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IN THE

COURT OF APPEALS OF INDIANA

David Hostetler,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 22, 2022

Court of Appeals Case No. 21A-CR-797

Appeal from the Marion Superior Court

The Honorable Shatrese M. Flowers, Judge

Trial Court Cause No. 49D28-2008-F2-25333

Pyle, Judge.

Statement of the Case

[1] David Hostetler ("Hostetler") appeals, following a jury trial, his convictions for Level 2 felony dealing in a narcotic drug,[1] Level 2 felony dealing in methamphetamine,[2] Level 6 felony possession of a controlled substance,[3] and Level 6 felony unlawful possession of a syringe.[4] Hostetler argues that the trial court abused its discretion by admitting evidence found during a vehicle inventory search. Concluding that Hostetler has waived appellate review of his appellate challenge to the admission of evidence found during the inventory search by repeatedly stating that he had no objection to the admission of the evidence when it was introduced at trial, we affirm the trial court's judgment.

[2] We affirm.

Issue

Whether Hostetler has waived appellate review of his challenge to the admission of evidence found during a vehicle inventory search.

Facts

[3] On August 12, 2020, at approximately 12:40 a.m., Beech Grove Police Department ("BGPD") Officer Timothy White ("Officer White") was driving

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[1] IND. CODE § 35-48-4-1.

[2] I.C. § 35-48-4-1.1.

[3] I.C. § 35-48-4-7.

[4] IND. CODE § 16-42-19-18.

behind a blue Chrysler vehicle on 17th Avenue in Beech Grove. The vehicle had a temporary license plate and was driven by Hostetler. Officer White ran the license plate number and discovered that it was registered to a yellow Honda. The officer activated his lights and conducted a traffic stop. Officer White walked up to Hostetler's car and advised Hostetler of the reason for the stop. Hostetler immediately told the officer that he did not have a license, and he gave the officer a state identification card. Officer White ran the identification card through the BMV, which showed that Hostetler had a suspended license with a prior suspension within ten years.

[4] Around that time, Officer Elizabeth Keisler ("Officer Keisler") arrived on the scene, and Officer White told her that he was going to remove Hostetler from his car and summons him. Additionally, Officer White arranged to have the vehicle towed because there was no valid driver, the plate did not match the vehicle, and the vehicle was not registered and was blocking traffic. Officer White then prepared to conduct an inventory of the vehicle pursuant to the BGPD policy that requires that "[a]ll vehicles being towed [to] be inventoried." (Ex. Vol. at 10). Officer Keisler conducted an initial patdown of Hostetler for weapons and found a baggie containing buprenorphine or suboxone sublingual strips for which Hostetler had a prescription. Officer White placed Hostetler in handcuffs and placed him "[i]n front of [the officer's] patrol vehicle." (Tr. Vol. 2 at 166).

[5] Officer White started his inventory at the front driver's seat area. On the floorboard, the officer saw a "medium sized plastic bag containing several

smaller plastic bags inside of it." (Tr. Vol. 2 at 167).[5] Officer White continued the inventory and saw a Pringles can on top of a "clothes hamper" and "some miscellaneous items" on the front passenger seat. (Tr. Vol. 2 at 167, 168). Officer White "noticed that the . . . silver rim [of the Pringles can] wasn't fully connected to the cardboard side" of the can. (Tr. Vol. 2 at 167). From the officer's prior training and experience, he knew that Pringles cans could have "false bottoms" and could contain either valuables and/or narcotics." (Tr. Vol. 2 at 20, 168). Officer White removed the bottom of the Pringles can and saw "what [he] believed to be narcotics." (Tr. Vol. 2 at 168). Specifically, inside the Pringles can, Officer White found a plastic baggie containing "peach pills," a plastic bag containing a "crystal like substance[,]" and another plastic baggie containing "a greyish powdery substance." (Tr. Vol. 2 at 168-69). Based on his training and experience, Officer White believed these substances to be narcotics.

