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**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS M. ROSENBERGER,)

Appellant-Defendant,)

vs.)

No. 24A01-0612-CR-544

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0304-FD-184

September 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Thomas Rosenberger appeals his convictions for Class D felony possession of methamphetamine and Class D felony possession of marijuana. We affirm.

Issues

The issues before us are:

- I. whether the trial properly admitted into evidence several items found and seized in Rosenberger's bedroom; and
- II. whether the admission into evidence of a drug field test result was fundamentally erroneous.

Facts

Shortly after midnight on January 5, 2003, Indiana State Police Detective Timothy Wuestefeld overheard the Franklin County Sheriff's Department put out a dispatch to investigate a homeowner's complaint that a mentally ill person had barricaded himself inside the home. Detective Wuestefeld drove to the home to assist. Upon arriving at the residence Detective Wuestefeld met Andrew Peters, who was the homeowner, and Thomas Rosenberger outside the residence, along with Franklin County Sheriff's Deputy John Roberts. Rosenberger had been staying at the home for the past few days. It was approximately zero degrees that night, so Detective Wuestefeld and Deputy Roberts suggested that they all go inside, especially since Rosenberger was wearing only jeans and a t-shirt, and they did so.

Rosenberger was sweating profusely and breathing rapidly. He told Detective Wuestefeld that people were "trying to get him" and that he had been "fighting them off

for a long period of time.” Trial Tr. p. 133. He also said that people had been tapping on his windows; Detective Wuestefeld noticed that some dogs were outside the house and jumping against a sliding glass door. Detective Wuestefeld then asked Peters and Rosenberger if they wanted him to look through the residence to see if there were any intruders, and they said yes.

When Detective Wuestefeld entered the bedroom Rosenberger had been using, he discovered that the lights were not working. Using his flashlight, he looked around the room. On a dresser near the bed, he saw a ceramic smoking device, or a “water bong,” which devices are commonly used to smoke marijuana. *Id.* at 141. Next to the bong was a thermometer, some rolling papers, and a metal or “roach” clip. *Id.* On the bed was a hollow ballpoint pen tube. From his training and experience, Detective Wuestefeld knew that such tubes were used to ingest illegal drugs. The bong had plant residue in it. The metal clip, thermometer, and pen tube all had burnt residue on them.

After completing a protective sweep of the house, Detective Wuestefeld told Deputy Roberts what he had seen in Rosenberger’s bedroom. The officers then placed Rosenberger in handcuffs, read him his Miranda rights, and began questioning him about what they found in the bedroom. Rosenberger then stated that Peters also had marijuana in the house. Because of his appearance, the officers called an ambulance for Rosenberger. Meanwhile, Detective Wuestefeld obtained Peters’ consent to conduct a more extensive search of the house. In the home, officers found marijuana, pieces of aluminum foil with burnt residue on them, a scale, numerous plastic baggies, and two smoking devices that contained burnt residue.

Detective Wuestefeld conducted a field test on material he found inside the bong from Rosenberger's bedroom, which indicated that the material was marijuana. The material was not sent to a lab for further testing. The pen tube was sent to a lab for testing. It was found to contain methamphetamine residue.

The State charged Rosenberger with Class D felony possession of methamphetamine, Class A misdemeanor possession of marijuana, and Class D felony possession of marijuana based on a previous conviction Rosenberger has for marijuana possession. Rosenberger moved to suppress the items recovered from his bedroom. The trial court denied the motion. At trial, Rosenberger renewed his objection to the introduction of these items, which the trial court overruled. Rosenberger did not object to the introduction of the results of Detective Wuestefeld's field test of the material found in the bong. A jury found Rosenberger guilty of all three charges. The trial court convicted and sentenced Rosenberger only for Class D felony possession of methamphetamine and Class D felony possession of marijuana. Rosenberger now appeals.

Analysis

I. Motion to Suppress

Rosenberger first challenges the trial court's denial of his motion to suppress and the admission into evidence of the items recovered from his bedroom, namely the bong, pen tube, rolling papers, thermometer, and metal clip. Rosenberger did not attempt to initiate an interlocutory appeal from the denial of his motion to suppress and instead proceeded to trial. Thus, the issue is whether the trial court abused its discretion by admitting the evidence at trial. See Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App.

2006), trans. denied. A trial court has broad discretion in ruling on the admissibility of evidence and we will reverse such a ruling only for an abuse of that discretion. Id. An abuse of discretion generally occurs when a decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Because a suppression hearing was held in this case, along with trial testimony related to the circumstances surrounding the recovery of the items from Rosenberger's bedroom, "we will consider 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, 427 (Ind. Ct. App. 2005). Additionally, we will consider uncontradicted evidence from the motion to suppress hearing that is favorable to the defendant and that has not been countered or contradicted by foundational evidence offered at the trial. Id. at 426.

