MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Ricky Ward,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

September 20, 2021

Court of Appeals Case No. 20A-CR-02399

Appeal from the Marion County Superior Court

The Honorable Shatrese Flowers, Judge
The Honorable James Snyder, Magistrate

Trial Court Cause No. 49D28-1906-F4-024985

Robb, Judge.

Case Summary and Issue

[1] Ricky Ward filed a motion to suppress evidence seized in a search of his hotel room and car. Ward raises one issue for our appeal, which we restate as: whether the trial court erred in denying his motion to suppress. Concluding that the trial court did not err, we affirm.

Facts and Procedural History

[2] Tyshawn Kellogg was on parole for a Michigan robbery conviction, and his parole was transferred to Indiana. Kellogg agreed to abide by Indiana parole conditions. Pursuant to Kellogg's Indiana Conditional Parole Release Agreement, Kellogg agreed to the following:

> HOME VISITATION AND SEARCH – (a) I will allow my supervising officer or other authorized officials of the Department of Correction to visit my residence and place of employment, at any reasonable time.
> (b) I understand that I am legally in the custody of the Department of Correction and that my person and residence [or] property under my control may be subject to reasonable search by my supervising officer or authorized official of the Department of Correction if the officer or official has reasonable cause to believe that the parolee is violating or is in imminent danger of violating a condition to remaining on parole.

Exhibits, Volume 1 at 4.

[3] Parole Officer Tony Green of the Indiana Department of Correction approved Kellogg to live with his sister in Indianapolis. Officer Green informed Kellogg

that every night Kellogg did not stay at the approved residence, Kellogg was required to notify him. On June 19, 2019, Officer Green was contacted by Kellogg's girlfriend's mother who informed him that Kellogg was committing robberies in South Bend, was in possession of a gun, and had threatened her daughter with said weapon. *See* Transcript, Volume II at 16.

[4] That same day, Kellogg contacted Officer Green and informed Officer Green that he would be staying at an extended stay hotel in room 206 that night. Officer Green considered this an approved temporary stay for the night. Subsequently, Officer Green contacted the parole field team to inspect the address given by Kellogg and informed them Kellogg was likely in possession of firearms.

[5] Later that evening, Parole Officer Harold Branch and other members of the parole field team, went to the extended stay hotel. When Officer Branch arrived, he knocked on the door of room 206 and identified himself. Kellogg answered the door. Kellogg was placed in restraints and pat searched before the parole field team began conducting a security sweep of the room. During the sweep, officers also found Ward in the room.[1] Ward was also searched and placed in handcuffs. Ward told officers that the hotel room was his, which they later confirmed. During the search of the room, officers found a marijuana blunt, two handguns, and two extended magazines. The search took around

[1] The record is unclear as to whether Ward was "in the bed" or "under the bed[.]" *See* Tr., Vol. II at 41.

two minutes from entry to finding the firearms. *See id.* at 50. Both Ward and Kellogg denied any knowledge of the guns.

[6] Officer Robert Cosler arrived on the scene after the initial search and found car keys in the hotel room. Ward stated that the keys were his but that the car to which they belonged was not at the hotel. However, another officer took the keys into the parking lot, discovered they unlocked a Chevrolet, ran the license plate, and confirmed that the car belonged to Ward. A canine sniff was performed, and the dog alerted on the car. Officer Cosler then obtained a search warrant for the car and the hotel room. Officers searching the car found burnt marijuana blunts in the ash tray.

[7] On June 25, 2019, the State charged Ward with two counts of unlawful possession of a firearm by a serious violent felon, both Level 4 felonies, and possession of marijuana, a Class B misdemeanor. Kellogg was also charged and filed a motion to suppress. On January 22, 2020, Ward joined Kellogg's motion. Following a hearing, the trial court denied the motion. Ward filed a motion to certify the order for interlocutory appeal which was granted by the trial court. On January 15, 2021, this court accepted jurisdiction. Ward now appeals.

Discussion and Decision

I. Standard of Review

[8] We review the denial of a motion to suppress in a manner similar to reviewing the sufficiency of evidence. *Harris v. State*, 60 N.E.3d 1070, 1072 (Ind. Ct. App. 2016), *trans. denied.* We do not reweigh the evidence. *Id.* We consider conflicting evidence most favorable to the trial court's ruling, as well as undisputed evidence favorable to the defendant. *Id.* "The record must disclose substantial evidence of probative value that supports the trial court's decision." *State v. Quirk*, 842 N.E.2d 334, 340 (Ind. 2006). Nevertheless, the constitutionality of a search or seizure is a question of law, which we review de novo. *Wertz v. State*, 41 N.E.3d 276, 279 (Ind. Ct. App. 2015), *trans. denied*.

II. Search and Seizure

A. Fourth Amendment

[9] The Fourth Amendment to the United States Constitution protects people from unreasonable search and seizure. A search warrant is generally a prerequisite to a constitutionally proper search and seizure. *Halsema v. State*, 823 N.E.2d 668, 676 (Ind. 2005). When a search is conducted without a warrant, the burden is on the State to prove that an exception to the warrant requirement existed at the time of the search. *Id.* One such exception is a valid consent to search. *Primus v. State*, 813 N.E.2d 370, 374 (Ind. Ct. App. 2004). Our supreme court has specifically recognized an exception to the warrant requirement for a search of the residence of a probationer or community corrections participant where the probationer or participant has authorized a warrantless, suspicionless search by

valid consent in the conditions of their release. *State v. Vanderkolk*, 32 N.E.3d 775, 780 (Ind. 2015).

