MEMORANDUM DECISION

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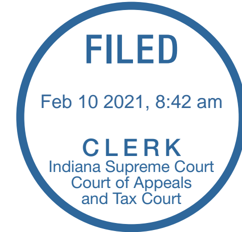

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IN THE COURT OF APPEALS OF INDIANA

Norman G. Trent,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 10, 2021

Court of Appeals Case No. 20A-CR-1280

Appeal from the Montgomery Superior Court

The Honorable Heather L. Barajas, Judge

Trial Court Cause No. 54D01-1812-F6-3704

Bailey, Judge.

Case Summary

[1] Norman G. Trent ("Trent") appeals his convictions for Possession of Marijuana,[1] and Possession of Hashish,[2] as Class B misdemeanors. We affirm.

Issues

[2] Trent presents three issues for review:

I. Whether the trial court abused its discretion by admitting evidence obtained in the execution of a search warrant unsupported by probable cause;

II. Whether the trial court abused its discretion by admitting testimony as to results from a marijuana field testing kit; and

III. Whether jury exposure to notations indicating that Trent has a prior drug conviction, appearing on a physical exhibit taken into the deliberation room, constitutes fundamental error.

Facts and Procedural History

[3] On December 10, 2018, Crawfordsville Police Officer Micah Hatch ("Officer Hatch") was patrolling in downtown Crawfordsville when he observed Trent operating a vehicle with a non-functioning headlight. Officer Hatch initiated a

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[1] Ind. Code § 35-48-4-11(a)(1).

[2] I.C. § 35-48-4-11(a)(1).

traffic stop, during which he detected the odor of marijuana emanating from the vehicle. At Officer Hatch's request, Trent exited the vehicle. Officer Hatch stated that he intended to search the vehicle; Trent refused to give permission for a search and locked the vehicle by using a key fob.

[4] Trent was permitted to walk away, and Officer Hatch obtained a search warrant for the vehicle and arranged to have it towed. The owner of the vehicle provided a spare key to officers, who then conducted a search of the vehicle. From the passenger floorboard, officers recovered a black drawstring bag containing a hat. Inside the hat were a glass jar and a plastic bag, each containing a green leafy material, and a piece of wax paper with a golden-brown waxy substance on it. Based upon the appearance and smell of the materials, Officer Hatch believed that he had recovered marijuana and hash oil. Two smoking devices were also recovered from the vehicle.

[5] On December 17, 2018, Trent was charged with Possession of Marijuana, Possession of Hashish, and Possession of Paraphernalia.[3] On February 18, 2020, Trent was tried in a jury trial at which Officer Hatch was the sole witness. Trent objected to the officer's testimony and the physical exhibits he sponsored, to the extent that the evidence was obtained during execution of the search warrant. Trent argued that the search warrant was not supported by probable cause because Officer Hatch's summation of his training and experience lacked

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[3] I.C. § 35-48-4-8.3(b)(1).

specificity. He also objected to the admission of results from a narcotics analysis reagent kit ("NARK test"), on grounds that the State provided no foundation for admission of scientific results. The evidence proffered by the State was admitted over Trent's objections.

[6] After the jury retired to deliberate, it issued a written question for the court: "three of the evidence bags note the defendant has a prior drug conviction – is that information we are allowed to use in our deliberation since it is written on an exhibit?" (Tr. Vol. II, pg. 170.) Notwithstanding the note, the jury then notified the court that verdicts had been reached. The trial court conducted a bench conference and notified the parties of the jury question, to which the court had been unable to respond. The proceedings continued without objection from either party, and it was revealed that the jury acquitted Trent of possession of paraphernalia and convicted him of possession of marijuana and hashish.

