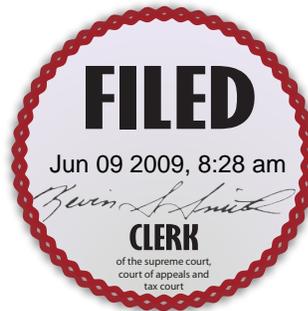


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**IN THE
COURT OF APPEALS OF INDIANA**

THEODUS MAYES,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0810-CR-889
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah Pierson-Treacy, Judge
Cause No. 49F19-0804-CM-90642

June 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After a bench trial, Theodus Mayes was convicted of operating a vehicle while intoxicated as a Class A misdemeanor along with two traffic infractions. On appeal, Mayes asks that we reverse his conviction for operating while intoxicated. Mayes argues that the trial court erred by denying his motion to suppress evidence because the officer who apprehended him did not have reasonable suspicion to detain him and his seizure was unreasonable in light of the totality of the circumstances, violating his Fourth Amendment rights and his rights under Article I, § 11 of the Indiana Constitution. Concluding that his seizure was proper and reasonable, we affirm the admission of the evidence and his conviction.

Facts and Procedural History

On April 22, 2008, Sergeant Lori Oatts of the Indianapolis Metropolitan Police Department was standing on a street corner in Marion County near her police vehicle speaking with two individuals about a problem in the area. Sergeant Oatts heard the sound of a revving engine and looked up. She saw an eastbound two-tone silver Chevrolet truck with a paper license plate cross left of center to pass another vehicle. The truck then came within twelve inches of Sergeant Oatts' parked vehicle, and she and the driver looked at each other. Sergeant Oatts noticed that the driver's eyes were red and glossy, such that "[h]e looked either high or intoxicated." Tr. p. 22. The driver of the truck then disregarded a stop sign and drove away.

After ending her conversation with the two individuals, Sergeant Oatts returned to her vehicle and began searching for the truck. Ten minutes later, she found it unoccupied

and parked in front of a house four blocks away from her encounter with the truck. Several people were on the porch of the home, and, while remaining on the sidewalk, Sergeant Oatts asked where the driver of the truck was located. Mayes, who appeared “off balance,” *id.* at 24, then came from the back yard to the front yard of the home. Sergeant Oatts recognized Mayes as the driver of the truck and told him she wanted to talk about his erratic driving. Mayes then fled toward the back yard, but Sergeant Oatts pursued in her vehicle and caught up to him in an alley behind the home. She asked him to stop and put his hands on her vehicle. Instead of complying, Mayes fled again. Sergeant Oatts caught him again on the sidewalk in front of the home and placed him in handcuffs.

While he was handcuffed, Mayes blurted, “Mommy, I won’t drive anymore if you let me go.” *Id.* at 29. After the *Miranda* warnings were given, Mayes admitted to drinking fortified wine and failed several field sobriety tests. Mayes’ blood-alcohol content test showed a BAC of .21.

The State charged Mayes with operating a vehicle while intoxicated as a Class A misdemeanor,¹ operating a vehicle with at least a .15 BAC, a Class A misdemeanor,² failure to stop at a stop sign as an infraction,³ and improper passing on the left as an infraction.⁴

¹ Ind. Code § 9-30-5-2(b).

² Ind. Code § 9-30-5-1(b).

³ Ind. Code § 9-21-8-32.

⁴ Ind. Code § 9-21-8-5.

The case was tried by the court. At trial, Mayes moved to suppress evidence of Mayes' statements to Sergeant Oatts and other evidence of his intoxication because, as he argued, Sergeant Oatts did not have authority "to request to have Mr. Mayes come speak to her." Tr. p. 20. The trial court denied the motion to suppress the evidence. As his defense, Mayes presented evidence that his long-time friend was the truck driver and he was merely a passenger. The trial court found Mayes guilty of all four counts. After merging the second count into the first count, the trial court sentenced Mayes to 365 days, with twenty of those days executed, four days credit for time served, and the remainder of the term suspended to probation. Mayes now appeals.

