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IN THE
COURT OF APPEALS OF INDIANA

Myles Danard Alexander-Woods,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 3, 2021

Court of Appeals Case No. 20A-CR-1233

Appeal from the Rush Superior Court

The Honorable Brian D. Hill, Judge

Trial Court Cause No. 70D01-1910-F3-639

Tavitas, Judge.

Case Summary

[1] This appeal stems from Myles Danard Alexander-Woods' convictions for possession of a narcotic drug, a Level 3 felony; carrying a handgun without a license, a Class A misdemeanor; possession of marijuana, a Class B misdemeanor; and being an habitual offender. The charges arose from the seizure of certain evidence pursuant to a traffic stop, during which a police officer determined that the presence of the odor of marijuana supplied probable cause for a vehicle search, which yielded a handgun and contraband. Alexander-Woods moved unsuccessfully to suppress the seized evidence on the bases that the police lacked reasonable suspicion to search and arrest him; and his arrest and the vehicle search were unreasonable and violated his rights under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

[2] During Alexander-Woods' jury trial, defense counsel objected to the State's introduction of the seized evidence on identical grounds. For the first time on appeal, however, Alexander-Woods challenges the underlying probable cause determination on the novel ground that the State failed to prove that the police officer was qualified to distinguish between the odors of illegal marijuana and legal hemp. Alexander-Woods failed to assert the "hemp argument" or challenge the police officer's qualifications below; thus, the issue is waived. Moreover, because Alexander-Woods cannot establish fundamental error, his claim must fail. We affirm.

Issue

[3] The issue on appeal is whether the trial court committed fundamental error pursuant to the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution by admitting evidence found during the search of Alexander-Woods' vehicle.

Facts

[4] On October 10, 2019, while Deputy Brent Horton ("Deputy Horton") of the Rush County Sheriff's Department was on routine patrol, Deputy Horton initiated a traffic stop of a speeding vehicle with an Oklahoma license plate. Without his canine partner, Deputy Horton approached the vehicle on the passenger side. Deputy Horton observed the driver, later identified as Alexander-Woods, making "abnormal[ly]" excessive, "furtive movements" within the vehicle. Tr. Vol. III pp. 222, 223. Alexander-Woods was accompanied by his wife, India Alexander-Woods ("India").[1] The vehicle was a rental car.[2]

[5] Deputy Horton detected a strong odor of marijuana in the vehicle and observed one package of Swisher Sweets cigarillos in the center console and another package on India's floorboard. In Deputy Horton's experience, cigarillos are commonly used to smoke marijuana, with marijuana substituted for the original

[1] Alexander-Woods resided in Michigan at the time of these events.

[2] The vehicle was originally rented by Alexander-Woods' brother.

tobacco. Deputy Horton instructed Alexander-Woods and India to exit the vehicle and advised the couple that Deputy Horton detected the odor of raw marijuana coming from the vehicle. India exited the vehicle promptly; however, Alexander-Woods "took a fair amount of time to exit the vehicle which was a red-flag to [Deputy Horton]." *Id*. at 225-26. Alexander-Woods advised that the couple smoked marijuana earlier that day. Deputy Horton called for backup and commenced a vehicle search based on his detection of the marijuana odor.[3]

[6] The vehicle search revealed a baggie containing a plant-like material in the center console of the vehicle. Deputy Horton believed the plant-like material to be marijuana. Visibly protruding from beneath the driver's seat, Deputy Horton found a t-shirt that was wrapped around a crumpled napkin and a handgun. The napkin contained a hard, brown, sand-like substance that Deputy Horton suspected was heroin; the substance was later determined to be fentanyl. Deputy Horton read the *Miranda* advisements to Alexander-Woods, who agreed to speak with Deputy Horton. Alexander-Woods admitted that he owned the gun and that the brown sand-like material was heroin.

