IN THE
INDIANA COURT OF APPEALS

CAUSE NO. 22A-CR-02524

BRIONE JACKSON	)	Appeal from the
	)	Hamilton County Superior Court 3
Appellant,	)	
	)	
v.	)	Cause No. 29D03-2203-F4-001271
	)	
	)	
STATE OF INDIANA,	)	The Honorable William J. Hughes, Judge
	)	
Appellee		

BRIEF OF THE APPELLANT

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The trial court erred in denying Brione's Motion to Suppress.

Statement of the Case

On March 1, 2022, the State charged Brione Jackson (hereinafter "Brione") with one count of unlawful possession of a firearm by a serious violent felon, a level 4 felony, under cause number 29D03-2203-F4-001271. App. at 32. The charge stemmed from a stop that took place on March 1, 2022. App. at 34. On April 18, 2022, Brione filed a Motion to Suppress. App. at 17; 36. He filed an amended motion on July 21, 2022. App. at 20; 28. The Court conducted a hearing on Brione's Motion to Suppress on July 29, 2022. App. at 20. On September 6, 2022, the trial court denied the Motion to Suppress. App. at 21; 38.

Following the denial, Brione filed a motion to certify the issue for interlocutory appeal. App. at 22, 27, 29. He also filed a motion to correct errors. App. at 47. That motion was denied on October 24, 2022. App. at 24-25. However, the petition to certify the issue was granted on September 26, 2022. App. at 31. On November 2, 2022, Brione filed a Motion to Accept Jurisdiction of an Interlocutory Appeal. Online Docket. The motion was granted by this Court on December 5, 2022. *Id.* On December 13, 2022, Brione filed his Notice of Appeal. *Id.* Notice of Completion of Transcript was filed on December 19, 2022. *Id.* Brione timely files his brief in this matter.

Statement of the Facts

On March 1, 2022 around 2:30 a.m., Brione was sitting in his car in the parking lot of the Extended Stay Hotel in Carmel. Tr. Vol. 2, p. 9-10. Like the other cars around his, Brione's car was backed into a spot at the rear of the parking lot. Tr. Vol. 2, p. 10; 20; App. Vol. II, p. 44. Officer Thomas Szybowski was patrolling the parking lot that

night and noticed Brione's car and how it was parked. *Id.* Due to early hour, and the way Brione's car was parked, Officer Szybowski decided to investigate further. Tr. Vol. 2, p. 10-11. Officer Szybowski approached Brione's car on foot. When he did so, Brione opened his car door to speak with the officer. Tr. Vol. 2, p. 12. Brione voluntarily provided the officer with his identification. Tr. Vol. 2, p. 12. When Brione opened the door, Officer Szybowski was "immediately met with the odor of marijuana emanating from the interior of that vehicle." Tr. Vol. 2, p. 12. The officer described the odor as that of burnt marijuana. Tr. Vol. 2, p. 30. Officer Szybowski asked Brione if he had been smoking in the car, to which Brione replied that he had not. App. Vol. 2, p. 44.

Based on the odor of burnt marijuana, Officer Syzbowski's original intended consensual encounter transformed into an investigative stop. Tr. Vol. 2, p. 12. Backup officers were called, and Brione was placed in handcuffs. Tr. Vol. 2, p. 13. The officer searched Brione and, when he found nothing criminal on Brione's person, moved to search Brione's car. App. Vol. II, p. 43. While Brione stood nearby, fully compliant with the officers on scene, Officer Szybowski searched the interior of Brione's car, the location from which the odor was emanating. Tr. Vol. 2, p. 13. When the officer found nothing criminal in the interior of the car, he moved to the trunk to search. Tr. Vol. 2, p. 13. In the trunk was a wooden box, which the officer moved aside as part of his search. Tr. Vol. 2, p. 14. Under the box, between it and the cover of the spare tire was a handgun. Tr. Vol. 2, p. 14. Brione was then arrested for unlawful possession of a firearm by a serious violent felon. App. Vol. II, p. 32. No marijuana was ever found. Tr. Vol. 2, p. 27.

