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.

FILED
Aug 25 2011, 10:10 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

JOHN ANDREW GOODRIDGE
Vanderburgh County Public Defender Agency
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KEITH NEMER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A05-1012-CR-800
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
The Honorable Kelli E. Fink, Magistrate
Cause No. 82C01-0903-FA-207

August 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Keith Nemer dealt methamphetamine from his home. The State charged him with two counts of class A felony dealing in methamphetamine. A jury found him guilty as charged. Nemer contends that the trial court should not have admitted certain evidence because it was seized pursuant to an allegedly insufficient search warrant. We conclude that he forfeited his right to appeal this issue by not objecting on this basis at trial, and therefore we affirm his conviction.

Facts and Procedural History

Sometime in January 2009, Sergeant Kurt Althoff of the Evansville-Vanderburgh Drug Task Force received information from a confidential source that Nemer was making methamphetamine in his home. During the next two months, Sergeant Althoff and other Task Force officers conducted surveillance of Nemer's residence. On March 2, 2009, Sergeant Matt Schnell of the Vanderburgh County Sheriff's Office was surveilling the home and noticed an unfamiliar vehicle parked in the driveway. Later, two men exited Nemer's house and got into that car. Sergeant Schnell followed the vehicle to a garage where another man briefly approached the window of the car before it drove away. Officer John Townsend stopped the vehicle for a traffic violation and searched the two men in the car, John Autry and Logan Hofferman.

The police found methamphetamine in Autry's boot and arrested him. After being read his *Miranda* rights, Autry told Sergeant Althoff that he had purchased approximately one gram of methamphetamine from Nemer earlier that day, and that he had purchased

methamphetamine from Nemer on at least two other occasions. Autry told Sergeant Althoff that while he was in Nemer's home he saw an oval-shaped bag that he thought had more methamphetamine inside it. Hofferman told Sergeant Schnell that he did not know anything about any methamphetamine.

Next, the Drug Task Force and the Vanderburgh County Sheriff's Office executed a search warrant at Nemer's residence. Inside, Nemer was read his *Miranda* rights but chose to cooperate with the police. He told the police that he had methamphetamine and that some of the chemicals used to manufacture methamphetamine were in the basement. When the officers searched the basement, they found scales, coffee filters, over $600 in cash, and twenty grams of methamphetamine.

The State charged Nemer with two counts of class A felony dealing in methamphetamine. Nemer filed a motion to suppress the evidence, claiming that the police did not have probable cause for the search warrant and that the statements he gave to the police were involuntary. The trial court denied his motion. During the trial, the evidence from the search was admitted without any Fourth Amendment objections from Nemer. The jury found Nemer guilty on both counts.

Discussion and Decision

Nemer alleges that the trial court erred by denying his motion to suppress evidence

because the State's search warrant was not supported by probable cause.[1] The State argues that Nemer has forfeited any right to appeal this issue because he did not object to the admission of the evidence on that basis at trial. We agree. A pretrial motion to suppress does not preserve error for appellate review; instead, a defendant must make the relevant objections contemporaneously during his trial to provide the trial court with the ability to make a final ruling on the evidence in the context that it is introduced. *Lanham v. State*, 937 N.E.2d 419, 422 (Ind. Ct. App. 2010). At trial, Nemer objected only on chain of custody grounds. "A party may not object to the admission of evidence on one ground at trial and seek reversal on appeal based on a different ground." *Boatner v. State*, 934 N.E.2d 184, 187 (Ind. Ct. App. 2010).

In his reply brief, Nemer alleges that the admission of the evidence seized pursuant to the search warrant constituted fundamental error. "A party may escape waiver of an issue, for failure to object, if the claimed error is fundamental in nature." *Charlton v. State*, 702 N.E.2d 1045, 1051 (Ind. 1998). However, even a fundamental error argument must be raised in the appropriate manner. "[P]arties may not raise an issue, such as fundamental error, for the first time in a reply brief." *Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011). Therefore, by failing to allege fundamental error in his primary brief, Nemer has waived any

[1] We note that in *Washington v. State*, we stated that the denial of a motion to suppress is appropriately handled by interlocutory appeal. 784 N.E.2d 584, 586 (Ind. Ct. App. 2003). If the matter proceeds to trial, the defendant must contemporaneously object to the evidence being admitted. *Id.* Once the issue comes before us, it is more appropriately framed as "whether the trial court abused its discretion by admitting the evidence at trial." *Id*. at 586-87.

argument to that claim. *Id*. Even if we were to consider the issue, we do not believe that the admission of the evidence was fundamental error.

Fundamental errors are those "blatant violation[s] of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due process." *Pope v. State*, 737 N.E.2d 374, 380 (Ind. 2000). A fundamental error "must be so prejudicial to the defendant's rights as to make a fair trial impossible." *Id*. In *Brown v. State*, our supreme court said:

> [A]n error in ruling on a motion to exclude improperly seized evidence is not per se fundamental error. Indeed, because improperly seized evidence is frequently relevant, its admission ordinarily does not cause us to question guilt. That is the case here. The only basis for questioning Brown's conviction lies not in doubt as to whether Brown committed these crimes, but rather in a challenge to the integrity of the judicial process. We do not consider that admission of unlawfully seized evidence ipso facto requires reversal. Here, there is no claim of evidence or willful malfeasance on the part of the investigating officers and no contention that the evidence is not what it appears to be. In short, the claimed error does not rise to the level of fundamental error.

929 N.E. 204, 207 (Ind. 2010). The same principles apply in Nemer's case. Accordingly, we affirm his convictions.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.