[7] On October 11, 2019, the State charged Alexander-Woods with possession of a narcotic drug, a Level 3 felony; theft of a firearm, a Level 6 felony; carrying a

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[3] Deputy Horton's canine partner did not participate in the vehicle search. *See* Tr. Vol. III p. 227 (Deputy Horton's testimony that "I'd already detected the odor of marijuana and searched based on that. My canine was not needed.").

handgun without a license, a Class A misdemeanor; and possession of marijuana, a Class B misdemeanor. In a separate information, the State alleged that Alexander-Woods was an habitual offender.

[8] On January 3, 2020, Alexander-Woods filed a motion to suppress evidence, wherein he asserted that: (1) "[t]he search and seizure was not based on reasonable suspicion that [ ]Alexander-Woods [ ] was involved in criminal activity"; (2) "[t]he search was not incident to arrest, because the search preceded the arrest of [ ]Alexander-Woods[ ]"; and (3) "[c]onsidering the totality of the circumstances, the arrest and search of [Alexander-Woods] was unreasonable, and thus, violated Article 1, Section 11 of the Indiana Constitution . . . and the Fourth Amendment to the Constitution of the United States." *See* Alexander-Woods' Conf. App. p. 71. On January 9, 2020, the trial court conducted a suppression hearing and, at the close of the evidence, found: ". . . [T]here was reasonable [ ] suspicion for the stop and [ ] the odor of marijuana, in itself, was Probable Cause for the search of the vehicle. [ ][T]he Motion for Suppression of Evidence should be denied." Tr. Vol. II p. 22.

[9] The trial court conducted Alexander-Woods' jury trial on February 25 and 26, 2020.[4] During the State's case-in-chief, Deputy Horton testified that: (1) he was previously trained regarding "street level narcotics training [and]

[4] To be precise, the underlying trial was Alexander-Woods' second jury trial. The first jury trial, held from January 14 to January 15, 2020, ended in a mistrial. On February 5, 2020, the State dismissed the theft of a firearm count before the State retried Alexander-Woods on the remaining charges.

identification[,]" tr. vol. III p. 220; and (2) he identified the odor of marijuana[5] in the vehicle based on his training and experience. The defense objected to Deputy Horton's testimony "based on [the] prior Motion to Suppress" and "ask[ed] the Court to note [the defense's] continuing objection to any testimony from the Deputy regarding the search of the vehicle." *Id*. at 225. The trial court overruled the objection. Thereafter, as the State introduced into evidence the marijuana, handgun, fentanyl, and other items seized from the vehicle, Alexander-Woods renewed his objection.

[10] On cross-examination of Deputy Horton, defense counsel challenged: (1) the State's ability to prove that Alexander-Woods knowingly possessed the fentanyl and the handgun found in the vehicle; (2) the propriety of Deputy Horton's continued search after the discovery of the marijuana; (3) the particular circumstances under which each item of contraband or evidence was discovered during the search; (4) the nature, extent, and import of Deputy Horton's remarks to Alexander-Woods and India; and (5) the rationale for various steps taken by Deputy Horton during his investigation.[6] The defense did not probe into Deputy Horton's qualifications to identify controlled substances and/or his

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[5] At trial, Deputy Horton did not specify that the detected odor was that of raw marijuana.

[6] The defense elicited India's and/or Alexander-Woods' testimony that: (1) the vehicle involved in the incident was a rental car; (2) India and Alexander-Woods lacked knowledge of the presence of the gun or the fentanyl in the vehicle; (3) India had a Michigan-issued license to carry a handgun and would have had lawful possession of any handgun in the couple's possession; (4) Alexander-Woods only claimed ownership of the handgun after Deputy Horton "threatened to lock [India] up" as well, tr. vol. IV p. 86; and (5) Alexander-Woods did not identify the brown sand-like substance as heroin.

ability to distinguish one controlled substance from another. *See* Tr. Vol. III pp. 246-47, Tr. Vol. IV p. 3 (Deputy Horton's testimony and defense counsel's references, on cross-examination, regarding Deputy Horton's detection of the odor of marijuana).

