MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brian Wesley Curry,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 31, 2021

Court of Appeals Case No. 20A-CR-1505

Appeal from the Hamilton Superior Court

The Honorable J. Richard Campbell, Judge

Trial Court Cause No. 29D04-1907-F6-6112

Brown, Judge.

[1] Brian Wesley Curry appeals his conviction for operating a vehicle while intoxicated as a level 6 felony and his aggregate sentence. Curry raises two issues which we restate as:

I. Whether the trial court abused its discretion in admitting into evidence the results of a blood draw; and

II. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

We affirm.

Facts and Procedural History

[2] At approximately 10:00 p.m. on July 22, 2019, Sheridan Police Officer Michael James Foote received a dispatch to a call regarding two men on a small motorcycle driving erratically and possibly drinking. Officer Foote arrived at the area and observed a motor scooter with two males on it weaving on a two-lane road in a mixed use rural area. The motor scooter "nearly struck the front of [Officer Foote's] vehicle in the opposing lane." Transcript Volume II at 78. Officer Foote turned around to follow the vehicle and continued to observe it. He observed Curry, a heavier-set male, as the primary operator of the vehicle, and the passenger, William Leigh, was a thin-set male. Curry "had his feet out, skimming along the ground in an apparent effort to maintain balance" and was weaving side-to-side inside and outside his lane. *Id.* at 79. The scooter did not have a registration visible at the rear.

[3] Officer Foote initiated a traffic stop. Upon exiting his vehicle, he noticed that the operator was the same individual he had seen operating the motor scooter when it passed him. Leigh immediately got off the vehicle, and Curry, the operator, took a drink from an open mason-type jar, which contained an amber liquid and smelled like an alcoholic beverage, and placed it on the floorboard.

[4] During his initial interaction, Curry asked if he could stand up and also exclaimed "I'm drunk." *Id.* at 83. Officer Foote noticed there was a strong odor of alcoholic beverage about Curry, his speech was extremely slurred, he was drooling, he had liquid splashed on the front of his shirt, and he was "extremely unsteady in balance." *Id.* at 85.

[5] Officer Foote asked Curry if he would consent to a field sobriety test, and Curry said: "Yes." *Id.* at 92. Officer Foote asked Curry if he had any impairment that would prohibit him from performing a field-sobriety test, and Curry answered in the negative. He conducted the horizontal gaze nystagmus test, and Curry failed. Officer Foote explained the instructions to the walk and turn test but did not fully instruct Curry because he was unable to maintain the starting position and repeatedly stepped off and fell off the line. Officer Foote terminated the test due to concerns for Curry's safety. He then attempted to administer the one-leg stand test, and Curry was unable to complete the test, repeatedly put his foot down, stepped off the line, was using his arms for balance, and was swaying extremely erratically. After the tests, Curry told Officer Foote that he had a traumatic brain injury. Curry's demeanor "vacillated between belligerent and sadness, affection, it was all over the map as it were." *Id.*

[6] Officer Foote asked Curry if he would consent to a portable breath test, and Curry initially stated that he would take a portable breath test but then refused. Officer Foote informed Curry of the Implied Consent Law, "a condition upon receiving a driver's license you agree that upon probable cause by a police officer, you will submit to a certified chemical test." *Id.* at 96. Curry then stated, "I will take it all." *Id.* at 97. Officer Foote put Curry in hand restraints and placed him in the rear of his patrol vehicle.

[7] Officer Foote looked for the vehicle identification number on the scooter and saw a jar containing green plant material, which later tested positive for marijuana, and a baggy containing a multicolored glass pipe in plain view. Officer Foote transported Curry toward the Hamilton County Jail, Curry complained of an undefined medical issue, and Officer Foote redirected to the hospital for Curry to receive a medical check and also requested a blood draw. Jill Broch, a registered nurse in the emergency room, drew Curry's blood. The blood alcohol content of the sample tested 0.251 plus or minus 0.019 grams per 100 milliliters of blood. The blood sample also contained metabolites indicating marijuana use.