This case involves two Fourth Amendment principles: the proper scope of consensual searches of property and the "plain view" exception to the warrant requirement. Rosenberger does not dispute that he and Peters gave Detective Wuestefeld permission to look through the entire house for possible intruders. A consensual search is reasonable only if it is kept within the bounds of that consent. Buckley v. State, 797 N.E.2d 845, 849 (Ind. Ct. App. 2003). Where consent is given for the express purpose of looking for a person or persons, a police officer searching a residence pursuant to such consent must confine the search to places where a person could have been hiding. See id. at 851. Detective Wuestefeld's search of the residence was so confined. Upon entering Rosenberger's bedroom, he shined his flashlight around it and saw the bong, rolling

papers, thermometer, and clip on top of a dresser or table and the pen tube on top of the bed. He did not have to open something too small for a person to be hiding in, such as a dresser drawer, in order to see them.

Nevertheless, Rosenberger contends that seizure of these items was improper and not supported by the “plain view” exception to the Fourth Amendment’s warrant requirement.¹ The plain view doctrine allows a police officer to seize items when he or she inadvertently discovers items of readily apparent criminality while rightfully occupying a particular location, if three requirements are met. Jones v. State, 783 N.E.2d 1132, 1137 (Ind. 2003). “First, the initial intrusion must have been authorized under the Fourth Amendment.” Id. “Second, the items must be in plain view.” Id. “Finally, the incriminating nature of the evidence must be immediately apparent.” Id.

Rosenberger’s argument focuses on the third requirement. That is, he claims that the incriminating nature of the bong, pen tube, rolling papers, clip, and thermometer were not immediately apparent, at least without Detective Wuestefeld actually approaching those items and scrutinizing them closely and seeing burnt residue on several of those items.² We have explained the “immediately apparent” requirement as follows:

¹ The plain view exception is addressed to concerns implicated by the seizure of items. Justice v. State, 765 N.E.2d 161, 165 (Ind. Ct. App. 2002). It is not clear that Detective Wuestefeld immediately seized the items in Rosenberger’s bedroom when he first saw them, as opposed to later after obtaining Parker’s consent to search the entire house more thoroughly. Detective Wuestefeld testified that he could not remember exactly when he actually seized the items. Nevertheless, both Rosenberger and the State appear to assume that Detective Wuestefeld immediately seized the items, and we will analyze the case accordingly under the plain view doctrine.

² It is not clear from Detective Wuestefeld’s testimony whether he claims to have seen burnt residue on the items as soon as he shone his flashlight on them, or only noticed it later after investigating the items more closely or picking them up. We will assume for the sake of argument that such residue was not immediately apparent.

The “immediately apparent” prong of the plain view doctrine requires that law enforcement officials have probable cause to believe the evidence will prove useful in solving a crime. This does not mean that the officer must “know” that the item is evidence of criminal behavior. Probable cause requires only that the information available to the officer would lead a person of reasonable caution to believe the items could be useful as evidence of a crime. A “practical, nontechnical” probability that incriminating evidence is involved is all that is required. A lawful seizure must be based upon a “nexus” between the item seized and particular criminal behavior. The “nexus” must be one known to the officers at the time of the seizure and may not be based upon mere speculation.

State v. Figgures, 839 N.E.2d 772, 779 (Ind. Ct. App. 2005), trans. denied (internal quotations and citations omitted).

Certainly, upon seeing a bong, a notorious drug paraphernalia item, Detective Wuestefeld’s curiosity would have been understandably and reasonably heightened. With respect to such an item, it would not have been necessary for Detective Wuestefeld to have seen whether it had burnt residue or plant material in it before seizure would have been justified. The “nexus” between such an item and illicit drug use is well known. Even if in theory such an item could have been used to smoke tobacco, Detective Wuestefeld did not have to be absolutely certain that the bong was used for illegal purposes before he was entitled to seize it under the plain view doctrine.

The same is true of a pen tube that has had both of its ends and the ink removed. It is highly unusual and contrary to normal usage for a pen to have its ink and both ends removed, and Detective Wuestefeld testified that the reason for such removal often is to use the hollow tube as a pipe for ingesting illegal drugs. He properly seized the tube under the plain view exception to the warrant requirement. As for the rolling papers,

thermometer, and metal clip, we believe it is unnecessary to decide whether they were properly seized. The evidence of Rosenberger's possession of marijuana and methamphetamine came from the bong and pen tube, respectively.

