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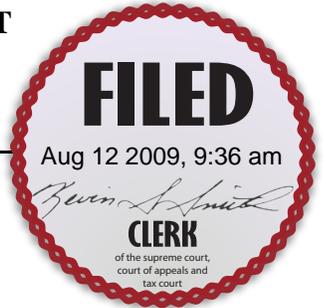
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**IN THE
COURT OF APPEALS OF INDIANA**

B.P.,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-0811-JV-1028

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
Cause No. 49D09-0807-JD-2019

August 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

B.P. was adjudicated a delinquent child for carrying a handgun without a license, a Class A misdemeanor if committed by an adult. He now appeals, arguing that the juvenile court abused its discretion by admitting the handgun into evidence because the patdown search which led to its discovery violated both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Concluding that the handgun was properly admitted, we affirm.

Facts and Procedural History

Around 4:00 p.m. on July 7, 2008, Indianapolis Metropolitan Police Department Officer Michael Leepper was dispatched to investigate a burglary in progress at 859 North Oxford, which was the home of Jorge Perez Gonzalez. Officer Leepper alone had previously taken three burglary reports out of this home because of its unique location. Gonzalez was in the basement at the time of this burglary, but his neighbor across the street called 911 when she saw someone trying to enter his home by pushing an air conditioner unit through a window. The neighbor was on the phone with the 911 operator and described the suspect as a black male in his late teens to early twenties wearing a black shirt and jeans. When Officer Leepper arrived on the scene, the suspect was gone, but he learned that the suspect's black shirt had a dragon print on it.

Approximately forty-five minutes to an hour later, Officer Leepper was patrolling the area when he saw three males walking down the street approximately one block from Gonzalez's home. One of the males, who was later identified as B.P., matched the description of the burglary suspect and was wearing a black shirt with a dragon print.

Officer Leepper called for backup and exited his patrol car. At this point, the three males started walking in the opposite direction. By this time, Officer Rand arrived on the scene in his patrol car and intercepted the males by pulling his car into their path of travel. Officer Rand then exited his car with his service dog and “stood there” while Officer Leepper gave commands for the three males to put their hands up and to get on the ground. Tr. p. 9. The three males complied. Additional officers began arriving on the scene. Officers Leepper and McCallister approached the three males while Officer Rand stood back with his service dog. Officer Leepper approached B.P. to determine whether he was involved in the burglary. For officer safety purposes and because Officer Leepper was investigating a felony, he proceeded to conduct a patdown of B.P. before handcuffing him and felt a bulge in his right pocket that he believed from his training as a police officer to be a firearm. Officer Leepper then removed the item, which was a .38 special revolver. Officer Leepper asked B.P. if the handgun was his, but B.P. did not respond. B.P. did not have a permit for the handgun.

Thereafter, the State filed a petition alleging that B.P. was a delinquent child for committing carrying a handgun without a license, a Class A misdemeanor if committed by an adult. B.P. filed a motion to suppress the handgun, arguing that the patdown search was illegal. The juvenile court held a hearing on the motion to suppress but denied the motion. During the fact-finding hearing that immediately followed, the juvenile court incorporated the evidence from the suppression hearing and entered a true finding. Following the disposition hearing, the juvenile court awarded wardship of B.P. to the

Department of Correction but suspended his commitment and placed him on probation. B.P. now appeals.

Discussion and Decision

B.P. contends that the trial court erred in admitting the handgun into evidence because the patdown search which led to its discovery violated the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Although B.P. initially challenged the admission of the handgun through a motion to suppress, he is now appealing following a completed trial. Our standard of review is thus whether the juvenile court abused its discretion by admitting the evidence at trial. *A.M. v. State*, 891 N.E.2d 146, 148-49 (Ind. Ct. App. 2008), *trans. denied*. The standard is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Id.* at 149. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Id.* However, we must also consider the uncontested evidence favorable to the defendant. *Id.* We will affirm the trial court's ruling if it is supported by substantial evidence of probative value. *Id.*

