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ATTORNEY FOR APPELLANT:

MITCHELL A. PETERS
Millerfisher Law LLC
Merrillville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

ISABELLE ALMODOVAR,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 64A03-1012-CR-633

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause No. 64D02-0805-FA-4379

October 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Isabelle Almodovar brings this interlocutory appeal from the trial court's denial of her motion to suppress the evidence. Almodovar raises a single issue for our review, which we restate as whether the trial court erred when it denied her motion to suppress.

We affirm.

FACTS AND PROCEDURAL HISTORY

On May 9, 2008, Lake County Highway Interdictions Unit Officer Angelo Vanni observed a van on Interstate 90 change lanes without signaling. Officer Vanni pulled his unmarked police vehicle behind the van, at which point he observed the van decrease in speed from seventy to forty-two miles per hour, which was below the posted minimum speed of forty-five miles per hour. Officer Vanni initiated a traffic stop.

Upon approaching the vehicle, Officer Vanni noticed an "overwhelming" odor of perfume coming from the van. Transcript at 72. He then observed multiple air fresheners hanging in different spots throughout the van, an open box of drier sheets with some sheets removed, and a bottle of Febreze in the door. Officer Vanni knew from his training and experience that drug traffickers often use such gimmicks to try to mask the odor of drugs from canine units.

Officer Vanni asked the vehicle's driver, Almodovar, to exit the vehicle, which she did. He then asked her to follow him back to his car, where he engaged her in a conversation regarding where she was travelling from and where she was going. During this conversation, Officer Vanni observed that Almodovar was nervous: she would not

make eye contact with him and she repeatedly rubbed her eyes and brow. Officer Vanni believed that Almodovar was trying to deceive him.

A few minutes thereafter, Officer Vanni escorted Almodovar back to her van. He informed her that he was only going to give her a warning for not using a signal to change lanes, and he told her to keep up with traffic. He returned her license and registration to her and told her that she was “free to go.” *Id.* at 99. Almodovar walked a few steps away from Officer Vanni and toward the driver’s seat of the van when Officer Vanni stated, “excuse me” and “could you come here for a second.” *Id.* at 100. Almodovar returned to where Officer Vanni was standing, and he asked her “if she had anything illegal” in the van. *Id.* at 99. Almodovar said she did not, and Officer Vanni asked, “can I check?” *Id.* Almodovar said yes, and Officer Vanni discovered two kilos of cocaine inside the van. Officer Vanni later testified that he had no intention of allowing Almodovar to leave and that, had she not consented to the search of the van, he would have called in a canine unit.

The State charged Almodovar with dealing in cocaine, as a Class A felony. Almodovar filed a motion to suppress the fruit of the van search, which the trial court denied after several hearings. The court certified its order for interlocutory appeal, which we accepted.

DISCUSSION AND DECISION

Almodovar contends that the trial court erred when it denied her motion to suppress the evidence. Our standard of review for the denial of a motion to suppress evidence is similar to other sufficiency issues. Jackson v. State, 785 N.E.2d 615, 618

(Ind. Ct. App. 2003), trans. denied. We determine whether substantial evidence of probative value exists to support the denial of the motion. Id. We do not reweigh the evidence, and we consider conflicting evidence that is most favorable to the trial court's ruling. Id. But the review of a denial of a motion to suppress is different from other sufficiency matters in that we must also consider uncontested evidence that is favorable to the defendant. Id. We review de novo a ruling on the constitutionality of a search or seizure, but we give deference to a trial court's determination of the facts, which will not be overturned unless clearly erroneous. Campos v. State, 885 N.E.2d 590, 596 (Ind. 2008).

Almodovar first contends that Officer Vanni—and, indeed, the entire Lake County Highway Interdictions Unit—has been trained to randomly initiate traffic stops in order to obtain consent to search vehicles. Indeed, Almodovar devotes fourteen pages of her appellate argument to discussing Lake County's policies and the relationship of those policies to general principles of the law of search and seizure. But Almodovar ignores the fact that her traffic stop was based on an observed traffic infraction. As such, we need not consider Almodovar's attack on Lake County's policies and police training.

“A police officer may stop a vehicle when he observes a minor traffic violation. A stop is lawful if there is an objectively justifiable reason for it, and the stop may be justified on less than probable cause.” Ransom v. State, 741 N.E.2d 419, 421 (Ind. Ct. App. 2000) (citation omitted), trans. denied. “It is the requirement of reasonable suspicion which strikes the balance between the government's legitimate interest in traffic safety and an individual's reasonable expectation of privacy.” Cash v. State, 593

N.E.2d 1267, 1268-69 (Ind. Ct. App. 1992) (citation omitted). Reasonable suspicion exists where the facts known to the officer, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe that a violation has or is about to occur. Id. Reasonable suspicion is determined by looking at the totality of the circumstances. Person v. State, 764 N.E.2d 743, 748 (Ind. Ct. App. 2002).

