MEMORANDUM DECISION

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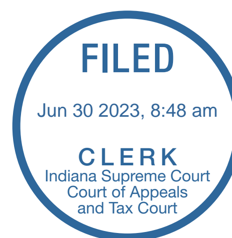

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IN THE

COURT OF APPEALS OF INDIANA

Lauren Phillips,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

June 30, 2023

Court of Appeals Case No. 22A-CR-2089

Appeal from the Fayette Superior Court

The Honorable Paul L. Freed, Judge

Trial Court Cause No. 21D01-2204-CM-250

Memorandum Decision by Judge Kenworthy
Judge Crone and Senior Judge Robb concur.

Kenworthy, Judge.

Case Summary

[1] The State charged Lauren Phillips with Class A misdemeanor operating a vehicle while intoxicated endangering a person[1] and Class C misdemeanor operating a vehicle while intoxicated.[2] Phillips now brings this interlocutory appeal, challenging the denial of her motion to suppress evidence obtained through a traffic stop. According to Phillips, the trial court should have granted her motion to suppress because police lacked reasonable suspicion to conduct a traffic stop under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. We affirm.[3]

Facts and Procedural History

[2] In April 2022, the State charged Phillips with Class A misdemeanor operating a vehicle while intoxicated in a manner endangering a person and Class C misdemeanor operating a vehicle while intoxicated after a traffic stop. Before trial, Phillips moved to suppress all evidence obtained through the stop, arguing Deputy Joshua Sparks lacked reasonable suspicion to conduct the stop. At the suppression hearing, Deputy Sparks testified about the traffic stop and the events leading to it.

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[1] Ind. Code § 9-30-5-2(b) (2001).

[2] I.C. § 9-30-5-2(a).

[3] We held oral argument on June 14, 2023, at the State House in Indianapolis. We thank the parties for their engaging presentations.

[3] On April 3, 2022, at nearly 3:00 a.m., Deputy Sparks parked his cruiser next to the police station in Connersville. Deputy Sparks was completing reports and doing computer work, at times noting his surroundings as he worked. He looked up and saw Phillips and a man crossing Fifth Street about fifty to one hundred feet in front of him. He "really started paying attention to [Phillips] because she . . . was walking and she was stumbling as she walked[.]" *Tr. Vol. 2* at 7. Deputy Sparks knew of only two businesses open at that hour, and both were bars. Phillips was walking from the direction of the bars, though Deputy Sparks could not see the bars to determine whether Phillips had exited either of them.

[4] Phillips started to walk into the parking lot across from Deputy Sparks, along the south side of Fifth Street. Deputy Sparks "didn't see her get into the car," but he saw a car exit the parking lot and recognized Phillips as the driver and the man as the passenger. *Tr. Vol. 2* at 22. Phillips turned left in front of Deputy Sparks, and Deputy Sparks pulled up to Phillips' vehicle to initiate a traffic stop. He did not see Phillips commit any traffic violation as he followed her. Phillips pulled over and stopped.

[5] When Deputy Sparks approached the vehicle, he smelled the odor of alcohol emanating from Phillips, saw Phillips' red, glassy eyes, and heard Phillips' slow and slurred speech. Deputy Sparks asked Phillips whether she had been drinking and Phillips admitted she had. Phillips submitted to a portable breath test, with a result of 0.21 grams of alcohol per 210 liters of breath. Deputy Sparks arrested Phillips, read her Indiana's Implied Consent law, and asked her

to consent to a blood draw. Phillips agreed to the blood draw and was taken to the hospital to provide a blood sample.

[6] Eventually, the State charged Phillips with Class A misdemeanor operating a vehicle while intoxicated in a manner endangering a person and Class C misdemeanor operating a vehicle while intoxicated. Phillips moved to suppress evidence, and the trial court held the suppression hearing. At the end of the hearing, the trial court orally denied Phillips' motion to suppress, finding Deputy Sparks had reasonable suspicion to conduct the traffic stop because of the time of day, the type of businesses open at that hour, and Deputy Sparks' identification of Phillips as the driver.

