

STATEMENT OF THE CASE

George Jones appeals from his conviction for Possession of Marijuana, as a Class A misdemeanor, following a bench trial. Jones raises a single issue for our review, namely, whether the trial court abused its discretion when it admitted into evidence both testimony about events and marijuana found in Jones's possession after police had seized Jones's person.

We affirm.

FACTS AND PROCEDURAL HISTORY

On January 9, 2009, Indianapolis Metropolitan Police Department Officer Jeremy Johnson received a dispatch call that "somebody in a vehicle [was] trying to run over somebody in the street" near the 3400 block of Bancroft Street. Transcript at 7. No other information was provided, and the tipster was not identified. Officer Johnson, in full uniform, drove to the scene in his patrol cruiser, but, upon arriving at the scene, he did not activate his cruiser's emergency lights. Officer Johnson observed a vehicle sitting at an angle "in the middle of the street with a female standing outside the driver's side door and a male standing in front of the vehicle." *Id.* The male and female saw Officer Johnson, and the female immediately sat in the driver's seat. The male, Jones, went to the front passenger door.

Officer Johnson exited his cruiser and asked Jones to step away from the front passenger door of the parked vehicle. Without raising his voice, Officer Johnson then "ordered [Jones] to come over and speak with" him "[t]o get his side of the story of what's going on." *Id.* at 9, 13. Jones stepped away from the vehicle door, but then Jones

placed his right hand into his coat pocket and began to visibly move his hand around inside the pocket. Officer Johnson, now about seven feet from Jones and concerned, “pulled [his] handgun out” of its holster and ordered Jones to take his hand out of his pocket. *Id.* at 15. Jones did not immediately comply, but, after Officer Johnson’s third request, Jones did remove his hand from his pocket. Officer Johnson observed that, “in [Jones’s] hand was a clear plastic baggie with green, leafy vegetation in it. He then threw the bag in the front passenger seat of the vehicle.” *Id.* at 17. At that point, Officer Johnson arrested Jones and seized the plastic baggie from the vehicle. The contents of the bag later tested positive as marijuana.

On January 10, 2009, the State charged Jones with possession of marijuana, as a Class A misdemeanor. The court held a bench trial on March 5, at which Jones’s counsel objected to the admission of the marijuana and any testimony regarding events that occurred both after “the moment Officer Johnson ordered Jones . . . to go to the officer for the purposes of a conversation” and after Officer Johnson withdrew his handgun from its holster. Appellant’s Brief at 6. The court overruled Jones’s motions and objections, found Jones guilty as charged, and sentenced him to 150 days in the Marion County Jail. This appeal ensued.

DISCUSSION AND DECISION

Jones contends that the trial court abused its discretion when it admitted evidence against him that was allegedly obtained in violation of his Fourth Amendment rights

against unreasonable search and seizure.¹ Admission of evidence is within the sound discretion of the trial court. Amos v. State, 896 N.E.2d 1163, 1167 (Ind. Ct. App. 2008), trans. denied. We will only reverse a decision of the trial court to admit evidence if there is an abuse of such discretion. Id. An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before the court. Id. at 1168.

The State argues that Officer Johnson's request to speak with Jones was not a seizure of Jones's person, and therefore there is no Fourth Amendment issue. In State v. Augustine, 851 N.E.2d 1022 (Ind. Ct. App. 2006), we considered whether an officer's inquiry of a citizen implicated that citizen's Fourth Amendment rights. In that case, police had received a tip of a vehicle with an identified license plate number being driven erratically at a particular location in Valparaiso. Id. at 1024. Upon arriving in that area, the responding officer was unable to locate the erratic driver. Id. The officer then used the given license plate number to obtain the address of the vehicle's owner, and the officer drove to that address. Id. There, the officer found a vehicle in the driveway with the engine running and an individual in the driver's seat. Id. The officer approached the driver and engaged him in conversation. Id. at 1024-25. Immediately thereafter, the officer noticed a heavy odor of alcohol, and the driver admitted to drinking and driving. Id. The officer arrested the driver. Id.

Before his trial, the driver-defendant asserted that the State had violated his Fourth Amendment right to be free from unreasonable search and seizure. Id. The trial court

¹ Jones also comments that his rights under the Indiana Constitution were violated, but he provides no substantive analysis of that law to these facts. Thus, that argument is waived. See, e.g., Davis v. State, 907 N.E.2d 1043, 1048 n.10 (Ind. Ct. App. 2009).

agreed, and the State appealed. Id. We reversed, holding that, at the point when the officer first approached the defendant and engaged him in conversation, the defendant's Fourth Amendment rights had not yet been implicated. Id. at 1026. As we discussed:

In order to determine whether the officer impinged upon [the defendant's] Fourth Amendment rights, we must first analyze what level of police investigation occurred. There are three levels of police investigation, two of which implicate the Fourth Amendment and one of which does not. 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. 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. 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. This is a consensual encounter in which the Fourth Amendment is not implicated. . . .

