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**IN THE
COURT OF APPEALS OF INDIANA**

JOSEPH LUNDY,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 49A04-1012-CR-765

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Peggy R. Hart, Commissioner
Cause No. 49G20-0903-FB-33230

August 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Following a bench trial, Joseph A. Lundy appeals his convictions of dealing in narcotics as a Class B felony, possession of a controlled substance as a Class C felony, and dealing in marijuana as a Class D felony. He raises the sole issue of whether the trial court erred in denying his motion to suppress evidence. Concluding that the trial court did not err, we affirm.

Facts and Procedural History

In March 2009, officers arrived at Lundy's home to arrest him pursuant to a warrant concerning domestic battery. When Lundy opened the door and officers stepped over the front door threshold to arrest him, they observed a handgun nearby. Without a word to Lundy about the gun or a search, officers handcuffed Lundy and placed him in the back of a police car. Still without a word to Lundy about searching his home, officers entered Lundy's home and conducted a protective sweep of the front two rooms for officer safety.

Officers returned to the police car and explained to Lundy that during the pendency of his domestic battery case it "would be in everyone's best interest" to allow officers to take possession of Lundy's firearms and store them in a police property room. Transcript at 26. Officers briefly removed Lundy from the car, removed his handcuffs, read aloud to him a form through which he could consent to officers conducting a search, and allowed Lundy to read the same before he decided whether to sign it. In pertinent part, the form states:

I Joseph Lundy [(handwritten)] having been informed of my constitutional right not to have a search made of my premises . . . without a warrant and

of my right to refuse consent to search, hereby authorize [specific officers]
... to conduct a complete search of my premises

. . . I also understand that I have the right to consult with counsel before
consenting to a search. **I HEREBY GIVE MY CONSENT TO
SEARCH.**

Exhibits at 8.

Lundy signed his consent on the form and told officers where he kept his guns: a
pistol in the center console of his sport-utility vehicle (“SUV”), a shotgun behind the
kitchen door, and a handgun in an upstairs bedroom.

Next to the pistol in the center console of Lundy’s SUV, officers found several
prescription pill bottles. In the kitchen an officer spotted a shiny object that appeared to
be a shotgun, but discovered it was the foil lining of a canvas cooler, which smelled of
raw marijuana; a shotgun was leaning against a kitchen wall. In the upstairs bedroom,
officers observed several marijuana plants growing under a light in a closet, and then
found the handgun Lundy mentioned under some items on a chest.

Upon discovering the drugs in Lundy’s home and SUV, officers called the drug
task force and waited on Lundy’s porch for drug task force officers to obtain a search
warrant. Per the search warrant, officers searched Lundy’s home and found various
additional firearms located throughout the house, marijuana plants, a grinder with
marijuana and cocaine residue, a digital scale, a total of over 1,000 grams of marijuana,
464 hydrocodone pills, 49.5 alprazolam pills, 2 morphine pills, 20 oxycodone pills, and
20 amphetamine pills.

Lundy was charged with fifteen drug possession and dealing felonies.¹ Following the State's opening statements at a bench trial, Lundy moved to suppress the evidence the State obtained in the search of Lundy's home and SUV. The trial court took the motion under advisement, and during trial denied Lundy's motions for mistrial and a partial directed verdict. At the conclusion of the evidence, the trial court ordered the State and Lundy to prepare briefs regarding Lundy's motion to suppress. The trial court later heard oral arguments on this motion and ultimately denied it, admitted into evidence the State's exhibits over Lundy's objection, and entered a finding of guilt and a judgment of conviction of dealing in narcotics as a Class B felony, possession of a controlled substance as a Class C felony, and dealing in marijuana as a Class D felony. Following a hearing, the trial court sentenced Lundy to six years in prison. Lundy now appeals.