[7] After Phillips filed a motion to certify the denial for interlocutory appeal, the trial court entered a written order memorializing its earlier decision which the court certified for interlocutory appeal. In the order, the trial court reiterated Deputy Sparks' testimony he "observed the Defendant stumble from the Fantasy Inn area, which is a bar on the other side of the intersection he was facing, and the only business open in the block at the late hour relevant herein" and "recognized the driver of the car as a woman he had just seen staggering[.]" *Appellant's App. Vol. 2* at 39. Phillips perfected her discretionary interlocutory appeal under Indiana Appellate Rule 14(B).

Discussion and Decision

[8] "We review a trial court's ruling on a motion to suppress under a standard 'similar to other sufficiency issues.'" *McIlquham v. State*, 10 N.E.3d 506, 511

(Ind. 2014) (quoting *State v. Richardson*, 927 N.E.2d 379, 385 (Ind. 2010)). That is, without reweighing the evidence, we look to whether there is "substantial evidence of probative value that supports the trial court's decision." *Id.* (internal quotation marks omitted). We review a trial court's denial of a motion to suppress evidence "deferentially, construing conflicting evidence in the light most favorable to the ruling, but we will also consider any substantial and uncontested evidence favorable to the defendant." *Robinson v. State*, 5 N.E.3d 362, 365 (Ind. 2014). "But the ultimate determination of the constitutionality of a search or seizure is a question of law that we consider de novo." *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014).

Fourth Amendment

[9] The Fourth Amendment provides, in relevant part, "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. Yet brief investigative stops—*Terry*[4] stops—require only reasonable suspicion to be permissible. *Clark v. State*, 994 N.E.2d 252, 261 (Ind. 2013). Reasonable suspicion is a lower standard than probable cause. *Id.* An officer has reasonable suspicion when the facts known to the officer and reasonable inferences drawn from those facts "would cause an ordinarily prudent person to believe that criminal activity has or is about to occur."

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[4] *Terry v. Ohio*, 392 U.S. 1 (1968).

Baldwin v. Reagan, 715 N.E.2d 332, 337 (Ind. 1999). "[T]he detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). That is, the stop must be based on more than an officer's "unparticularized hunch." *Clark*, 994 N.E.2d at 265; *see also Terry*, 392 U.S. at 22. In making a reasonable-suspicion determination, a court must look at the totality of the circumstances of each case. *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

[10] Phillips' arguments center on certain testimony from the suppression hearing, where Deputy Sparks testified the following on cross-examination:

> [Defense Attorney]: [O]k now you state that she . . . stumbled several times in your affidavit, right?
>
> [Deputy Sparks]: Yes, Sir.
>
> * * *
>
> [Defense Attorney]: [A]nd we don't know if she tripped less than twice because you can't testify to that[,] right?
>
> [Deputy Sparks]: [R]ight[.]
>
> [Defense Attorney]: [O]k and so it could have been just one time[.]

[Deputy Sparks]:	[I]t could have. . . . [S]he could have tripped[.]
[Defense Attorney]:	[B]ut you're not certain that she tripped[.]
[Deputy Sparks]:	[R]ight[,] not 100% certain, no Sir.
[Defense Attorney]:	[O]k so you really couldn't see her is what you're saying[.]
[Deputy Sparks]:	I could see her[.]
[Defense Attorney]:	[O]k but you couldn't see that she was stumbling[.]
[Deputy Sparks]:	I . . . seen [sic] that she was stumbling.
[Defense Attorney]:	[S]o . . . is she stumbling or is she not tripping? You just testified both[.]

* * *

[Deputy Sparks]:	[Y]ou're . . . trying to . . . [.] [T]he terms are . . . very similar, so staggering could that be looked at as tripping[?] It could . . . I guess, but . . . stumbling, staggering, tripping[,] they're all in the same category. No matter what . . . she's off balance for . . . some reason.

Tr. Vol. 2 at 16–18.