Here, there is no dispute that Officer Vanni observed Almodovar commit at least one driving infraction, namely, she failed to use a signal while changing lanes. That observation, undisputed by Almodovar, was an objectively justifiable reason for the traffic stop. Thus, on these facts the traffic stop was lawful and not “arbitrary,” see Appellant’s Br. at 32.

Almodovar also argues that her consent for Officer Vanni to search the van was not freely and voluntarily given. Consent is a clear exception to the general rule that warrantless searches are unreasonable. Pinkney v. State, 742 N.E.2d 956, 959 (Ind. Ct. App. 2001), trans. denied. “The theory underlying this exception is that, when an individual gives the State permission to search either his person or property, the governmental intrusion is presumably reasonable.” Id. In Pinkney, we held that an officer’s search of the defendant’s person during a routine stop did not violate the defendant’s constitutional rights because the defendant had consented to the search upon the officer’s request. Id. at 959-61.

As we stated in Pinkney:

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and

voluntarily given. The voluntariness of a consent to search is a question of fact to be determined from the totality of the circumstances, and a trial court's determination with regard to the validity of a consent is a factual matter which will not be set aside unless it is clearly erroneous. A consent to search is valid except where it is procured by fraud, duress, fear, intimidation, or where it is merely a submission to the supremacy of the law.

Id. at 959-60 (citations, quotations, and alteration omitted). Further:

To constitute a valid waiver of Fourth Amendment rights, a consent must be the intelligent relinquishment of a known right or privilege. Such a waiver cannot be conclusively presumed from a verbal expression of assent unless the court determines, from the totality of the circumstances, that the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld. Knowledge of the right to refuse a search is one factor which indicates voluntariness.

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.

Callahan v. State, 719 N.E.2d 430, 435 (Ind. Ct. App. 1999) (citations omitted).

Almodovar contends that her purported consent to the search of her van was not validly given. The trial court disagreed, expressly finding that Almodovar "consented" to the search. Appellant's App. at 287. We agree with the trial court. Officer Vanni told Almodovar that she was "free to go" and returned her license and registration to her. Transcript at 99. After she had walked some steps away, he called her back and asked

her if she had anything illegal in the van, which she denied. He then asked if he could “check.” Id. Almodovar said “yes.” Id.

Nonetheless, Almodovar states that Officer Vanni’s actions were intentionally designed to coerce her into giving consent by creating an appearance that she was free to leave when, in fact, Officer Vanni had no real intention of letting her leave. We agree that Officer Vanni’s actions were calculated. But that does not make them illegal, and it does not mean that Almodovar lost her ability to make decisions for herself. Almodovar could have refused consent and required Officer Vanni to call in a canine unit if he so chose. And while Officer Vanni’s actions were calculated, Almodovar’s consent was not procured by fraud, duress, fear, or intimidation, and his actions were not so coercive that Almodovar was merely submitting to the supremacy of the law.

Almodovar also argues that she has limited mental capacity and, therefore, she could not consent to the search. Almodovar states that she has a sixty-eight IQ, which classifies her as mildly mentally retarded. Again, consent must reflect “an understanding, uncoerced, . . . to grant the officers a license which the person knows may be freely and effectively withheld.” Callahan, 719 N.E.2d at 435. And the defendant’s intelligence is one factor to consider in determining the validity of her consent. Id.

However, while Almodovar states that she is of below-average intelligence, the totality of the circumstances shows that she interacted with Officer Vanni in a normal manner during the traffic stop. She was not confused by his questions, and she was able to carry on a conversation of several minutes with the officer during the stop. In other words, the facts favorable to the trial court’s judgment demonstrate that Almodovar

“seemed to be a person of normal intelligence” to Officer Vanni at the time she gave her consent. See id. Thus, we cannot agree with Almodovar’s assertion that her low level of intelligence invalidated her consent.

Finally, Almodovar asserts that she was not given her Pirtle warnings before she consented to the search of her van, in violation of Indiana’s Constitution. See Campos, 885 N.E.2d at 601. But no such warning is required where, as here, the defendant “is merely the subject of an investigative stop.” Id. Rather, Pirtle warnings apply only when the defendant is in custody. “Custody is determined by an objective test: whether reasonable persons under the same circumstances would believe they were in custody or free to leave.” Id. Given that Officer Vanni had expressly told Almodovar that she was “free to go,” transcript at 99, and had returned her license and registration to her, Almodovar cannot show that a reasonable person in that same situation would not believe she was free to go.

In sum, considering the facts favorable to the trial court’s judgment, we conclude that Almodovar knowingly and voluntarily consented to Officer Vanni’s search of the vehicle. We also hold that Officer Vanni did not arbitrarily stop Almodovar but, instead, relied on an observed traffic infraction as the basis for the traffic stop. Accordingly, we cannot say the trial court erred when it denied Almodovar’s motion to suppress the evidence.

Affirmed.

RILEY, J., and MAY, J., concur.