MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tyler Cross,
Appellant-Defendant,
v.
State of Indiana,
Appellee-Plaintiff.

July 11, 2022

Court of Appeals Case No. 21A-CR-2366

Appeal from the Lawrence Superior Court

The Honorable John M. Plummer, III, Judge

Trial Court Cause No. 47D01-2105-F2-746

Molter, Judge.

[1] Tyler Cross brings this interlocutory appeal of the trial court's order denying his motion to suppress. After allegedly attempting to sell heroin to a confidential informant during a controlled drug buy and later hiding the heroin in his mouth, Cross was charged with two counts of dealing in a narcotic drug, each as a Level 2 felony; possession of a narcotic drug as a Level 4 felony; and obstruction of justice as a Level 6 felony. He contends the evidence was recovered through a search and seizure which were illegal under the Fourth Amendment to

the United States Constitution and Article 1, section 11 of the Indiana Constitution. Concluding there were no constitutional violations, we affirm.

Facts and Procedural History

[2] On May 10, 2021, a confidential informant contacted Detective Michael Robbins with the Indiana State Police to inform him that the informant could purchase heroin from Cross. To verify this, the informant provided screenshots of text messages where the informant told Cross he wanted to purchase half an ounce of heroin, and Cross responded that the price was $750 for half an ounce or $1,500 for a full ounce. The informant then arranged a meeting with Cross at the Quality Inn on May 11, 2021 at 5:00 p.m.

[3] Around that time, Cross arrived at the Quality Inn, and Detective Robbins recognized him from Facebook photos the detective had reviewed. Detective Robbins then directed the informant to tell Cross he had mistakenly referred to the wrong hotel, and they needed to meet at the Holiday Inn in Bedford. The informant did so, and Cross then drove to the Holiday Inn.

[4] Once he arrived, another police officer stopped his vehicle for a suspected traffic violation. The parties do not tell us, and the record does not reveal, the basis for the stop, but Cross does not argue the stop was illegal. After providing the police officer with his driver's license, Cross was asked to exit his vehicle. Another officer then deployed his canine partner, Zazu, to sniff Cross's car, and Zazu reacted to the driver's side of the car. But a subsequent search of the vehicle did not reveal any illicit substances. Also, the officers did not find any contraband on Cross's person during a pat-down search. Detective Robbins then decided to apply for a search warrant to conduct a body cavity search on Cross.

[5] Cross, who was handcuffed, was seated in a police vehicle with an officer. When they began to drive to a local hospital for the potential body cavity search, the officer noticed that Cross had a large object in his mouth which was protruding from his cheek. The officer also noticed that Cross looked as though he was trying to swallow the object. Knowing that Cross was suspected to possess at least half an ounce of heroin and that ingesting such an amount of heroin could be fatal, the officer directed Cross to spit out the object. Because Cross did not comply, the officer exited the car and removed Cross from the backseat.

[6] He then placed Cross on the ground and pressed on his cheek to remove the large object from his mouth. Eventually, Cross spit out a ball of heroin that was wrapped in plastic and was roughly the size of a golf ball. He was then transported to the hospital because he had ingested some of the heroin. During the ride, the officer tried to keep Cross awake and alert because he was dozing off. The officer also asked Cross where he had been hiding the contraband, and Cross replied: "[U]nderneath my nut sack." Tr. at 36. When Cross reached the hospital, his vital signs were dropping.

[7] The State charged Cross with two counts of dealing in a narcotic drug, each as a Level 2 felony; possession of a narcotic drug as a Level 4 felony; and obstruction of justice as a Level 6 felony. The State then amended the charges and clarified that, for the second count of dealing in a narcotic drug, Cross possessed heroin with the intent to deliver it.

[8] Before trial, Cross moved to suppress the evidence discovered by the police, arguing that his arrest and the search of his mouth violated the Fourth Amendment to the United States Constitution and Article 1, section 11 of the Indiana Constitution. The trial court denied his motion, and he now brings this interlocutory appeal.

Discussion and Decision

I. Standard of Review

[9] We entrust the admission of evidence to the trial court's sound discretion. *Robinson v. State*, 5 N.E.3d 362, 365 (Ind. 2014). We review a trial court's denial of a defendant's motion to suppress deferentially, construing conflicting evidence in the light most favorable to the ruling, but we also consider any substantial and uncontested evidence favorable to the defendant. *Id.* We defer to the trial court's findings of fact unless they are clearly erroneous, and we will not reweigh the evidence. *Campos v. State*, 885 N.E.2d 590, 596 (Ind. 2008). When the trial court's denial of a defendant's motion to suppress concerns the constitutionality of a search or seizure, however, it presents a question of law, and we address that question de novo. *Id.*

II. United States Constitution

[10] Cross argues the trial court erred in denying his motion to suppress because the challenged evidence was recovered following an illegal arrest under the Fourth Amendment to the United States Constitution. 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. This generally requires police to obtain a warrant before arresting a suspect, but one of the exceptions to this general warrant requirement is when the police have probable cause to believe a suspect has committed a felony. *Thomas v. State*, 81 N.E.3d 621, 625 (Ind. 2017). Here police seized the evidence at issue after arresting Cross without a warrant, so the question is whether the police had probable cause to arrest Cross for a felony.