[8] On July 24, 2019, the State charged Curry with: Count I, possession of marijuana as a class B misdemeanor; Count II, operating a vehicle while intoxicated as a class C misdemeanor; Count III, possession of paraphernalia as a class C misdemeanor; and Count IV, operating a vehicle while intoxicated as

a level 6 felony.[1] The State also alleged that Curry was an habitual vehicular substance offender.

[9] On July 23, 2020, the court held a jury trial. Defense counsel argued that the blood test occurred without a warrant; that while Curry initially agreed to a chemical test, he later no longer wished to consent to a chemical test; and that he did not give actual knowing and voluntary consent to the drawing and testing of his blood. The court took defense counsel's motion to suppress under advisement.

[10] During the direct examination of Officer Foote, the court admitted seventeen and one-half minutes of video recording from Officer Foote's body camera as State's Exhibit 1 and played it for the jury without objection. During a recess, the court asked if there was any argument or additional evidence on Curry's motion to suppress. The prosecutor stated:

> Your Honor, we can take additional testimony. I can't summarize – there were several statements made after the video ended. At one point, Officer Foote at the time approached the Defendant, asked to check his mouth, the Defendant at that time refused. Got in the vehicle, asked him again later and he still consented to a chemical test. He said, I don't want to talk to you. When they went to the hospital, he was compliant. And

[1] Count IV alleged that Curry "did operate a vehicle while intoxicated, while having a prior conviction for operating while intoxicated in the seven (7) years immediately preceding the occurrence of the instant violation, to-wit: a conviction in the Hamilton Superior Court 6 on or about September 21, 2016, under cause number 29D06-1602-F6-001430." Appellant's Appendix Volume II at 19.

> the nurse confirmed that he wanted to do a blood draw. At that time, he flopped out his arm and said, "Yes, ma'am.

Id. at 99-100. The court asked defense counsel if he agreed with the summary, and he answered affirmatively. Defense counsel stated that the officer asked a second time, "You consented once, do you consent again," and Curry answered: "I don't want to talk to you." *Id.* at 100. He stated that Curry did not consent to the officer a second time and that "[i]f anything, he might have consented to a nurse." *Id.* at 101. After some discussion, the court asked defense counsel: "So, the argument is by not responding, he's withdrawing his initial consent? Right?" *Id.* at 102. Defense counsel answered: "That is my argument. Judge, and just for the record, I do want to make it clear that my client never explicitly consented to a blood draw." *Id.* The court denied the motion to suppress based on the stipulated facts. It also found that Curry agreed to take a chemical test which would include a blood draw.

[11] Nurse Broch testified that she did not remember performing a blood draw on Curry, and when asked for the procedures involving a blood draw for police custody, she answered: "[I]f the patient gives consent, we draw the blood. If the patient doesn't give consent, the police officer has to get a warrant before we draw the blood." *Id.* at 133.

[12] During cross-examination, when asked what she thought was Curry's BAC level at the time of the stop, Dr. Christina Beymer, the Assistant Director at the Indiana State Department of Toxicology, answered that she believed it would be .28 which was a high level of intoxication in her opinion.

[13] Curry testified that he was at Matt Smith's house that evening, went to obtain a six pack of beer, returned, and hung out with Leigh who wanted to take him to his apartment three blocks away. He stated that he walked to Leigh's apartment where he consumed probably four beers, smoked marijuana, and then tried to have someone bring him his seizure medication. He testified that he suffered from seizures since 2012 and has a traumatic brain injury. He stated that he got on the scooter at Smith's house and Leigh was on the scooter "[t]o help [him] get to [his] meds." *Id.* at 187. He testified that the mason jar contained alcohol and he was drinking it while he was on his scooter. He stated that Leigh was operating the scooter and his medication was at his mother's house, which was four or five miles away. On rebuttal, Officer Foote testified that Curry did not indicate he was having a seizure, Curry indicated that he needed medical attention when they were in route to the jail, and that he took Curry to the hospital.

