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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 02A05-0808-CR-464
)	
ERRICK G. BENSON,)	
)	
Appellee-Defendant.)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0803-FD-187

May 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

The State of Indiana appeals from the trial court's grant of Errick G. Benson's motion to suppress evidence found on his person. The State argues that the police search of Benson was proper because police had probable cause to arrest him for public intoxication and the record does not support a conclusion that they had decided not to. We reverse and remand.

FACTS AND PROCEDURAL HISTORY¹

At approximately 1:30 a.m. on March 2, 2008, uniformed Fort Wayne Police Officers Michael McEachern and Cory Troyer were patrolling in their marked police car when Officer Troyer noticed Benson walking down the middle of a street. As Officer Troyer drove by Benson, Benson pulled up his hood and held his hand up so that the officers could not see his face. After driving around the block, the officers soon located Benson again, still walking down the middle of a street that had sidewalks. Benson appeared to be staggering and was carrying a soft drink bottle that contained a clear liquid.

Benson's version of subsequent events is as follows: Officer Troyer asked Benson why he was walking in the street and gave him a verbal warning to use the sidewalk. At that point, Benson provided the officers with his identification. While Officer McEachern checked Benson's identification on his computer, Benson spoke with Officer Troyer, explaining that his father had been bitten by a dog and that he was walking to his father's vacant house. As soon as Officer McEachern determined that there were no open warrants

¹ On April 24, 2009, we heard oral argument in this case at Warsaw Community High School in Warsaw, Indiana. We would like to commend council on the quality of their presentations and thank the faculty, staff, and students of Warsaw Community High School for their hospitality.

for Benson, however, the officers exited the car and asked if they could check Benson for weapons. At this point, Benson admitted that he ran from the officers.

Officer McEachern's version of subsequent events is as follows: Benson approached the car and provided the officers with his identification. As Benson spoke, Officer McEachern noticed that his speech was "thick tongued and slurred." Tr. p. 9. When asked about the clear bottle, Benson admitted that it contained liquor. As Benson was speaking to the officers, Officer McEachern checked to determine whether Benson had any outstanding warrants. At this point, the officers exited the car to speak with Benson further, at which point Benson ran off. As Benson ran, he threw the bottle he was carrying and a pack of cigarettes. The officers apprehended Benson after a chase of approximately two blocks and placed him under arrest. A subsequent search of Benson discovered twenty pills alleged to be a generic form of Darvocet, a schedule III controlled substance. A portable breath test ("PBT") indicated that Benson had no measurable alcohol in his bloodstream. (Tr. 16).

On March 6, 2008, the State charged Benson with Class D felony possession of a controlled substance and Class A misdemeanor resisting law enforcement. On June 13, 2008, Benson filed a motion to suppress evidence seized as a result of the search of his person. On June 30, 2008, after a hearing, the trial court granted Benson's motion to suppress. In so doing, the trial court made the following statements on the record:

Alright, first of all I'm going to find that the officer's stop of Mr. Benson in the second instance is a proper investigatory stop. They observe conduct which raises their suspicions but is less than case law would permit them to stop and they properly passed him. They did nothing. The fact that they took another turn around the block is not wrong. They can continue to investigate, which is what they were doing as I hear the evidence. And so when they came

around the block the second time to make an investigatory stop they see the defendant walking down the middle of the street at 1:30 in the morning and apparently staggering, which I think gives them the authority, particularly the walking down the middle of the street. I mean, you just can't miss that. I don't care whether there's a little snow on the sidewalk or not, at 1:00 in the morning they have, I think, they have a duty as officers to stop this gentleman and to see that he's capable of taking care of himself instead of walking down the street at 1:30 or 2:00 in the morning. And they observed a staggering gait. As they get to talking to him they find that he has slurred speech. They conduct a warrants check while [Officer] Troyer talks to him[. Officer] McEachern [r]uns the warrant check, finds no active warrants. They give him, in the course of that also, they give him a verbal warning. I think that was kind of a[t] the opening of the situation, give him a warning about walking on the sidewalk. It seems to me at that point they have all the information that they need in order to make an intoxication arrest if that's what they want to do. They did not. It seems to me at that point the purpose of the stop has expired. Depending on the testimony you hear, either they simply got out of the cars and he ran or they got out of their car and he ran, or they asked if he was armed and he ran. And I don't know that there's anything significant one way or another about whether they said anything to him or not. The point is that it is-- there is no evidence before me at least that they said, I'm sorry sir, we believe that you're intoxicated and it's our intent to place you under arrest. And I believe they could have done that at that time and we wouldn't be here. On the other hand, based upon the evidence that I've heard, the purpose of the stop being a legitimate stop in the first place and good police work and necessary police work, I don't mean anything here to be disrespectful of those two officers, but at such time as they made their check for warrants, gave him a verbal warning, had everything that they were going to have about an intoxication or not and chose not to make an arrest at that point, the fact that he ran is not enough to resurrect the whole incident. The purpose of the stop had expired and therefore I'm going to grant the Motion to Suppress.