[6] Officer White told Officer Keisler to read Hostetler his *Miranda* rights. Officer Keisler searched Hostetler's person and found $653 in cash in Hostetler's pocket. Officer White found an "uncapped, used hypodermic needle" between the seat and back cushions of the front passenger seat. (Tr. Vol. 2 at 170). While searching the trunk, Officer White found a bag of unused hypodermic needles, a tote full of clothes, and two or three additional Pringle cans. Also in

[5] Officer White activated his dashboard camera during the search, and the State admitted the video, without objection, at trial.

the trunk, Officer White found a "Whizzinator[,]" which is a rubber penis with an attached bag that is used to pass drug tests. (Tr. Vol. 2 at 177). Hostetler denied that the items in the front of the car were his, but he admitted that the items, including the tote and Pringles cans in the trunk belonged to him. Hostetler told Officer White that the car belonged to a friend.

[7] The BGPD sent the suspected drug substances found in Hostetler's car to the Marion County Forensic Services Agency ("Crime Lab") for testing. This testing revealed the peach pills to be buprenorphine pills weighing 3.55 grams, the crystal-like substance to be methamphetamine weighing 5.48 grams, and the greyish powder substance to be fentanyl weighing 5.04 grams.

[8] The State charged Hostetler with Level 3 felony dealing in a narcotic drug (fentanyl), Level 3 felony dealing in methamphetamine, Level 5 felony possession of a narcotic drug (fentanyl), Level 5 felony possession of methamphetamine, Class A misdemeanor possession of a controlled substance (buprenorphine pills), and Level 6 felony unlawful possession of a syringe. On a separately-filed charging information, the State alleged that Hostetler had a prior conviction for dealing in a controlled substance and sought to enhance all these charges, except the unlawful possession of a syringe charge, to the next level felony.

[9] Hostetler filed a motion to suppress, arguing that the inventory search of the car was unreasonable and violated the Fourth Amendment of the United States

Constitution and Article 1, Section 11 of the Indiana Constitution. The trial court held a hearing on Hostetler's motion on March 31, 2021.

[10] During the suppression hearing, Officer White testified that BGPD officers always conducted an inventory search at the scene before a car was towed to the impound lot. The State also introduced the BGPD policy on towing vehicles. The BGPD tow policy provided, in part, that BGPD officers were "authorized" to "remove and/or cause to be removed any vehicle found upon a street" when that vehicle was left "unattended[,]" "display[ed] illegal license plates[,]" "fail[ed] to display the lawfully required license plates[,]" or was "left unattended due to the removal of an . . . arrested operator." (Ex. Vol. at 9). Additionally, the BGPD policy provided as follows:

> H. All vehicles being towed will be inventoried. The purpose of the inventory is to protect the owner's property, protect the officer and the towing company from dangerous objects, and to protect the Beech Grove Police Department from false allegations of theft. The passenger compartment, trunk, as well as storage areas will be inventoried. All locked containers will be opened when the officer is unable to determine the contents of the container when viewed from the outside. All items located in the vehicle will be listed on the impound form. Officers may remove any contraband or evidence of a crime from an impounded vehicle if the property removed was taken during an inventory of the vehicle. All property of a valuable nature should be removed from an impounded vehicle and turned in to the property room, to be returned to the owner at a later time. Any property removed or left in the vehicle shall be noted on the impound report form.

(Ex. Vol. at 10). The State also introduced a copy of the towing impound form, which revealed that the inventory of Hostetler's car had included "[m]iscellaneous clothing, three phones, chargers, [and] food and drinks." (Tr. Vol. 2 at 27). At the end of the hearing, the trial court took the motion under advisement.