[14] The jury found Curry guilty of Count I, possession of marijuana as a class B misdemeanor, Count II, operating a vehicle while intoxicated as a class C misdemeanor, and Count III, possession of paraphernalia as a class C misdemeanor. Curry stipulated to the prior convictions for the level 6 felony enhancement and the habitual vehicular substance offender allegation. The court found Curry guilty of Count IV, operating a vehicle while intoxicated as a level 6 felony.

[15] At the sentencing hearing, Curry testified that he had three seizures since he had been to jail after the trial. He stated that he would like to be back home

with his family, it is hard with his medical conditions, and he was sorry for wasting the court's time. With respect to a sentence, he stated he hoped to "do two years do one so [he] could be back home." *Id.* at 244. The prosecutor requested concurrent sentences of 180 days for Count I, sixty days for Count III, and 545 days executed for Count IV but enhanced due to his status as an habitual vehicle substance offender by 1,095 days for a total sentence of four and one-half years. Defense counsel argued the offense occurred on a back country road on a moped and requested a two-year executed sentence.

[16] The court stated that it would accept the aggravating and mitigating circumstances as stated in the presentence investigation report ("PSI").[2] It also found that Curry was driving a moped instead of a normal-sized vehicle as a mitigating circumstance. The court found the aggravating circumstances greatly outweighed the mitigating circumstances due to Curry's criminal history.

[17] The court merged Count II into Count IV, ordered no jail time for Counts I and Count III, sentenced Curry to two years for Count IV, operating a vehicle while intoxicated as a level 6 felony, and enhanced the sentence by two years due to

[2] The PSI states the aggravating factors included Curry's history of criminal or delinquent behavior and that he had recently violated the conditions of any probation, parole, community corrections placement, or pretrial release and the mitigating factors include that Curry "has post-traumatic stress disorder, traumatic brain injury, or a post-concussive brain injury." Appellant's Appendix Volume II at 99.

his status as an habitual vehicular substance offender for an aggregate sentence of four years.

Discussion

I.

[18] The first issue is whether the trial court abused its discretion in admitting into evidence the results of the blood draw. The trial court has broad discretion to rule on the admissibility of evidence. *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). Rulings on the admissibility of evidence are reviewed for an abuse of discretion and ordinarily reversed when admission is clearly against the logic and effect of the facts and circumstances. *Id.* However, when a challenge to such a ruling is predicated on the constitutionality of the search or seizure of evidence, it raises a question of law that we review *de novo*. *Id.*

[19] Curry argues that the warrantless blood draw constituted an unreasonable search and was conducted in violation of his Fourth Amendment rights. He does not argue that he was incapable of giving consent. Rather, he asserts his previously-given consent to a chemical test was no longer valid at the time that the blood draw occurred. He asserts that, "although [he] may have verbally indicated assent to the chemical tests when he uttered that he would 'take it all,'" both his subsequent refusal to allow Officer Foote to perform a mouth check and his later statement that he did not want to speak with Officer Foote belied his previous verbal indication. Appellant's Brief at 13. The State argues the court did not abuse its discretion by admitting the test results because Curry

consented to the blood draw and did not withdraw his consent or refuse the blood draw.

[20] 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.

[21] The taking of a blood sample is a search. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). Normally, the Fourth Amendment is satisfied when police obtain a warrant. *Garcia-Torres v. State*, 949 N.E.2d 1229, 1237 (Ind. 2011). A warrant is not required, however, when there is consent to search. *Id.* Consent to search is valid when it is given voluntarily, and voluntariness is a question of fact determined from the totality of the circumstances. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041 (1972)). Voluntariness is not vitiated merely because the defendant is in custody. *Id.* (quoting *United States v. Watson*, 423 U.S. 411, 424, 96 S. Ct. 820 (1976)). "It is well established that a search is reasonable when the subject consents and that sometimes consent to a

search need not be express but may be fairly inferred from context." *Birchfield*, 136 S. Ct. at 2185 (citations omitted).[3]