[11] On February 26, 2020, the jury found Alexander-Woods guilty on all counts; Alexander-Woods subsequently admitted he was an habitual offender. On June 4, 2020, the trial court sentenced Alexander-Woods as follows and ordered the counts to be served concurrently: (1) for possessing a narcotic drug, ten years in the Department of Correction ("DOC"), plus a six-year habitual offender enhancement; (2) for carrying a handgun without a license, one year; and (3) for possession of marijuana, sixty days. Alexander-Woods, thus, received a sixteen-year aggregate sentence from which he now appeals.

Analysis

[12] Alexander-Woods alleges the trial court abused its discretion in admitting the fentanyl and the handgun evidence; he maintains that the admission of these items violated his Fourth Amendment rights as well as his rights under Article 1, Section 11 of the Indiana Constitution. We review challenges to the admission of evidence for an abuse of the trial court's discretion. *Fansler v. State*, 100 N.E.3d 250, 253 (Ind. 2018). In those instances, we will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* "[W]hen an appellant's challenge to such a ruling is predicated on an argument that impugns the constitutionality of the search or

seizure of the evidence, it raises a question of law, and we consider that question de novo." Kelly v. State, 997 N.E.2d 1045, 1050 (Ind. 2013).

[13] As noted above, Alexander-Woods argued below that:

> 3. The search and seizure was without lawful authority because:
>
> a. The search and seizure was not based on reasonable suspicion that the citizen (Alexander-Woods) was involved in criminal activity.
>
> b. The search was not incident to arrest, because the search preceded the arrest of the citizen (Alexander-Woods).
>
> Considering the totality of the circumstances, the arrest and search of the Defendant was unreasonable, and thus, violated Article l, Section 11 of the Indiana Constitution. *Brown v. State*, 653 N.E.2d 77 (Ind. 1995) and the Fourth Amendment to the Constitution of the United States.

Alexander-Woods' Conf. App. p. 71. On appeal, however, Alexander-Woods challenges the vehicle search on a different basis. Alexander-Woods now contends that Deputy Horton lacked probable cause to search because: (1) "the smell of marijuana is no longer a sufficient basis to establish probable cause because the smell is virtually indistinguishable from the smell of a legal plant like hemp"; (2) "[w]ithout evidence that a police officer has been formally trained and has experience in distinguishing the odor of legal hemp from the odor of illegal marijuana, the incriminating nature of the source of an odor that has commonly been associated with marijuana is no longer immediately

apparent to a police officer"; and (3) "Deputy Horton . . . did not testify that he had the training and experience necessary to discern between legal hemp and illegal marijuana." Alexander-Woods' Br. pp. 16-17.

[14] Alexander-Woods cannot now raise an argument that he did not raise to the trial court. Accordingly, this issue is waived. *See Washington v. State*, 808 N.E.2d 617, 625 (Ind. 2004) (concluding that failure to raise an argument in the trial court constituted waiver on appeal because "'a trial court cannot be found to have erred as to an issue or argument that it never had an opportunity to consider'").

[15] As the State points out, Alexander-Woods may circumvent waiver by establishing fundamental error. *See Treadway v. State*, 924 N.E.2d 621, 633 (Ind. 2010) ("Failure to object at trial waives the issue for review unless fundamental error occurred."). "The 'fundamental error' exception is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). "The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process." *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (internal quotation omitted). Thus, we will consider whether the admission of the evidence at issue constituted fundamental error under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

A. Fourth Amendment

[16] The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures by prohibiting them without a warrant supported by probable cause. U.S. Const. amend. IV. "The fundamental purpose of the Fourth Amendment to the United States Constitution is to protect the legitimate expectations of privacy that citizens possess in their persons, their homes, and their belongings." *Taylor v. State*, 842 N.E.2d 327, 330 (Ind. 2006). This protection has been "extended to the states through the Fourteenth Amendment." *Bradley v. State*, 54 N.E.3d 996, 999 (Ind. 2016). "As a deterrent mechanism, evidence obtained in violation of this rule is generally not admissible in a prosecution against the victim of the unlawful search or seizure absent evidence of a recognized exception." *Clark v. State*, 994 N.E.2d 252, 260 (Ind. 2013).

