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**IN THE
COURT OF APPEALS OF INDIANA**

DIRRICK J. BURKS,)
)
Appellant-Defendant,)
)
vs.) No. 79A02-0810-CR-947
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0802-FD-5

June 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Dirrick J. Burks appeals his conviction of Dealing in Marijuana,¹ as a class D felony, as well as his adjudication as a habitual offender. He presents the following restated issue for review: Did the trial court abuse its discretion by admitting into evidence the marijuana that was recovered from a search of Burks's backpack?

We affirm.

Just before midnight on August 18, 2007, Officer Bob Petillo and Detective Payne, members of the Lafayette Police Department's street crimes unit, were patrolling an area known for drug activity. The officers made contact with the occupant of a suspicious vehicle parked behind a building. After determining that the occupant was not engaged in criminal activity, the officers asked for any information that might help in their investigation. The man related that a heavy-set black male sells drugs from the north side of South Street between the 1300 to 1400 block. The officers proceeded in their unmarked vehicle to that nearby location and observed two heavy-set black males walking together in the 1300 block of South Street.

The officers drove around the block and parked so that they could approach the pair on foot. The officers were wearing their street crimes uniforms and, although armed, did not draw their weapons. They both held flashlights as they approached, though it is not clear that the flashlights were turned on since there was ambient light in the area. When the officers were about twenty feet from the men, whom they were approaching head on, Petillo verbally identified himself as Lafayette Police so as "not to alarm them or spook them." *Appendix at*

¹ Ind. Code Ann. § 35-48-4-10 (West, PREMISE through 2008 2nd Regular Sess.).

70. He then engaged them in conversation in a non-threatening, non-authoritative manner to “see what they were doing” in that area at such a late hour.² *Id.* at 71.

Petillo spoke with Burks, while Payne stepped aside with the other gentleman to speak with him. Petillo asked Burks if he had identification, and Burks, who was being very cooperative, provided an Indiana identification card. Petillo then asked Burks, “what are you guys up to?” *Id.* at 73. Burks responded that they were walking to the Village Pantry a few blocks away. Petillo then asked if Burks would consent to a search of his person. Burks indicated that would be “fine”. *Id.* at 24. Petillo asked Burks to remove the backpack from his shoulder and place it on the ground. For safety purposes, Petillo then held one of Burks’s wrists behind his back during the pat-down search. When the brief search revealed no weapons or contraband, Petillo immediately released Burks’s wrist. Petillo then turned his attention to the backpack and inquired about its contents. When Burks responded that there were clothes inside, Petillo asked Burks if he could look in it. Once again, Burks promptly gave his consent. Upon unzipping the backpack, Petillo smelled marijuana and found twenty-six individual small bags of marijuana. At that point, Burks was arrested for possession of marijuana.

On February 25, 2008, the State charged Burks with class D felony dealing in marijuana over thirty grams and class D felony possession of marijuana over thirty grams. The State also alleged that Burks was a habitual offender. On May 5, 2008, Burks filed a

² Petillo described his tone and demeanor as follows: “Just a pretty standard friendly information gathering how you doing, you know, what are you doing here? Do you have ID? Stuff like that.” *Id.* at 23.

motion to suppress the marijuana seized from his backpack. Following a hearing, the trial court denied Burks's motion on June 11, 2008. In its written order, the court explained in part:

The Court finds that the search of defendant's backpack was consensual and therefore neither the United State [sic] Constitution nor the Indiana Constitution were violated. The pat down of the defendant is somewhat problematic in that the Officer was restraining the defendant while doing so. Nevertheless, the Court finds that the pat down was consensual. In any event, after the pat down, the defendant was free to leave. Nothing about the encounter indicated to the defendant that he was not free to leave.

The search of defendant's backpack was consensual. Under both *Florida v Bostick*, 501 U.S. 429 (1991) and *State v Clark*, [sic] 868 Ind. [sic] 1114 (Ind. 2007), defendant was not in custody and his freedom was not limited at the time that he gave consent to search his backpack. Therefore the motion to suppress is denied.

Appendix at 55. At his bench trial on October 22, 2008, Burks once again challenged the marijuana evidence, arguing that the search of his backpack was the result of an unconstitutional investigatory stop. The trial court overruled the objection and found Burks guilty as set forth above. Burks now appeals based upon both the United States and Indiana Constitutions. We will address each in turn.

The standard used to review rulings on the admissibility of evidence is effectively the same whether the challenge is made by a pretrial motion to suppress or by a trial objection. *Burkes v. State*, 842 N.E.2d 426 (Ind. Ct. App. 2006), *trans. denied*. We review for abuse of discretion and reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Joyner v. State*, 678 N.E.2d 386 (Ind. 1997). We will not reweigh the evidence, and we consider the conflicting evidence most favorable to the trial court's ruling. *Burkes v. State*, 842 N.E.2d 426. We will, however, also consider any uncontradicted

evidence to the contrary. *Id.* We will affirm the decision if it is supported by substantial evidence of probative value. *Id.*

The Fourth Amendment to the United States Constitution guarantees the right to be secure against unreasonable search and seizure. *State v. Calmes*, 894 N.E.2d 199 (Ind. Ct. App. 2008) (opinion on rehearing). As we have recently explained:

There are three levels of police investigation, two of which implicate the Fourth Amendment and one of which does not. *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), *reh'g denied, trans. denied*. First, the Fourth Amendment requires that an arrest or detention that lasts for more than a short period of time must be justified by probable cause. *Id.* Second, pursuant to Fourth Amendment jurisprudence, 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 has or is about to occur. *Id.* The third level of investigation occurs when a police officer makes a casual and brief inquiry of a citizen, which involves neither an arrest nor a stop. *Id.* This is a consensual encounter in which the Fourth Amendment is not implicated. *Id.*

