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IN THE
COURT OF APPEALS OF INDIANA

D'WAN MAXWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1006-CR-622
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah F. Pierson-Treacy, Judge
Cause No. 49F19-1003-CM-19425

February 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

D'wan Maxwell appeals his conviction, after a bench trial, of one count of possession of marijuana, as a class A misdemeanor.

We affirm.

ISSUE

Whether the trial court abused its discretion by admitting marijuana seized when it appeared in plain view upon the police officer's retrieval – with Maxwell's consent – of Maxwell's identification from his jacket pocket.

FACTS

On March 11, 2010, Maxwell was driving his girlfriend's car. Officer Danny Reynolds of the Indianapolis Metropolitan Police Department observed Maxwell driving without his seatbelt fastened. When Reynolds ran a license plate check, he found the car was registered to a female. Reynolds pulled behind Maxwell in his fully marked patrol car. Maxwell immediately parked "and then jumped out of the car real quick." (Tr. 10). Reynolds informed Maxwell about the seatbelt violation and asked him about the car's ownership. As Maxwell "advised that the vehicle belonged to his girlfriend," Reynolds "smell[ed] the odor of burnt marijuana coming from [Maxwell's] person." *Id.* at 11. Maxwell stepped backwards and turned his body, giving Reynolds "the impression" that he might "run or fight." *Id.* At that point, Reynolds wanted "to keep [Maxwell] away from the car" while he "investigat[ed] ownership of the vehicle and the odor of the burnt marijuana that [he] smelled emanating from Mr. Maxwell." *Id.* at 13, 12. Having no back-up officer, Reynolds "put [Maxwell] in handcuffs," and "asked him to come over to [the police] vehicle," telling him "he could sit on the car if he wanted." *Id.* at 13.

Officer Reynolds testified,

> [I] asked him if I could get his ID. And he said his ID – he said I could. And I asked him where it was at. And he said that it was in his jacket pocket, his right jacket pocket. And I asked him if it was okay for me to go ahead and reach in there and get it and he said yeah.

Id. at 14.

According to his subsequent testimony, Reynolds "reached into [Maxwell's] right jacket pocket where he indicated his wallet was. And [Reynolds] pulled it out." *Id.* at 30. When he pulled the wallet from the jacket pocket, "there was a clear plastic like a sandwich baggie, caught in the fold of the wallet." *Id.* The baggie contained marijuana, and Reynolds then "found a second baggie in his right pocket that was underneath the wallet." *Id.* Reynolds advised Maxwell that he was under arrest for possession of marijuana and "Mirandized him." *Id.* Maxwell admitted that he had purchased the marijuana earlier in the day.

On March 11, 2010, the State charged Maxwell with one count of possession of marijuana, as a class A misdemeanor. On May 11, 2010, the trial court conducted a bench trial.

Officer Reynolds testified to the above facts about his initial interaction with Maxwell, and having asked Maxwell whether he could "get his ID"; Maxwell agreeing; Maxwell telling him that the ID was in his right jacket pocket; and that "it was okay for [the officer] to go ahead and reach in there and get it." *Id.* at 14. At that point, Maxwell "move[d] to suppress any further evidence base[d] on the fact that what we have a search [sic] while he is in custody," when he "had a right under Indiana law to be told that he

had the right to refuse the search" and "a right to have an attorney present before he consented to that search." *Id.* at 26. The trial court denied Maxwell's motion to suppress.

Thereafter, the trial court heard Reynolds' testimony about the clear plastic baggie of marijuana in the fold of Maxwell's wallet, and his discovery of the second baggie of marijuana in Maxwell's pocket. Further evidence established that the two baggies contained a total of 4.89 grams of marijuana. At the conclusion of the trial, the trial court found Maxwell guilty.

DECISION

Maxwell argues that the trial court "erred when it denied his trial motion to suppress the admission of the marijuana recovered when the officer failed to" advise him "of his *Pirtle* [*v. State*, 263 Ind. 16, 323 N.E.2d 634 (1975)] rights." Maxwell's Br. at 1. We do not agree.

A trial court has broad discretion in ruling upon the admissibility of evidence, and its decision in that regard is afforded great deference on appeal. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). An abuse of discretion in this context occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id.* at 703. Further, "[i]n reviewing the trial court's ruling on the admissibility of evidence from an allegedly illegal search, an appellate court does not reweigh the evidence but defers to the trial court's factual determinations unless clearly erroneous," and "views conflicting evidence most favorably to the ruling." *Meredith v. State*, 906 N.E.2d 867, 869 (Ind. 2009). Nevertheless, the

appellate court "considers afresh any legal question of the constitutionality of a search or seizure." *Id.*

As our Supreme Court recently reiterated, *Pirtle* held that "[u]nder Article 1, § 11 of the Indiana Constitution, 'a person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent.'" *Id.* at 873 (quoting *Pirtle*, 263 Ind. at 29, 323 N.E.2d at 640). In *Meredith*, the officer "asked for permission to search the vehicle, and the defendant consented." *Id.* at 869. Here, however, there was no testimony that Officer Reynolds "asked for permission to search" Maxwell's pocket. Rather, the officer testified, and the trial court found, that he "was procuring identification from the defendant from exactly where the defendant . . . said that the identification was going to be located." (Tr. 29).

