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IN THE COURT OF APPEALS OF INDIANA

CHARLES E. DUMAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0706-CR-488
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick Murphy, Commissioner
Cause No. 49G23-0612-FC-246169

March 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Charles E. Dumas appeals his conviction for possession of cocaine as a Class C felony. Specifically, Dumas argues that the trial court abused its discretion in admitting the cocaine into evidence because the police obtained the cocaine as the result of a pat down search that violated the Fourth Amendment to the United States Constitution. As a preliminary matter, we conclude Officer Hartman had reasonable suspicion to extend the scope of the initial stop. We further find that Dumas voluntarily consented to the pat down search and, in addition, that Officer Hartman had reasonable suspicion to conduct the search. We therefore affirm the judgment of the trial court.

Facts and Procedural History

On December 20, 2006, Indianapolis Metropolitan Police Officer Keith Hartman initiated a traffic stop of a vehicle on the exit ramp from I-70 westbound to Emerson Avenue in Marion County, Indiana. Officer Hartman stopped the vehicle because it had been traveling seventy miles per hour in a fifty-five mile per hour zone and because the officer believed that the tint on the vehicle's windows was too dark. When Officer Hartman approached the vehicle, he could see an individual through the open driver's side window, later identified as Dumas, moving around in the back seat. Because he could not see into the other windows due to the tint, Officer Hartman asked the occupants to roll down the back seat window to gain a better view of Dumas.

Eventually, Officer Stephanie Humerickhouse arrived on the scene and provided Officer Hartman with additional assistance. Once Officer Humerickhouse arrived, Officer Hartman asked the driver to get out of the car and come back to his patrol car

while he ran the driver's license and registration. While Officer Hartman was checking the driver's information, he asked the driver where he was going. The driver told Officer Hartman that they were going to Lafayette Square Mall. Officer Hartman thought the driver's answer was peculiar because the route that the driver claimed to be taking was a roundabout way to go to that mall. Officer Hartman then asked the driver about the identity of his back seat passenger. The driver claimed that he did not know his name. While speaking with the officer, the driver was not making eye contact and his voice and hands were shaking.

While Officer Hartman was talking with the driver, Officer Humerickhouse stayed with the stopped vehicle to observe Dumas and the female front seat passenger, who was later identified as the driver's girlfriend. During this time, Dumas continuously reached down under the seat even after Officer Humerickhouse asked him to stop. According to Officer Humerickhouse, Dumas looked nervous, was overly talkative, and was sweating despite the cold temperature outside.

Once Officer Hartman finished securing the driver's information, he returned to the stopped vehicle where Officer Humerickhouse told him that Dumas had been moving around in the car and reaching underneath the back seat despite the officer's request that he stop. Officer Hartman asked Dumas where they were going. Dumas responded, "To Greenwood." Tr. p. 29. Officer Hartman then asked Dumas to get out of the vehicle. After Dumas did, Officer Hartman asked him if he "could pat him down for weapons." *Id*. at 84. Dumas said "no problem," *id*. at 84, put his hands up, and said, "You can search me." *Id*. at 30. Officer Hartman then asked, "I can search you?" *Id*. Dumas

responded, "Yeah. You can search me." *Id*. While Officer Hartman was conducting a pat down search on Dumas, a clear plastic bag, containing what was later identified as cocaine in excess of three grams, fell out of his pant leg and onto the ground. From the time Officer Hartman initiated the stop to the time when the pat down search began, approximately ten minutes had elapsed.

The State charged Dumas with possession of cocaine as a Class C felony.[1] During a pre-trial hearing, Dumas moved to suppress the cocaine claiming that Officer Hartman's pat down search was illegal. The trial court denied Dumas's motion. Dumas waived a jury trial, and a bench trial ensued several weeks later. At the conclusion of his bench trial, the court found Dumas guilty as charged. Dumas now appeals.

Discussion and Decision

On appeal, Dumas contends that the trial court erred in denying his motion to suppress the cocaine because the pat down search violated his rights under the Fourth Amendment to the United States Constitution. Although he originally challenged the admission of the cocaine through a pre-trial motion to suppress, Dumas appeals following a completed bench trial and challenges the admission of such evidence at trial. Thus, the issue is appropriately framed as whether the trial court abused its discretion by admitting the cocaine at trial.[2] *See Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). Our standard of review regarding rulings on the admissibility of evidence is essentially

[1] Ind. Code § 35-48-4-6.

[2] The State asserts that Dumas waived this issue for failure to properly preserve it with a timely and specific objection at trial. However, Dumas did object to the admission of the cocaine at trial. At trial, the court asked Dumas, "Your only objection is the admissibility, right?" *Id*. at 67. Dumas responded, "That's right." *Id*. Although the objection was somewhat general in nature, we believe it was sufficient to preserve the issue for our review.

the same whether the challenge is made by a pre-trial motion to suppress or by a trial objection. *Ackerman v. State*, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), *reh'g denied, trans. denied*. When ruling on the admissibility of evidence, the trial court is afforded broad discretion and we will only reverse the ruling upon a showing of abuse of discretion. *Id*. We therefore consider the evidence most favorable to the trial court's ruling and any uncontradicted evidence to the contrary to determine whether sufficient evidence exists to support the ruling. *Id*. at 975.

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.

U.S. Const. amend. IV. 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). 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).