[17] > Probable cause is "not a high bar," *Kaley v. United States*, 571 U.S. 320, 338, 134 S. Ct. 1090 (2014), and is cleared when the totality of the circumstances establishes "a fair probability"—not proof or a prima facie showing—of criminal activity, contraband, or evidence of a crime, *Illinois v. Gates*, 462 U.S. 213, 235, 238, 243 n.13, 103 S. Ct. 2317 (1983). *See McGrath v. State*, 95 N.E.3d 522, 528 (Ind. 2018).

Hodges v. State, 125 N.E.3d 578, 581-82 (Ind. 2019) (internal citations omitted). "Probable cause to search exists where the facts and circumstances within the knowledge of the officer making the search, based on reasonably trustworthy information, are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed." *Shorter v. State*, 144

N.E.3d 829, 837 (Ind. Ct. App. 2020), *trans. denied.* "[T]he determination is to be based on the factual and practical considerations of everyday life upon which reasonable and prudent persons act." *Hawkins,* 766 N.E.2d 749, 751 (Ind. Ct. App. 2002). The Supreme Court of the United States has long held that the "presence of odors" can establish probable cause to issue a search warrant, provided that the following conditions are met: (1) the issuing judicial officer "finds the affiant qualified to know the odor"; and (2) the odor "is one sufficiently distinctive to identify a forbidden substance." *Johnson v. United States*, 333 U.S. 10, 13, 68 S. Ct. 367 (1948).

[18] In *Hawkins*, this Court held that, when a trained and experienced police officer detects the distinctive odor of a drug—such as raw or burnt marijuana—coming from a vehicle, the officer has probable cause to search the vehicle. *See Marcum v. State,* 843 N.E.2d 546, 547 (Ind. Ct. App. 2006) (citing *Hawkins*, 766 N.E.2d at 752); *see also Shorter*, 144 N.E.3d at 838-39 (finding that detection of burnt synthetic drugs supplied probable cause for a search). Notably, however, in each of those decisions, the defendant either failed to challenge law enforcement's qualifications to detect the odor, *Hawkins*, 766 N.E.2d at 752, or the officer's qualifications were sufficiently established, *Marcum*, 843 N.E.2d at 548; *Shorter*, 144 N.E.3d at 839.

[19] *Hawkins* is especially instructive. In *Hawkins*, a police officer lawfully stopped Hawkins' vehicle, detected the odor of burnt marijuana, and conducted a warrantless search of the vehicle, which yielded a gun. Hawkins was charged with a related offense and moved to suppress the gun for lack of probable cause.

At the ensuing suppression hearing, Hawkins stipulated to the facts as provided in the probable cause affidavit. The trial court subsequently granted Hawkins' motion to suppress. In reversing on appeal, this Court held: "[W]hen a trained and experienced police officer detects the strong and distinctive odor of burnt marijuana coming from a vehicle, the officer has probable cause to search the vehicle . . . . under *both* the Fourth Amendment of our federal constitution and under Article 1, Section 11 of the Indiana Constitution." *Hawkins*, 766 N.E.2d at 752 (emphasis added).

[20] Further, the panel noted: "Hawkins complains [ ] the record is silent concerning the training and experience of the police officer. We certainly agree that an accused may challenge the qualifications of the officer to determine the nature of the detected odor. That opportunity was, however, foregone in this case." *Id*. Because Hawkins stipulated to the probable cause affidavit's recitation of the facts, which provided that, the officer identified the odor of burnt marijuana based on the officer's training and experience, the panel found "no issue was raised [below] concerning the training and experience of the police officer, and none can be raised now." *Id*.