Discussion and Decision

I. Standard of Review

We generally review the denial of a motion to suppress for an abuse of discretion, similar to other sufficiency issues. Griffith v. State, 788 N.E.2d 835, 839 (Ind. 2003). We determine whether substantial evidence of probative value was presented to support the trial court's ruling. Litchfield v. State, 824 N.E.2d 356, 358 (Ind. 2005). In doing so, we do not reweigh evidence and will only consider the evidence presented, including any conflicting evidence, in a manner most favorable to the trial court's ruling. Id. “[W]e also consider the uncontested evidence favorable to the defendant.” Parish v. State, 936 N.E.2d 346, 349 (Ind. Ct. App. 2010), trans. denied.

¹ Three of these fifteen charges were for possession of a narcotic drug and a firearm. But to be clear, Lundy's possession of firearms was not alleged to be illegal except that he also possessed narcotics.

II. Search and Seizure

The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution require a validly issued search warrant “prior to” officers undertaking a search, except under special circumstances which present “carefully drawn and well-delineated exceptions.” Sellmer v. State, 842 N.E.2d 358, 360, 362 (Ind. 2006) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). Several actions by officers in this case might be considered a “search.” First, Lundy does not argue that officers stepping through his front door to arrest him required a search warrant or exception.

Second, with Lundy placed in the back of a police car, officers conducted a protective sweep of the front two rooms of Lundy’s home to make sure that no one was there who, armed with the gun that officers noticed near the door or anything else, might endanger officers. “[A] protective sweep is authorized . . . either of rooms immediately adjoining the place of the arrest (without need for officer suspicion), or of areas that might, given facts articulable by the searching officer, contain a hiding person who might jeopardize officers[’] safety.” State v. Estep, 753 N.E.2d 22, 26 (Ind. Ct. App. 2001). The record does not indicate officers found anything during this sweep that formed the basis for a subsequent search, nor did they confiscate anything during the sweep. Accordingly, this protective sweep, even if we assume it improper for the sake of argument, did not lead to the direct or indirect discovery of evidence that would need to be excluded under the exclusionary rule or fruit of the poisonous tree doctrine. See State v. Farber, 677 N.E.2d 1111, 1114 (Ind. Ct. App. 1997) (discussing the exclusionary rule and fruit of the poisonous tree doctrine), trans. denied. Therefore, the propriety of this

protective sweep has no bearing on our evaluation of whether officers conducted an improper search.

Third, officers searched Lundy's home and SUV for firearms pursuant to Lundy's consent, and in doing so also found drugs, which led officers to seek assistance from the drug task force in obtaining a search warrant and conducting a full search.² Consent is a recognized exception to the warrant requirement, and is valid when given voluntarily; voluntariness is a question of fact determined from the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 222, 227 (1973).

Before we evaluate the validity of Lundy's consent, Lundy claims officers searched his home and SUV before he signed the consent form, which would make his purported consent irrelevant and the search improper. While we agree that some portions of the record suggest officers searched at least his SUV before receiving his consent, the record also contains explicit testimony that officers did not search his home or SUV until after they received his consent. See Tr. at 41, 397. Because we do not reweigh evidence and will resolve any conflicting evidence in a manner most favorable to the trial court's ruling, we must disagree with Lundy's claim that officers searched his home or SUV prior to his consent.

² Both Lundy and the State refer to Lundy's consent as limited to firearms, and the record suggests Lundy verbally confirmed this with officers by telling them where to find his firearms in his home and SUV. To the contrary, the consent to search form, Exhibits at 8, indicates Lundy's consent to a "complete search of my premises," and authorized officers to "take from my premises any letters, papers, materials or other property which they may desire." Id. Neither side raises an issue as to the discrepancy between Lundy's verbal consent to a limited search and his written consent to a complete search. We deem this discrepancy irrelevant because even Lundy agrees that officers' search (at this point, prior to execution of the search warrant) was limited to the areas to which he verbally consented. As noted and discussed above, the primary issue is the order of officers' search and Lundy's consent; the scope of consent is not an issue on appeal.

Similarly, although the consent form does not indicate Lundy's consent to search his SUV, Lundy does not contend he withheld consent for that search. Lundy agrees he verbally consented to a search of his SUV and specifically told officers that they would find a pistol in the center console. They did, and found drugs next to the pistol, too.

