MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jeffery L. Weaver, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 10, 2022

Court of Appeals Case No. 21A-CR-911

Appeal from the Jay Circuit Court

The Honorable Brian D. Hutchison, Judge

Trial Court Cause No. 38C01-1909-F2-18

Vaidik, Judge.

Case Summary

[1] Jeffery L. Weaver, Jr. appeals his convictions for dealing in methamphetamine and possession of a narcotic drug. He contends evidence admitted at trial was obtained as the result of an illegal search and seizure of his person, and thus that evidence should have been excluded. But because law enforcement had probable cause to believe Weaver possessed marijuana, he was properly searched incident to arrest and the trial court did not err in admitting the evidence at trial. We affirm.

Facts and Procedural History

[2] At around 4 a.m. on September 24, 2019, Sergeant Derek Bogenschutz of the Jay County Sheriff's Department received a report of a female with a syringe at Jinny's Café. Sergeant Bogenschutz went to the restaurant and saw two vehicles—a pickup truck and a passenger car—in the parking lot. He went into the restaurant and saw Weaver and another male, Timothy Eguia. After speaking to an employee, Sergeant Bogenschutz left the restaurant.

[3] In the parking lot, Sergeant Bogenschutz noticed a female sitting on a bench near the backdoor of the restaurant. He went over and began speaking to her. Weaver then exited the restaurant and walked toward the passenger car in the parking lot. Sergeant Bogenschutz asked Weaver if he would come speak to him, and Weaver walked over to the bench. When Weaver got within "a foot," Sergeant Bogenschutz "smell[ed] a strong odor of marijuana coming from

him." Tr. Vol. II p. 11. Sergeant Bogenschutz patted Weaver down and felt a baggie in his back pocket but did not remove it. Weaver and the female became "agitated," so Sergeant Bogenschutz handcuffed Weaver and sat him on the ground. *Id.* at 196. Eguia then exited the restaurant and walked over near Weaver. Weaver, still handcuffed, maneuvered the baggie out of his pocket and threw it near Eguia's feet. Sergeant Bogenschutz ordered Eguia to move away from the baggie, and when he did not, Sergeant Bogenschutz also handcuffed him.

[4] Sergeant Bogenschutz opened the baggie and found what looked to be marijuana, methamphetamine, heroin, and one pill. Weaver told Sergeant Bogenschutz that he had arrived in the passenger car and that there were syringes in it. Sergeant Bogenschutz obtained a warrant to search the car and in it found syringes and "a large amount of unused Ziploc bags." *Id.* at 72-73. In a later interview with Sergeant Bogenschutz, Weaver admitted that he "trades and sells" drugs. *Id.* at 184.

[5] Testing of the baggie's contents revealed it contained an oxycodone tablet, 13.2 grams of methamphetamine, and .83 grams of a mixture of heroin and fentanyl. The State charged Weaver with Level 2 felony dealing in methamphetamine, two counts of Level 6 felony possession of a narcotic drug (one for the heroin and one for the oxycodone), and Level 6 felony unlawful possession of a

syringe. The State also sought to have him sentenced as a habitual offender based on two prior felony convictions.[1]

[6] Weaver moved to suppress the evidence found in the baggie and car, arguing Sergeant Bogenschutz illegally patted him down and handcuffed him and this tainted all evidence found thereafter. Following a hearing, the trial court denied the motion, finding Sergeant Bogenschutz had "reasonable suspicion" to pat down and detain Weaver based on the odor of marijuana. Appellant's App. Vol. II p. 59.

[7] A jury trial was held in October 2020. Evidence of the contraband found in the baggie and the car was admitted over Weaver's objection. The jury found Weaver guilty of both counts of Level 6 felony possession of a narcotic drug and not guilty of Level 6 felony unlawful possession of a syringe. The jury hung on the count of Level 2 felony dealing in methamphetamine, and the court declared a mistrial as to that count. A second jury trial was held in March 2021. Again, evidence of the contraband was admitted over Weaver's objection. The jury found Weaver guilty of Level 2 felony dealing in methamphetamine. Weaver then admitted to having at least two prior felony convictions, and the court found him to be a habitual offender. The court sentenced Weaver to an aggregate sentence of forty years.

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[1] Weaver has an extensive criminal history, including eleven felony convictions and five misdemeanor convictions.

[8] Weaver now appeals.

Discussion and Decision

[9] Weaver contends the contraband found in the baggie and car should not have been admitted into evidence because it was discovered in violation of his rights under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Specifically, Weaver argues that Sergeant Bogenschutz illegally patted him down and detained him, and thus the evidence seized in the subsequent searches should have been excluded.[2] "The constitutionality of a search or seizure is a question of law, and we review it de novo." *Kelly v. State*, 997 N.E.2d 1045, 1050 (Ind. 2013).

I. Fourth Amendment

[10] Weaver first contends the search and seizure of his person violated the Fourth Amendment. 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.

[2] Weaver does not argue Sergeant Bogenschutz's searches of the baggie or car were unconstitutional.

Weaver argues Sergeant Bogenschutz's actions of patting him down and handcuffing him amounted to a *Terry* stop, and thus Sergeant Bogenschutz needed "a belief . . . that Weaver was armed and dangerous." Appellant's Br. p. 14. The State argues that, irrespective of Sergeant Bogenschutz's subjective beliefs, he had probable cause to arrest Weaver when he approached smelling of marijuana, and thus the pat down was lawful as a search incident to arrest. We agree.

