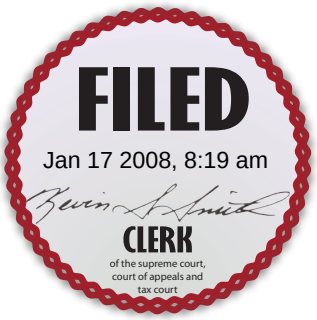

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IN THE
COURT OF APPEALS OF INDIANA

SANCHEZ L. STEPHENS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0705-CR-426
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 15
The Honorable Lisa Borges, Judge
Cause No. 49F15-0602-CM-181135

January 17, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Sanchez Stephens (Stephens), appeals his conviction for Count I, carrying a handgun without a license, a Class A misdemeanor, Ind. Code § 35-47-2-1, and Count II, possession of marijuana, a Class A misdemeanor, I.C. § 35-48-4-11.

We affirm.

ISSUE

Stephens raises one issue on appeal, which we restate as follows: Whether the trial court abused its discretion by admitting evidence obtained by Officer Steward after he stopped a vehicle for a non-conforming license plate, ordered the occupants out of the vehicle, and announced he was going to pat down the occupants.

FACTS AND PROCEDURAL HISTORY

On the night of January 31, 2006, Officer Jeremy Steward (Officer Steward) of the Indianapolis Police Department stopped a vehicle in Marion County, Indiana, because the license plate was registered to another vehicle. Officer Steward informed the driver the reason for the stop and that he would be given a uniform traffic ticket. Stephens and another individual were passengers in the vehicle.

After writing the ticket, Officer Steward told the driver the vehicle was going to be towed and impounded until he could provide proof of ownership of the vehicle. Officer

Steward instructed the vehicle's occupants to exit one at a time, and informed them that as they exited the vehicle he would conduct a quick pat down since he was alone.

The driver was patted down first. Stephens was next in line to exit the vehicle and be searched. As he exited the vehicle, Stephens admitted to Officer Steward he had "something" on him. (Transcript p. 11). The substance was later identified as marijuana. Officer Steward asked Stephens where the marijuana was located and retrieved the marijuana, placed Stephens in handcuffs, and arrested him for possession of marijuana. Officer Steward then performed a more thorough search of Stephens and found a small handgun, with a live round in the chamber and a loaded magazine attached. Stephens admitted he did not have a permit for the gun.

On February 3, 2006, the State filed an Information charging Stephens with Count I, carrying a handgun without a license, a Class A misdemeanor, I.C. § 35-47-2-1, and Count II, possession of marijuana, a Class A misdemeanor, I.C. § 35-48-4-11. On April 10, 2007, a bench trial was held. During the State's direct examination of Officer Steward, Stephens moved that "all statements made and evidence recovered after [Officer Steward] told [Stephens] he was going to perform a pat down of him" and "all testimony relating to the items described above which are sought to be suppressed." (Appellant's App. p. 29). A motion was filed later that day. The trial court bifurcated the trial, took the motion under advisement, and set a hearing on the motion for April 24, 2007. No hearing was held April 24, but the bench trial resumed April 27, 2007. There is no Order in the record responding to Stephens' Motion to Suppress, but based on the trial court's admitting the evidence recovered

during Officer Steward's pat down of Stephens at trial over his counsel's continued objection, we assume Stephens' Motion was effectively denied. Stephens was found guilty of both Counts. The trial court sentenced Stephens to one year for each Count with one hundred eight-five days suspended, and ordered the sentences to be served concurrently.

Stephens now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Stephens argues the trial court abused its discretion by admitting the evidence obtained as a result of Officer Steward's pat down search of Stephens. Specifically, Stephens contends Officer Steward unlawfully conducted a pat down because he did not have reasonable suspicion to believe Stephens was armed and dangerous.

I. *Standard of Review*

At trial Stephens challenged the admission of the evidence that was found after executing the pat down search. Our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Ackerman v. State*, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), *trans. denied*. A trial court has broad discretion in ruling on the admissibility of evidence. *Washington v. State*, 784 N.E.2d 584, 586 (Ind. Ct. App. 2003). Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only upon a showing of an abuse of discretion. *Id.* We do not reweigh the evidence, or judge the credibility of witnesses, but only determine if there was substantial evidence of probative value to support the trial court's ruling. *Howard v. State*, 862 N.E.2d 1208, 1210 (Ind. Ct. App. 2007).

"When evaluating determinations of reasonable suspicion, we accept the factual findings of the trial court unless they are clearly erroneous." *Id.* (quoting *Coleman v. State*, 847 N.E.2d 259, 262 (Ind. Ct. App. 2006), *trans. denied*). However, the ultimate determination of reasonable suspicion is reviewed *de novo*. *Howard*, 862 N.E.2d at 1210; *L.A.F. v. State*, 698 N.E.2d 355, 356 (Ind. Ct. App. 1998).

