MEMORANDUM DECISION

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IN THE

Court of Appeals of Indiana

Richard W. Plue,

Appellant-Defendant

v.

State of Indiana,

Appellee-Plaintiff

April 2, 2024

Court of Appeals Case No.
23A-CR-638

Appeal from the Madison Circuit Court

The Honorable Mark K. Dudley, Judge

Trial Court Cause No.
48C06-2206-F6-1634

Memorandum Decision by Judge Weissmann
Chief Judge Altice and Judge Kenworthy concur.

Weissmann, Judge.

[1] Richard Plue appeals his conviction and sentence for possession of methamphetamine, a Level 6 felony. The charge followed a traffic stop, during which a police dog sniff and subsequent search of Plue's vehicle revealed methamphetamine. Plue contends the trial court should have excluded evidence of the dog sniff and vehicle search because police prolonged the traffic stop beyond constitutional boundaries.

[2] As the stop was not completed when the dog sniff began, and because Plue does not challenge the vehicle search on any other basis, we conclude the search did not violate either the federal or state constitutions. We also reject Plue's sentencing claims and therefore affirm both his conviction and sentence.

Facts

[3] Elwood Police Lieutenant Marcus Shoppell stopped Plue's vehicle for failing to stop at a stop sign and having an opaque license plate. Officer Shoppell, who had activated his body camera, immediately requested a K9 officer before leaving his vehicle to speak to Plue. Although the request for a K9 Officer was prompted by Officer Shoppell's familiarity with Plue, calling for a K9 officer as backup was commonplace for Elwood police. The K9 officer and his dog had been involved in 220 to 230 traffic stops within the year before the suppression hearing.

[4] After informing Plue of the reasons for the stop, Officer Shoppell requested Plue's license, his passenger's identification, and the vehicle registration. Plue

handed Officer Shoppell paperwork showing that he had "specialized driving privileges."[1] Tr. Vol. II, pp. 16-17. Officer Shoppell returned to his police cruiser with the documents to review them and to check Plue's license status.

[5] Less than five minutes later, the K9 officer and his dog arrived. Officer Shoppell was still in his vehicle reviewing the documents and had not yet drafted a warning or citation. By that point, about eight minutes had elapsed since the start of the traffic stop. The K9 officer requested Plue and his passenger get out of the vehicle. After they complied, the K9 officer circled Plue's vehicle with the dog, who alerted to drugs in the vehicle. The officers' subsequent search of the vehicle revealed methamphetamine in the center console.

[6] After being advised of his rights, Plue acknowledged the methamphetamine belonged to him. He also stated that he had smoked methamphetamine about a month earlier. The State charged Plue with Level 6 felony possession of methamphetamine. The record contains no evidence that he ever was cited for the infractions for which he initially was stopped.

[7] Plue moved to suppress the evidence of the traffic stop under both the federal and state constitutions. After a hearing, the trial court denied the motion to suppress. And over objection at trial, the court admitted the evidence of the

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[1] The record does not detail the nature of Plue's "specialized driving privileges." However, the term may refer to a court order that grants limited driving privileges to a person with a suspended license. *See*, *e.g.*, Ind. Code §§ 9-30-16-3, 3.5.

traffic stop. After finding Plue guilty as charged, the court sentenced him to 26 months in prison. Plue appeals both his conviction and sentence.

Discussion and Decision

[8] Besides contending the search stemmed from an impermissibly long traffic stop, Plue argues that his 26-month sentence was inappropriate under Indiana Appellate Rule 7(B) in light of the nature of the offense and the character of the offender. He also asserts that his sentence is disproportionate to the offense in violation of Article 1, Section 16 of the Indiana Constitution. We conclude that the traffic stop was within constitutional boundaries and that Plue's sentence was neither inappropriate nor disproportionate.

I. Traffic Stop Was Not Impermissibly Long

[9] Plue contends the search of his vehicle violated the Fourth Amendment and Article 1, Section 11 because police lacked reasonable suspicion to detain him until the K9 officer arrived. Plue concludes the evidence resulting from that allegedly illegal search—including the methamphetamine and his admission that the drug belonged to him—was inadmissible. We conclude no state or federal constitutional violation occurred because the search was not extended beyond the time necessary to carry out the purpose of the traffic stop.