Summary of Argument

Without more, the smell of burnt marijuana alone is insufficient to establish probable cause to search the trunk of Brione's car under the automobile exception to the warrant requirement. Under the automobile exception, a motor vehicle may be searched without a warrant when there is probable cause to believe that the vehicle contains contraband or other items that are related to criminal activity. Because the scope of the search is defined by the object of the search and the places in which there is probable cause to believe that it may be found, not the nature of the container, there exist limits to the automobile exception. Without more, the smell of burnt marijuana alone emanating from the passenger compartment does not give probable cause to search the trunk of a vehicle. Here, the trial court found Officer Szybowski searched Brione's trunk without any additional indicia of illegal activity or contraband beyond the smell of burnt marijuana. Therefore, the search was unlawful under the Fourth Amendment to the United States Constitution.

While the odor of marijuana creates probable cause to search a vehicle, the search of Brione's trunk was unreasonable under Article 1, § 11 of the Indiana Constitution. Unlike its federal counterpart, Article 1, § 11 uses a balancing test to look to the totality of the circumstances to determine whether a warrantless search of a car is reasonable. Here, given the totality of the circumstances, the search of Brione's trunk was unreasonable.

Argument

The trial court erred when it denied Brione's Motion to Suppress.

I. Standard of Review

This Court conducts a de novo review of the trial court's determinations of

reasonable suspicion to make stops and probable cause to make warrantless searches or arrests, after reviewing findings of historical fact for clear error and giving due weight to inferences. *Ornelas v. United States*, 517 U.S. 690 (1996). Unlike typical sufficiency of the evidence cases where only the evidence favorable to the judgment is considered, the reviewing court must also consider the uncontested evidence favorable to the defendant. *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000).

II. Without other corroborating evidence, the mere odor of burnt marijuana emanating from the passenger compartment did not provide probable cause to search the trunk of Brione's car under the automobile exception.

The Fourth Amendment states that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VI. Under the automobile exception to the warrant requirement, a motor vehicle may be searched without a warrant when there is probable cause to believe that the vehicle contains contraband or other items that are related to criminal activity and are therefore subject to seizure because there is a reduced expectation of privacy which stems from a vehicle's ability to move and the public nature of automobile travel. *Rogers v. State*, 396 N.E.2d 348 (Ind. 1979). Under the Fourth Amendment, the inherent mobility of the vehicle and a diminished expectation of privacy in the vehicle is enough exigency to justify the warrantless search and seizure of evidence from a car. *Maryland v. Dyson*, 527 U.S. 465 (1999); *Meister v. State*, 933 N.E.2d 875 (Ind. 2010).

While the automobile exception gives officers the ability to search a car if there is probable cause to believe contraband exists within the vehicle, the exception is not without limits. In *United States v. Ross,* 456 U.S. 798, 824 (1982), the United States

Supreme Court considered "the extent to which police officers-who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it-may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view." In *Ross,* after receiving a tip from an informant, and developing probable cause, officers searched a closed paper bag and a zippered leather pouch found in the trunk. *Id*. at 801. The paper bag contained drug paraphernalia and the leather pouch contained $3,200 in cash. *Id*. In determining the scope allowable for a search under the automobile exception, the high Court explained,

> "[t]he scope of a warrantless search of an automobile … is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab."

Id. at 824. Ultimately, the Supreme Court held, "where police officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages, that may conceal the object of the search." *Id*. In the case before this Court, the object of the search was burnt marijuana.

"[D]o we normally have people smoking marijuana in the trunk? Or more importantly, do we normally have them smoking in a sub-woofer?" Tr. Vol. 2, p. 34. The trial court's questions go directly to the law as set out in *Ross*. The scope of a search of a