I. Fourth Amendment

In *Terry v. Ohio*, 392 U.S. 1, 30 (1968), the United States Supreme Court held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when, based on a totality of the circumstances, the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Hardister v. State*, 849 N.E.2d 563, 570 (Ind. 2006). A *Terry* stop is a lesser intrusion on the person than an arrest and may include a request to see identification and inquiry necessary to confirm or dispel the

officer's suspicions. *Id.* (citing *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185-89 (2004)). B.P. concedes that Officer Leepper was justified in conducting a *Terry* stop of him because an attempted burglary occurred in the area forty-five minutes earlier, and he was wearing a shirt that matched the description of the one the burglary suspect wore. *See* Appellant's Br. p. 7 ("Under these facts, B.P. does not contest that an investigatory stop was justified."). Nevertheless, B.P. argues that "the facts and circumstances known to Officer Leepper did not give him reason to believe that B.P. was armed and dangerous, justifying a pat down." *Id.*

Terry "permits a 'reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing' with an armed person, and the officer 'need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'" *A.M.*, 891 N.E.2d at 149 (quoting *Terry*, 392 U.S. at 27). Here, we find that it was reasonable for Officer Leepper to conduct a protective patdown of B.P.'s outer clothing. B.P. matched the description of the suspect who attempted to commit the felony burglary of Gonzalez's home forty-five minutes earlier and one block away. Gonzalez was inside his home at the time, and Gonzalez's home had been burglarized several times previously. In addition, when Officer Leepper exited his patrol car upon seeing B.P. and his companions, they started walking in the opposite direction. Officer Leepper was thus justified for officer safety purposes to conduct a reasonable search of B.P. for weapons. *See Johnson v. State*, 710 N.E.2d 925, 928 (Ind. Ct. App. 1999) ("It was reasonable for Officer Guilfooy to conduct the protective patdown

of Johnson's outer garments, because Johnson matched the description of a fleeing suspect reported to have fired shots just minutes before the defendant was spotted and detained by the officer."). The patdown did not violate the Fourth Amendment.

II. Article 1, Section 11

Article 1, Section 11 of the Indiana Constitution provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated." "Although Section 11 appears to have been derived from the Fourth Amendment and shares very similar language, we interpret and apply it independently from Fourth Amendment jurisprudence." *A.M.*, 891 N.E.2d at 150 (quoting *Taylor v. State*, 842 N.E.2d 327, 334 (Ind. 2006)). "Section 11's purpose is to 'protect from unreasonable police activity those areas of life that Hoosiers regard as private.'" *Id.* (quoting *Taylor*, 842 N.E.2d at 334). "In determining whether the 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.* (quoting *Taylor*, 842 N.E.2d at 334). The "burden is on the State to show that under the totality of the circumstances its intrusion was reasonable." *State v. Bulington*, 802 N.E.2d 435, 438 (Ind. 2004). In determining reasonableness, we balance: (1) the degree of concern, suspicion, or knowledge that a violation of law 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. *Holder v. State*, 847 N.E.2d 930, 940 (Ind. 2006).

B.P. argues that while a brief detention of him may have been reasonable to investigate whether he was involved in the burglary, “searching him before any questions were asked of him most certainly was not. No facts or circumstances were present in this case to cause Officer Leepper to believe that B.P. had committed a crime or that he was armed and dangerous. Under the circumstances here, the police conduct was unreasonable[.]” Appellant’s Br. p. 10.

We disagree. Approximately forty-five minutes after a burglary was reported in progress at Gonzalez’s home, Officer Leepper observed B.P. walking one block from the scene of the burglary. B.P. matched the description of the burglary suspect, including wearing a black shirt with a dragon print. When Officer Leepper exited his patrol car, B.P. and the other males started walking in the opposite direction. Based on the report that a home burglary had occurred within the hour and that B.P., who matched the description of the suspect, and his companions changed directions when initially approached by Officer Leepper, Officer Leepper was justifiably concerned that a violation of law occurred. Officer Leepper was also reasonably concerned, based on the nature of the crime and the fact that B.P. changed directions of travel, that B.P. might be armed and was thus justifiably concerned for his safety. These considerations outweigh the intrusion to B.P. *See A.M.*, 891 N.E.2d at 150. Accordingly, we conclude that under the totality of the circumstances, the State’s intrusion was reasonable. Because there is neither a Fourth Amendment nor an Article 1, Section 11 violation, the trial court did not abuse its discretion in admitting the handgun into evidence. We therefore affirm B.P.’s

juvenile delinquency adjudication.

Affirmed.

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