Tr. pp. 40-42. The State now appeals.

DISCUSSION

Standard of Review

In appealing from the grant of a motion to suppress, the State appeals a negative judgment and must show the trial court's ruling on the suppression motion was contrary to

law. *State v. Cook*, 853 N.E.2d 483, 485 (Ind. Ct. App. 2006). We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that reached by the trial court. *Id.* We do not reweigh the evidence or judge the credibility of the witnesses; rather, we consider only the evidence most favorable to the judgment. *Id.* We review *de novo* the ultimate determinations of reasonable suspicion and probable cause. *Ransom v. State*, 741 N.E.2d 419, 421 (Ind. Ct. App. 2000), *trans. denied*; *VanPelt v. State*, 760 N.E.2d 218, 222 (Ind. Ct. App. 2001), *trans. denied*.

The State contends that (1) the officers had probable cause to believe that Benson was publicly intoxicated and (2) the record does not support a finding that the officers had decided not to arrest Benson. For his part, Benson argues that the trial court's grant of his motion to suppress was correct because the police no longer had any reason to detain him when they exited their vehicle.

Fourth Amendment in General

The Fourth Amendment provides all citizens with the “right ... to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures...” U.S. Const. Amen. IV. This “fundamental right” is protected by the requirement that a warrant be issued by a neutral judicial officer prior to a search being conducted. *California v. Carney*, 471 U.S. 386, 390, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985); [*New York v.*] *Belton*, 453 U.S. [454,] 457, 101 S.Ct. 2860[, 69 L.Ed.2d 768 (1981)]. In general, the Fourth Amendment prohibits warrantless searches. *Vehorn v. State*, 717 N.E.2d 869, 875 (Ind. 1999); *Berry v. State*, 704 N.E.2d 462, 465 (Ind. 1998). There are, however, exceptions to the warrant requirement. *Carney*, 471 U.S. at 390, 105 S.Ct. 2066. If the search is conducted without a warrant, the burden is upon the state to prove that, at the time of the search, an exception to the warrant requirement existed. *Vehorn*, 717 N.E.2d at 875.

Black v. State, 810 N.E.2d 713, 715 (Ind. 2004).

As previously mentioned, the trial court concluded that the police were justified in investigating Benson's behavior and that they ultimately developed probable cause to believe that he was committing public intoxication. The trial court concluded, however, that because the police had decided not to arrest Benson, they were required to let him go.

Initial Detention

Our first inquiry is whether the police were justified in briefly detaining Benson after they had witnessed him walking down the middle of a street, a possible violation of a Fort Wayne ordinance. In similar cases involving traffic infractions, it is well-settled that a police officer may briefly detain someone whom the officer believes has committed an infraction. *State v. Harris*, 702 N.E.2d 722, 726 (Ind. Ct. App. 1998). "Once the purpose of the traffic stop is completed, a motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable and articulable suspicion that criminal activity was afoot." *U.S. v. Hill*, 195 F.3d 258, 264 (6th Cir. 1999). "If the ... detention exceeds its proper investigative scope, the seized items must be excluded under the 'fruits of the poisonous tree doctrine.'" *Id.* Here, the police were justified in briefly detaining Benson after observing him staggering down the middle of a street very early in the morning. Quite simply, it was known to Officer McEachern that failure to use sidewalks when available violated a Fort Wayne ordinance, which violation could result in a citation. (Tr. 7). The question then becomes whether anything else happened that would justify a detention longer than that necessary to issue a citation or warning.

Probable Cause to Arrest for Public Intoxication

The State contends that the police eventually developed probable cause to arrest Benson for public intoxication, thereby justifying a search incident to arrest even if the police had decided not to arrest him for public intoxication. Benson contends that the police did not, in fact, have probable cause to arrest him for public intoxication.

A search incident to a lawful arrest is one such exception to the warrant requirement. Under this exception, an officer may conduct a warrantless search of the arrestee's person and the area within his or her immediate control. Our initial inquiry under this exception to the warrant requirement is to determine whether the arrest itself was lawful. Indiana Code Section 35-33-1-5 defines an arrest as the "taking of a person into custody, that he may be held to answer for a crime." An arrest occurs when a police officer "interrupts the freedom of the accused an[d] restricts his liberty of movement." In addition, even when a police officer does not tell a defendant that he or she is under arrest prior to a search, that fact does not invalidate a search incident to an arrest as long as there is probable cause to make an arrest. Furthermore, the subjective belief of the police officer that he may not have probable cause to arrest a defendant when he handcuffs the defendant has no legal effect.

Probable cause adequate to support a warrantless arrest exists when, at the time of the arrest, the officer has knowledge of facts and circumstances that would warrant a person of reasonable caution to believe that the suspect committed a criminal act. The amount of evidence necessary to satisfy the probable cause requirement for a warrantless arrest is determined on a case-by-case basis. However, an unlawful arrest cannot be the foundation of a lawful search. Indeed, evidence obtained as a direct result of a search conducted after an illegal arrest is excluded under the fruit of the poisonous tree doctrine.