Dumas does not challenge the propriety of the initial traffic stop of the vehicle in which he was a passenger. *See Black v. State*, 621 N.E.2d 368, 370 (Ind. Ct. App. 1993) ("[P]olice officers may stop a vehicle when they observe minor traffic violations."). Rather, Dumas argues that Officer Hartman unreasonably detained him in violation of the Fourth Amendment when he inquired about weapons and solicited his consent to a pat down search even though the initial purpose of the traffic stop had been satisfied. He further claims that Officer Hartman conducted a pat down search absent a reasonable belief that Dumas was armed and dangerous.

Dumas first asserts that the pat down search was illegal because it occurred after the initial purpose of the traffic stop had been satisfied. In other words, Dumas maintains that because he was merely a passenger in a vehicle that was stopped for minor traffic infractions, the officer did not have a reason to extend the stop beyond its initial scope to conduct a pat down search for weapons. We disagree.

"Law enforcement officers may, as a matter of course, order the driver and passengers to exit a lawfully stopped vehicle." *Tumblin v. State*, 736 N.E.2d 317, 321 (Ind. Ct. App. 2000), *trans. denied*. Once a vehicle has been lawfully stopped, the additional intrusion of asking the driver and passengers to exit is considered a mere inconvenience and therefore lawful. *Id*. Nevertheless, this *per se* rule is not equivalent to the right to forcibly detain a passenger for the entire duration of the traffic stop. *Id*.

Generally, we have held that a police officer is not authorized to routinely order the passenger of a vehicle, who has not been observed to be involved in any illegal activity, to remain at the scene of a traffic stop. *Id*. at 321-22. However, "[i]f probable cause or reasonable suspicion develops during the assessment, the officer may be justified in detaining the individual longer to further investigate." *Id*. at 322.

In support of his argument, Dumas relies on *Tumblin*. In *Tumblin*, the record established that "Officer Trimble fully concluded the routine traffic stop without any indication of illegal activity beyond traffic infractions. He admitted that the purpose of his initial stop had been completed and the vehicle occupants were 'free to go' before he inquired as to drugs or weapons." *Id*. Thereafter, we concluded that the search and seizure were unconstitutional and reversed Tumblin's conviction.

However, unlike in *Tumblin*, here, the officers did not inform Dumas that the initial stop had been completed. Moreover, Dumas's actions provided Officer Hartman with additional reasons to be suspicious. Dumas was acting nervous, was overly talkative, and was sweating despite the cold temperature. Dumas and the driver provided Officer Hartman with conflicting stories as to where they were heading. The driver indicated that they were going to Lafayette Square Mall, while Dumas indicated that they were going to Greenwood. The driver did not know Dumas's name, Dumas could not provide the officer with identification, and during the stop Dumas continuously reached underneath his seat even after Officer Humerickhouse ordered him to stop. We therefore conclude that Officer Hartman had reasonable suspicion to extend the scope of the initial

stop and now address whether Dumas voluntarily consented to the pat down search and whether the search was reasonable under the circumstances.

A well-recognized exception to the warrant requirement is a voluntary and knowing consent to search. *Krise v. State*, 746 N.E.2d 957, 961 (Ind. 2001). "When the State seeks to rely upon consent to justify a warrantless search, it has the burden of proving that the consent was freely and voluntarily given." *Meyers v. State*, 790 N.E.2d 169, 172 (Ind. Ct. App. 2003). The voluntariness of this consent to search is a question of fact to be determined based on the totality of the circumstances. *Id*. A consent to search is considered valid "unless it is procured by fraud, duress, fear, or intimidation, or where it is merely a submission to the supremacy of the law." *Id*.

Here, the totality of the circumstances shows that Dumas voluntarily consented to the search. Dumas was cooperative during the encounter and Officer Hartman did not threaten or deceive him. Moreover, the record does not reflect the officer made any express or implied claims of authority to search without Dumas's consent. Rather, Dumas readily stepped out of the vehicle and twice informed Officer Hartman that he could search him.

Assuming, *arguendo*, that Dumas did not voluntarily consent to a pat down search, we nevertheless conclude that the totality of the circumstances shows that Officer Hartman had reasonable suspicion to justify a pat down search of Dumas. With regard to the reasonableness of the 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. As we earlier indicated, several factors leave us convinced that Officer Hartman had reason to extend the scope of the initial stop. For these same reasons, we believe that Officer Hartman had reasonable suspicion to suspect that Dumas may have been armed or dangerous and therefore was justified in engaging in a limited *Terry* pat down search. That is, Dumas was acting nervous, was overly talkative, was sweating despite the cold temperature, and Dumas and the driver provided Officer Hartman with conflicting stories as to where they were heading. Moreover, the driver did not know Dumas's name, Dumas had no identification to give to the officer, and during the stop, Dumas continuously reached down under his seat even after Officer Humerickhouse asked him to stop. *See Trigg v. State*, 725 N.E.2d 446, 449 (Ind. Ct. App. 2000) (concluding that a pat down search was reasonable where the officer approached a vehicle after a traffic stop and the defendant became "very nervous and fidgeted in his seat as if trying to hide or retrieve something"). Dumas's actions justified the pat down search because a reasonably prudent person in similar circumstances would be warranted in believing the officers' safety was in danger. Therefore, Officer Hartman had reasonable suspicion to conduct the pat down search and did not exceed the boundaries of *Terry*. The trial court did not abuse its discretion in admitting the cocaine into evidence.

Affirmed.

SHARPNACK, J., and BARNES, J., concur.