuana. That evidence is sufficient to support the inference that the substance Armstrong possessed in his vehicle was marijuana.

Armstrong also challenges the sufficiency of the evidence supporting his conviction for possession of paraphernalia. Specifically, he argues that the State failed to establish how the soda can found in Armstrong's car could be used to introduce a controlled substance into a person's body. The record reveals that Trooper Krueger testified that soda cans are used to ingest marijuana by heating up the can to burn the marijuana so that the fumes may be inhaled. The soda can found in Armstrong's car contained burnt residue, had a hole in the side, and smelled of burnt marijuana. That evidence is sufficient to sustain Armstrong's conviction for possession of paraphernalia.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.