II. *Fourth Amendment*

Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution provide:

> 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 reasonable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Created to protect the right to privacy, this protection against reasonable searches and seizures is "a principal mode of discouraging lawless police conduct." *State v. Parham*, 875 N.E.2d 377, 379 (Ind. Ct. App. 2007) (citing *Jones v. State*, 655 N.E.2d 49, 54 (Ind. 1995)). Our supreme court has stated on several occasions that we are to view the protections provided by Article 1, Section 11 of the Indiana Constitution as separate and distinct from those of the federal Fourth Amendment. *See, e.g., Mitchell v. State*, 745 N.E.2d 775, 786 (Ind. 2001); *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999). Under Indiana law, we look to the totality of the circumstances to determine whether the State has carried its burden by demonstrating that the search was reasonable. *Parham*, 875 N.E.2d at 379. However, in his appellate brief, Stephens only challenges the trial court's admission of the evidence

derived from Officer Steward's pat down pursuant to the federal Fourth Amendment.[1] Therefore, we will address Stephens' contentions under the federal Fourth Amendment reasonable suspicion standard.[2]

As a general rule, the Fourth Amendment prohibits warrantless searches. *Black v. State*, 810 N.E.2d 713, 715 (Ind. 2004). However, there are exceptions to the warrant requirement. *Id.* One such exception is a *Terry* stop, or the "investigatory stop and frisk." *Stalling v. State*, 713 N.E.2d 922, 923 (Ind. Ct. App. 1999). In *Terry v. Ohio*, 392 U.S. 1, 30 (1968), the United States Supreme Court held that the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based upon specific and articulable facts, the officer has a reasonable suspicion that criminal activity "may be afoot." More specifically, "limited investigatory seizures or stops on the street involving a brief question or two and a possible frisk for weapons can be justified by mere reasonable suspicion." *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), *reh'g denied, trans. denied.*

Stephens does not challenge the propriety of the initial stop; rather, he challenges only the subsequent pat down search. In the companion case to *Terry*, the United States Supreme Court made the following comments regarding the pat down:

> [A] police officer is not entitled to seize and search every person whom he [or she] sees on the street or of whom he [or she] makes inquiries. Before he [or

---

[1] Stephens never actually mentions the federal Fourth Amendment in his brief. Rather, he merely states the standard of review employed when alleging a Fourth Amendment violation.

[2] Further we note that Stephens' failure to make a cogent argument under Article I, Section 11 of the Indiana Constitution constitutes waiver of the issue on appeal. *See* Ind. Appellate Rule 48(A)(8).

> she] places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of self-protective search for weapons, [the police officer] must be able to point to particular facts from which he [or she] reasonably inferred that the individual was armed and dangerous.

Sibron v. New York, 392 U.S. 40, 64 (1968). As such, generalized concerns of officer safety will not support a lawful frisk. *Swanson v. State*, 730 N.E.2d 205, 210 (Ind. Ct. App. 2000) (citing *L.A.F.*, 698 N.E.2d at 356). In deciding whether a pat-down search for weapons was proper, we consider whether the facts available to the officer at the moment of the search would warrant a person of reasonable caution in believing the action was appropriate. *Pearson v. State*, 870 N.E.2d 1061, 1065 (Ind. Ct. App. 2007). However, the officer need not be absolutely certain that the individual is armed before performing a search; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Abel v. State*, 773 N.E.2d 276, 279 (Ind. 2002).

Here, several factors leave us convinced that Officer Steward was rightfully concerned for his safety. At trial, the following colloquy between Officer Steward and Stephen's counsel occurred:

> [Officer Steward]: [] I was going to tow the car and put a hold on it for proof of ownership and plates[,] yes sir.
>
> [Stephen's Counsel]: And obviously you have to do an inventory search when you're going to tow the car[,] right?
>
> [Officer Steward]: Yes sir.
>
> [Stephen's Counsel]: Okay so at that time your testimony is that [when] you told the 3 subjects that you were going to perform a pat down on each individual[,] right?

[Officer Steward]: Yes sir.

[Stephen's Counsel]: Ok and you had them come out one at a time[,] right?

[Officer Steward]: Yes sir.

[Stephen's Counsel]: Your bases for doing the pat down is that you were the lone officer present[,] right?

[Officer Steward]: Yes sir.

[Stephen's Counsel]: And that it was [nighttime]? . . .

[Officer Steward]: Yes sir.

[Stephen's Counsel]: So obviously you first did the pat down on [the driver]?

[Officer Steward]: Yes sir.

[Stephen's Counsel]: You didn't have any problems with him[,] right? He was cooperative?

[Officer Steward]: Yes sir.

[Stephen's Counsel]: And then [Stephens] --- you had no problems with [Stephens] while you were patting [down the driver] did you?

[Officer Steward]: No sir[.] I didn't have a problem with anybody in the vehicle.

[Stephen's Counsel]: They were all cooperative?

[Officer Steward]: Yes sir.

[Stephen's Counsel]: Now as . . . Stephens [got] out of the vehicle, that's when you said he made --- he stated to you that he had something on [him]?

[Officer Steward]: Yes sir.

[Stephen's Counsel]: This was . . . right before [you were] about to pat him down[,] right?

[Officer Steward]: As he was coming out of the vehicle[,] yes sir.

[Stephen's Counsel]: Ok and he was aware that you were . . . getting him out of the vehicle to pat him down?

[Officer Steward]: I believe so[,] yes sir.

(Tr. pp. 15-16).

Officer Stephens was rightfully removing the persons from the vehicle in order to perform an inventory search. *See Abran v. State*, 825 N.E.2d 384, 390 (Ind. Ct. App. 2005), *trans. denied* ("The 'inventory exception' allows police to conduct a warrantless search of a lawfully impounded [vehicle] if the search is designed to produce an inventory of the vehicle's contents."). Moreover, we conclude that the pat-down was reasonable since Officer Stephens was alone, had no backup, and was outnumbered three to one. Therefore, we conclude that the trial court did not abuse its discretion by admitting the evidence seized as a product of the pat-down of Stephens.

CONCLUSION

Based on the foregoing, we find the trial court did not abuse its discretion by admitting the evidence procured by Officer Steward as a result of conducting a pat down search of the vehicle's occupants.

Affirmed.

KIRSCH, J., and MAY, J., concur.