MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Denise L. Turner
DTurner Legal LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Robert M. Yoke
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Brione Jackson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 4, 2023

Court of Appeals Case No. 22A-CR-2524

Interlocutory Appeal from the Hamilton Superior Court

The Honorable William J. Hughes, Judge

Trial Court Cause No. 29D03-2203-F4-1271

Memorandum Decision by Judge Bradford
Judges May and Mathias.

Bradford, Judge.

Case Summary

[1] On March 1, 2022, Brione Jackson was charged with one count of Level 4 felony unlawful possession of a firearm by a serious violent felon ("SVF"), after a police officer found a handgun concealed in the trunk of his vehicle. Prior to trial, Jackson filed a motion to suppress the handgun and any statements he had made following its discovery. The trial court certified the matter for interlocutory appeal after denying Jackson's motion to suppress, and we accepted jurisdiction. We affirm.

Facts and Procedural History

[2] At approximately 2:40 a.m. on March 1, 2022, Carmel Police Officer Thomas Szybowski was patrolling the parking lot of the Extended Stay America Hotel in Carmel, which he knew to have "a significant history of … criminal activities" occurring in the parking lot, including illegal drug activity. Tr. Vol. II p. 10. Officer Szybowski observed Jackson sitting in a silver Lexus GS3 in "the back parking lot." Tr. Vol. II p. 10. Officer Szybowski further observed that the vehicle had been backed into a parking spot, which, based on its position in the parking lot behind the hotel, "drew [Officer Szybowski's] attention with [his] experience that sometimes criminals know to do that to conceal the license plate being displayed on that vehicle." Tr. Vol. II p. 10.

[3] Officer Szybowski approached the vehicle and spoke to Jackson, the sole occupant of the vehicle. During the encounter, Officer Szybowski smelled what

he knew from his training and experience to be the odor of burnt marijuana emanating from the interior of Jackson's vehicle. Officer Szybowski searched Jackson's vehicle, finding a "silver and black Glock 48 handgun" concealed under a wooden box in the trunk. Appellant's App. Vol. II p. 34. By this time, Officer Szybowski had become aware that Jackson had a previous conviction for carjacking and, as a result, qualified as an SVF. Later that day, the State charged Jackson with one count of Level 4 felony unlawful possession of a firearm by an SVF.

[4] On April 18, 2022, Jackson filed a motion to suppress "all evidence recovered from the search of [his] automobile trunk, and any statements made by [Jackson] thereafter." Appellant's App. Vol. II p. 36. After a hearing on Jackson's motion, the trial court denied Jackson's motion to suppress. At Jackson's request, the trial court certified its order for interlocutory appeal.[1]

Discussion and Decision

[5] Jackson contends that the trial court erred in denying his motion to suppress the handgun recovered during the search of the trunk of his vehicle. Specifically, Jackson argues that "[w]ithout more, the smell of burnt marijuana alone [was] insufficient to establish probable cause to search the trunk of [his] vehicle." Appellant's Br. p. 6. Our standard of review on appeal for the denial of a

[1] In addition to requesting that the trial court's order be certified for interlocutory appeal, Jackson also filed a motion to correct error, which was denied by the trial court.

motion to suppress evidence is similar to other sufficiency issues. *Johnson v. State*, 21 N.E.3d 841, 843 (Ind. Ct. App. 2014), *trans. denied*.

> We determine whether substantial evidence of probative value exists to support the court's denial of the motion. [*Westmoreland v. State*, 965 N.E.2d 163, 165 (Ind. Ct. App. 2012)]. We do not reweigh the evidence, and we consider conflicting evidence most favorably to the trial court's ruling. *Taylor v. State*, 689 N.E.2d 699, 702 (Ind. 1997). However, unlike other sufficiency matters, we must also consider the uncontested evidence that is favorable to the defendant. *Westmoreland*, 965 N.E.2d at 165.

Id. "We review de novo a ruling on the constitutionality of a search or seizure, but we give deference to a trial court's determination of the facts, which will not be overturned unless clearly erroneous." *Westmoreland*, 965 N.E.2d at 165 (citing *Campos v. State*, 885 N.E.2d 590, 596 (Ind. 2008)).

[6] > A traffic stop is a seizure subject to the constraints imposed by both the Indiana and Federal Constitutions. One exception to the warrant requirement for a seizure is an investigatory stop based on reasonable suspicion. *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999); *Terry v. Ohio*, [392 U.S. 1, 30– 31 (1968)]. Reasonable suspicion exists where the facts known to the officer, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe that criminal activity has or is about to occur. *Baldwin*, 715 N.E.2d at 337.

Campos, 885 N.E.2d at 597. Although Jackson concedes that Officer Szybowski had reasonable suspicion to search the passenger compartment of his vehicle, Jackson claims that the search of the trunk of his vehicle was impermissible under both the Fourth Amendment to the United States Constitution ("the

Fourth Amendment") and Article 1, Section 11 of the Indiana Constitution ("Article 1, Section 11").