[22] Officer Foote informed Curry of the Implied Consent Law, "a condition upon receiving a driver's license you agree that upon probable cause by a police officer, you will submit to a certified chemical test." Transcript Volume II at 96. Curry then stated, "I will take it all." *Id.* at 97. Officer Foote began to transport Curry to the Hamilton County Jail, Curry complained of an undefined medical issue, and Officer Foote redirected to the hospital for a medical check and requested a blood draw. Officer Foote testified that Curry was cooperative when they arrived at the hospital, and that Curry complied with commands and directives, answered questions concerning his identity for the hospital, complied with hospital staff, and never resisted in any way, shape, or form. The prosecutor stated that there were several statements made after the video recording ended, "[a]t one point, Officer Foote at the time approached the Defendant, asked to check his mouth, the Defendant at that time refused," Officer Foote "[g]ot in the vehicle, asked him again later and he still consented to a chemical test," Curry stated "I don't want to talk to you,"

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[3] In *Burnell v. State*, 56 N.E.3d 1146, 1147 (Ind. 2016), which both parties cite on appeal, the driving privileges of a motorist were administratively suspended on grounds the motorist refused to take a chemical test and, upon judicial review the trial court declined to set aside the suspension. The Indiana Supreme Court addressed the question of "what constitutes a 'refusal' to submit to a chemical test so as to warrant the revocation of the license of a person arrested for driving under the influence of alcohol." 56 N.E.3d at 1147. In that context, the Court held that "a refusal to submit to a chemical test occurs when the conduct of the motorist is such that a reasonable person in the officer's position would be justified in believing the motorist was capable of refusal and manifested an unwillingness to submit to the test." *Id.* at 1151.

Curry was compliant at the hospital, "the nurse confirmed that [Curry] wanted to do a blood draw," and Curry "flopped out his arm and said, 'Yes, ma'am.'" *Id.* at 100. When the court asked defense counsel if he agreed with the summary, he answered affirmatively. While Nurse Broch did not specifically recall Curry, she testified that "if the patient gives consent, we draw the blood" and "[i]f the patient doesn't give consent, the police officer has to get a warrant before we draw the blood." *Id.* at 133.

[23] Under the circumstances, we conclude that Curry's consent was voluntary and he did not withdraw his consent. Accordingly, the blood draw was not a violation of the Fourth Amendment. *See Gutenstein v. State*, 59 N.E.3d 984, 1003 (Ind. Ct. App. 2016) (concluding that the defendant's consent was voluntary and the blood draw was not a violation of the Fourth Amendment where the defendant consented to the blood draw and did not voice any objection or concern when his blood was drawn), *trans. denied*; *Garcia-Torres*, 949 N.E.2d at 1237 (holding that the defendant consented to a cheek swab where the officer described the procedure and asked defendant if it was okay, the defendant answered "no problem," and the defendant opened his mouth, cooperated, and was helpful through the entire procedure); *Cochran v. State*, 771 N.E.2d 104, 108 (Ind. Ct. App. 2002) (holding that the trial court properly denied the defendant's motion to suppress his chemical test results where the defendant consented to the chemical testing), *trans. denied*.

II.

[24] The next issue is whether Curry's sentence is inappropriate in light of the nature of the offenses and his character. Curry asserts that he was operating a motor scooter which posed less risk to the motoring public than a regular-sized vehicle and he was traveling a relatively short distance in a rural area. He states that he lives in a home next to his mother on his mother's property, works with her at her painting business, and is disabled.

[25] Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[26] Ind. Code § 35-50-2-7 provides that a person who commits a level 6 felony shall be imprisoned for a fixed term of between six months and three years, with the advisory sentence being one year. Ind. Code § 9-30-15.5-2(d) provides that the court shall sentence a person found to be an habitual vehicular substance offender to an additional fixed term of at least one year but not more than eight years of imprisonment, to be added to the term of imprisonment imposed under Ind. Code Chapter 35-50-2.