[10] Because Plue's case proceeded to trial, he is challenging the trial court's admission of that evidence rather than the denial of his motion to suppress. *Clark v. State,* 994 N.E.2d 252, 259 (Ind. 2013) ("Direct review of the denial of a motion to suppress is only proper when the defendant files an interlocutory

appeal."). A trial court has discretion to admit evidence, and we review evidentiary rulings for an abuse of that discretion. *Guilmette v. State*, 14 N.E.3d 38, 40 (Ind. 2014).

[11] An abuse of discretion occurs when admission of the evidence "is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights." *Clark*, 994 N.E.2d at 260. "But when an appellant's challenge to such a[n evidentiary] 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." *Guilmette*, 14 N.E.3d at 40-41.

A. Fourth Amendment

[12] The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's prohibition. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

[13] But "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez v. United States*, 575 U.S. 348, 350 (2015). "A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Id.* at 350-51 (citing *Caballes*, 543 U.S. at 407).

[14] Focusing on the officers' failure to issue a citation, Plue contends "there was never really a valid traffic stop to be completed or extended." Appellant's Br., p. 17. The approximate eight-minute detention was to effect nothing other than the dog sniff, according to Plue.

[15] But Officer Shoppell's body camera showed that he was still reviewing the paperwork retrieved from Plue and his passenger when the police dog arrived. This paperwork included Plue's driver's license, registration, insurance information, and specialized driving privileges paperwork, as well as Plue's passenger's driver's license. Officer Shoppell's review included reading those multi-page documents and verifying the information electronically.

[16] Although Plue seems to suggest that the police stop was pretextual, Officer Shoppell testified that he observed Plue commit two infractions before the officer launched the stop: failure to come to a complete stop and having an opaque license plate, both Class C infractions. Ind. Code §§ 9-21-8-32, -18.1-4-4(b)(3). These traffic infractions provided reasonable suspicion for Officer Shoppell to initiate the stop. *See* Ind. Code § 34-28-5-3(a) (authorizing a law enforcement officer who "believes in good faith that a person has committed an infraction . . . may detain that person for a time sufficient to" inform the person of the allegation and obtain either the person's name, address, and date of birth or driver's license and allow the person to execute a notice to appear); *Shorter v. State*, 144 N.E.3d 829, 837 (Ind. Ct. App. 2020) (finding a valid traffic stop occurred after a traffic violation was observed by the officer).

[17] Still, "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Caballes*, 543 U.S. at 407. "In assessing whether a detention is too long in duration, we examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *Ramsey v. State,* 222 N.E.3d 1038, 1045 (Ind. Ct. App. 2023)*, trans. denied*. The burden is on the State to show the traffic stop was not extended due to the dog sniff. *Id.*

[18] Without citation to the record, Plue contends that Officer Shoppell's review of the documents could not have taken five minutes, meaning the officer prolonged the traffic stop beyond the time reasonably required to complete any traffic citation. Plue does not offer any evidence to support his view that Officer Shoppell took unreasonably long to conduct his review. And Plue's contention is directly refuted by two pieces of evidence.

[19] First, Officer Shoppell testified that he was still reviewing the documents provided by Plue and his passenger when the K9 officer arrived. Second, Officer Shoppell's body cam footage substantiated this testimony. It seemingly shows Officer Shoppell looking at the last of the documents as the K9 officer arrived. Officer Shoppell had not begun to draft any warning or citation for the infractions or returned the documents to Plue and his passenger. In short, the body cam footage does not reflect any unreasonable delay by Officer Shoppell.

[20] Second, Officer Shoppell's approximate five-minute review of the documents resembled normal verification procedures during a traffic stop. "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop,'" including "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Rodriguez*, 575 U.S. at 355 (citing *Caballes*, 543 U.S. at 408).

[21] Here, Officer Shoppell verified the driver's licenses provided by Plue and his passenger, checked Plue's driving record, and reviewed Plue's special driving privileges, registration, and insurance paperwork. "These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id.* The record contains no evidence suggesting that Officer Shoppell did not diligently pursue a means of investigation likely to confirm or dispel quickly his suspicions that Plue had committed two infractions.