[11] Prior to commencing a two-day bifurcated jury trial on April 5-6, 2021, the court denied Hostetler's motion to suppress. At trial, Officer White testified regarding the inventory search of Hostetler's vehicle and what had been found inside the vehicle during that search. Specifically, Officer White testified that there was a "medium sized plastic bag containing several smaller plastic bags inside of it" on the driver's side floorboard and that baggies such as the ones found were "commonly used to package narcotics." (Tr. Vol. 2 at 167). Officer White then testified that he found a false-bottomed Pringles can on the front passenger seat and that he removed the bottom of the Pringles can and saw "what [he] believed to be narcotics." (Tr. Vol. 2 at 168).

[12] At that point, Hostetler stated, "I'm going to interrupt here to object to the admission of any evidence discovered during the inventory search and make that a standing objection." (Tr. Vol. 2 at 168). The State responded that, "based on the hearing that[] [had] been held, . . . this was a proper inventory." (Tr. Vol. 2 at 168). The trial court overruled the objection and noted that Hostetler had a "standing objection." (Tr. Vol. 2 at 168).

[13] Thereafter, Officer White testified further about the methamphetamine, fentanyl, buprenorphine pills, and the hypodermic needles that were found in Hostetler's car. Hostetler did not object. When the State introduced State's Exhibits 3-9, photographs of the items found in Hostetler's car, Hostetler stated, "We have no objection, Your Honor." (Tr. Vol. 2 at 179). Thereafter, the State moved to admit State's Exhibits 10-15, which included the methamphetamine, fentanyl, buprenorphine pills, hypodermic needles, and buprenorphine prescription that had been packaged by police to send to the Crime Lab. The trial court asked Hostetler if he had any objection to State's Exhibits 10-15, and Hostetler stated, "No, Your Honor." (Tr. Vol. 2 at 186). Moreover, Hostetler did not object to the Crime Lab analyst's testimony regarding the identification of the methamphetamine, fentanyl, or buprenorphine pills. Additionally, Hostetler stated that he had "[n]o objection" when the State moved to admit State's Exhibit 16, the Crime Lab report that identified the substances found in his car as being methamphetamine, fentanyl, or buprenorphine pills. (Tr. Vol. 2 at 217).

[14] The jury found Hostetler guilty as charged. Hostetler waived his right to a jury for the enhancement phase of the trial and stipulated that he had a prior conviction for dealing in a controlled substance. The trial court found Hostetler guilty on the enhancement allegation. The trial court entered judgments of conviction for Level 2 felony dealing in a narcotic drug, Level 2 felony dealing in methamphetamine, Level 4 felony possession of a narcotic drug, Level 4

felony possession of methamphetamine, Level 6 felony possession of a controlled substance, and Level 6 felony unlawful possession of a syringe.

[15] During Hostetler's subsequent sentencing hearing, the trial court vacated Hostetler's Level 4 felony possession of a narcotic drug and Level 4 felony possession of methamphetamine convictions based on double jeopardy. For each of Hostetler's two Level 2 felony convictions, the trial court imposed a twenty (20) year sentence, with sixteen (16) years executed and four (4) years suspended to probation. For each of Hostetler's two Level 6 felony convictions, the trial court imposed a two (2) year executed sentence. The trial court ordered all Hostetler's sentences to be served concurrently to one another. Hostetler now appeals.

Decision

[16] Hostetler argues the trial court abused its discretion by admitting evidence found during the vehicle inventory search. Hostetler does not specifically mention which evidence should have been excluded. Nor does he challenge the propriety of the impoundment of the vehicle. Instead, Hostetler contends that the inventory search of the car was unreasonable and violated his rights under the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

[17] We need not, however, determine whether the trial court abused its discretion by admitting the evidence found during the inventory search because Hostetler

has failed to preserve for appellate review the question of the admissibility of the evidence obtained during the search.