[7] After the trial court entered judgments of convictions upon the verdicts, defense counsel indicated that he would be asking the court to set aside the verdicts "based upon the writing." (*Id.* at 176.) The court responded that it was "not inclined" to grant the motion but granted the defense twenty-one days to submit written argument. On March 17, 2020, Trent filed a motion to correct error seeking to set aside the verdicts because of jury exposure to his prior criminal history during deliberations. On March 23, 2020, the motion was denied without a hearing. On June 9, 2020, Trent received two concurrent sentences of 180 days, to be fully executed. He now appeals.

Discussion and Decision

Standard of Review

[8] A trial court has broad discretion to rule on the admissibility of evidence. *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). In general, an abuse of discretion occurs when admission of the evidence is clearly against the logic and effect of the facts and circumstances before the trial court. *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997). However, when a challenge to admission of evidence is predicated upon the constitutionality of a search or seizure of evidence, it raises a question of law that we review de novo. *Thomas*, 81 N.E.3d at 624.

Probable Cause for Search Warrant

[9] At trial, Trent objected to the admission of Officer Hatch's testimony and "every piece of evidence or picture flowing from the warrant" because it was obtained without probable cause. (Tr. Vol. II, pg. 107.) On appeal, he observes that no drug interdiction dog was used to sniff the vehicle and argues that the search warrant was obtained solely upon a "conclusory statement" as to Officer Hatch's training in recognition of contraband. Appellant's Brief at 7.

[10] The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution require that a search warrant be supported by probable cause. *See Combs v. State*, 895 N.E.2d 1252, 1255 (Ind. Ct. App. 2008), *trans. denied*. In deciding whether to issue a search warrant, "[t]he task of the issuing magistrate is simply to make a practical, commonsense

decision whether, given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Query v. State*, 745 N.E.2d 769, 771 (Ind. 2001) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Probable cause determinations "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Gates*, 462 U.S. at 231.

[11] The duty of the reviewing court is to determine whether the magistrate had a "substantial basis" for concluding that probable cause existed. *Query*, 745 N.E.2d at 771. A substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause. *Id*. A "reviewing court" in this context includes both the trial court ruling on a motion to suppress and an appellate court reviewing that decision. *Id*. In conducting our review, we consider only the evidence presented to the issuing magistrate and not post hoc justifications for the search. *Id*.

[12] For the proposition that probable cause cannot be based solely on a conclusory assertion, Trent directs our attention to *Bean v. State*, 142 N.E.3d 456, 461 (Ind. Ct. App. 2020), *trans. denied*. In *Bean*, the appellant had been convicted of dealing controlled substances. Those substances had been recovered in a warrantless search incident to arrest. According to testimony from the arresting officer, he had arrested Bean after discovering in Bean's vehicle "marijuana

shake" or small bits and pieces of marijuana. *Id.* at 463. A panel of this Court agreed with Bean that the warrantless search was not supported by probable cause, explaining:

> Detective Wood did not recover the suspected marijuana shake from the vehicle. The substance was never tested to determine whether it was marijuana. Even though Detective Wood had a police dog in his car, he did not have the dog sniff Bean's vehicle to detect the presence of illegal drugs. Detective Wood did not testify regarding any distinguishing characteristics of the substance that led him to the conclusion that the substance was marijuana. Rather, Detective Wood just testified as to his conclusion that the substance was marijuana "given [his] training and experience." … Probable cause cannot be based solely on a conclusory assertion. For example, an affidavit that contains only "bare conclusory information, lacking underlying facts, cannot suffice as probable cause upon which to base a search warrant." *Bryant v. State*, 655 N.E.2d 103, 108 (Ind. Ct. App. 1995) (holding search warrant affidavit containing speculative conclusions did not establish probable cause).

Bean, 142 N.E.3d at 463-64.

[13] Here, in the search warrant affidavit, Officer Hatch stated that he had graduated from the Indiana Law Enforcement Academy ("the Academy") and that he had "been trained and I have experience in identifying marijuana, the odor of marijuana, and items used to introduce marijuana into the body." (App. Vol. II, pg. 56.) Officer Hatch described the circumstances of the traffic stop, including the observation that Trent was the sole occupant of the vehicle and the detection of a smell the officer recognized as marijuana. Officer Hatch stated that Trent had locked the vehicle door, and that Trent had a known

history of drug convictions. The affidavit provides more than a "bare assertion that a substance was a prohibited substance," as was the case in *Bean*. 143 N.E.3d at 464. There exists "a substantial basis for the magistrate's conclusion that probable cause existed." *Query*, 745 N.E.2d at 771.