[11] Probable cause arises when, at the time of the arrest, the arresting officer knows of facts and circumstances which would warrant a reasonable person to believe the suspect committed a crime. *I.G. v. State*, 177 N.E.3d 75, 78 (Ind. Ct. App. 2021). The amount of evidence needed to satisfy the probable cause requirement is evaluated on a case-by-case basis. *Id.* Further, this is grounded in common sense, not mathematical computations. *White v. State*, 24 N.E.3d 535, 539 (Ind. Ct. App. 2015), *trans. denied*.

[12] For his argument that the officers lacked probable cause, Cross relies on *Thomas*, 81 N.E.3d at 621, but we concluded *Thomas* cuts the other way, confirming the police here did have probable cause. In *Thomas*, police officers with a drug task force received a tip from a

confidential informant that two men from Chicago were going to visit Grant County to sell drugs. *Id.* at 622. The informant also told the officers the two men were traveling in a white minivan with a temporary Illinois license plate and would be staying at a particular hotel in Bedford, Indiana. *Id.* Based on this information, the officers began to surveil the van and saw two men enter the vehicle and drive away. *Id.* at 622–23. The officers then initiated a traffic stop after the car changed lanes without properly signaling. *Id.* at 623.

[13] During the stop, the officers asked the two men for their identification and their reason for traveling through Marion, Indiana. *Id.* While the men told the officers they were visiting family, neither man could identify where their family members lived. *Id.* Also, the driver had no form of identification. *Id.* The officers then had a trained canine walk around the van, and the canine reacted to the driver's side of the vehicle. *Id.* The men were subsequently removed from the van, and the officers conducted a pat-down search for officer safety. *Id.* No contraband was found during the pat-down. *Id.* The officers did not find any contraband in the vehicle after the driver gave them permission to search it, and the canine no longer alerted to drugs in the vehicle after the men were removed. *Id.*

[14] The officers then asked the men if they would consent to a strip search. *Id.* Although the driver agreed, Thomas did not. *Id.* The officers transported Thomas to the police station while they applied for a search warrant, and they put Thomas in an interview room alone and watched him through video monitors. *Id.* When Thomas removed an object from his pocket and put it in his mouth, the officers entered the room, forced his mouth open, and retrieved a small plastic baggie containing 8.5 grams of heroin. *Id.* Thomas was convicted of Class A felony dealing in a narcotic drug. *Id.*

[15] Our Supreme Court concluded the officers had "knowledge of facts and circumstances which would warrant a person of reasonable caution to believe that Thomas was in possession of narcotics." *Id.* at 627. Those facts and circumstances were: (1) a credible confidential informant provided the officers with specific information about "illicit activities being carried out and offered a detailed description of the vehicle involved"; (2) the officers confirmed the description of the minivan at the hotel; (3) Thomas "seemed nervous" during the stop; (4) neither man could identify where the family they were visiting lived; (5) the driver had no form of identification; and (6) a trained canine alerted to drugs while the men were inside the minivan but no longer alerted once they were removed. *Id.* at 627–28.

[16] While Cross acknowledges *Thomas* concluded there was probable cause, he argues the case supports his argument because some of the facts establishing probable cause in *Thomas* are not present in this case. The *Thomas* defendant was inside the car when the canine first alerted, and the canine did not alert again after the defendant was removed from the car. In this case, Cross was outside the car when the canine alerted. Unlike the defendant in *Thomas*, Cross did not give inconsistent answers about where he was going, and he was not without identification. There is less evidence in this case confirming the reliability of the informant than there was in *Thomas*.

[17] Cross's argument fails because it depends on the sort of mathematical, bright-line approach that both the *Thomas* Court and the U.S. Supreme Court have rejected. *Id.* At 626 ("Rather than requiring a precise mathematical computation, probable cause is grounded in notions of common sense."); *Lewis v. U.S.*, 385 U.S. 206, 212 (1966) (explaining that "in this area, each

case must be judged on its own particular facts"). Instead, the bottom line in *Thomas* was that a "common sense" understanding of the facts "would warrant a reasonable person to believe one of the two occupants took the drugs with him when he exited the vehicle and likely still had them on his person." *Thomas*, 81 N.E.3d at 628.

[18] That same common sense approach dictates the same outcome here. Similar to *Thomas*, a confidential informant told Detective Robbins that he could purchase heroin from Cross, and the informant proved reliable. He showed the detective a text exchange between the two that discussed a drug deal. The informant then arranged a controlled drug buy with Cross at a hotel. On the date of the drug buy, officers observed Cross reach the hotel at the scheduled time, after having driven all the way from Louisville, Kentucky. As soon as Detective Robbins instructed the informant to tell Cross that he had misspoke and wanted to meet at a nearby Holiday Inn, the officers witnessed Cross arrive at that hotel.