[11] According to Phillips, Deputy Sparks "stopped a person because of where they were walking and the time of night. He *thought* he saw her stumble or trip but was not '100% certain.'" *Appellant's Br.* at 16 (quoting *Tr. Vol. 2* at 18). Phillips claims Deputy Sparks' testimony is inconsistent because he said he saw Phillips stumble, but not trip, and later said "stumbling, staggering, tripping[,] they're all in the same category." *Tr. Vol. 2* at 18. Ultimately arguing Deputy Sparks' testimony about stumbling is unreliable, Phillips asserts Deputy Sparks could have based his reason for stopping Phillips only on her proximity to a bar and the time of day. Phillips points out presence in a high crime area and "looking suspicious" are not sufficient bases for reasonable suspicion, although presence in a high crime area can be considered as a factor in the totality of the circumstances. *Appellant's Br.* at 13 (citing *Green v. State*, 719 N.E.2d 426, 429 (Ind. Ct. App. 1999) and *Tumblin v. State*, 664 N.E.2d 783, 784 (Ind. Ct. App. 1996)). Phillips likens presence in a high crime area to her proximity to a bar around 3:00 a.m. and "looking suspicious" to Phillips' "alleged stumbling." *Id.* Yet Deputy Sparks consistently testified he saw Phillips walking unsteadily. *See Tr. Vol. 2* at 7, 8, 9, 15, 17, 18. Deputy Sparks' uncertainty arose when Phillips, through counsel, began using the word "trip" instead of "stumble." *Tr. Vol. 2* at 17.

[12] Phillips argues Deputy Sparks' testimony is not credible because it is inconsistent as to whether he saw Phillips get into her car. Phillips points out on direct examination Deputy Sparks said he saw Phillips "getting into the driver's seat of her vehicle," *Tr. Vol. 2* at 9, but on cross-examination he

admitted he "didn't see her get into the car, no," *Tr. Vol. 2* at 22. Even so, Deputy Sparks clarified on cross-examination that once the vehicle pulled up to face him, he "could see that the male subject was the passenger and the female subject . . . was the driver." *Tr. Vol. 2* at 23. Phillips also argues Deputy Sparks' basis for stopping Phillips was "neither particularized nor objective," *Appellant's Br.* at 15, because Deputy Sparks asserted Phillips was off balance "for some reason," *Tr. Vol. 2* at 18. Yet it is not as though Deputy Sparks failed to explain his reason for stopping Phillips. Rather, Deputy Sparks testified, "to me . . . it appeared that she . . . had been drinking." *Tr. Vol. 2* at 9.

[13] Apart from what Phillips contends is inconsistent testimony about stumbling, Phillips claims she displayed no other signs of intoxication. Phillips notes she did not fall to the ground, vomit, or yell, nor did she commit any other traffic violations while driving (*e.g.*, swerving, weaving in and out of her lane, speeding, or almost hitting something). Under Indiana Code Section 9-13-2-86 "intoxicated" means "under the influence of . . . alcohol . . . so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." Even when intoxication is an element of a criminal offense, the State need not prove each of these three abilities—(1) impairment of thought, (2) impairment of action, and (3) loss of normal control of faculties—in a "separate, element-by-element fashion." *Curtis v. State*, 937 N.E.2d 868, 873 (Ind. Ct. App. 2010). Rather, a person's impairment "is to be determined by considering his capability as a whole . . . such that impairment of any of the

three abilities necessary for the safe operation of a vehicle equals impairment within the meaning of [Indiana Code Section] 9-30-5-2." *Id.*

[14] For there to be reasonable suspicion to support a traffic stop based on concerns of impairment, the State need not prove the defendant was falling to the ground, vomiting, or yelling. *See Woodson v. State*, 966 N.E.2d 135, 142 (Ind. Ct. App. 2012) (holding an officer's opinion that defendant was intoxicated based on officer's training and experience can support public intoxication conviction), *trans denied*. In some cases, an officer need not even see the defendant's behavior to have reasonable suspicion to conduct the traffic stop. *Bogetti v. State*, 723 N.E.2d 876, 879 (Ind. Ct. App. 2000) (identifying reasonable suspicion to support a traffic stop where a citizen told a police officer that defendant who had driven away "may be intoxicated"). And as the Indiana Supreme Court has said, "[W]e do not believe the Fourth Amendment requires police 'to grant drunk drivers "one free swerve" before they can legally be pulled over.'" *Robinson*, 5 N.E.3d at 368 (quoting *Virginia v. Harris,* 558 U.S. 978 (2009).