Admission of NARK Test Results

[14] Trent contends that the trial court abused its discretion by admitting testimony of NARK test results without a foundation as to the scientific principles employed or test reliability. He asserts that the admission of this evidence contravenes the authority of *Doolin v. State*, 970 N.E.2d 785 (Ind. Ct. App. 2012). In *Doolin*, the deputy performing an in-court field test explained only: "Break an ampoule of something over the challenged plant material and shake it up. If whatever is in the ampoule causes the material to turn blue, it's marijuana." *Id.* at 789. He did not testify as to any specific name or otherwise identify the test, nor did he indicate its reliability, the scientific principles on which it was based, or recognize any standards regarding its use and operation. *See id.* On appeal of Doolin's convictions, this Court held that, under those circumstances, the test results should not have been admitted into evidence because of a lack of foundation as to test reliability under Indiana Evidence Rule 702(b).

[15] Pursuant to the foregoing rule, expert scientific testimony is admissible only if reliability is demonstrated to the trial court. Rule 702 provides:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

[16] The proponent of expert testimony bears the burden of establishing the foundation and reliability of the scientific principles. *McGrew v. State*, 682 N.E.2d 1289, 1292 (Ind. 1997). There is "no specific test" that must be considered in order to satisfy Rule 702(b). *Id.* Rather, reliability may be established by judicial notice or, in its absence, by sufficient foundation to convince the trial court that the relevant scientific principles are reliable. *West v. State*, 805 N.E.2d 909, 913 (Ind. Ct. App. 2004), *trans. denied*. In determining whether scientific evidence is reliable, the trial court must determine whether the evidence appears sufficiently valid, or, in other words, trustworthy, to assist the trier of fact. *Id.* (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 n.9 (1993)).

[17] At trial, Officer Hatch testified that, based upon his training and experience, he recognized the green leafy substance found in Trent's drawstring bag as marijuana and the brown-gold waxy material as "hashish or hash oil." (Tr. Vol. II, pg. 109.) He then testified that he had "tested" all the substances with a kit designed to detect marijuana, hashish, hash oil, THC, or THC concentrate.

He described the procedure employed and testified that a positive result was indicated when a purple color appeared. When Officer Hatch was asked to relay the specific results of his testing, Trent objected that the State had elicited no foundational testimony for admitting results of a scientific test. (*Id.* at 110.)

[18] Initially sustaining the objection, the trial court permitted defense counsel to conduct voir dire questioning of Officer Hatch. Officer Hatch conceded that he did not know "on a scientific level what the exact results are" and didn't "know the accuracy or error rate." (*Id.* at 114.) He opined that he had "never had a false positive result." (*Id.*) However, he testified that the department protocol was to request Indiana State Laboratory verification of presumptive tests for methamphetamine and heroin, but not for marijuana. Defense counsel argued that Officer Hatch knew "how to physically manipulate the kit" but lacked "indication of its reliability" and his conclusory testimony should be excluded. (*Id.* at 116.) The trial court noted concerns about the officer's lack of knowledge of the scientific principles or accuracy rate but stated that the officer had employed the test to "confirm" his own observations. (*Id.* at 117.) The defense objection was overruled, in part based upon the trial court's observation that *Doolin* had involved in-court testing.

[19] Officer Hatch then testified that the leafy material obtained from the plastic bag and jar each tested positive for THC. He further testified that the "suspected hashish" tested positive for THC and that the wax yielded "a darker reagent color" and smelled "stronger than the plant version." (*Id.* at 118.) Officer

Hatch identified State's Exhibit 14 as "hashish oil or marijuana wax." (*Id.* at 124.)

