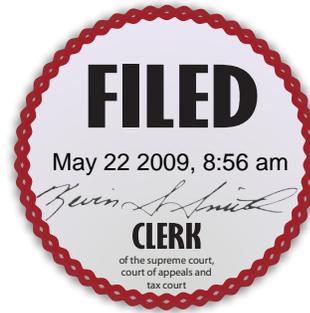


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JUAN ALLEN,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0809-CR-867
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Eichholtz, Judge
The Honorable Peggy Ryan-Hart, Magistrate
Cause No. 49G23-0712-FB-279594

May 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Juan Allen (“Allen”) appeals from his conviction after a jury trial of unlawful possession of a firearm by a serious violent felon¹ as a Class B felony. Allen presents the following restated issues for our review:

- I. Whether the protections afforded Allen under the Fourth Amendment to the United States Constitution and Article 1, section 11 of the Indiana Constitution were violated when a bullet, recovered during a patdown search of Allen after the vehicle in which he was the passenger was stopped, was admitted at trial; and
- II. Whether the evidence is sufficient to support his conviction for unlawful possession of a firearm by a serious violent felon.

We affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 8:00 p.m. on December 28, 2007, Indianapolis Metropolitan Police Department Officers David Bisard and Chris McKay were on routine patrol on the east side of Indianapolis when they observed a disturbance in a business parking lot. A group of people was standing around a white Pontiac and there were “a lot of loud voices that you could hear arms were in the air and it just looked like something out of the ordinary.” *Tr.* at 108. When the officers pulled into the parking lot, the crowd dispersed, two people entered the white Pontiac, and the car left at a “quick rate of speed.” *Id.* at 110.

Officer McKay initiated a traffic stop of the Pontiac and approached the driver’s side of the vehicle while Officer Bisard approached the passenger’s side. Officer McKay learned that the driver of the Pontiac did not have a driver’s license. Officer Bisard spoke

¹ See Ind. Code § 35-47-4-5.

with Allen, the passenger, and attempted to obtain identification information from him, but Allen initially refused to identify himself. Eventually, Allen identified himself as “Maurice Allen” and refused to provide his date of birth or other identifying information. Officer Bisard believed that Allen was lying about his name and had Allen step out of the vehicle. After Allen was handcuffed, Officer Bisard conducted a patdown search, during the course of which he found a .38 caliber bullet in Allen’s pocket. Allen was instructed to sit down on the curb next to the vehicle.

Officer McKay directed the driver to exit the vehicle because he had no driver’s license. As the driver exited the vehicle, Officer McKay saw a firearm in an open console between the driver’s and passenger’s seats, and removed it from the car. The firearm was a fully loaded .38 caliber handgun. Officer McKay later spoke with Allen, who ultimately admitted that his name was Juan Allen.

The State charged Allen with unlawful possession of a firearm by a serious violent felon as a Class B felony. Prior to his jury trial, Allen filed a motion to suppress the bullet found during the patdown search. The trial court denied Allen’s motion to suppress, and Allen was found guilty as charged. Allen had stipulated that he had the requisite prior conviction for a “serious violent felon.” The trial court sentenced Allen to ten years in the Department of Correction, with two years suspended, and one year of probation. Allen now appeals.

DISCUSSION AND DECISION

I. Admissibility of Evidence

Allen argues that the bullet discovered during the patdown search should have been excluded from evidence because there was no reasonable suspicion to support the initial traffic stop. In ruling on Allen's motion to suppress, the trial court found that the officers had a reasonable suspicion to believe that criminal activity had occurred, supporting their decision to stop the vehicle.

A trial court has broad discretion in ruling on the admissibility of evidence. *Scott v. State*, 855 N.E.2d 1068, 1071 (Ind. Ct. App. 2006). "Because we are considering the issue after a completed trial, we review the admission of evidence for an abuse of discretion." *Taylor v. State*, 891 N.E.2d 155, 158 (Ind. Ct. App. 2008), *trans. denied, cert. denied* (2009). We will consider the conflicting evidence most favorable to the trial court's ruling and any uncontested evidence favorable to the defendant. *Id.* An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id.*

The Fourth Amendment protects persons from unreasonable search and seizure, and this protection has been extended to the states through the Fourteenth Amendment. U.S. Const. amend. IV; *Krise v. State*, 746 N.E.2d 957, 961 (Ind. 2001). Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure. *Halsema v. State*, 823 N.E.2d 668, 676 (Ind. 2005). When a search or seizure is conducted without a warrant, the State bears the burden of proving that an exception to the warrant requirement existed at the time of the search or seizure. *Id.*

“The United States Supreme Court established one such exception in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), which held that a police officer may briefly detain a person for investigatory purposes without a warrant or probable cause, if, based on specific and articulable facts together with reasonable inferences from those facts, an ordinarily prudent person would reasonably suspect that criminal activity was afoot.” *Howard v. State*, 862 N.E.2d 1208, 1210 (Ind. Ct. App. 2007). Reasonable suspicion is determined on a case-by-case basis by looking at the totality of the circumstances. *Id.* We review the trial court’s ultimate determination regarding reasonable suspicion de novo. *See State v. Atkins*, 834 N.E.2d 1028, 1032 (Ind. Ct. App. 2005).