As long as an individual remains free to leave, the encounter is consensual and there has been no violation of the individual's Fourth Amendment rights. *Shirley v. State*, 803 N.E.2d 251, 255 (Ind. Ct. App. 2004). Factors to be considered in determining whether a reasonable person would believe he was not free to leave include: (1) the threatening presence of several officers, (2) the display of a weapon by an officer, (3) the physical touching of the person, or (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Id.*

State v. Calmes, 894 N.E.2d at 202. Thus, the crucial consideration in determining whether a contact between a citizen and a police officer is a consensual encounter or an investigatory stop (implicating the *Terry* protections) is whether the citizen was under a reasonable impression that he was not free to leave the officer's presence. *State v. Calmes*, 894 N.E.2d 199. "The test for whether such a reasonable impression existed is what a reasonable person,

innocent of any crime, would have thought had he been in the citizen's shoes." *Id.* at 205.

Burks argues that what began as a consensual encounter soon became an investigatory stop with the Officer Petillo's actions leading him to reasonably believe he was not free to leave prior to the search of his backpack. He does not clearly explain his argument in this regard. Rather, he simply asserts that after the pat-down search and prior to the request to search the backpack, a reasonable person would not have felt free to leave. The State, on the other hand, argues that the entire encounter leading up to the search of the backpack was consensual. We agree with the State.

Burks appears to agree that up until the time of the pat-down search the encounter was consensual. Indeed, the evidence reveals that the officers approached Burks and his companion on foot in a casual, non-threatening manner. No weapons were drawn and, contrary to Burks's assertion on appeal, the record does not establish that the officers even shined their flashlights on the men. The officers did not order the men to stop, nor did they physically prevent or restrain the men from proceeding on their way. *Cf. Johnson v. State*, 856 N.E.2d 706, 711 (Ind. Ct. App. 2005) ("a consensual encounter may become a seizure when a police officer orders a suspect to freeze or get out of a vehicle"). While Officer Petillo engaged Burks in conversation about what he was doing, he asked if Burks had identification, which Burks provided. Up to this point, Burks had certainly not been seized by this casual and brief inquiry. *See id.* at 710 ("a seizure does not occur simply because a police officer approaches a person, asks questions, or requests identification"); *State v. Carlson*, 762 N.E.2d 121, 125 (Ind. Ct. App. 2002) ("[w]hile most citizens will respond to a

police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response”)(quoting *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984)).³

Petillo continued to speak with Burks in a conversational manner and did not threaten or attempt to coerce Burks to cooperate. Further, at no time did Burks indicate an unwillingness to cooperate. When Petillo asked if Burks would consent to a search of his person, Burks indicated that would be “fine”. *Appendix* at 24. Although Burks was briefly restrained (for purposes of officer safety) during the consensual pat-down search, his wrist was promptly released when the search revealed no weapons or contraband. Petillo then engaged Burks in conversation about the contents of the backpack and ultimately asked for permission to look inside. In light of the totality of the circumstances, we agree with the trial court that the encounter was consensual and that a reasonable person would believe that he was free to refuse the search of his backpack and walk away. Thus, Burks was not seized and subjected to an investigatory stop for Fourth Amendment purposes.

As set forth above, Burks also challenges the admission of the evidence on state constitutional grounds. Although the Fourth Amendment and article 1, section 11 both serve to protect persons from unreasonable searches and seizures, we interpret and apply the provisions independently. *See Taylor v. State*, 842 N.E.2d 327 (Ind. 2006). The purpose of

³ To the extent Burks likens the instant case to *Combs v. State*, 851 N.E.2d 1053 (Ind. Ct. App. 2006), *trans. denied*, we disagree. Initially, we observe that there appears to have been no dispute in that case that the encounter quickly evolved into an investigatory stop. Moreover, the facts of that case reveal that the officer pulled in behind Combs’s vehicle with his emergency lights activated and, after informing Combs that he was investigating a report of a suspicious vehicle, requested identification and specifically told Combs that he could not let him go.

article 1, section 11 is to “protect from unreasonable police activity those areas of life that Hoosiers regard as private.” *Id.* In determining whether police behavior was reasonable under section 11, courts “must consider each case on its own facts and construe the constitutional provision liberally so as to guarantee the rights of people against unreasonable searches and seizures.” *Id.* Thus, we evaluate the reasonableness of the police conduct under the totality of the evidence. *Masterson v. State*, 843 N.E.2d 1001 (Ind. Ct. App. 2006), *trans. denied*.

With respect to his state-constitutional argument, Burks argues on appeal:

Once the defendant had indicated his intentions – “going to the Village Pantry” – provided valid identification and a search of his person located no contraband, drugs or other suspicious items, the consensual nature of the encounter ended and the officers [sic] work related to his *stopping* the defendant was completed. The officers [sic] further actions (asking to search the defendant’s backpack) exceeded the scope of a reasonable and necessary intrusion.

Appellant’s Brief at 13-14 (emphasis supplied). Burks’s argument is based on the assumption that he was stopped and seized by Officer Petillo. For the reasons discussed above, this is not the case. The encounter between Burks and Officer Petillo was consensual and Burks had not been seized much less placed in custody at the time he consented to the search of his backpack. *See Clarke v. State*, 868 N.E.2d 1114 (Ind. 2007) (*Pirtle* advisement only required to be given under Indiana Constitution when suspect has been placed in custody). Accordingly, we conclude that the police acted reasonably under article 1, section 11 during the encounter with Burks.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.