[7] The Fourth Amendment, which protects individuals against unreasonable searches and seizures of persons and property, provides as follows:

> 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.

"As a deterrent mechanism, evidence obtained in violation of this rule is generally not admissible against a defendant absent a recognized exception." *Johnson v. State*, 117 N.E.3d 581, 583 (Ind. Ct. App. 2018), *trans. denied*. "Likewise, [Article 1, Section 11] protects citizens from unreasonable searches and seizures." *Id*. However, although the language of Article 1, Section 11 tracks the Fourth Amendment verbatim,

> Indiana has explicitly rejected the expectation of privacy as a test of the reasonableness of a search or seizure. The legality of a governmental search under the Indiana Constitution turns on … 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, 359–61 (Ind. 2005). Thus, "[d]espite the similarity of the two provisions, Indiana courts interpret and apply [A]rticle 1,

[S]ection 11 independently from Fourth Amendment analysis." *Johnson*, 117 N.E.3d at 583 (citing *Mitchell v. State*, 745 N.E.2d 775 (Ind. 2001)).

I. The Fourth Amendment

[8] Jackson argues that, under the Fourth Amendment, the probable cause to search his vehicle did not extend to his trunk. "Probable cause to search a vehicle is established if, under the '*totality of the circumstances*' there is a 'fair probability' that the car contains contraband or evidence." *U.S. v. Nielsen*, 9 F.3d 1487, 1489–90 (10th Cir. 1993) (quoting *Ill. v. Gates*, 462 U.S. 213, 238 (1983) (emphasis in original). In *U.S. v. Ross*, 456 U.S. 798, 825 (1982), the United States Supreme Court held that the scope of the warrantless search allowable under the vehicle exception to the general warrant requirement "is no broader and no narrower than a magistrate could legitimately authorize by warrant." In reaching this holding, the Court explained that

> [t]he scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

Ross, 456 U.S. at 824. However, the Court held that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825.

[9] In support of his claim that the probable cause to search his vehicle did not extend to the vehicle's trunk, Jackson points to the United States Court of Appeals for Tenth Circuit's decision in *Nielson*, in which the Court stated that "[w]e do not believe under the circumstances that there was a fair probability that the *trunk* contained marijuana, or that a disinterested magistrate would so hold if asked to issue a search warrant." 9 F.3d at 1491 (emphasis in original). However, the Court of Special Appeals of Maryland has concluded the opposite, noting that

> [t]he reality is that marijuana and other illegal drugs, by their very nature, can be stored almost anywhere within a vehicle. The location-specific principle that probable cause must be tailored to specific compartments and containers within an automobile, does not apply when officers have only probable cause to believe that contraband is located somewhere within the vehicle, rather than in a specific compartment or container within the vehicle. The odor of burnt marijuana emanating from a vehicle provides probable cause to believe that additional marijuana is present elsewhere in the vehicle.

Wilson v. State, 921 A.2d 881, 892 (Md. Ct. Spec. App. 2007) (internal quotation and citation omitted). The *Wilson* Court further noted that one may reasonably infer that an individual who smokes marijuana in his vehicle may store

marijuana in its trunk and that it was not unreasonable for a police officer "to believe that the odor of burnt marijuana indicates current possession of unsmoked marijuana somewhere inside the vehicle, including the trunk." *Id.* at 892. The *Wilson* Court explained that if it were to adopt the opposite conclusion, "the trunk, or any other area outside of the passenger compartment, becomes a safe harbor for the transportation of drugs for both users and traffickers who use drugs. We are not persuaded that a Fourth Amendment reasonableness analysis dictates that result." *Id.* at 893. We find the *Wilson* Court's reasoning to be persuasive.

[10] In denying Jackson's motion to suppress, the trial court found as follows:

> 9. Was it reasonable under these circumstances to search the trunk of the vehicle after locating nothing in the interior of the vehicle. This is a close question, but under all the circumstances known to the police officer at the time of the search of the trunk, the search of the trunk was reasonable. In general where there is the smell of burnt marijuana at some prior time there was the smell of raw marijuana. When no marijuana residue or raw marijuana was located in the passenger compartment, it is reasonable to check the trunk of a stopped vehicle in those locations w[h]ere raw marijuana may be found. Such an area includes under a wooden speaker box on top of the spare tire. In this case it was not marijuana that was found but a gun in the immediate possession of [an SVF]. The officer had the right to seize the gun based upon open view because the officer was lawfully searching for marijuana in the trunk in a location where marijuana could be concealed when he saw the gun.

Appellant's App. Vol. II pp. 44–45.

[11] In addition, while the trial court's order indicated that Officer Szybowski "had not observed any activity in relationship to the trunk," Appellant's App. Vol. II p. 44, the record did contain evidence of a change in Jackson's demeanor when Officer Szybowski approached the trunk. Defense Exhibit One ("the Exhibit"), which is the recording taken by Officer Szybowski's body camera during his encounter with Jackson, was offered by Jackson and admitted into the record during the suppression hearing. The Exhibit indicates that while Officer Szybowski initially found Jackson to be calm and compliant, an assisting officer observed and informed Officer Szybowski that Jackson's demeanor had changed just prior to the search of his trunk. Specifically, the Exhibit demonstrates that another officer on the scene observed that Jackson "was banging on the window" of Officer Szybowski's police vehicle and appeared to be "more nervous" when Officer Szybowski approached the trunk of his vehicle. Ex. 1 at 17:40–17:45.