[19] Next, Zazu, a trained canine, alerted the officers to narcotics in the vehicle by reacting to the driver's side of the car. Although Cross was not in the car at the time, and a subsequent search of the vehicle revealed nothing, Zazu's canine handler testified that this type of reaction often occurs if there is a lingering odor in the vehicle from a narcotic that was there. Tr. At 41. So, it was likely that Zazu was alerting because Cross had recently possessed the drugs when he was sitting in the car. Therefore, all the facts and circumstances in this case would warrant a reasonable person to believe that Cross visited Bedford to sell heroin to the informant, took the heroin with him when he exited the vehicle after the *Terry* stop, and likely still possessed the heroin at that time.

[20] We therefore conclude that the officers had enough information to warrant a reasonable person to believe that Cross possessed narcotic drugs and intended to sell them to the informant. Accordingly, the trial court did not abuse its discretion in denying Cross's motion to suppress.

III. Indiana Constitution

[21] Cross also argues the trial court erred in denying his motion to suppress because the challenged evidence was recovered after an illegal search under Article 1, section 11 of the Indiana Constitution, which also protects citizens from unreasonable searches and seizures. He particularly asserts that the search of his mouth after his arrest violated Article 1, section 11's prohibition against unreasonable searches.

[22] Although its text mirrors the Fourth Amendment, we interpret Article 1, section 11 of our Constitution separately and independently. *Triblet v. State*, 169 N.E.3d 430, 436 (Ind. Ct. App. 2021), *trans. denied*. When a section 11 claim is raised, the State must show that the police conduct was reasonable under the totality of the circumstances. *Id.* In evaluating the reasonableness of police conduct, we consider three factors: (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. *Id.*

[23] Regarding the degree of concern, suspicion, or knowledge of a violation, we look at "the reasonableness of the officers' assumptions, suspicions, or beliefs based on the information available to them at the time." *Shorter v. State*, 151 N.E.3d 296, 304 (Ind. Ct. App. 2020)

(quotation marks omitted), *trans. denied*. Here, the degree of suspicion weighs in the State's favor. Again, Detective Robbins examined a text exchange, which discussed a drug deal, between Cross and the confidential informant. Also, officers successfully arranged a controlled drug buy with Cross at a hotel. And they not only observed Cross arrive at the hotel at the scheduled date and time for the meeting, but they also witnessed him drive from the hotel to the Holiday Inn after the informant told him that he wanted to meet there instead.

[24] Further, Zazu alerted the officers to the smell of narcotics on the driver's side of Cross's vehicle, where Cross was previously seated. Moreover, while in the police car, an officer later saw an object protruding from the side of Cross's mouth. The officer also noticed that Cross looked as if he was trying to swallow the object in his mouth.

[25] Next, "[t]he degree of intrusion is assessed from the defendant's point of view." *Bell v. State*, 144 N.E.3d 791, 800 (Ind. Ct. App. 2020). At first, the degree of intrusion was low because Cross was already under arrest, and the officer merely instructed Cross to spit out the object in his mouth. *See Garcia v. State*, 47 N.E.3d 1196, 1201 (Ind. 2016) ("[O]nce a lawful arrest occurs, no additional probable cause is necessary to conduct a relatively extensive exploration of the person." (quotation marks omitted)). However, the degree of intrusion escalated when the officer removed Cross from the police car, placed him on the ground while handcuffed, and pressed on his cheek to remove the object from his mouth.

[26] Although the degree of suspicion and the degree of intrusion are both high in this case, we conclude that the extent of law enforcement needs tips the balance in favor of reasonableness. "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." *Hardin v. State*, 148 N.E.3d 932, 946 (Ind. 2020). Here, the officers justifiably believed that Cross possessed heroin and intended to sell it to the informant. *See Austin v. State*, 997 N.E.2d 1027, 1036 (Ind. 2013) (recognizing that "[i]ntra- and international drug trafficking are significant issues facing law enforcement and public safety officials at the federal, state, and local levels"). Also, Cross was putting his life at risk if he had swallowed the heroin, which amounted to 17.2 grams. Tr. at 29. Thus, while Cross argues the officers should have waited for the heroin to pass through his bloodstream and then use other methods to obtain the evidence, *see Grier v. State*, 868 N.E.2d 443, 445 (Ind. 2007) (holding that "application of force to a detainee's throat to prevent swallowing of suspected contraband violates the constitutional prohibitions against unreasonable search and seizure"), we do not find this argument persuasive given the amount of heroin he would have ingested here and the risk that it would have posed to his well-being. *See Hardin*, 148 N.E.3d at 946 ("[L]aw-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."). Accordingly, the search of Cross's mouth did not violate Article 1, section 11 of the Indiana Constitution.

[27] In sum, the officers did not violate Cross's rights under the Fourth Amendment or Article 1, section 11. Consequently, Cross has not established that the trial court abused its discretion in denying his motion to suppress the evidence.

[28] Affirmed.

Mathias, J., and Brown, J., concur.