Rosenberger also asserts that seizure of the items violated Article 1, Section 11 of the Indiana Constitution. "The legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances." Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005). The totality of the circumstances requires consideration of both 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. Id. at 360. Although there may be other relevant considerations under the circumstances, the reasonableness of a search or seizure turns 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 citizen's ordinary activities, and 3) the extent of law enforcement needs. Id. at 361.

Here, Detective Wuestefeld went to Peters' residence, where Rosenberger was staying, in response to a dispatch requesting assistance related to a possibly mentally ill person. When an obviously agitated Rosenberger began claiming that unknown persons in or around the house were "trying to get him," Detective Wuestefeld offered to look through the house for intruders, in an apparent attempt to calm Rosenberger down. Trial Tr. p. 133. Peters and Rosenberger consented to such a search. While conducting the search, Detective Wuestefeld observed the bong and hollow pen tube out in the open in Rosenberger's bedroom. Detective Wuestefeld was not required to force himself to be

blind to possible evidence of illegal drug use and to avert his eyes from the bong and tube, rather than investigating further and physically seizing the items. We find Detective Wuestefeld's conduct under the totality of the circumstances to be reasonable under Article 1, Section 11 of the Indiana Constitution. The trial court did not abuse its discretion in admitting the bong and tube into evidence.

II. Marijuana Field Test Results

Rosenberger also contends error occurred when Detective Wuestefeld testified that he conducted a field test on plant residue he found in the bong, which returned a positive result for marijuana. As Rosenberger admits, he did not object to the introduction of this evidence at trial. Therefore, he may prevail on appeal only if he establishes the existence of fundamental error. See Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002). “Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue.” Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). It is error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process, thus presenting an undeniable and substantial potential for harm. Id.

Rosenberger contends the State failed to establish that the field test Detective Wuestefeld used, which he said was a Duquenois test, was scientifically valid. He relies heavily upon West v. State, 805 N.E.2d 909, 913-14 (Ind. Ct. App. 2004), trans. denied, where we held that the results of a certain field test for anhydrous ammonia were inadmissible because the State failed to establish the scientific validity of the test in accordance with Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786

(1993). However, the defendant in West had objected to the introduction of the test results. Thus, West is not controlling here with respect to fundamental error.

We observe that the contemporaneous objection rule requires a defendant to voice objections in time so that harmful error may be avoided or corrected and a fair and proper verdict will be secured. Purifoy v. State, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005), trans. denied. By failing to object to the scientific reliability of the Duquenois test, the State was deprived of the opportunity to introduce preliminary or foundational evidence of such reliability before the trial court, which was the proper time and place to litigate such an issue. See id. at 412-13. We are reluctant to say on appeal that the State could not have established the test's scientific validity when it was not asked to do so before the trial court. See id.

Here, Detective Wuestefeld testified that the Duquenois test is standard issue for the State Police, that it is used only to test for marijuana or the presence of THC, marijuana's active ingredient, and that he received training on how to use the test at the State Police Academy. He also explained how to use the test, by placing a substance in a vial with two capsules of liquid and agitating the vial, and that if THC was present the liquid would turn dark blue or purple, but would not change color at all if THC was not present. Finally, Detective Wuestefeld testified that the Duquenois test in this case did return a positive result for marijuana or THC, which corroborated the highly distinctive and unique odor of marijuana the residue in the bong had.

The question here for fundamental error purposes is not whether the admission of the test results was highly prejudicial—it clearly was—but whether the particular field

test was so clearly unreliable and scientifically unsound that it was patently unreasonable to admit the results. Rosenberger presents nothing to suggest that the Duquenois test has been questioned anywhere as unreliable. In fact, our own research suggests the opposite—that the test Detective Wuestefeld performed is an accepted test for the presence of marijuana or THC and has been for many years. See Cunrod v. State, 526 S.E.2d 900, 902-03 (Ga. Ct. App. 1999) (collecting cases holding that Duquenois-Levine test is generally accepted as valid method for detecting marijuana);³ see also Hardin v. State, 254 Ind. 56, 61, 257 N.E.2d 671, 673-74 (1970) (holding that positive result of Duquenois test helped provide sufficient evidence that defendant possessed marijuana). In light of these cases and Detective Wuestefeld’s testimony concerning the field test, Rosenberger has failed to convince us that it was fundamentally erroneous to admit the results of the test.

Conclusion

The trial court did not err in admitting into evidence items seized from Rosenberger’s bedroom. Additionally, the admission into evidence of the results of the field test Detective Wuestefeld conducted did not constitute fundamental error. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.

³ If there is a difference between the “Duquenois-Levine” test and the test Detective Wuestefeld performed, Rosenberger has failed to point it out to us. Again, an objection at trial and response by the State might have clarified this issue.