Discussion and Decision

On appeal, Mayes argues that the trial court should have suppressed his statements and the other evidence of his intoxication because his seizure violated the Fourth Amendment to the United States Constitution and was not reasonable given the totality of the circumstances under Article I, § 11 of the Indiana Constitution. Although he argues on appeal that the trial court erred in denying his motion to suppress, Mayes appeals following a completed trial. The issue on appeal is therefore properly framed as whether the trial court abused its discretion by admitting the challenged evidence at trial. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*. Our standard of review of a trial court's determination as to the admissibility of evidence is for an abuse of discretion. *Smith v. State*, 754 N.E.2d 502, 504 (Ind. 2001). We will reverse only if a trial court's decision is clearly against the logic and effect of the facts and circumstances. *Id.* We will not reweigh the evidence and will consider any conflicting evidence in favor

of the trial court's ruling. *Collins*, 822 N.E.2d at 218. However, we must also consider the uncontested evidence favorable to the defendant. *Id.* Although a trial court's determination of facts is entitled to deferential review, we employ a *de novo* standard when reviewing the trial court's ultimate determinations of reasonable suspicion and probable cause. *Myers v. State*, 839 N.E.2d 1146, 1150 (Ind. 2005).

I. Federal Constitution

Mayes argues that Sergeant Oatts' request to speak to him was a *Terry* stop that violated the Fourth Amendment to the United States Constitution because it was not supported by reasonable suspicion and, as a result, all evidence resulting from the encounter should have been suppressed. The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, protects people from unreasonable government intrusions into areas of an individual's life in which he or she has a reasonable expectation of privacy. *State v. Friedel*, 714 N.E.2d 1231, 1237 (Ind. Ct. App. 1999). "The fundamental purpose of the Fourth Amendment is to protect the legitimate expectations of privacy that citizens possess in their persons, their homes and their belongings." *Taylor v. State*, 842 N.E.2d 327, 330 (Ind. 2006) (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)). In *Terry v. Ohio*, the United States Supreme Court held that the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based upon specific and articulable facts, the officer has a reasonable suspicion that criminal activity "may be afoot." 392 U.S. 1, 30 (1968). More specifically, "limited investigatory seizures or stops on the street involving a brief question or two and a possible frisk for weapons can be justified by

mere reasonable suspicion.” *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), *reh’g denied, trans. denied*. In determining whether the police had reasonable suspicion to believe there was criminal activity afoot, we consider the totality of the circumstances. *Carter v. State*, 692 N.E.2d 464, 467 (Ind. Ct. App. 1997).

When Sergeant Oatts saw Mayes in the lawn, she recognized him as the glossy-eyed driver of the truck that had come within twelve inches of her vehicle, improperly passed another car, and then disregarded a stop sign. Sergeant Oatts then asked to speak to him about his driving. Mayes and the State debate in their briefs whether or not Sergeant Oatts’ request constituted a *Terry* stop or was merely a request for information that did not constitute a seizure.⁵ We need not resolve this question for two reasons.

First, even assuming *arguendo* that her request was a *Terry* stop, such a stop was supported by reasonable suspicion. Sergeant Oatts recognized Mayes as the driver of the truck that came within a foot from her police vehicle, she saw him commit two traffic infractions, and she observed signs that he was intoxicated (the red, glossy eyes and the erratic driving). Further, when Mayes appeared on the lawn, Sergeant Oatts noticed that he was off balance. The traffic infractions alone would have been sufficient grounds for Sergeant Oatts to initiate a traffic stop while Mayes was driving. *See State v. Quirk*, 842 N.E.2d 334, 340 (Ind. 2006) (“[P]olice officers may stop a vehicle when they observe minor traffic violations.”) (quotation omitted). The signs of intoxication (the glossy eyes, the erratic driving, and the difficulty maintaining balance), the close proximity in time

⁵ There are three levels of police investigation: the arrest, the *Terry* stop, and the consensual encounter. *See Overstreet*, 724 N.E.2d at 663. A consensual encounter involves a brief, casual inquiry of a citizen and does not implicate the Fourth Amendment. *Id.*

and location, and her recognition of Mayes as the driver combined when Sergeant Oatts saw Mayes on the lawn to provide reasonable suspicion that more serious criminal activity had recently occurred; that is, that Mayes had recently been operating a vehicle while intoxicated. Sergeant Oatts would have been justified in making a *Terry* stop at this point.