[18] Here, Hostetler filed a motion to suppress, arguing that the inventory search of the car violated his constitutional rights under both the federal and state constitutions, and the trial court denied Hostetler's pre-trial motion. Accordingly, Hostetler was then required to make a timely objection, stating the specific ground therefore, to any challenged evidence when that evidence was introduced at trial. *See Neukam v. State*, 934 N.E.2d 198, 201 (Ind. Ct. App. 2010) (explaining that a party seeking to preserve any error from the denial of a motion to suppress, "must . . . reassert his objection at trial contemporaneously with the introduction of the evidence"); Ind. Evidence Rule 103(a)(1) (providing that a "party may claim error in a ruling to admit . . . evidence only if . . . a party, on the record[,] . . . timely objects . . . and . . . states the specific ground" for the objection).

[19] During Hostetler's jury trial, Officer White testified about conducting the vehicle inventory search during which he found some baggies that were similar to those "commonly used to package narcotics" and a false-bottomed Pringles can that contained "what [the officer] believed to be narcotics." (Tr. Vol. 2 at 167, 168). Hostetler then generally objected to the admission of any evidence obtained from the inventory search and asked for a "standing" or a continuing objection. (Tr. Vol. 2 at 168). The trial court overruled the objection and noted that Hostetler had a continuing objection.

[20] It is well settled that "Indiana recognizes continuing objections." *Hayworth v. State*, 904 N.E.2d 684, 691 (Ind. Ct. App. 2009). Indeed, "continuing objections serve a useful purpose in trials" because "they avoid the futility of and waste of time inherent in requiring repetition of the same unsuccessful objection each time evidence of a given character is offered." *Id.* at 692. In 2013, our supreme court amended Indiana Evidence Rule 103, recognizing the use of a continuing objection at trial. Specifically, Indiana Evidence Rule 103(b), which became effective January 1, 2014, provides that "[o]nce the court rules definitively on the record at trial a party need not renew an objection . . . to preserve a claim of error for appeal."[6]

[21] While continuing objections are useful, "there are dangers to using continuing objections." *Id.* For example, in *Hayworth*, we explained that a defendant could waive a continuing objection by her subsequent affirmative actions that were contrary to the continuing objection request. *Id.* at 692-94. Specifically, the *Hayworth* defendant filed a motion to suppress any evidence—including guns, methamphetamine, and various items associated with the manufacturing of methamphetamine—seized from a warrant-based search of her residence, and the trial court denied her motion. *Id.* at 686-88. During trial, the defendant asked for a continuing objection to the admission of evidence seized from her residence. *Id.* at 689. However, thereafter, when the State moved to admit

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[6] Prior to the 2013 amendment, Indiana Evidence Rule 103(b) provided that "[t]he court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form."

much of the evidence seized from the house or photographs of that evidence, the defendant stated that she had no objection to the evidence. *Id.* at 690-91, 693.

[22] On appeal, the defendant attempted to argue that the trial court had erred by admitting the evidence seized during the execution of the search warrant at her house. *Id.* at 691. We held that, where the defendant had requested a continuing objection but had then subsequently "affirmatively [stated] that she had 'No objection' to the vast majority of the evidence against her[,]" the defendant had "waived her objection to the admission of the evidence seized[.]" *Id.* at 694. In her appellate argument, the defendant "assert[ed] that 'No objection' really meant 'no objection *other than the continuing objection.*'" *Id.* (emphasis in original). This Court, however, refused to "read 'No objection,' a simple and powerful two-word phrase, to have such meaning." *Id.* Instead, we clarified that "once [a defendant] lodges a sufficiently specific objection to a particular class of evidence and the trial court grants a continuing objection, the proper procedure is [for the defendant] to remain silent during the subsequent admission of that class of evidence." *Id.* at 686.

[23] Additionally, in *Nowling v. State*, 961 N.E.2d 34 (Ind. Ct. App. 2012), *trans. denied*, this Court followed the *Hayworth* Court's holding regarding waiver of a continuing objection. The *Nowling* Court held that, despite obtaining a continuing objection, the defendant had waived his appellate challenge to the admission of evidence by his subsequent affirmative statement that he had no objection to the evidence. *Nowling*, 961 N.E.2d at 35.

