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# IN THE
# COURT OF APPEALS OF INDIANA

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| DUSTIN BURKHARDT, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A04-0704-CR-205 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jeffrey L. Marchal, Master Commissioner
Cause No. 49F08-0609-CM-176129

**October 3, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Dustin Burkhardt ("Burkhardt") appeals his conviction for Possession of Marijuana as a Class A Misdemeanor. He argues that the pat down search that led to the discovery of marijuana violated his rights under the Fourth Amendment to the United States Constitution and Article I, § 11 of the Indiana Constitution. Concluding that the pat down search was reasonable under the circumstances, we affirm the judgment of the trial court.

## Facts and Procedural History

At approximately 9:15 p.m. on September 15, 2006, three females were involved in a verbal altercation outside of the Glastonbury Court apartment complex. After the verbal altercation, five individuals came out of an apartment, and a fight ensued. Officers Noel Gudat and Nicholas Hubbs of the Indianapolis Police Department were called to the scene to investigate this incident. Glastonbury Court is located in a high crime area, known to the officers to be the location of previous shootings, stabbings, fights, and drug dealing. The apartment complex had lighting, but it was not well lit. When Officers Gudat and Hubbs arrived on the scene, it was dark outside, and ten or more people had congregated outside of the apartment complex in the parking lot area. After seeing Burkhardt and another individual walking toward a vehicle, at least two individuals told Officer Hubbs that Burkhardt might be one of the individuals who was involved in the fight. Thereafter, Officer Gudat approached Burkhardt, asked him to remove his hands from his coat pockets, and inquired about his involvement in the fight. Burkhardt denied any involvement in the fight. Officer Gudat then began a pat down search for weapons

and felt a bulge near Burkhardt's lower ankle area. Officer Gudat asked Burkhardt about the bulge, and Burkhardt told him that it was marijuana.

Thereafter, the State charged Burkhardt with Possession of Marijuana as a Class A Misdemeanor.[1] Before his bench trial, Burkhardt filed a Motion to Suppress claiming the marijuana found pursuant to the pat down search violated his Fourth Amendment rights under the United States Constitution and Article I, § 11 of the Indiana Constitution. The trial court denied Burkhardt's motion during an in-trial suppression hearing, and thereafter, Burkhardt was convicted as charged.

**Discussion and Decision**

On appeal, Burkhardt contends that the trial court abused its discretion in admitting the evidence obtained as a result of the pat down search because the search violated his rights under the Fourth Amendment to the United States Constitution and Article I, § 11 of the Indiana Constitution.

Burkhardt first argues that the trial court abused its discretion by denying his Motion to Suppress. Although Burkhardt originally challenged the admission of the evidence through a pre-trial motion to suppress, he appeals following a completed bench trial and challenges the admission of such evidence at trial. Thus, although Burkhardt states the issue as whether the trial court abused its discretion in denying his motion to suppress, "the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial." *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). Our standard of review for rulings on the admissibility of evidence

[1] Ind. Code § 35-48-4-11.

is essentially the same whether the challenge is made by a pre-trial motion to suppress or by an objection at trial. *Ackerman v. State*, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), *reh'g denied, trans. denied*. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*. We also consider uncontroverted evidence in the defendant's favor. *Id*. Burkhardt challenges the admission of the evidence regarding his possession of marijuana under both the Fourth Amendment to the United States Constitution and Article I, § 11 of the Indiana Constitution.

**I. Fourth Amendment**

Burkhardt argues that Officer Gudat did not hold a reasonable belief that he was armed and dangerous and therefore the pat down search violated his Fourth Amendment rights. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

As a general rule, the Fourth Amendment prohibits warrantless searches. *Black v. State*, 810 N.E.2d 713, 715 (Ind. 2004). However, there are exceptions to the warrant requirement. *Id*.

One such exception is a *Terry* stop, or the "investigatory stop and frisk." *Stalling v. State*, 713 N.E.2d 922, 923 (Ind. Ct. App. 1999). In *Terry v. Ohio*, the United States Supreme Court held that the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based upon specific and articulable

facts, the officer has a reasonable suspicion that criminal activity "may be afoot." 392 U.S. 1, 30 (1968). More specifically, "limited investigatory seizures or stops on the street involving a brief question or two and a possible frisk for weapons can be justified by mere reasonable suspicion." *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), *reh'g denied*, *trans. denied*. In determining whether the police had reasonable suspicion to believe there was criminal activity afoot, we consider the totality of the circumstances. *Carter v. State*, 692 N.E.2d 464, 467 (Ind. Ct. App. 1997).

Burkhardt does not challenge the propriety of the initial stop; rather, he challenges only the subsequent pat down search. *Terry* permits a:

> reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

*Terry*, 392 U.S. at 27. Here, several factors leave us convinced that Officer Gudat had reason to believe that his safety or that of others was in danger. The violence here involved seven to ten people fighting in an apartment complex parking lot located in a poorly-lit high crime area that was known for shootings, stabbings, fights, and drug dealing. Additionally, at least two of the witnesses identified Burkhardt as being involved in the fight, and Burkhardt had his hands in his coat pockets when approached by Officer Gudat. Based upon these considerations, Officer Gudat's pat down search of Burkhardt was a reasonable officer safety precaution. *See Hailey v. State*, 521 N.E.2d 1318, 1320 (Ind. 1988) ("Once the stop had been accomplished and Officer Vogel

learned the identity of the subject, the officer was justified in conducting a search of appellant for his own safety."); *Jones v. State*, 472 N.E.2d 1255, 1258 (Ind. 1985) ("The police may search a person prior to questioning to remove any weapons the person can use to harm the officer or effect an escape.").

Officer Gudat's decision to conduct a pat down search was reasonable, and therefore, the trial court did not violate Burkhardt's Fourth Amendment rights by admitting the evidence obtained as a result of the search.

**II. Article I, § 11**

Burkhardt also makes a brief argument that the pat down search violated his rights under Article I, § 11 of the Indiana Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Generally, in spite of the similarity in structure of the Fourth Amendment and Article I, § 11, they are interpreted and applied differently. *Holder v. State*, 847 N.E.2d 930, 935 (Ind. 2006). "The Indiana Constitution has unique vitality, even where its words parallel federal language." *Id*. The question under this provision is whether the officer's conduct "was reasonable in light of the totality of the circumstances." *Id*. at 940. In determining reasonableness, we balance: 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*. Here, two witnesses identified Burkhardt as being involved in a fight of seven to ten

people in a poorly-lit high crime area known to be the site of violent crimes. When Burkhardt approached the officer, he had his hands in his pockets. These concerns implicated two of the three factors we balance to determine the reasonableness of a search. These two factors outweigh the minimal intrusion to Burkhardt of the pat down search. We conclude that the pat down search of Burkhardt was reasonable in light of the totality of the circumstances and hence did not violate Burkhardt's rights under Article I, § 11 of the Indiana Constitution.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.