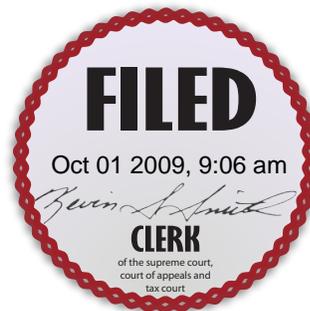


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

PATRICIA CARESS McMATH
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

B.P.,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0811-JV-1028
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

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

October 1, 2009

MEMORANDUM DECISION ON REHEARING- NOT FOR PUBLICATION

VAIDIK, Judge

B.P. seeks rehearing arguing that we did not address his argument that he was unlawfully arrested (and therefore the handgun was unlawfully seized) because the officers used the threat of a police dog much like holding them at gunpoint. But in addressing B.P.'s alternate argument¹ and concluding that the police officers properly conducted an investigatory stop of him under the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution and in noting in the facts section of our opinion that the dog "stood there" and stood back during the investigatory stop, *B.P. v. State*, No. 49A02-0811-JV-1028 (Ind. Ct. App. Aug. 12, 2009), we implicitly determined that B.P. was not under arrest. Nonetheless, we now explicitly so find. We therefore grant rehearing for this limited purpose and affirm our original decision.

B.P. argues on rehearing that this "was not a mere investigatory stop, but rather was an illegal arrest without probable cause because the officers held [him] and his companions with the threat of the police dog, much like holding them at gunpoint. The presence of the police dog made it clear the boys were not free to leave and were under arrest." Appellant's Reh'g Br. p. 1. The record shows that Officer Leeper did not request a K-9 unit to respond to the scene. Rather, Officer Rand and his dog responded because they were nearby. *See* Tr. p. 24 ("Public Defender: Was it your intention that this dog would help, kind of be back up? [Officer Leeper]: No I asked for another car to assist me, a back up officer. I[t] just so happened that the officer that assisted me happened to be a K-9 officer."). After Officer Rand intercepted the boys with his patrol car, he and

¹ B.P. argued on appeal, "Even if this Court determines that B.P. was not placed under arrest, the search was unconstitutionally intrusive for a [sic] investigatory stop." Appellant's Br. p. 6.

his dog exited the car and merely “stood there.” *Id.* at 9. It was Officer Leeper who approached the boys and ordered them down on the ground. Officer Rand never unleashed his dog. Rather, he and his dog “stood back.” *Id.* at 10.

In his original brief, B.P. cited *Taylor v. State*, 464 N.E.2d 1333, 1335 (Ind. Ct. App. 1984), in which this Court held that “[h]olding a person at gunpoint certainly restrains his liberty of movement and is a clear example of arrest.” *But see Willis v. State*, 907 N.E.2d 541, 545-46 (Ind. Ct. App. 2009) (holding that defendant was not arrested when the police approached him with their guns drawn and put him in handcuffs). This case, however, is readily distinguishable from *Taylor*. Officer Rand’s dog was never unleashed and stood back with Officer Rand while Officer Leeper took control of the situation, approached the boys, and gave out orders. That is, the dog was not actively used in the burglary investigation. Even though the presence of the police dog may have added weight to Officer Leeper’s commands to the boys, *see* Tr. p. 24, the mere presence alone did not turn this investigatory stop into an arrest. We therefore grant B.P.’s petition for rehearing and affirm our original decision.

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