Blacks defines "search" as follows:

> An examination of a person's body, property, or other area that the person would reasonably be expected to consider as private, conducted by a law-enforcement officer for the purpose of finding evidence of a crime.

Black's Law Dictionary 1377 (8th ed. 2004). According to his testimony, and the trial court's finding of fact, Reynolds was retrieving Maxwell's identification – with Maxwell's consent – not examining his person to find evidence of a crime.

Our Supreme Court has noted that the word "search" connotes uncovering that which is hidden, prying into hidden places for that which is concealed, or an exploratory investigation or quest. *Alcorn v. State*, 255 Ind. 491, 265 N.E.2d 413, 416 (1970). Reynolds did not ask Maxwell's consent to pry into or investigate the contents of his

pocket. As previously noted, the officer simply sought to procure Maxwell's identification from the location where Maxwell indicated it could be found – in his wallet in his right jacket pocket.

Maxwell reminds us that he was handcuffed, a fact which he contends supports the finding of an illegal search under the Indiana Constitution. Given the standard of review for such a claim, we do not find the fact that Maxwell was handcuffed to be dispositive.

"The legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances." *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). 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. *Id.* at 360. Although there may be other relevant considerations under the circumstances, the reasonableness of the search or seizure turns 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.

Officer Reynolds observed Maxwell driving a vehicle without a fastened seatbelt, a traffic infraction. *See* Ind. Code § 9-19-10-8. Therefore, the encounter between Reynolds and Maxwell was based on knowledge that a violation occurred. Indiana law requires an individual "stopped . . . for an infraction" to provide identification to the law enforcement officer who stopped him. I.C. § 34-38-5-3.5. Thus, we have held that when an officer stops a person for an infraction, the officer "has 'statutory justification' for

requesting that the person produce his license and 'for expecting [the person] to comply with his request.'" *Lashley v. State*, 745 N.E.2d 254, 262 (Ind. Ct. App. 2001) (quoting *State v. Harris*, 702 N.E.2d 722, 726 (Ind. Ct. App. 1998)), *trans. denied*. Thus, we find that the "basis upon which the officer selected" Maxwell, *Litchfield*, 824 N.E.2d at 359, was reasonable.

We turn to the additional *Litchfield* considerations. We find that the degree of concern or suspicion of illegality, *Litchfield*, 824 N.E.2d at 359, was strong. After Maxwell parked his vehicle and exited it, Officer Reynolds "asked him if [he] could talk to him about whose vehicle it was" and "about the seatbelt"; Maxwell agreed. (Tr. 11) As Maxwell "advised that the vehicle belonged to his girlfriend," Reynolds immediately "smell[ed] the odor of burnt marijuana coming from his person." *Id.* Reynolds then "took some small steps backwards away" and "turned his body" to the side," giving Reynolds the impression that Maxwell was going to "run or fight." *Id.* Further, as already discussed, Reynolds had observed Maxwell driving a vehicle without his seatbelt fastened.

We find the degree of intrusion, *Litchfield*, 824 N.E.2d at 359, not to be extremely great. As already indicated, Maxwell had parked and exited his vehicle of his own accord. He then agreed to the officer's request to discuss the seatbelt violation and ownership of the vehicle. Although his handcuffing was an intrusion on his liberty, he was not placed in the squad car and Reynolds told Maxwell that "he could sit on the [squad] car if he wanted" while Reynolds continued his investigation. (Tr. 13). Moreover, the "intrusion" of removing Maxwell's wallet followed Maxwell's agreement

to provide identification, his indication that the identification was in his wallet, and his agreement that "it was okay for [Officer Reynolds] to go ahead and reach in there and get it." (Tr. 14).

Finally, we find "the extent of law enforcement needs," *Litchfield*, 824 N.E.2d at 359, to be strong. Officer Reynolds was alone and without back-up. Following Maxwell's agreement to a consensual discussion, Reynolds noticed the strong odor of marijuana emanating from Maxwell. He also noticed the nervousness and body movements by Maxwell implying his intent to flee or fight. The odor of burnt marijuana supports an officer's further investigation of possible criminal activity. *Kenner v. State*, 703 N.E.2d 1122, 1127 (Ind. Ct. App. 1999), *trans. denied*. Therefore, in order to protect himself while furthering his investigation of possible criminal activity, Reynolds handcuffed Maxwell.

In the totality of the circumstances, we find Officer Reynolds' action to be reasonable. *Litchfield*, 824 N.E.2d at 359. Accordingly, we find no violation of Maxwell's rights under the Indiana Constitution.

Affirmed.

NAJAM, J., and BAILEY, J., concur.