[24] We recognize that *Hayworth* and *Nowling* were decided prior to the amendment to Evidence Rule 103(b). However, our supreme court's amendment to Rule 103(b) merely recognized the use of a continuing objection at trial. The rule amendment did not change or overrule the existing case law explaining that a defendant can waive a continuing objection by affirmatively stating that he has no objection when evidence is introduced and admitted at trial. We take this opportunity to echo and supplement the *Hayworth* Court's clarification regarding the "proper procedure" for a defendant who seeks to rely upon a continuing objection, which is now set forth under Evidence Rule 103(b). Upon a defendant's "timely" and "sufficiently specific objection to a particular class of evidence" at trial, the defendant's request for a continuing objection should ideally specify that it is pursuant to Evidence Rule 103(b). *See Hayworth*, 904 N.E.2d at 686; Evid. R. 103(a),(b). The trial court may then "rule[] definitively on the record at trial" on the defendant's continuing objection request. *See* Evid. R. 103(b). Thereafter, "during the subsequent admission of that class of evidence" to which the defendant sought the continuing objection under Evidence Rule 103(b), the "proper procedure" is for the defendant to "remain silent[.]" *Hayworth*, 904 N.E.2d at 686, 694. If the defendant were to make a statement to the admission of the evidence, especially where a trial court asks if the defendant has any objection, the recommended procedure would be for the defendant to simply state that he is relying upon his continuing objection under Evidence Rule 103(b).

[25] We now turn back to the case before us. Here, after the trial court had granted Hostetler a continuing objection, Officer White testified about the methamphetamine, fentanyl, buprenorphine pills, and the hypodermic needles that were found in Hostetler's car. When the State introduced State's Exhibits 3-9, photographs of the items found in Hostetler's car, Hostetler stated, "We have no objection, Your Honor." (Tr. Vol. 2 at 179). Thereafter, the State moved to admit State's Exhibits 10-15, which included the methamphetamine, fentanyl, buprenorphine pills, hypodermic needles, and buprenorphine prescription that had been packaged by police to send to the Crime Lab. The trial court asked Hostetler if he had any objection to State's Exhibits 10-15, and Hostetler stated, "No, Your Honor." (Tr. Vol. 2 at 186). Moreover, Hostetler did not object to the Crime Lab analyst's testimony regarding the identification of the methamphetamine, fentanyl, or buprenorphine pills. Additionally, Hostetler stated that he had "[n]o objection" when the State moved to admit State's Exhibit 16, the Crime Lab report that identified the substances found in his car as being methamphetamine, fentanyl, or buprenorphine pills. (Tr. Vol. 2 at 217).

[26] As did the defendants in *Hayworth* and *Nowling*, here, despite the request for a continuing objection, Hostetler has waived his appellate challenge to the admission of evidence by his subsequent affirmative statements that he had no objection to the evidence. *See Nowling*, 961 N.E.2d at 35; *Hayworth*, 904 N.E.2d at 694. An "'appellant cannot on the one hand state at trial that he has no objection to the admission of evidence and thereafter in this Court claim such

admission to be erroneous.'" *Halliburton v. State*, 1 N.E.3d 670, 679 (Ind. 2013) (quoting *Harrison v. State*, 258 Ind. 359, 363, 281 N.E.2d 98, 100 (1972)). Consequently, Hostetler has waived appellate review of his claim of error. *See Nowling*, 961 N.E.2d at 35; *Hayworth*, 904 N.E.2d at 694. Therefore, we affirm the trial court's judgment.[7]

[27] Affirmed.

Bailey, J., and Crone, J., concur.

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[7] Hostetler does not argue that the admission of the evidence seized from the vehicle inventory search constituted fundamental error. Indeed, Hostetler does not acknowledge that he affirmatively stated that he had no objection to the admission of any of the evidence.