[27] Our review of the nature of the offenses reveals that Curry drank multiple beers, smoked marijuana, operated a motor scooter, and "had his feet out, skimming

along the ground in an apparent effort to maintain balance."[4] Transcript Volume II at 79. He weaved side-to-side inside and outside his lane on a two-lane road and nearly struck Officer Foote's vehicle. After Officer Foote initiated the traffic stop, Curry took a drink from an open mason-type jar containing alcohol and exclaimed "I'm drunk." *Id.* at 83. Officer Foote noticed there was a strong odor of alcoholic beverage about Curry, his speech was extremely slurred, he was drooling, he had liquid splashed on the front of his shirt, and he was extremely unsteady in balance. Office Foote saw a jar containing marijuana and a glass pipe on the scooter in plain view.

[28] Our review of the character of the offender reveals that the PSI states that Curry has been disabled since 2012 due to a traumatic brain injury from to a moped accident in which he hit a telephone pole, he lives in his own home on his mother's property, and he helps her in her painting business approximately ten hours per month and earns twenty dollars an hour while working for her. He stated that he has a filter under his heart, multiple blood clots in his legs, and suffers from seizures.

[29] The PSI indicates that Curry reported first using alcohol at the age of eight and marijuana at the age of twelve. He stated using cocaine "on and off" but denied using it on a regular basis. Appellant's Appendix Volume II at 97. He stated: "I have used about every kind of drug you can think of." *Id.* The PSI

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[4] The PSI states that Curry admitted to consuming six to twelve beers and smoking approximately seven grams of marijuana on the day of the offense.

states that juvenile probation records indicate that Curry, who was born in 1984, was ordered to complete substance abuse treatment twice and that it appears he completed one of those treatments. Curry was ordered to complete substance abuse treatment in 2004 and 2009, and he did not complete treatment in 2004 but completed IOP and Sober Living at Behavior Corp in 2009. Curry advised that he also completed substance abuse treatment while at the Indiana Department of Correction. He stated he had been in substance abuse treatment many times, did not feel it was helpful, and did not feel he needed treatment.

[30] Curry has juvenile adjudications for conversion and theft in 1997, theft and criminal mischief in 1998, battery and illegal consumption of alcohol in 1999, and theft in 2002. As an adult, Curry has convictions for illegal consumption of alcohol in 2002; operating a motor vehicle without ever receiving a license as a class C misdemeanor in 2003; illegal consumption of alcohol and resisting law enforcement in 2004; public intoxication in 2008; operating a vehicle while intoxicated, leaving the scene of an accident, and resisting law enforcement as class A misdemeanors as well as possession of a controlled substance, possession of marijuana, operating a vehicle with an ACE of .08 or more, and operating a vehicle while intoxicated in 2009; operating a vehicle while intoxicated as a class D felony in 2011; operating a vehicle as an habitual traffic violator as a class D felony in 2013; public intoxication as a class B misdemeanor in 2015; and possession of marijuana as a class B misdemeanor, operating a vehicle after being an habitual traffic offender as a level 6 felony,

and operating a vehicle with a BAC of .08 or more as a class C misdemeanor in 2016.

[31] The PSI indicates Curry was placed on four terms of probation as a juvenile and had violations filed in two of those terms. It indicates that he was placed on probation three times as an adult and all resulted in revocations. The PSI indicates Curry's overall risk assessment score using the Indiana Risk Assessment System places him in the high risk to reoffend category.

[32] After due consideration, we conclude that Curry has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the offenses and his character.

[33] For the foregoing reasons, we affirm Curry's conviction for operating a vehicle while intoxicated as a level 6 felony and his sentence.

[34] Affirmed.

Bradford, C.J., and Vaidik, J., concur.