vehicle based on the odor of marijuana was addressed in *United States v. Parker,* 72 F.3d 1444 (10th Cir. 1995) and *United States v. Kizart,* 967 F.3d 693 (7th Cir. 2020). In *Parker,* after detecting the smell of marijuana coming from the defendant's car, officers searched the driver and the passenger compartment of the car. 72 F.3d at 1447. Officers found a rolled-up dollar bill with white residue and a burnt marijuana cigarette on the driver's person. *Id.* In the 10th Circuit, "[t]he odor of marijuana in the passenger compartment of a vehicle does not, standing alone, establish probable cause to search the trunk of the vehicle." *United States v. Nielson,* 9 F.3d 1487, 1491 (10th Cir. 1993). Because of this, the *Parker* Court held "an officer obtains probable cause to search the trunk of a vehicle once he smells marijuana in the passenger compartment *and* finds corroborating evidence of contraband." 72 F.3d at 1450. (Emphasis in original). An example of this can be seen in *United States v. Kizart*, where, after officers smelled burnt marijuana, the defendant admitted that marijuana had been smoked in the car and had an abrupt change in demeanor from "relieved" to "shocked" or "concern", when the officers began their search of the car. 967 F.3d at 696-697. The 7th Circuit found the defendant's "reaction and behavior when he realized that the search had not ended short of the trunk was part of the evidence that probable cause of a crime would be found in a particular place." *Id.* at 698. In looking at the totality of the circumstances, the appellate court noted the general rule that "the smell of burnt marijuana *plus other suspicious activity* may provide probable cause for the search of an entire vehicle including its trunk." *Id.*

In the present case, the trial court questioned whether a magistrate would have authorized a search of Brione's trunk based solely on the smell of marijuana emanating from the passenger compartment. Interrupting the prosecutor's argument, the trial

court asked, "Where do you get the impression that it is a piece of cake to get a search warrant at 2:40 in the a.m., based solely on the sniff of marijuana?" Tr. Vol. 2, p. 38. The trial judge commented, "I've been doing my share of on-call for the last twenty-five years, actually thirty-four plus a month and [prosecutor], I've never once been wakened in the night to come in or to do a telephone search warrant on the basis of only a sniff." Tr. Vol. 2, p. 39. In its order denying Brione's motion to suppress, the trial court noted the lack of suspicious activity or anything that would give rise to probable cause to believe there was contraband in the trunk. "The officer had not observed any activity in relationship to the trunk of the vehicle. The officer searched the trunk without any additional indicia of illegal activity or contraband beyond the smell of burnt marijuana." App. Vol. II, p. 44. Consistent with the rules in *Ross, Parker* and *Kizart,* because the only evidence allowing the officer to search the vehicle was the smell of marijuana, and was not corroborated by any other suspicious activity or admissions, his right to search did not extend to the vehicle's trunk. Thus, Officer Szybowski did not have probable cause to search the trunk, the search of Brione's trunk exceeded the scope allowed under the automobile exception.

III. Officer Szybowski's search of the trunk of Brione's car was unreasonable under Article 1, § 11 of the Indiana Constitution because it was based solely on the odor of burnt marijuana.

Indiana law is well-settled that the odor of burnt marijuana gives officers probable cause to search a vehicle. *State v. Hawkins,* 766 N.E.2d 749 (Ind. Ct. App. 2002). However, not all searches predicated on the smell of marijuana are reasonable. *See Scott v. State,* 775 N.E.2d 1207 (Ind. Ct. App. 2002)(finding officers' search of car based on smell of raw marijuana unreasonable where the car was legally parked, immobile and unoccupied; officers could have eliminated any risk of evidence

destruction and there was little likelihood the car would be moved or lost to police), *criticized on other grounds by Myers v. State,* 839 N.E.2d 1146 (Ind. 2006). Under Article 1, § 11 of the Indiana Constitution, each case must be considered upon its own facts to decide if police behavior was reasonable. *Brown v. State*, 653 N.E.2d 77 (Ind. 1995); *State v. Bulington*, 802 N.E.2d 435 (Ind. 2004); *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005). Article 1, § 11 of the Indiana Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While the language tracks the language of the Fourth Amendment to the United States Constitution, Article 1, § of the Indiana Constitution provides more protection to Hoosiers than that provided in the U.S. Constitution and prohibits some searches which the Federal Constitution does not. *State v. Gerschoffer*, 763 N.E.2d 960, 965 (Ind. 2002)(stating "The Indiana Constitution has unique vitality, even where its words parallel federal language."). In analyzing a search or seizure under the Indiana Constitution, each situation should be analyzed independently for reasonableness under the totality of the circumstances. *Brown*, 653 N.E.2d at 79.