[12] The United States Court of Appeals for the Seventh Circuit has previously considered a similar factual scenario in *United States v. Kizart*, 967 F.3d 693 (7th Cir. 2020). In *Kizart*, an officer initiated a traffic stop after he had observed the defendant speeding. 967 F.3d at 694. When the officer approached the vehicle, he "smelled burnt marijuana coming from" the vehicle. *Id.* The defendant was initially calm and compliant. *Id.* However, when the officer inquired about the trunk, the defendant's demeanor changed, making the officer "suspicious about what might be in the trunk." *Id.* (internal quotation marks omitted). During a search of the trunk, the officer discovered approximately three pounds each of

marijuana and methamphetamine. *Id.* at 695. The defendant appealed after the trial court had denied his motion to suppress the evidence relating to the search of his trunk. *Id.* On appeal, he argued that "the search could legally include only [his] person or the interior of the car, not the trunk." *Id.* The Seventh Circuit concluded otherwise, finding that "the totality of the circumstances, including the smell of burnt marijuana and [the defendant's] reaction and behavior when [the officer] asked [him] about the trunk, had provided probable cause to search his car's trunk." *Id.* at 699.

[13] Turing our attention back to the instant matter, we conclude that it was reasonable for Officer Szybowski to believe that the odor of burnt marijuana indicated that Jackson was in possession of additional marijuana somewhere in the vehicle, including the trunk. In addition, Jackson's change of demeanor when Officer Szybowski approached his trunk supports a reasonable inference that Jackson knew that there was contraband in the trunk. As such, we conclude that the search of the trunk was reasonable under the Fourth Amendment.

II. Article 1, Section 11

[14] While Jackson concedes that under Indiana law, Officer Szybowski had probable cause to search the passenger compartment of his vehicle after Officer Szybowski smelled the odor of burnt marijuana emanating from his vehicle, he argues that it was unreasonable under Article 1, Section 11 for Officer Szybowski to search his trunk. When considering whether a search is lawful

under Article 1, Section 11, we consider "each case on its own facts to decide whether the police behavior was reasonable." *Brown v. State*, 653 N.E.2d 77, 79 (Ind. 1995). Again, in *Litchfield*, the Indiana Supreme Court recognized that while "there may well be other relevant considerations under the circumstances," the reasonableness of a search 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.

[15] In arguing that the search of his trunk was unreasonable under Article 1, Section 11, Jackson asserts that while Officer Szybowski's "degree of concern, suspicion, or knowledge that a violation had occurred may have initially be high, that degree diminished dramatically when searches of both [his] person and the passenger compartment of his car … yielded nothing illegal." Appellant's Br. p. 12. He further asserts that

> [w]hen the factors are balanced, the totality of the circumstances suggests that the search of the trunk was unreasonable. The officer's highly intrusive search of the trunk was not justified by the relatively low needs of law enforcement and the lack of degree, knowledge, and suspicion a violation had occurred.

Appellant's Br. pp. 13–14. For its part, the State argues that the degree of suspicion was high, the degree of intrusion was relatively low, and the law-enforcement needs were significant.

[16] After reviewing the record, we must agree with the State that the degree of suspicion was high. Officer Szybowski was patrolling the parking lot a hotel, which he knew to have "a significant history of … criminal activities" occurring in the parking lot, including illegal drug activity, at 2:40 a.m., when he encountered Jackson. Tr. Vol. II p. 10. Officer Szybowski observed Jackson sitting in his vehicle behind a hotel at approximately 2:40 a.m. and smelled the odor of burnt marijuana emanating from the vehicle when he approached the vehicle to speak to Jackson. As we have discussed above, it was reasonable for one to infer that additional drugs could be stored in not only the passenger compartment, but also the trunk of the vehicle. This is especially true given the change in Jackson's demeanor as Officer Szybowski approached his trunk. Jackson's actions could lead one to reasonably infer that there was contraband located within the trunk. Further, under the circumstances, we do not believe that the search of the trunk rendered the overall search any more intrusive to Jackson's privacy than the level of intrusion experienced by Jackson in relation to the search of the passenger compartment of his vehicle. As for the needs of law enforcement, considering the above facts together with Officer Szybowski's knowledge of the area to be an area where drug activity frequently occurred, we disagree with Jackson's suggestion that law enforcement's needs were "relatively low." Appellant's Br. p. 14. Thus, we conclude that the search was also reasonable under Article 1, Section 11.

[17] In sum, having concluded that the search was reasonable under both the Fourth Amendment and Article 1, Section 11, we further conclude that the trial court did not err in denying Jackson's motion to suppress.

[18] The judgment of the trial court is affirmed.

May, J., and Mathias, J., concur.