

Case Summary

Kelly Barngrover appeals her convictions for Class D felony neglect of a dependent and Class A misdemeanor possession of paraphernalia. We affirm in part and reverse in part.

Issues

Barngrover raises four issues, which we consolidate and restate as:

- I. whether evidence of the paraphernalia obtained during the stop of her vehicle was admissible; and
- II. whether there is sufficient evidence to support her neglect conviction.

Facts

At around 2:45 or 3:00 a.m. on February 28, 2010, Officer Geoffrey Barbieri of the Indianapolis Metropolitan Police Department was conducting surveillance in Indianapolis of a house he knew to be associated with drug-related activity. While observing the house from four to five houses away, he saw a 1993 Nissan Pathfinder, which appeared to be black, parked in the driveway. Officer Barbieri “could not get the license plate to come back on file,” which means “the sticker that’s placed on the upper right hand corner, which is the expiration date, is either incorrect or it could have expired for the year that it was.” Tr. pp. 10, 22. Officer Barbieri ran the “hot sheet,” a report of stolen vehicles in Indianapolis, and it indicated that a black 1993 Pathfinder had been reported stolen. Although the license plate number on the Pathfinder in the driveway did not match the license plate on the Pathfinder that had been reported stolen, Officer Barbieri believed the vehicle in the driveway was stolen.

After waiting at least a half an hour, Officer Barbieri saw two people leave the house and get into the vehicle. He watched the vehicle back out of the driveway and proceed down the street past two houses before turning on the headlights. The car made two right turns without signaling and then abruptly turned into an alley without signaling or slowing down. With backup nearby, Officer Barbieri activated his emergency lights, and proceeded to conduct a “felony traffic stop.” Id. at 25.

Officer Barbieri illuminated the Pathfinder with his spotlight and got out of his car. He stayed by his car and ordered the occupants out of the Pathfinder using his PA system. They complied, and Officer Barbieri immediately recognized the driver as Barngrover, and the passenger was identified as Brian Stewart. Officer Barbieri did not believe Barngrover had a weapon and was not afraid of her. Barngrover and Stewart were immediately handcuffed by other officers on the scene.

Officer Barbieri then walked up to the Pathfinder in a tactical manner with his gun out to make sure no one else was inside. As he approached, Officer Barbieri realized the Pathfinder was actually green. Barngrover became very upset and instructed the officers to check on her child in the backseat of the car. Officer Barbieri confirmed that Barngrover’s son, S.B., whom he believed to be six or seven years old, was in the car. As Officer Barbieri began to walk back to continue his investigation, Barngrover continued to demand that someone check on her child. In response, Officer Barbieri opened the back door of the Pathfinder, setting off the car’s alarm.

Barngrover informed Officer Barbieri that the key needed to be put in the ignition to turn off the alarm. Officer Barbieri asked where her keys were, and she told him they

were on the front seat. Officer Barbieri opened the door and located the keys, which were near the console. As he reached for the keys, he recognized a crack pipe lying in the top of a purse in the center console. Barngrover was placed under arrest, and the Department of Child Services took custody of Barngrover's son. Officer Barbieri was eventually able to confirm that Barngrover owned the Pathfinder and that the license plate had expired.

The State charged Barngrover with Class D felony neglect of a dependent and Class A misdemeanor possession of paraphernalia. On April 14, 2010, Barngrover filed a motion to suppress evidence related to the possession charge. The trial court conducted a hearing on the motion to suppress on September 24, 2010, immediately before the bench trial. The trial court denied Barngrover's motion to suppress and found her guilty as charged. Barngrover now appeals.

Analysis

I. Admission of Evidence

Barngrover argues that the trial court improperly denied her motion to suppress. Because she is appealing after trial, the issue is appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. See Lanham v. State, 937 N.E.2d 419, 421-22 (Ind. Ct. App. 2010). A trial court is afforded broad discretion in ruling upon the admissibility of evidence, and we will reverse such a ruling only when the defendant has shown an abuse of discretion, which involves a decision that is clearly against the logic and effect of the facts and circumstances before the trial court. Id. at 422. "We do not reweigh the evidence, and we consider conflicting evidence in the light

most favorable to the trial court's ruling." Id. We also consider the uncontested evidence favorable to Barngrover. See id.

"The Fourth Amendment regulates nonconsensual encounters between citizens and law enforcement officials and does not deal with situations in which a person voluntarily interacts with a police officer." Finger v. State, 799 N.E.2d 528, 532 (Ind. 2003). Although a brief investigative stop may be justified by reasonable suspicion that the person detained is involved in criminal activity, a full-blown arrest or a detention that lasts for more than a short period of time must be justified by probable cause. Id. (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968)).

