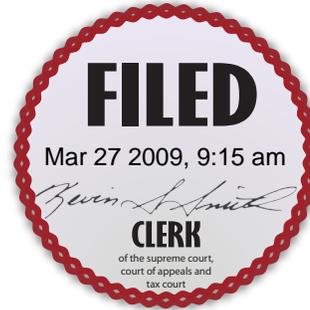


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

VINCENT GENTILE,)
)
Appellant-Defendant,)
)
vs.) No. 15A04-0805-CR-261
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable Sally Blankenship, Judge
Cause No. 15D02-0605-FB-4

March 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Vincent Gentile appeals his conviction and sentence, after a jury trial, for class B felony possession of a firearm by a serious violent felon.¹

We affirm.

ISSUES

1. Whether the trial court abused its discretion in admitting evidence.
2. Whether Gentile's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

On May 2, 2006, as motorist Angela Boyd traveled east on US-50 in Dearborn County, she observed other motorists swerving to get away from a silver Mercury Sable. The vehicle was moving at a high rate of speed and weaving erratically through heavy traffic. Boyd saw the vehicle swerve out of its lane and nearly strike the median wall. Boyd called 9-1-1 and reported a possible drunk driver. She provided a description of the vehicle and the license plate number, as well as her name and telephone number. She also remained on the line with the 9-1-1 dispatcher throughout the incident. Boyd followed the vehicle and kept the dispatcher apprised of its movements. The dispatcher broadcasted Boyd's observations to the police.

Greendale Police Department Officer Kevin Turner was dispatched to investigate. Initially, he was incorrectly told that the silver Mercury Sable was traveling west on US-50. When Boyd observed that Officer Turner was headed the wrong way, she told the 9-

¹ Indiana Code § 35-47-4-5.

1-1 dispatcher that he had passed her and the suspect vehicle. The dispatcher relayed Boyd's instructions to Officer Turner, who turned his car around and activated his lights and siren in order to maneuver through the heavy traffic.

After he observed the vehicle in the left lane of US-50, Officer Turner turned off his lights and siren and got behind it. He saw the vehicle drift to the left very close to the wall and partially cross the center line twice. Officer Turner again activated his lights and siren and initiated a traffic stop because he believed that the driver had committed the infraction of driving left of center. The driver, Gentile, pulled over onto the shoulder.

Officer Turner approached Gentile and observed that Gentile was disheveled and his eyes were glassy and bloodshot. Officer Turner asked him whether he had been drinking; Gentile responded that he had not. Officer Turner asked Gentile to step out of his vehicle for standardized field sobriety tests. Officer Brad Schwing of the Greendale Police Department arrived to assist. As Officer Turner was speaking with Gentile, he observed the barrel of a pistol protruding from the left leg of Gentile's trousers. The pistol fell out onto the ground, and Officer Turner drew his weapon. Officer Schwing handcuffed Gentile and picked up the loaded pistol. The officers searched Gentile's person and read him the *Miranda* advisement.

Gentile subsequently told the officers that he had purchased the car recently and had found the gun inside. He stated that he carried the pistol for protection, but he had no handgun permit. He admitted further that, after Officer Turner pulled him over, he had placed the gun on his person because he expected it to be found anyway. Gentile also admitted to recent cocaine use.

Officer Schwing advised Officer Turner that Gentile had consented to a search of the vehicle. Officer Turner searched the car and found a silver and white crack pipe containing part of a Brill-O² scouring pad and a digital scale. Officer Turner ran the license plate on the vehicle and determined that it belonged on a different vehicle. Officer Turner then checked Gentile's criminal history and determined that he had been convicted in Ohio of robbery in 1976 and two counts of aggravated burglary in 1978.

On May 3, 2006, the State charged Gentile with the following offenses: count I, class B felony possession of a firearm by a serious violent felon; count II, class C felony possession of a handgun without a license having been convicted of a felony within fifteen years; count III, class A misdemeanor possession of paraphernalia; and count IV, class D felony possession of paraphernalia with a prior unrelated conviction.

On January 18, 2008, Gentile filed a motion to suppress the evidence obtained pursuant to the stop, wherein he alleged that the evidence was unlawfully obtained because Officer Turner lacked reasonable suspicion to stop him. On February 11, 2008, the trial court conducted a hearing on the motion, and denied the motion on February 21, 2008. The trial court conducted a jury trial on February 25-26, 2008. The jury found Gentile guilty of class B felony possession of a firearm by a serious violent felon. The trial court conducted Gentile's sentencing hearing on March 27, 2008. After hearing evidence and argument of counsel, it took the matter under advisement. In its sentencing order issued on April 3, 2008, the trial court stated, in pertinent part, the following:

² In Officer Turner's experience, scouring pads and digital scales are frequently associated with illicit drug use and sales, respectively.