Lundy next argues his consent was invalid anyway, and directs us to Pirtle v. State, 263 Ind. 16, 29, 323 N.E.2d 634, 640 (1975), which provides that a person held in police custody is entitled to the presence and advice of counsel prior to consenting to a search, and if he or she waives this right, he or she must do so explicitly. When the State claims consent for a warrantless search, it bears the burden to prove that the consent was given voluntarily. Callahan v. State, 719 N.E.2d 430, 435 (Ind. Ct. App. 1999).

The “totality of the circumstances” from which the voluntariness of a detainee’s consent is to be determined includes, but is not limited to, the following considerations: (1) whether the defendant was advised of his Miranda rights prior to the request to search; (2) the defendant’s degree of education and intelligence; (3) whether the defendant was advised of his right not to consent; (4) whether the detainee has previous encounters with law enforcement; (5) whether the officer made any express or implied claims of authority to search without consent; (6) whether the officer was engaged in any illegal action prior to the request; (7) whether the defendant was cooperative previously; and (8) whether the officer was deceptive as to his true identity or the purpose of the search.

Id.

Lundy was not advised of his Miranda rights prior to the request to search, and his degree of education or intelligence was not included in the record. However, Lundy was advised verbally and in writing of his right not to consent and his right to consult an attorney before consenting. Officers read aloud the consent form and Lundy verbally indicated his understanding. Officers then removed Lundy’s handcuffs and allowed him to read carefully for himself the form before signing it. Again, although Lundy points us to some evidence that suggests differently, we must consider any conflicting evidence in favor of the trial court’s ruling. Lundy was arrested and convicted of public intoxication in 2005, so he has a moderate amount of prior contact with law enforcement. Lundy does not contend officers made any claim of authority to search without consent. Lundy notes

conflicting evidence was presented as to whether officers engaged in illegal activity prior to the request – a conflict which we resolve in favor of the trial court’s ruling. The record suggests Lundy was cooperative at all times. Lundy argues the probable cause affidavit in support of the search warrant reveals officers’ deceptive intentions, but this probable cause affidavit for a full search was not written until after Lundy consented to the initial search for firearms. Considering all evidence presented and reasonable inferences therefrom in a manner most favorable to the trial court’s ruling, the totality of the circumstances indicate that Lundy’s consent to search his home and SUV was informed, voluntary, explicit, and made after specific notice of his right to refuse consent and his right to consult an attorney before deciding whether to give consent.

Fourth, following the initial search to recover Lundy’s firearms, officers secured a search warrant, conducted a search, and seized various narcotics and firearms from Lundy’s home and SUV. Once the State has obtained a magistrate’s determination of probable cause, there is a presumption of validity, which the defendant bears the burden to overcome. Stephenson v. State, 796 N.E.2d 811, 814 (Ind. Ct. App. 2003), trans. denied. Because the officers’ initial search for firearms led to the discovery of prescription drug bottles and marijuana plants, probable cause for the search warrant existed and the search and seizure by the drug task force was valid. See Lundquist v. State, 834 N.E.2d 1061, 1072 (Ind. Ct. App. 2005) (concluding an officer’s personal observation of numerous marijuana plants constitutes probable cause to support a search warrant).

Of the four instances which might be considered a search, thereby implicating Lundy’s constitutional rights, Lundy does not object to the first, and the second has no

bearing on our determination of the motion to suppress. The State has met its burden to prove Lundy voluntarily consented to the third. Probable cause and a search warrant support the fourth. In searching Lundy's home and SUV, officers did not violate Lundy's rights, and the trial court's order denying his motion to suppress evidence obtained in these searches was not improper.

Conclusion

Officers did not violate Lundy's rights under the Fourth Amendment to the United States Constitution or Article 1, Section 11 of the Indiana Constitution when they searched Lundy's home and SUV. The trial court's order denying Lundy's motion to suppress evidence seized in these searches and his resulting convictions are therefore affirmed.

Affirmed.

NAJAM, J., and CRONE, J., concur.