"Under the federal constitution, searches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.'" Middleton v. State, 714 N.E.2d 1099, 1101 (Ind. 1999) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967) (footnote omitted)). "The State carries the burden of demonstrating that a warrantless search or seizure falls within one of the exceptions." Id.

Barngrover does not dispute that Officer Barbieri had reasonable suspicion to initiate the traffic stop. She contends, however, that the manner in which the stop was conducted was the equivalent of an arrest, which required probable cause. In response, the State asserts that Barngrover was not subject to a full-blown arrest and that Officer Barbieri's actions were reasonable under the circumstances.

We addressed a similar question in Reinhart v. State, 930 N.E.2d 42 (Ind. Ct. App. 2010), where we observed:

Our supreme court has held that an arrest occurs “when a police officer interrupts the freedom of the accused and restricts his liberty of movement.” Sears v. State, 668 N.E.2d 662, 667 (Ind. 1996). While a Terry investigatory stop also interrupts a suspect’s freedom and restricts his liberty of movement, such interruption is presumably much less intrusive and for a shorter duration than an arrest. See Mitchell v. State, 745 N.E.2d 775, 782 (Ind. 2001). Indeed “there is no ‘bright line’ for evaluating whether an investigative detention is unreasonable, and ‘common sense and ordinary human experience must govern over rigid criteria.’” Id. (quoting United States v. Sharpe, 470 U.S. 675, 685, 105 S. Ct. 1568, 84 L.Ed.2d 605 (1985)). Because a Terry stop is a lesser intrusion than an arrest, the scope of an investigatory stop involves such “inquiry necessary to confirm or dispel the officer’s suspicions.” Hardister v. State, 849 N.E.2d 563, 570 (Ind. 2006).

Reinhart, 930 N.E.2d at 46.

We also acknowledged that as part of a valid Terry stop, the investigating officer is entitled to take reasonable steps to ensure his or her own safety, including ordering a detainee to exit the vehicle.¹ Id. Further, placing a person in handcuffs may convert an investigatory stop into an arrest depending on the totality of the circumstances. Id. (citing Payne v. State, 854 N.E.2d 1199, 1204-05 (Ind. Ct. App. 2006), trans. denied).

¹ Citing Arizona v. Johnson, 555 U.S. 323,--, 129 S. Ct. 781, 786-87 (2009), the State asserts, “Because of the enhanced risk, police are permitted to order drivers and passengers out of their vehicles and frisk them for weapons automatically at a traffic stop.” Appellee’s Br. p. 10. The Johnson court in fact stated, “After Wilson, but before Brendlin, the Court had stated, in dictum, that officers who conduct “routine traffic stop[s]” may “perform a ‘patdown’ of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous.” Johnson, 555 U.S. at --, 129 S. Ct. at 787 (quoting Knowles v. Iowa, 525 U.S. 113, 117-18, 119 S. Ct. 484, 488 (1998)) (alterations in original).

Willis v. State, 907 N.E.2d 541 (Ind. Ct. App. 2009), is an example of a case in which we concluded that an investigatory stop was not converted to an arrest even though police officers held the defendant at gunpoint and handcuffed him. In that case, police were responding to a report of a man holding a handgun to another man's head. Willis, 907 N.E.2d at 543. When officers arrived in the area and saw two men on a sidewalk and one or two women in the adjacent yard, they drew their guns, approached the group, and ordered the men to kneel with their hands raised. Id. The officers handcuffed the men and conducted pat-down searches of the group to determine whether anyone was carrying a handgun. Id. We concluded that, because it would be unreasonable to expect a police officer to approach a suspect, who had been accused of pointing a gun at someone's head, without his or her gun drawn and that the totality of the circumstances justified the use of the handcuffs during a brief detention to determine whether a suspect is armed, the brief intrusion into Willis's privacy and the brief deprivation of his liberty of movement were not constitutionally unreasonable. Id. at 546.

On the other hand, in Reinhart, we recognized that what may have begun as a Terry stop was quickly converted to an arrest requiring probable cause. Reinhart, 930 N.E.2d at 47. There, a police officer purported to stop Reinhart's vehicle to investigate a possible drunk driver. Id. Although the investigating officer testified that he was concerned for his safety based upon Reinhart's earlier behavior of pulling into three driveways and yelling out the window, there was no evidence suggesting that the driver was engaged in any behavior that would lead to a specific and reasonable inference that he was armed with a weapon. Id. We concluded that the investigating officer's act of

ordering Reinhart to exit the vehicle at gunpoint was excessive. Id. Further, with the laser sight of the investigating officer's gun prominently fixed on him, Reinhart was ordered to kneel with hands behind his head and then lie face down on the ground while waiting for backup to arrive. He was then handcuffed and searched twice. We concluded that a reasonable person in Reinhart's position would not have believed that he or she was free to leave and would have considered his or her freedom of movement to have been restrained to the degree associated with a formal arrest. Id.