[22] We repeatedly have found that traffic stops were not unreasonably extended under the Fourth Amendment when the dog sniffs occurred less than 16 minutes after the traffic stop began and while the officer continued to investigate potential wrongdoing. *See, e.g.*, *Ramsey*, 222 N.E.3d at 1043, 1047 (11-minute period between onset of traffic stop and the dog sniff); *Danh v. State*, 142 N.E.3d 1055,1064 (Ind. Ct. App. 2020) (10-minute period); *Hansbrough v. State*, 49 N.E.3d 1112, 1115 (Ind. Ct. App. 2016) (16-minute period). Comparatively speaking, the 8-minute period at issue in this case—including

only five minutes reviewing documents and determining whether to issue a citation—is far from unreasonable. For all these reasons, we conclude that Plue has not shown any Fourth Amendment violation.

B. Article 1, Section 11

[23] We also reject Plue's claim that the search and seizure violated Article 1, Section 11 of the Indiana Constitution. As with the Fourth Amendment, Article 1, Section 11 guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizures." Despite its similar language, Article 1, Section 11 is analyzed independently from federal Fourth Amendment jurisprudence. *Mitchell v. State*, 745 N.E.2d 775, 786 (Ind. 2001).

[24] When determining whether a search violates Article 1, Section 11, we evaluate the "reasonableness of the police conduct under the totality of the circumstances." *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). Reasonableness "turn[s] 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." *Id.* at 361.

1. Degree of Concern, Suspicion, or Knowledge

[25] Plue claims that before the dog sniff, police had "zero" degree of concern, suspicion, or knowledge of criminal activity; Officer Shoppell was only aware of the traffic infractions. Appellant's Br., p. 18. However, Officer Shoppell's

observation of the traffic infractions was sufficient to justify the traffic stop. *Austin v. State*, 997 N.E.2d 1027, 1034 (Ind. 2013) (finding even minor traffic violations justify a police stop of a vehicle).

[26] Although the later dog sniff is not a search itself within the meaning of Article 1, Section 11, it may provide probable cause for a vehicle search. *McKinney v. State*, 212 N.E.3d 697, 707 (Ind. Ct. App. 2023). As Plue concedes, the dog sniff indicated to police before the vehicle search that Plue was engaged in criminal activity.

[27] Plue's attack on the dog sniff is as unavailing under Article 1, Section 11 as it was under the Fourth Amendment. A dog sniff is unreasonable under Article 1, Section 11 "if the motorist is held for longer than necessary to complete the officer's work related to the traffic violation and the officer lacks reasonable suspicion that the motorist is engaged in criminal activity." *Austin,* 997 N.E.2d at 1034. We have already determined that the dog sniff did not extend the traffic stop. Plue does not allege any other irregularities in the dog sniff, which pointed to drugs being in the vehicle and provided probable cause for the search. *See McKinney*, 212 N.E.3d at 707.

[28] We therefore conclude the degree of concern, suspicion, or knowledge of Plue's criminal conduct was high. *See Harbaugh v. State*, 96 N.E.3d 102, 107 (Ind. Ct. App. 2018) (finding positive dog sniff generated degree of concern, suspicion, or knowledge of criminal activity that contributed to finding that vehicle search did not violate Article 1, Section 11).

2. Degree of Intrusion

[29] The degree of intrusion that the search or seizure method imposed on Plue's ordinary activities was moderate. "[W]e consider the degree of intrusiveness from the defendant's point of view." *Hardin v. State*, 148 N.E.3d 932, 944 (Ind. 2020). Given that the dog sniff was not a search and occurred shortly after the start of the traffic stop, it was only a "minimal intrusion" on Plue's ordinary activities. *See McKinney*, 212 N.E.3d at 707. But Plue's detention and the search of his vehicle were moderately intrusive because they impacted both his "physical movements" and his "privacy." *Hardin*, 148 N.E.3d at 944-46.

3. Extent of Law Enforcement Needs

[30] "The needs of law enforcement to find evidence of drug activity is obviously high." *McKinney,* 212 N.E.3d at 708. "[N]o simpler method exists for detection of hidden drugs than a dog sniff." *State v. Gibson*, 886 N.E.2d 639, 643 (Ind. Ct. App. 2008). And absent the search of his vehicle, Plue would have been able to quickly leave the scene in his vehicle with the suspected drugs.

4. Totality of the Circumstances

[31] The totality of the circumstances leads us to conclude that the vehicle search was reasonable under Article 1, Section 11. The intrusive nature of the vehicle search is offset by the high degree of concern and suspicion of criminal conduct and a similarly high degree of law enforcement needs. *See Harbaugh*, 96 N.E.3d at 107 (finding vehicle search after dog sniff during traffic stop did not violate state constitution).