[21] Here, the record reveals that Alexander-Woods simply failed to seize his opportunity below to challenge Deputy Horton's training and experience regarding the identification of controlled substances, including Deputy Horton's ability to distinguish between the odors of marijuana and hemp. Deputy Hawkins testified that he was previously trained regarding "street level narcotics training [and] identification[,]" tr. vol. III p. 220, and that he

identified the odor of marijuana in the vehicle based on his training and experience. Alexander-Woods' ensuing objection was based generally on the motion to suppress, but failed to press Deputy Horton regarding the nature and extent of his qualifications. As in *Hawkins*, Alexander-Woods seeks, on appeal, to litigate issues that were not raised or properly preserved before the trial court. *See* State's Br. p. 14 (arguing that "[h]emp was never mentioned in the trial court, and the trial court was never presented with any facts or argument about the similarities or differences between the odors of hemp and marijuana"). This is improper.

[22] "Fundamental error is meant to permit appellate courts a means to correct the most egregious and blatant trial errors that otherwise would have been procedurally barred, not to provide a second bite at the apple for defense counsel who ignorantly, carelessly, or strategically fail to preserve an error." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014). Alexander-Woods' failure to raise the "hemp argument" below is fatal to his claim that the trial court fundamentally erred in finding probable cause for the vehicle search under the Fourth Amendment.

[23] Moreover, we find that facts and circumstances within Deputy Horton's knowledge support the trial court's finding of probable cause for the vehicle search. The record includes Deputy Horton's testimony that, before the vehicle search, Deputy Horton detected an odor of marijuana coming from the vehicle; observed in plain view cigarillos commonly used for smoking marijuana; and

learned directly from Alexander-Woods that the couple smoked marijuana earlier that day. *See* Tr. Vol. III p. 226.

[24] For the foregoing reasons, Alexander-Woods has not established that the trial court, by its admission of evidence, committed an egregious and blatant error that rendered a fair trial impossible or violated due process under the Fourth Amendment. Thus, Alexander-Woods' claim fails.

B. Indiana Constitution

[25] Next, we address whether the admission of the evidence at issue here constituted fundamental error under the Indiana Constitution. Article 1, Section 11 of the Indiana Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and 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.

[26] Although Article 1, Section 11 contains language nearly identical to the Fourth Amendment, Indiana courts interpret Article 1, Section 11 independently. *Hardin v. State*, 148 N.E.3d 932, 942 (Ind. 2020). In cases involving Article 1, Section 11 of the Indiana Constitution, the State must show that the challenged police action was reasonable based on the totality of the circumstances. *Robinson v. State*, 5 N.E.3d 362, 368 (Ind. 2014); *see Austin v. State*, 997 N.E.2d 1027, 1034 (Ind. 2013) (quoting *Duran v. State*, 930 N.E.2d

10, 17 (Ind. 2010)) ("'[W]e focus on the actions of the police officer,' and employ a totality-of-the-circumstances test to evaluate the reasonableness of the officer's actions."). "The totality of the circumstances requires consideration of both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search or seizure." *Litchfield v. State*, 824 N.E.2d 356, 360 (Ind. 2005). In *Litchfield*, our Indiana Supreme Court summarized this evaluation as follows:

> In sum, although we recognize there may well be other relevant considerations under the circumstances, we have explained reasonableness of a search or seizure as turning 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 citizens' ordinary activities, and 3) the extent of law enforcement needs.

Litchfield, 824 N.E.2d at 361.

[27] > We begin our analysis by examining the law-enforcement officers' "degree of concern, suspicion, or knowledge that a violation has occurred." *Litchfield*, 824 N.E.2d at 361. In evaluating the officers' degree of suspicion, we consider all "the information available to them at the time" of the search or seizure. *Duran*, 930 N.E.2d at 18.