1. The Defendant presents a significant risk of committing another crime based on the length of his criminal history over a significant period of time.

2. The Defendant was found guilty at jury trial of Possession of a Firearm in Violation of Indiana Code 35-47-4-5, a Class B felony.

* * *

4. The Court finds as aggravating circumstances the history of serious offenses committed by the Defendant in multiple states over the full span of his life that includes the crime of trafficking in LSD, felony possession of cocaine, escape, resisting arrest, possession of a controlled substance, nine (9) theft related convictions and two (2) convictions for burglary in the State of Ohio that were the serious violent felonies pursuant to Indiana Code 35-47-4-5.

5. The criminal history of the Defendant demonstrates that the Defendant is a risk to the community. The Defendant has an extended history of not following the law and is in need of correctional treatment that can best be provided at a penal facility.

6. The mitigating circumstances presented by the Defendant of a substance problem can best be addressed based on criminal history in a penal facility.

7. The mitigating circumstance of the need to support a ten year old child is outweighed by the aggravating circumstance of the serious criminal history and the need to protect the community.

(App. 254-55). It imposed a twenty-year sentence to be served in the Department of Correction. Gentile now appeals.

DECISION

Gentile argues that the trial court erred in admitting the evidence obtained pursuant to the stop because Officer Turner lacked reasonable suspicion to stop him. He also argues that his sentence is inappropriate in light of the nature of the offense and his character.

1. Reasonable Suspicion

Gentile argues that Boyd’s tip to police was not sufficiently reliable and therefore, that Officer Turner lacked reasonable suspicion to stop him.³ Thus, he argues, the trial court erred in admitting the evidence obtained pursuant to the stop. We disagree.

We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *Gauvin v. State*, 878 N.E.2d 515, 519 (Ind. Ct. App. 2007), *trans. denied*. An abuse of discretion occurs if a trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* Moreover, we will not reverse the trial court’s decision to admit evidence if that decision is sustainable on any basis. *Id.*

The Fourth Amendment to the United States Constitution prohibits ‘unreasonable searches and seizures’ by the Government, and its safeguards extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. However, a police officer may briefly detain a person for investigatory purposes without a warrant or probable cause if, based upon specific and articulable facts together with rational inferences from those facts, the official intrusion is reasonably warranted and the officer has a reasonable suspicion that criminal activity ‘may be afoot.’

State v. Glass, 769 N.E.2d 639, 641-42 (Ind. Ct. App. 2002) (internal citations omitted).

“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.” *State v. Augustine*, 851 N.E.2d 1022, 1026 (Ind. Ct. App. 2006) (citing *Sellmer v. State*, 842 N.E.2d 358, 360 (Ind. 2006)).

In support of his contention that Boyd’s telephone tip to police was unreliable, Gentile relies heavily upon *Washington v. State*, 740 N.E.2d 1241 (Ind. Ct. App. 2000),

³ Gentile also argues that Officer Turner lacked reasonable suspicion for the stop because Gentile committed no traffic infraction; however, we do not address this claim because we find his challenge to Boyd’s tip to be dispositive.

and *State v. Glass*, 769 N.E.2d 639 (Ind. Ct. App. 2002); however, his reliance on these cases is misplaced. The police informant in *Washington* was an anonymous caller, and the identity of the informant in *Glass* was unverified. Thus, in these cases the tipster's reliability could not be assessed. We agree with the State's assertion that *State v. Eichholtz*, 752 N.E.2d 163 (Ind. Ct. App. 2001), in which the identity of the informant was known, is more akin to the instant facts.

In *Eichholtz*, motorist Lenny Thatch observed Eichholtz's vehicle moving erratically, crossing the center line, and driving up onto the curb. Thatch followed the vehicle and called 9-1-1. Thatch gave the dispatcher a description of the car, the license plate number, and its location. Thatch also provided his name and a description of his vehicle. At the scene, the responding officer identified Eichholtz's vehicle using Thatch's identification and observed Thatch's vehicle following Eichholtz. The officer initiated a traffic stop and ultimately arrested the defendant for operating a vehicle while intoxicated. The defendant sought and was granted a motion to suppress the evidence obtained pursuant to the traffic stop.