II. Plue's Sentence Is Not Inappropriate

[32] Plue claims his 26-month sentence is inappropriate under Indiana Appellate Rule 7(B), which specifies that this Court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

[33] Our principal role in reviewing sentence appropriateness is to "attempt to leaven the outliers ... not to achieve a perceived 'correct' sentence." *Knapp v. State*, 9 N.E.3d 1274, 1292 (Ind. 2014) (citations omitted). We thus defer substantially to the trial court's sentencing decision, which prevails "unless overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant's character." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[34] Our Rule 7(B) analysis begins with consideration of the advisory sentence, which "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). The sentencing range for Level 6 felony possession of methamphetamine is 6 months to 2½ years imprisonment, with an advisory sentence of 1 year imprisonment. Ind. Code § 35-50-2-7(b). Plue's sentence of 26 months imprisonment is 4 months short of the maximum statutory sentence.

[35] As to the nature of the offense, Plue claims only that his offense did not cause harm to people or property. But our Supreme Court has soundly rejected the claim that drug possession is a victimless crime. *State v. Timbs*, 169 N.E.3d 361, 373 (Ind. 2021) (noting that "distributing or possessing even small amounts of drugs threatens society").

[36] As to the character of the offender, Plue points to his cooperation with police at the scene, his age (65), his reliance on Social Security benefits as his sole income, his alleged nine years of sobriety, and his several years without incarceration in Indiana Department of Correction (DOC). But Plue admitted to police that he had smoked methamphetamine a month before the present offense. That places in question the accuracy of his claim of pre-offense sobriety.

[37] In any case, Plue's criminal record is substantial, as this was his tenth felony conviction. Although Plue notes that he had not been incarcerated in DOC since 2017, he has been an inmate there six times. His continued criminal conduct reflects poorly on his character. Plue has failed to meet his burden of showing his sentence is inappropriate.

III. Plue's Sentence Was Not Disproportionate

[38] Lastly, Plue claims his sentence violates Article 1, Section 16 of the Indiana Constitution, which specifies that "[a]ll penalties shall be proportioned to the nature of the offense." Although the State suggests Plue waived this issue

through the brevity of his argument, we choose to address his claim on the merits.

[39] A penalty is disproportionate under Article 1, Section 16 of the Indiana Constitution "only when the criminal penalty is not graduated and proportioned to the nature of the offense." *Knapp,* 9 N.E.3d at 1289 (citing *Phelps v. State*, 969 N.E.2d 1009, 1021 (Ind. Ct. App. 2012)). This constitutional provision "proscribes atrocious or obsolete punishments and is aimed at the kind and form of punishment, rather than the duration or amount." *Dunlop v. State*, 724 N.E.2d 592, 597 (Ind. 2000). Therefore, Article 1, Section 16 is violated "'only when the criminal penalty is not graduated and proportioned to the nature of the offense.'" *Knapp*, 9 N.E.3d at 1289-90 (citing *Phelps,* 969 N.E.2d at 1021).

[40] A proportionality claim is essentially a challenge to the constitutionality of the sentencing statute. *See generally Mann v. State*, 895 N.E.2d 119, 122 (Ind. Ct. App. 2008). Challenges to the constitutionality of a statute begin with a presumption of the statute's constitutionality. *Id.* This presumption is particularly difficult to overcome when the challenge is based on Article 1, Section 16. *Id.* This is so "because criminal sanctions are a legislative prerogative [and] separation-of-powers principles require a reviewing court to afford substantial deference to the sanction the legislature has chosen." *Id.* We therefore will not disturb the legislative determination of the proper sanction "except upon a showing of clear constitutional infirmity." *Id.* (citing *State v. Moss-Dwyer*, 686 N.E.2d 109, 111-12 (Ind. 1997)).

[41] Plue has failed to make that showing. His disproportionality claim is based solely on his argument that his "possession of a small amount of methamphetamine did not harm anyone" or cause property damage—a claim we have already rejected. Even more importantly, Plue does not establish how the legislative sanctions for possession of methamphetamine are unconstitutional. Accordingly, we reject his disproportionality claim.

[42] We therefore affirm the trial court's judgment.

Altice, C.J., and Kenworthy, J., concur.

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