[20] The State failed to establish the reliability of the NARK test. The presumptive results were not verified by laboratory testing and admitted into evidence, such that the NARK test results would have been cumulative evidence. Under these circumstances, Trent's objection to the admission of the results into evidence should have been sustained. That said, the improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction. *Doolin*, 970 N.E.2d at 789.

[21] To convict Trent of Possession of Marijuana, as a Class B misdemeanor, the State was required to establish beyond a reasonable doubt that Trent knowingly or intentionally possessed marijuana. I.C. § 35-48-4-11(a)(1). To convict Trent of Possession of Hashish, as a Class B misdemeanor, the State was required to establish beyond a reasonable doubt that Trent knowingly or intentionally possessed hashish. *Id.*

[22] Officer Hatch testified that Trent was the sole occupant of the vehicle involved in the subject traffic stop and that the drawstring bag, from which emanated a distinctive odor, was in the passenger side floorboard within a driver's reach. Inside the bag were a glass container and a plastic bag, which each contained

green leafy material, and a piece of wax paper upon which there was an oily brown-gold material.

[23] Officer Hatch also testified that he had worked on "roughly fifteen" marijuana cases and he had been trained at the Academy in detection of marijuana and its byproducts. (Tr. Vol. II, pg. 90.) He expressed familiarity with those substances. In part, he explained that marijuana has a distinctive smell and that hashish, which is also a substance with THC, has that same distinctive – but stronger – smell. (Tr. Vol. II, pg. 90.) He identified the leafy material as marijuana and the brown-gold substance as hashish. The identity of a controlled substance may be established through witness testimony and circumstantial evidence. *Helton v. State*, 907 N.E.2d 1020, 1024 (Ind. 2009). The State presented sufficient independent evidence of guilt such that we are satisfied there is no substantial likelihood that the testimony of NARK test results contributed to the conviction. As such, its admission into evidence is harmless error.

Jury Exposure to Criminal History Notation

[24] The jury was permitted to retain physical exhibits. By all indications, neither the State's attorney, the trial court, nor the defense attorney realized that one physical exhibit, consisting of evidence bags, included administrative notations that Trent has a prior drug-related conviction. During deliberations, the jury posed a question about the propriety of considering the notations but rendered their verdicts without waiting for a response. Trent now contends that the

inadvertent exposure, without opportunity for trial court instruction, denied him a fair trial.

[25] Indiana Trial Rule 404(b) provides in relevant part:

> Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. …This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

[26] "Even oblique or apparently innocuous references to prior convictions are impermissible." *Thompson v. State*, 690 N.E.2d 224, 235 (Ind. 1997). Thus, had either counsel examined the physical exhibits thoroughly enough to discover the notations, exclusion of the information would have been appropriate. But timely discovery did not happen. Moreover, had the jury waited for further instruction, defense counsel could have requested an instruction based upon Trial Rule 404(b). But this remedy was not available to Trent because the jury did not stay their deliberations until the trial court responded. At bottom, the relevant inquiry is whether fundamental error occurred.

[27] The fundamental error doctrine is extremely narrow. *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). The doctrine "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." *McQueen v. State*, 862 N.E.2d 1237, 1241 (Ind. Ct. App. 2007). Here, the reference to criminal history was non-specific and not sponsored by a

witness. The jury's exposure was isolated and inadvertent. Because the jury returned its verdicts without awaiting an answer to their inquiry, it is not clear that the jury took the information into account in reaching verdicts. We are not of the opinion that there occurred a blatant violation of basic principles with harm of such magnitude that Trent was denied fundamental due process.

Conclusion

[28] There was probable cause to support the issuance of a search warrant and therefore the subsequent admission of the evidence by the trial court was not error. The admission of testimony regarding the NARK test results was harmless error. We discern no fundamental error.

[29] Affirmed.

Robb, J., and Tavitas, J., concur.