Moffitt v. State, 817 N.E.2d 239, 246 (Ind. Ct. App. 2004) (citations omitted), *trans. denied*.

Indiana Code section 7.1-5-1-3 (2007) provides that "[i]t is a Class B misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication caused by the person's use of alcohol or a controlled substance[.]" There is no dispute that Benson was

in a public place, so the only question is whether police had probable cause to believe that he was intoxicated.²

In previously addressing this question, this court has determined as follows:

Objectively observed clear indications of intoxication include dilated pupils, bloodshot eyes, glassy eyes, and the odor of alcohol on the person's breath. *Datzek v. State*, 838 N.E.2d 1149, 1156 (Ind. Ct. App. 2005). Furthermore, we observed in *Hannoy [v. State]*, 789 N.E.2d 977 (Ind. Ct. App. 2003)] that "the amount of evidence needed to supply probable cause of operating while intoxicated is minimal; we have held that noticing the odor of alcohol on the driver's breath during the course of an accident investigation can be sufficient." 789 N.E.2d at 989; *see also Clark v. State*, 175 Ind. App. 391, 372 N.E.2d 185, 190 (1978) (holding that probable cause was "clearly present," justifying the taking of a blood sample without the defendant's consent when it was established that the defendant was involved in an automobile accident and the police noticed liquor on his breath at the scene of the accident and at the hospital).

Frensemeier v. State, 849 N.E.2d 157, 162 (Ind. Ct. App. 2006), *trans. denied*.

Here, we conclude that the police had probable cause to arrest Benson for public intoxication. Officers observed, and the trial court found, that Benson was staggering and that his speech was "thick tongued and slurred." Tr. p. 9. Moreover, Benson admitted that the clear liquid in the soft drink bottle he was carrying was liquor. Finally, Officer

² Although "intoxicated" is not defined in Indiana Code Title 7.1 (Alcohol and Tobacco), it is defined in Title 9 (Motor Vehicles) as

under the influence of:

- (1) alcohol;
- (2) a controlled substance (as defined in IC 35-48-1);
- (3) a drug other than alcohol or a controlled substance;
- (4) a substance described in IC 35-46-6-2 or IC 35-46-6-3; or
- (5) a combination of substances described in subdivisions (1) through (4);

so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties.

Ind. Code § 9-13-2-86 (2007).

McEachern testified that he was concerned that Benson might be intoxicated. The above evidence would convince a person of reasonable caution that Benson was committing the crime of public intoxication. While the PBT indicated no measurable alcohol in Benson's bloodstream, this does not discount the possibility that he may have been intoxicated by a controlled substance.

The trial court's stated justification for granting Benson's motion to suppress was its finding that police decided not to arrest Benson for public intoxication despite having probable cause to do so, and so were required to let him go about his business. We conclude, however, that this finding is not supported by the record. There is no evidence that the police had either decided not to arrest Benson or had communicated any such decision to him. Additionally, the actions of the officers, even if we assume, as we must, the truth of the version of events most favorable to Benson, give no indication that they had decided not to arrest him. Benson ran either while the police were exiting their vehicle or immediately after they had exited and asked him if they could search him for weapons. Neither version supports a conclusion that the police had decided not to arrest Benson. In our view, the record indicates that the police had either decided to arrest Benson or, at the very least, continue their investigation. We conclude that the trial court's finding to the contrary in this regard was clearly erroneous. As the finding in question was the basis for granting Benson's motion to suppress, we are constrained to reverse the trial court.

The judgment of the trial court is reversed.³

BAKER, C.J. concurs.

CRONE, J. dissenting with opinion.

³ We need not address the State's argument that Benson's flight would have justified his ultimate arrest even if the initial detention had been illegal.

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CRONE, Judge, dissenting

I would affirm the trial court’s grant of the motion to suppress. As noted by the majority, we do not reweigh the evidence or judge the credibility of the witnesses; rather, we defer to the trial court on these matters. The seasoned trial judge in this case heard evidence regarding the circumstances of the investigatory stop, including evidence that the officers stopped Benson because they witnessed him “kind of staggering” in the middle of the street, that he admitted to having liquor in the soda bottle he was carrying, that the officers performed a warrant search on Benson and found nothing, and that the officers issued a verbal warning about Benson’s failure to use the sidewalk. Tr. at 22. This evidence

supports the trial court's conclusions that, prior to Benson's flight, the officers did not intend and/or did not express their intent to place Benson under arrest, even after they had gathered information sufficient to support such an arrest for public intoxication, and that the purpose of the investigatory stop had expired before Benson ran from the officers. I cannot say that the evidence is without conflict and all reasonable inferences lead to the opposite conclusion. Therefore, I respectfully dissent.⁴

⁴ To the extent that the State argued in its appellate brief that the search was proper as a search incident to arrest for resisting law enforcement, we note that the State conceded at oral argument that it waived this argument by failing to raise it before the trial court.