Specifically, this Court's determination of reasonableness under Article 1, § 11 should turn on the factors provided by the Indiana Supreme Court in *Litchfield*. In *Litchfield*, the Court relied on the following non-exclusive factors to determine reasonableness: "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 citizen's ordinary activities, and 3) the extent of law enforcement needs." *Litchfield*, 824

N.E.2d at 361. Here, based on the totality of the circumstances, the search of Brione's trunk was unreasonable.

The first factor in *Litchfield* looks to the "degree of concern, suspicion, or knowledge that a violation has occurred." In this case, the search of Brione's trunk was predicated solely on the smell of burnt marijuana emanating from the passenger compartment of the car. Tr. Vol. 2, p. 13. At the time of his investigative stop, the officer had not seen Brione commit any traffic violations, nor did he observe any equipment violations. Tr. Vol. 2, p. 20. Brione's vehicle was validly registered and there had been no reports made about the car by hotel staff or other concerned citizens. Tr. Vol. 2, p. 21, 24. While Officer Szywbowski testified extensively about his training and experience in detecting the odor of marijuana, he admitted that his training did not allow him to distinguish how recently a person had smoked marijuana. Tr. Vol. 2, p. 26. ("So you have no idea when you smell marijuana whether it's been smoked two days ago or two minutes ago,"…"Correct.") The officer also admitted that a car might smell like marijuana even when there is no marijuana in the car. *Id.* Prior to searching Brione's trunk, the officer searched both Brione's person and the passenger compartment of the car and found nothing criminal. Tr. Vol. 2, p. 14. At all times, Brione was cooperative with the officers. App. Vol. II, p. 44. While the degree of concern, suspicion, or knowledge that a violation had occurred may have initially been high, that degree diminished dramatically when searches of both Brione's person and the passenger compartment of his car, the only place from which the smell of burnt marijuana emanated, yielded nothing illegal.

The second factor that should be considered is "the degree of intrusion" imposed by law enforcement on Brione's ordinary activities. *Litchfield* at 361. Balanced with the

decreased degree of suspicion, the officer's actions in stopping Brione, handcuffing him, and ultimately searching the trunk of his car were highly intrusive. Brione was handcuffed, searched, and forced to stand by while his car was searched. His freedom of movement was restricted, his able to leave the scene was stopped, and the privacy of both his person and his vehicle were intruded upon. Consequently, the degree of intrusion at issue in this case is high.

The third and final factor to be considered is "the extent of law enforcement needs" in searching the trunk of Brione's car. *Litchfield* at 361. In the present case, at the time the trunk was searched, the needs of law enforcement were minimal. Both Brione and the passenger compartment of his car had been searched and nothing illegal found. As stated by the trial court in its order, "[t]he officer had not observed any activity in relationship to the trunk of the vehicle. The officer searched the trunk without any additional indicia of illegal activity or contraband beyond the smell of burnt marijuana." App. Vol. II, p. 44. "It is not clear why he searched the trunk. There is no evidence that people normally smoke marijuana in their trunk or that they drive around with burning marijuana in their trunks." App. Vol. II, p. 43. While law enforcement does have an interest in protecting the community from the use and sale of narcotics, there simply was no evidence here to support the notion that that particular interest was served by searching the trunk of Brione's car. Nor was there any indication that Brione's action were dangerous or concerning to the officer or the general public. Brione himself was calm and cooperative and there was no 911 call or other citizen complaint that began the interaction.

When the factors are balanced, the totality of the circumstances suggests that the search of the trunk was unreasonable. The officer's highly intrusive search of the trunk

was not justified by the relatively low needs of law enforcement and the lack of degree, knowledge, and suspicion a violation had occurred. Thus, this Court should reverse the trial court and find that the search of Brione's car was unreasonable under Article I, § 11 of the Indiana Constitution.

Conclusion

For all the foregoing reasons, Brione respectfully requests that this Court reverse the trial court's denial of his motion to suppress.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of the foregoing has been delivered through E-service using the Indiana E-filing System to Todd Rokita, Attorney General of Indiana this 13th day of January 2023.

Respectfully submitted,

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