Second, Mayes did not submit to Sergeant Oatts' authority and come to the sidewalk to speak to her as requested. Instead, Mayes fled.⁶ A seizure does not occur until the officer has by means of physical force or show of authority restrained the liberty of a citizen. *Murphy v. State*, 747 N.E.2d 557, 559 (Ind. 2001) (citing *Terry*, 392 U.S. at 20 n.16). A seizure does not occur when the suspect fails to yield to an officer's authority. *Id.* (citing *California v. Hodari D.*, 499 U.S. 621, 624-26 (1991)). Once a seizure occurs, the police may briefly detain an individual if, based on the totality of the circumstances, the officer has a reasonable suspicion that the individual is engaged or about to engage in criminal activity. *Id.*

When Sergeant Oatts finally apprehended Mayes on the sidewalk in front of the home, she handcuffed him for officer safety. At that point, she noticed that Mayes smelled like alcohol and his eyes were bloodshot. He then blurted, "Mommy, I won't drive anymore if you let me go."⁷ Mayes' erratic driving, his difficulty keeping balance, his flight, his admission that he was driving, his appearance, and his smell combined gave

⁶ Mayes explained at trial that he went to the back yard to discard the illegal substances he was carrying in his pocket. Tr. p. 58-59.

⁷ Sergeant Oatts testified that this statement was volunteered by Mayes before she asked any questions. Volunteered statements made without police interrogation are not subject to exclusion under *Miranda v. Arizona*, 384 U.S. 436 (1966). *McClure v. State*, 803 N.E.2d 210, 213-14 (Ind. Ct. App. 2004), *trans. denied*.

Sergeant Oatts reasonable suspicion, if not probable cause, to detain Mayes for further investigation as to whether he had been driving while intoxicated. As a result, there has been no Fourth Amendment violation and the trial court did not abuse its discretion by admitting the challenged evidence of Mayes' intoxication.

II. Indiana Constitution

Next, Mayes argues that his seizure was unreasonable under Article I, § 11 of the Indiana Constitution. This constitutional provision reads,

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 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.

Generally, in spite of the similarity in structure of the Fourth Amendment and Article I, § 11, interpretations and applications vary between them. *Holder v. State*, 847 N.E.2d 930, 935 (Ind. 2006). “The Indiana Constitution has unique vitality, even where its words parallel federal language.” *Id.* The question under this provision is whether the officer’s conduct “was reasonable in light of the totality of the circumstances.” *Id.* at 940. In determining reasonableness, we balance: (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.* Sergeant Oatts observed Mayes driving erratically, including coming within a foot of striking her police vehicle, and committing two traffic infractions. She saw that his eyes were red and glossy and that he was having trouble keeping balance. Mayes fled from Sergeant Oatts when she asked to speak to him about

his driving. When she finally apprehended him, Sergeant Oatts handcuffed Mayes, who smelled like alcohol, for officer safety because he fled when she requested to speak with him and then fled again when she ordered him to place his hands on her vehicle. These circumstances outweigh the intrusion to Mayes,⁸ who was later discovered to have a BAC of .21. We conclude that Mayes' seizure was reasonable in light of the totality of the circumstances and hence did not violate Mayes' rights under Article I, § 11 of the Indiana Constitution.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.

⁸ Although Mayes was handcuffed and asked to undergo various tests to determine intoxication, we note that there is no evidence on the record that Sergeant Oatts entered private property at any point during these events.