“While almost identical to the wording in the search and seizure clause of the federal constitution, Indiana’s search and seizure clause is independently interpreted and applied.” *Baniaga v. State*, 891 N.E.2d 615, 618 (Ind. Ct. App. 2008). Under the Indiana Constitution, the legality of a governmental search turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances. *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). Although other relevant considerations under the circumstances may exist, our Supreme Court has determined that the reasonableness of a search or seizure turns on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred; 2) the degree of intrusion the method of the search or seizure imposes on the citizens’ ordinary activities; and 3) the extent of law enforcement needs. *Baniaga*, 891 N.E.2d at 618. The burden is on the State to show that under the totality of the circumstances, the intrusion was reasonable. *Id.*

Here, the police officers saw a disturbance in the parking lot in front of several businesses. There were a lot of loud voices, arms in the air, and it looked out of the ordinary. Allen was one of two people who, upon seeing the officers, sped from the parking lot in a Pontiac. Consequently, the officers had a sufficient justification for a *Terry* stop, and the trial court correctly found that the officers had a reasonable suspicion that criminal activity had occurred justifying the stop.

In the course of the *Terry* stop, Allen initially refused to identify himself to Officer Bisard, then identified himself as “Maurice Allen,” only later correctly identifying himself to Officer McKay. After Allen exited the vehicle, Officer Bisard placed him in handcuffs and conducted a patdown search for officer safety. During the course of the patdown, the bullet was discovered in a pocket of Allen’s pants. Meanwhile, Officer McKay learned that the driver of the vehicle did not have an operator’s license and asked him to exit the vehicle. The firearm was found in plain view when the driver exited the vehicle.

Although the trial court found that the bullet was admissible under the inevitable discovery doctrine, we do not address that reasoning here. We will affirm the judgment of the trial court if it is sustainable on any legal grounds apparent in the record. *See Alford v. State*, 699 N.E.2d 247, 250 (Ind. 1998). We find that the search did not violate either the Fourth Amendment to the United States Constitution or Article 1, section 11 of the Indiana Constitution, and the bullet was properly admitted into evidence.

II. Sufficiency of the Evidence

Although Allen had stipulated that he had the requisite prior conviction for the status “serious violent felon,” he argues that his conviction must be vacated because there is insufficient evidence in the record that he knowingly or intentionally possessed the firearm found inside the white Pontiac.

Our standard of review for sufficiency claims is well settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Amos v. State*, 896 N.E.2d 1163, 1170 (Ind. Ct. App. 2008). We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. *Id.* We will affirm the conviction if sufficient probative evidence exists from which the fact finder could find the defendant guilty beyond a reasonable doubt. *Id.*

In order to convict Allen of possession of a firearm by a serious violent felon, the State was required to prove that he knowingly or intentionally possessed a firearm and that he was a serious violent felon. Ind. Code § 35-47-4-5. Possession of an item may be either actual or constructive. *Massey v. State*, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004). Actual possession occurs when a person has direct physical control over the item. *Id.* “Constructive possession occurs when someone has ‘the intent and capability to maintain dominion and control over the item.’” *Id.* (quoting *Henderson v. State*, 715 N.E.2d 833, 835 (Ind. 1999)). To prove the intent element, the State must demonstrate the defendant’s knowledge of the presence of the contraband. *Id.* This knowledge may be inferred from either the exclusive dominion and control over the premises containing the contraband or, if the control is non-exclusive, evidence of additional circumstances that

point to the defendant's knowledge of the presence of the contraband. *Id.* These additional circumstances may include flight or furtive gestures, proximity to the contraband, the contraband being in plain view, or the location of the contraband in close proximity to items owned by the defendant. *Id.*

Here, the evidence demonstrated that the fully loaded .38 caliber handgun was found in the console between the driver's seat and the passenger's seat of the white Pontiac in plain view. While the car was not registered to Allen, the handgun was found in proximity to Allen. Allen had the ability to exert control over the firearm and possessed a .38 caliber bullet in the pocket of his pants. We conclude that the evidence was sufficient to prove that Allen had the capability to maintain exercised dominion and control over the firearm for which he was carrying ammunition.

Affirmed.

RILEY, J., and MATHIAS, J., concur.