[10] Ward argues that "[a] parolee's consent should not waive a citizen's privacy rights without proof that the citizen knowingly assumed that risk." Appellant's Brief at 9. To support this, Ward distinguishes our decision in *McElroy v. State,* characterizing the holding in that case as "premised on the knowledge and consent of the host to assume the risk of housing a known offender and to accept a reduced expectation of privacy." *Id.* at 16 (citing *McElroy v. State*, 133 N.E.3d 201, 208-09 (Ind. Ct. App. 2019), *trans. denied*). In *McElroy*, we held:

> [A] person who agrees to house a community corrections participant retains a limited expectation of privacy in his residence and possessions. This is so because the participant's person, residence, and possessions are subject to search, including common areas and common possessions.

133 N.E.3d at 209.

[11] However, we conclude that whether Ward knew Kellogg was on parole or not is irrelevant. It is well-established in Indiana that consent to search may be given by a third party who has common authority over the premises. *Walker v. State*, 986 N.E.2d 328, 334 (Ind. Ct. App. 2013), *trans. denied*, *cert. denied*, 571 U.S. 1134 (2014). In *Walker*, we stated:

> Common authority rests on the mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the cohabitants has the right to permit the inspection in his or her

> own right and that the others have *assumed the risk that one of their number might permit the common area to be searched.*

Id. (quoting *Hill v. State*, 825 N.E.2d 432, 436 (Ind. Ct. App. 2005)) (emphasis added).

[12] Here, both Ward and Kellogg were staying in the hotel room. Both had mutual use of the entire room and had joint access and control. We have previously held that when parties share a motel room, "[t]hey both [have] joint access to and mutual use of the room, including the beds and fixtures" and thus each party risks that the other would permit a search of the room. *Peel v. State*, 868 N.E.2d 569, 576 (Ind. Ct. App. 2007). We conclude that Kellogg's parole conditions constituted valid consent to search room 206 and such a search was a risk Ward assumed by rooming with Kellogg. Accordingly, Ward's Fourth Amendment rights were not violated. [2]

B. Article 1, Section 11

[13] Ward also contends that "[i]t is unreasonable under the Indiana constitution to limit the privacy rights of any Hoosier who wittingly or unwittingly becomes parole adjacent." Appellant's Br. at 19. Like the Fourth Amendment, Article 1,

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[2] Ward also argues that the search of his car violated his Fourth Amendment rights. Ward contends that the search warrant obtained, in part, to search his car was invalid as fruit of the poisonous tree because the initial search of the hotel room was invalid. However, we need not address this because we conclude the search of the hotel room was valid under the consent exception to the warrant requirement. Further, prior to searching the car, the police employed a narcotics dog to sniff the car and got a positive response which would have provided independent probable cause to search the car. *See Myers v. State*, 839 N.E.2d 1146, 1152 (Ind. 2005). We also note that Ward was not charged for anything found in the car.

section 11 of the Indiana Constitution protects people from unreasonable search and seizure. The language of section 11 mirrors the federal protection and appears to have been derived from the Fourth Amendment; however, we interpret and apply it independently from Fourth Amendment jurisprudence. *State v. Bulington*, 802 N.E.2d 435, 438 (Ind. 2004). When evaluating section 11 claims, we place the burden on the State to show that the intrusion was reasonable under the totality of the circumstances. *Id.* Our supreme court has explained:

> [R]easonableness 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.

Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005).

[14] Ward argues that under the *Litchfield* factors, "the search of room 206 was unreasonable." Appellant's Br. at 18. We disagree. First, the degree of concern, suspicion, or knowledge that a violation had occurred was high. Officer Green was given information that Kellogg was committing robberies in South Bend, was in possession of a gun, and had threatened his girlfriend with a firearm. *See* Tr., Vol. II at 16.

[15] The second *Litchfield* factor requires us to consider the "degree of intrusion" upon the citizen. 824 N.E.2d at 361. We are to "consider the degree of intrusion from the defendant's point of view. Thus, a defendant's consent to the search or

seizure is relevant to determining the degree of intrusion." *Hardin v. State*, 148 N.E.3d 932, 944 (Ind. 2020) (internal citation omitted), *cert. denied*, 141 S.Ct. 2468 (2021). Here, Ward did not give consent to search the room; however, Kellogg's parole agreement provided the necessary consent. *See* Ex., Vol. 1 at 4. And this court has held that once consent is obtained, the degree of intrusion is minimal. *See State v. Keller*, 845 N.E.2d 154, 169 (Ind. Ct. App. 2006), *trans. denied*. Further, the "method" of the search or seizure was minimal. Officers knocked on the hotel room door and identified themselves. While they restrained both Ward and Kellogg, they informed them they were conducting a parole search and performed the search relatively quickly. *Cf. Hardin*, 148 N.E.3d at 945 ("For example, we have found a high degree of intrusion when officers executed a search warrant using a battering ram, flash-bang grenade, and SWAT team as well as when officers conducted a warrantless strip search of a misdemeanor arrestee as a matter of course.").

[16] Last, we consider the "extent of law enforcement needs." *Litchfield*, 824 N.E.2d at 361. We have previously noted the "State's legitimate interests of supervising participants, protecting the public from criminal acts by reoffenders, and furthering its rehabilitative objectives." *McElroy*, 133 N.E.3d at 209.

> [W]ithout the resulting burden upon the privacy rights of non-participants, community corrections participants would have a substantial motive to reside with a non-participant, thereby thwarting the State's ability to effectively monitor participants and carry out its governmental functions.

Id.

[17] We conclude that the search of hotel room 206 and seizure of Ward was not unreasonable under the totality of the circumstances and therefore did not violate Article 1, section 11 of the Indiana Constitution.

Conclusion

[18] We conclude that the trial court did not err by denying Ward's motion to suppress. Accordingly, we affirm.

[19] Affirmed.

Bailey, J., and May, J., concur.