On appeal, we reversed the trial court's judgment, finding that Thatch's tip carried sufficient indicia of reliability to justify the officer's investigatory stop of the defendant. We noted that Thatch provided the dispatcher with information about the defendant's car, his own car, and their location. Thatch also "continued following Eichholtz, stayed on the line with the 9-1-1 operator, listened to the operator relay his communication to the responding officer, and remained behind Eichholtz until [the officer] arrived to pull Eichholtz over." *Id.* at 166. In addition, Thatch "identified himself to the 9-1-1 operator

in such a manner that he could be held legally responsible if [the police officer's] investigation indicated that Mr. Thatch filed a false police report.” *Id.* at 167. Such is the case under the instant facts.

Based upon Boyd’s tip alone, Officer Turner had a proper basis upon which to initiate the investigatory stop. In *Alabama v. White*, 496 U.S. 325, 330 (1990), the United States Supreme Court held that tips from an identified or known informants are sufficiently reliable to justify an investigatory *Terry* stop, even if they may not be sufficient to support a probable cause finding.

Our courts have noted that there are two primary types of informants: professional informants and cooperative citizens, and the test for determining the reliability of each is different. The cooperative citizens group of informants includes victims of crimes and persons who personally witness a crime who come forward with information out of the ‘spirit of good citizenship’ and their desire to assist law enforcement. They are usually one-time informants so that there is no basis from which to determine their reliability. Although there may well be greater indicia of reliability in the report of the cooperative citizen, as distinguished from the professional informant, it is still the totality of the circumstances that controls when determining reasonable suspicion.

Id. at 1027 (some citations omitted).

Here, the record reveals that when Boyd telephoned police about Gentile’s driving, she gave her name and telephone number, and thereby identified herself in such a manner that she could be held legally responsible if the investigation indicated that she had fabricated her claim. Furthermore, Boyd followed Gentile; remained on the line with the dispatcher; gave directions from which Officer Turner was able to locate Gentile and personally observe his erratic driving; remained at the scene throughout the entire episode, including Gentile’s arrest; and appeared for trial and testified.

Based upon the foregoing, we conclude that like Thatch in *Eichholtz*, Boyd was a cooperative citizen informant whose identity was known and whose ongoing observations and information carried sufficient indicia of reliability to justify Officer Turner's investigatory stop of Gentile. Thus, we conclude that Officer Turner's investigatory stop of Gentile did not run afoul of the Fourth Amendment, and that the trial court did not abuse its discretion when it admitted the evidence obtained pursuant to the stop.

2. Inappropriate Sentence

Next, Gentile contends that his maximum sentence of twenty years is inappropriate in light of the nature of the offense and the character of the offender because he is not "the worst of all offenders." Gentile's Br. at 13.

We may revise a sentence if, "after due consideration of the trial court's decision," we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). "Although Rule 7(B) does not require us to be 'very deferential' to a trial court's sentencing decision, we still must give due consideration to that decision." *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). "We also understand and recognize the unique perspective a trial court brings to its sentencing decisions." *Id.* The burden is on the defendant to persuade the reviewing court that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh'g*, 875 N.E.2d 218.

In determining whether a sentence is inappropriate, the advisory sentence is the starting point that the Legislature has selected as an appropriate sentence for the crime

committed. *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class B felony is ten years, with a minimum of six and a maximum of twenty years. Here, the trial court imposed the maximum sentence.

We initially note that in challenging his sentence, Gentile suggests that the trial court enhanced his sentence based upon the presence of a weapon at the scene. This contention is not borne out by the record. In its sentencing order, the trial court identifies Gentile's extensive criminal history as the sole aggravating circumstance, citing his need for correctional treatment and the risk he poses to the community. *See Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005) (a single aggravator is sufficient to support an enhanced sentence). Thus, we decline to address Gentile's contention that the trial court erred when it enhanced his sentence based on a fact that comprises a material element of a crime.

Our review of the nature of the offense reveals that after Gentile was pulled over by police for a traffic infraction, he intentionally armed himself with a pistol and concealed the weapon on his person before getting out of his vehicle to interact with the officers, thereby escalating what was a routine stop for a traffic infraction into a potentially deadly confrontation with police.

Our examination of Gentile's character further reveals a staggering criminal history spanning over thirty years, and comprised of more than thirty convictions committed in the States of Florida, Georgia, Indiana, Kentucky, and Ohio. (App. 254). The pre-sentence investigation report classifies Gentile as a "high risk offender." (App.

254). According to the PSI, the instant offense represents his thirty-fifth criminal conviction and his ninth felony conviction. (App. 254).

The maximum sentence imposed by the trial court is supported by the evidence of Gentile's character and the nature of his offense. As a result, Gentile has not carried his burden of persuading us that his sentence is inappropriate.

Affirmed.

RILEY, J., and VAIDIK, J., concur.