[15] All in all, when Deputy Sparks made the traffic stop, he (1) knew there were only two nearby businesses open at the late hour, both bars; (2) saw Phillips stumble, appearing intoxicated; (3) and saw Phillips driving the car. Under the totality of these circumstances, an ordinarily prudent person would believe criminal activity had occurred, *i.e.* that Phillips was unlawfully operating the vehicle while intoxicated. And the evidence shows Deputy Sparks had a particularized and objective basis for conducting the traffic stop because he

thought Phillips was intoxicated based on her stumbling and her location at the time. We therefore conclude Deputy Sparks had reasonable suspicion to conduct the traffic stop under the Fourth Amendment.

Article 1, Section 11

[16] As an initial matter, the State argues Phillips waived any claim the traffic stop violated the Indiana Constitution. The State argues although Phillips addresses Article 1, Section 11 separately, she does not specifically cite the totality-of-the-circumstances test from *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005), which is a leading case on Article 1, Section 11. But Phillips' analysis considers the totality of the circumstances. And we are not persuaded Phillips waived her claim under the Indiana Constitution because not all our decisions since *Litchfield* analyze Article 1, Section 11 under the *Litchfield* test. *See, e.g.*, *State v. Renzulli*, 958 N.E.2d 1143, 1146–47 (Ind. 2011) (applying the analysis in *Bogetti*, 723 N.E.2d at 879, to hold a citizen's tip that a driver was weaving all over the road gave an officer reasonable suspicion); *J.D. v. State*, 902 N.E.2d 293, 296–97 (Ind. Ct. App. 2009) (applying the analysis of *State v. Atkins*, 834 N.E.2d 1028, 1034 (Ind. Ct. App. 2005), to hold the State bears the burden of showing the search was reasonable under the totality of the circumstances). And, in any case, the Indiana Supreme Court has directed us to address cases on their merits whenever possible. *See Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015). We do so here.

[17] Although Article 1, Section 11 closely follows the language of the Fourth Amendment to the United States Constitution, we separately analyze the

impact of the Indiana constitutional provision. *State v. Washington*, 898 N.E.2d 1200, 1205–06 (Ind. 2008). Article 1, Section 11 provides, in relevant part, "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." Ind. Const. art. 1 § 11. In addressing a claim under Article 1, Section 11, the Indiana Supreme Court has said, "[T]he totality-of-the-circumstances *Litchfield* test—a test applied hundreds of times in our courts—remains well-suited to assess reasonableness[.]" *Watkins v. State*, 85 N.E.3d 597, 599–600 (Ind. 2017). Under *Litchfield*, 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." 824 N.E.2d at 361.

[18] Again, Phillips bases much of her argument on her assertion Deputy Sparks was uncertain he saw Phillips stumble. Phillips requests we discredit Deputy Sparks' testimony about Phillips' stumbling, which we must decline. The trial court found Deputy Sparks' testimony credible, and Deputy Sparks unequivocally testified he saw Phillips was "off balance." *Tr. Vol. 2* at 18.

[19] Turning to the *Litchfield* factors, the degree of concern, suspicion, or knowledge that a violation had occurred was high because Deputy Sparks saw Phillips walking away from the general area of a nearby bar around 3:00 a.m.; witnessed Phillips stumble as she crossed the intersection to her vehicle; and confirmed Phillips was driving the vehicle. The degree of intrusion the method

of the seizure imposed on Phillips' ordinary activities was low, and only escalated as much as necessary to conduct a routine investigation for operating a vehicle while intoxicated. Finally, any intrusion here was outweighed by law enforcement's need to protect the public from drunk drivers. Thus, Phillips' rights were not violated under Article 1, Section 11.

Conclusion

[20] Because Deputy Sparks had reasonable suspicion to conduct the traffic stop, Phillips' rights under the Fourth Amendment and Article 1, Section 11 were not violated. Therefore, the trial court did not err in denying Phillips' motion to suppress.

[21] Affirmed.

Crone, J., and Robb, Sr.J., concur.