Hardin, 148 N.E.3d at 943. The record reveals that Deputy Horton: (1) lawfully stopped Alexander-Woods' speeding vehicle; (2) observed Alexander-Woods' furtive movements inside the vehicle; (3) detected the odor of marijuana from the vehicle; (4) saw potentially-incriminating cigarillos in plain view; and (5) noted Alexander-Woods' delay in exiting the vehicle as instructed. Deputy

Horton, thus, had a firm suspicion that there was illegal activity occurring in Alexander-Woods' vehicle as well as concern that Alexander-Woods was operating the vehicle under the influence of drugs.

[28] Next, our consideration of the second factor, "the degree of intrusion the method of the search or seizure imposes on the citizens' ordinary activities", is guided by various principles. We first 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*, 148 N.E.3d at 944. Second, we consider the intrusion into both the citizen's physical movements and the citizen's privacy. *Id.* In traffic stop cases, we focus on the degree of intrusion into the defendant's physical movements. *Id.* at 944-45. Third, we consider the manner in which the officers conducted a search or seizure. *See id.* at 945. Specifically, we continue to consider the totality of the circumstances and look at "all of the attendant circumstances"—not a single aspect of the search or seizure in isolation. *Id.* (quoting Garcia v. State, 47 N.E.3d 1196, 1202 (Ind. 2016)). Here, Alexander-Woods did not grant consent to the vehicle search. Alexander-Woods does not suggest, and there is nothing in the record to support a finding, that the actual vehicle search was conducted in an extraordinary manner. We acknowledge, however, that Deputy Horton's order that Alexander-Woods and India should exit the vehicle as well as the interior search of the vehicle imposed a moderate degree of intrusion into Alexander-Woods' ordinary activities.

[29] Regarding the third *Litchfield* factor, "the extent of law enforcement needs, our Supreme Court has stated the following:

> These law-enforcement needs exist not only when officers conduct investigations of wrongdoing but also when they provide emergency assistance or act to prevent some imminent harm.
>
> In reviewing the extent of law-enforcement needs, we look to the needs of the officers to act in a general way.
>
> But we also look to the needs of the officers to act in the particular way and at the particular time they did. In considering the needs of law-enforcement officers in this more specific way, however, we take a practical approach and do not require officers to undertake duplicative tasks.

Hardin, 148 N.E.3d at 946-47 (internal citations omitted).

[30] Here, we find that the law enforcement need was elevated and, overall, moderate. Deputy Horton was assigned to patrol the public highway and to look out for public safety. After the lawful traffic stop, Alexander-Woods' movements within the vehicle, his delay in exiting the vehicle, and his ability to drive the vehicle away implicated officer safety and necessitated that officers search the vehicle. Additionally, in the interest of ensuring the safety of motorists, we find that conducting the search without a warrant was not unreasonable. *See* Marshall v. State, 117 N.E.3d 1254, 1262 (Ind. 2019) (recognizing the "need to enforce traffic-safety laws").

[31] Based on our consideration and balancing of the *Litchfield* factors, we conclude that the vehicle search was reasonable under the totality of the circumstances. *See Meek v. State*, 950 N.E.2d 816 (Ind. Ct. App. 2011) (finding, under substantially similar facts, that the warrantless search of a lawfully-stopped vehicle was "reasonable under [the] totality of the circumstances[,]" based upon police detection of the odor of raw marijuana), *trans. denied*; *see also Hawkins*, 766 N.E.2d at 752 ("[W]hen a trained and experienced police officer detects the strong and distinctive odor of [ ] marijuana coming from a vehicle, the officer has probable cause to search the vehicle . . . . under Article 1, Section 11 of the Indiana Constitution.").

[32] Based on the foregoing, we conclude that the vehicle search did not run afoul of Article 1, Section 11 of the Indiana Constitution. Alexander-Woods has, therefore, not established that the trial court, by its admission of evidence, committed an egregious and blatant error that rendered a fair trial impossible or violated principles of due process under the Indiana Constitution. Alexander-Woods' claim fails.

Conclusion

[33] The trial court did not fundamentally err in admitting the evidence found during the search of Alexander-Woods' vehicle. We affirm.

[34] Affirmed.

Bailey, J., and Robb, J., concur.