The facts of this case are more similar to those in Reinhart. Here, after conducting surveillance, Officer Barbieri saw the driver and passenger leave the house, get into the car, and drive away. Officer Barbieri initiated what he described as a "felony traffic stop" based on the infractions he observed and his belief that the Pathfinder was stolen. Tr. p. 25. He testified that at least two officers from nearby locations immediately arrived at the scene and that he illuminated the Pathfinder with his spotlight, stayed by his car, and used his PA system to order the driver and the passenger out of the car. He explained that per protocol, "we order every person out of the vehicle, and have them approach us." Id. at 30. The other officers immediately handcuffed Barngrover and Stewart, and Officer Barbieri walked up to the car to see if anyone else was in it. Id. at 27, 30. Although it is not clear when exactly Officer Barbieri drew his weapon he testified that he approached the car in a "tactical manner" and that he had his gun out at that point. Id. at 31.

Officer Barbieri suspected Barngrover was driving a stolen vehicle; however, he had no reason to believe she was armed. In fact, when Barngrover got out of the car,

Officer Barbieri immediately recognized her and testified that he did not believe she had a weapon, that he was not afraid of her, and that she gave him no reason to be afraid of her. See id. at 27-28. He further testified that, although Barngrover was upset, she did not resist or try to run away.

We certainly agree with the State that minimizing the risk of harm to police officers is a “weighty interest.” Appellee’s Br. p. 11. Nevertheless, the fact that Officer Barbieri was following protocol does not mean Barngrover was not arrested for purposes of the Fourth Amendment. Moreover, we cannot say that, in the presence of multiple officers, ordering Barngrover out of the car, immediately handcuffing her, and then approaching her car with weapon drawn was a “minimal additional intrusion” on her privacy. Cf. Arizona v. Johnson, 555 U.S. 323,--, 129 S. Ct. 781, 786 (2009) (“The government’s ‘legitimate and weighty’ interest in officer safety . . . outweighs the ‘de minimis’ additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle.” (quoting Pennsylvania v. Mimms, 434 U.S. 106, 110-11, 98 S. Ct. 330, 333 (1977))).

Although the initial stop began as a lawful Terry stop, it quickly became an invalid arrest. Because Officer Barbieri lacked probable cause to arrest Barngrover prior to his observation of the paraphernalia in the car, the trial court abused its discretion when it admitted it into evidence.² See Reinhart, 930 N.E.2d at 48.

² Because of this conclusion, we need not address Barngrover’s argument that Officer Barbieri’s entry into her car was unlawful.

Relying on the doctrine of inevitable discovery, however, the State contends that the vehicle would have been impounded because of the expired tags and the paraphernalia would have been discovered during a valid inventory search and was properly admitted. Indeed, the inevitable discovery exception to the exclusionary rule permits the introduction of evidence that eventually would have been located had there been no error where there is no nexus sufficient to provide a taint. Shultz v. State, 742 N.E.2d 961, 965 (Ind. Ct. App. 2001), trans. denied. “If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received.” Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509 (1984).

An inventory search is a well-recognized exception to the warrant requirement. Jackson v. State, 890 N.E.2d 11, 17 (Ind. Ct. App. 2008). “An impoundment is proper when it is either part of the routine administrative caretaking functions of the police or when it is authorized by statute.” Id. (citation omitted). Even if the impoundment is lawful, however, the constitutional requirement of reasonableness requires that the inventory search itself must be conducted pursuant to standard police procedures. Id. at 18.

At the suppression hearing, the State did not rely on the inevitable discovery exception to the exclusionary rule and presented no evidence relating to the inventory search. Therefore, even if the impoundment was proper, there is no indication that an inventory search was conducted pursuant to standard police procedures. Thus, the State

did not establish by a preponderance of the evidence that the paraphernalia in the purse inevitably would have been discovered during a lawful inventory search of the Pathfinder. Thus, because the State did not establish an exception to the exclusionary rule, the trial court's admission of evidence relating to the paraphernalia was improper, and we reverse the possession of paraphernalia conviction.³

II. Sufficiency of the Evidence

Barngrover argues that there is insufficient evidence to support her conviction for Class D felony neglect of a dependent. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). “It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction.” Id. We affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