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. 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.

In the instant case, when the officer arrived at [the defendant's] residence, he found [the defendant] sitting in the driver's seat of his vehicle on his driveway with the engine running. The officer approached the vehicle, and [the defendant] rolled down the window to speak to the officer. At that time, no other officers were present, there is no evidence that the officer on the scene displayed a weapon or touched [the defendant], and there is no indication that the officer used any language or spoke in a tone of voice mandating compliance. At this point, the situation appeared to be a consensual encounter where a law enforcement officer was making a casual and brief inquiry of a citizen. Therefore, up to that point, the Fourth Amendment was not implicated.

Id. at 1025-26 (citations omitted).

Here, we agree with the State that Officer Johnson’s mere request to speak with Jones did not rise to the level of a protectable Fourth Amendment seizure. Officer Johnson approached the scene without his emergency lights on. There were no other officers present. At that time, Officer Johnson had not yet displayed his weapon. Officer Johnson neither physically approached Jones nor used language or a tone of voice indicating that Jones was compelled to comply with Officer Johnson’s request to talk. By all appearances, at this point “the situation [was] a consensual encounter where a law enforcement officer was making a casual and brief inquiry of a citizen.” Id. at 1026. Thus, the Fourth Amendment was not implicated by Officer Johnson’s request to speak with Jones.

However, we disagree with the State’s contention that the Fourth Amendment never came into play during Officer Johnson’s encounter with Jones. Immediately following Officer Johnson’s request to speak, the encounter took a markedly different form. Jones reached into his pocket and visibly moved his hand around. Understandably concerned for his safety, Officer Johnson removed his handgun from its holster. From that moment forward, Jones’s compliance—however hesitant—with Officer Johnson’s instructions ceased to be consensual. No reasonable person would feel free to leave the presence of an officer who has withdrawn his firearm. See id. (noting that “the display of a weapon by an officer” is a factor to be considered in determining “whether a reasonable person would believe he was not free to leave” the encounter).

Thus, at that point in the encounter and thereafter, we agree with Jones's argument on appeal that Officer Johnson was required to have reasonable suspicion to justify the now-investigatory stop. As also noted in Augustine:

In order to withstand constitutional scrutiny, an investigatory stop requires reasonable suspicion, based on specific and articulable facts, that criminal activity has or is about to occur. Reasonable suspicion determinations are to be made by looking at the totality of the circumstances of each case to see whether the officer has a particularized and objective basis for suspecting legal wrongdoing.

Id. (citations omitted). But that standard of review is the extent of our agreement with Jones's argument. Although not discussed by Jones, it was his act of reaching into his pocket, visibly rummaging around, and twice refusing to comply with Officer Johnson's demand to cease that gave Officer Johnson reasonable suspicion that criminal activity was afoot. Specifically, based on those clear facts, Officer Johnson had every reason to suspect that Jones had contraband, or a firearm, in his pocket.

In any event, throughout the encounter Officer Johnson had reasonable suspicion to stop Jones. Again, Officer Johnson was in that area because dispatch had received an anonymous tip of a potential crime. As this court has frequently noted:

As a general rule, an anonymous tip alone is not likely to constitute the reasonable suspicion necessary for a valid investigatory stop. If an anonymous tip is suitably corroborated, however, it may bear sufficient indicia of reliability to provide the reasonable suspicion necessary to justify an investigatory stop. Reasonable suspicion requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Jamerson v. State, 870 N.E.2d 1051, 1056 (Ind. Ct. App. 2007) (quotations and citations omitted). While the original tip was anonymous and lacking in detail, it did identify both a specific assertion of illegality and a location at which Officer Johnson could

corroborate that assertion. Specifically, the tipster informed dispatch that “somebody in a vehicle [was] trying to run over somebody in the street”² near the 3400 block of Bancroft Street. Transcript at 7. Upon arriving at that location, Officer Johnson witnessed a car stopped at an angle in the middle of the road, with an individual standing in front of the car and another near the driver’s seat. Thus, under the totality of the circumstances, we conclude that Officer Johnson had a reasonable suspicion that criminal activity had occurred or was about to occur, and he therefore had cause for an investigatory stop. See Augustine, 851 N.E.2d at 1026-27.

In sum, Officer Johnson did not violate the dictates of the Fourth Amendment when he seized Jones. And, after having lawfully seized Jones, Officer Johnson then witnessed Jones dispose of the marijuana. Accordingly, Officer Johnson properly seized the marijuana as well. Hence, the trial court did not abuse its discretion when it admitted into the record either the marijuana or testimony regarding events following Officer Johnson’s seizure of Jones. We affirm Jones’s conviction.

Affirmed.

KIRSCH, J., and BARNES, J., concur.

² Indiana Code Section 35-42-2-2(c)(1) states that it is a Class A misdemeanor to recklessly, knowingly, or intentionally perform an act that creates a substantial risk of bodily injury to another person using a motor vehicle.