[11] A search incident to a lawful arrest is an exception to the warrant requirement. *Culpepper v. State*, 662 N.E.2d 670, 675 (Ind. Ct. App. 1996), *reh'g denied*, *trans. denied*. Under this exception, the arresting officer may conduct a warrantless search of the arrestee's person and the area within his immediate control. *Id.* (citing *Chimel v. California*, 395 U.S. 752, 772 (1969)). The initial inquiry under this exception is to determine whether the arrest itself was lawful. *Moffitt v. State*, 817 N.E.2d 239, 246 (Ind. Ct. App. 2004), *trans. denied*. "An arrest occurs when a police officer 'interrupts the freedom of the accused an[d] restricts his liberty of movement.'" *Id.* (quoting *Sears v. State*, 668 N.E.2d 662, 667 (Ind. 1996)). In addition, even when a police officer does not tell a defendant that he is under arrest before a search, that fact does not invalidate a search incident to an arrest as long as there is probable cause to make an arrest. *Id.* Furthermore, the subjective belief of the police officer that he may not have probable cause to arrest a defendant has no legal effect. *Id.*

[12] A police officer may arrest a person when the officer has probable cause to believe the person is committing or attempting to commit a misdemeanor in his

presence. *Winebrenner v. State*, 790 N.E.2d 1037, 1040 (Ind. Ct. App. 2003). Probable cause exists when, at the time of the arrest, the officer has knowledge of facts and circumstances that would warrant a person of reasonable caution to believe that the suspect committed a criminal act. *Griffith v. State*, 788 N.E.2d 835, 840 (Ind. 2003). The amount of evidence necessary to meet the probable-cause requirement for a warrantless arrest is determined on a case-by-case basis. *Id.*

[13] Here, Sergeant Bogenschutz smelled marijuana coming off Weaver as he approached. Thus, Sergeant Bogenschutz had probable cause to arrest Weaver for the crime of possession of marijuana and a lawful basis to search him. *See Bell v. State*, 13 N.E.3d 543, 546 (Ind. Ct. App. 2014) ("[T]he smell of raw marijuana on a person is sufficient to provide probable cause that the person possesses marijuana."), *trans. denied*; *Edmond v. State*, 951 N.E.2d 585, 591 (Ind. Ct. App. 2011) (officer had probable cause to arrest and search defendant after smelling marijuana on his breath).

[14] However, Weaver argues "the trial court clearly determined that . . . the odor of marijuana testified to by Bogenschutz [is] insufficient to meet the probable cause standard" and we should defer to that finding. Appellant's Br. p. 16. This is incorrect for two reasons. First, the record does not indicate the trial court determined the smell of marijuana was insufficient to establish probable cause. The trial court found the "detention and pat down" of Weaver were proper because Sergeant Bogenschutz had "reasonable suspicion" that Weaver possessed marijuana. Appellant's App. Vol. II p. 59. But we do not agree with

Weaver that the court's finding of reasonable suspicion implicitly means it rejected a finding of probable cause, especially given that the court also found the "odor of burnt marijuana coming from an individual" gives an officer "probable cause to search." *Id.* Second, even if the court did make such a determination, we may affirm a trial court's decision admitting evidence if it is sustainable on any basis in the record. *Barker v. State*, 695 N.E.2d 925, 930 (Ind. 1998), *reh'g denied*. So the trial court's basis for admitting the evidence is not dispositive.

[15] The pat down and detention did not violate the Fourth Amendment, so the trial court did not err in admitting the evidence.

I. Article 1, Section 11

[16] Weaver also argues the search and seizure violated our state constitution. Article 1, Section 11 of the Indiana Constitution provides that "[t]he 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." Article 1, Section 11 tracks the Fourth Amendment almost verbatim, but we proceed somewhat differently when analyzing the language under the Indiana Constitution than when considering the same language under the United States Constitution. *Redden v. State*, 850 N.E.2d 451, 460 (Ind. Ct. App. 2006). Our analysis of reasonableness under Article 1, Section 11 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, 361 (Ind. 2005).

[17] Here, as we have concluded Sergeant Bogenschutz had probable cause to arrest Weaver, the degree of suspicion weighs in the State's favor. *State v. Parrott*, 69 N.E.3d 535, 545 (Ind. Ct. App. 2017), *reh'g denied*, *trans denied*. Furthermore, the degree of intrusion was minimal under the circumstances. Sergeant Bogenschutz conducted only a pat down search of Weaver's clothing despite being authorized to conduct a thorough search of Weaver's person as an arrestee. *See Garcia v. State*, 47 N.E.3d 1196, 1201 (Ind. 2016) ("[A] police officer is authorized to conduct a thorough search of an arrestee, and where the police carry out only a pat-down search of [an arrestee's] clothing . . . the degree of intrusion [is] minimal."). Finally, a "search incident to arrest serves important purposes, such as ensuring that the arrestee is unarmed, preventing the arrestee from bringing contraband into jail, and preventing the destruction of evidence." *Edmond*, 951 N.E.2d at 592. As such, the extent of law-enforcement needs also weighs in favor of the State.

[18] The pat down and detention did not violate Article 1, Section 11, so the trial court did not err in admitting the evidence.[3]

[19] Affirmed.

Najam, J., and Weissmann, J., concur.

[3] Weaver also argues that holding that the odor of marijuana on one's person establishes probable cause for an arrest violates "the right to travel freely between the states" because several states near Indiana have legalized marijuana. Appellant's Br. p. 19. However, as the State points out, Weaver did not assert this argument in the trial court and does not argue fundamental error. Thus, he has waived this argument for our review. *See Skeens v. State*, 151 N.E.3d 1248 (Ind. Ct. App. 2020) ("A trial court cannot be found to have erred as to an argument that it never had an opportunity to consider; accordingly, as a general rule, a party may not present an argument on appeal unless the party raised that argument before the trial court."), *trans. denied*. Additionally, he fails to make a cogent argument. In his one-page argument, he cites no law except to define the "right to travel" and includes no legal analysis. So again, he has waived this argument. *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) (A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.), *trans. denied*.