In the charging information, the State alleged that Barngrover had care of six-year-old S.B., a dependent, and that she did knowing or intentionally place him in a situation that endangered his life or health by leaving him unattended inside a vehicle in front of a drug house, and/or driving in a car without him fastened with a seatbelt, and/or having him in close proximity to drug paraphernalia. We address Barngrover’s arguments that

³ Barngrover did not specifically argue to the trial court and does not specifically argue on appeal that evidence that S.B. was in the Pathfinder also should have been suppressed.

the State failed to prove that S.B. was left in the Pathfinder outside of the house or that leaving him in the vehicle placed him in actual and appreciable danger.⁴

Indiana Code Section 35-46-1-4(a) provides in part that a person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally places the dependent in a situation that endangers the dependent's life or health commits neglect of a dependent, a Class D felony. Our supreme court has held that a former version of the statute must be read as applying only to situations that expose a dependent to an "actual and appreciable" danger to life or health. Gross v. State, 817 N.E.2d 306, 309 (Ind. Ct. App. 2004) (quoting State v. Downey, 476 N.E.2d 121, 123 (Ind. 1985)). We have held "that to be an 'actual and appreciable' danger for purposes of the neglect statute when children are concerned, the child must be exposed to some risk of physical or mental harm that goes substantially beyond the normal risk of bumps, bruises, or even worse that accompany the activities of the average child." Id. We observed that this is consistent with a "knowing" mens rea, "which requires subjective awareness of a 'high probability' that a dependent has been placed in a dangerous situation, not just any probability." Id.

Barngrover's argument that there is insufficient evidence that S.B. was in the Pathfinder while she was in the house is a request to reweigh the evidence. Officer Barbieri testified that, although he did not see the Pathfinder arrive at the house and did not actually see S.B. in the vehicle until after he approached it during the traffic stop, he

⁴ The trial court rejected the State's other two bases for the neglect charge and specifically found, "quite frankly, whether the child was in a high drug crime area or not, it would concern the court that the child was left in the vehicle at 2:30 in the morning with no supervision, a six (6) year old." Tr. p. 73.

had been watching the house from down the street for at least a half an hour when he saw two adults leave the house and get into the vehicle. He testified that he did not see a child come out of the front door of the residence and did not see anyone go into the backseat of the vehicle. Because S.B. was undisputedly in the car during the stop and Officer Barbieri did not see him get into the car with Barngrover and Stewart, it is reasonable to infer that S.B. was in the car while Barngrover was in the house.

In arguing that she was not subjectively aware of a high probability that she was placing S.B. in a dangerous situation by leaving him in the car alone for at least a half an hour, Barngrover relies on Scruggs v. State, 883 N.E.2d 189 (Ind. Ct. App. 2008), trans. denied. In that case, Scruggs was convicted of Class D felony neglect of a dependent for leaving her seven-year-old son home alone from 9:00 a.m. until 12:00 p.m. Scruggs, 883 N.E.2d at 189-90. Scruggs appealed, challenging the sufficiency of the evidence, and we reversed, holding “Scruggs may have demonstrated bad judgment, but, again, the State has not proved beyond a reasonable doubt that she had a subjective awareness of a high probability that she had placed M.H. in a dangerous situation.” Id. at 191.

Barngrover contends there is no evidence that she had visited the house before or was subjectively aware of the danger of robbery, prostitution, or drugs in the area. Even if she was not aware of the prevalence of crime in the area, there is sufficient evidence that she had a subjective awareness of a high probability that she had placed S.B. in a dangerous situation. Barngrover did not leave S.B. in the car momentarily; it is undisputed that S.B. had to have been alone in the car for at least a half an hour without her checking on him. Moreover, it was around 2:45 a.m. in February, and Officer

Barbieri testified that it was “very cold” and that S.B. had on only a “light jacket.” Tr. pp. 43, 48. Leaving a six-year-old child unattended in the middle of the night in February for at least a half an hour is sufficient evidence from which the fact-finder could have found that Barngrover was subjectively aware of a high probability that she placed S.B. in a dangerous situation. There is sufficient evidence to support the neglect conviction.

Conclusion

Because Officer Barbieri’s actions amounted to an arrest, evidence of the paraphernalia obtained during his entry into the Pathfinder was inadmissible. There is, however, sufficient evidence from which the trial court could have found that Barngrover committed Class D felony neglect of a dependent. We affirm the neglect conviction and reverse possession of paraphernalia conviction.

Affirmed in part and reversed in part.

RILEY, J., and DARDEN, J., concur.