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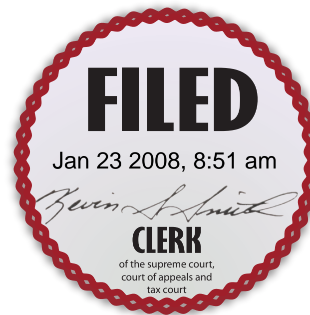


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# IN THE COURT OF APPEALS OF INDIANA

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| TERRI MUSSELMAN, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 41A01-0704-CR-150 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

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APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Kim VanValer, Judge
Cause No. 41D03-0502-FD-42

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**January 23, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

Terri L. Musselman appeals her conviction for Operating While Intoxicated, as a Class D felony, and her Habitual Offender adjudication, following a bench trial. Musselman presents two issues for review, namely:

1. Whether the trial court abused its discretion when it admitted evidence obtained by the arresting officer.
2. Whether the evidence is sufficient to support Musselman's habitual offender adjudication.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On December 31, 2005, a person identifying himself as Musselman's son reported to the Greenwood Police Department that Musselman was driving intoxicated in a grey Voyager van. Officer Tim F. Guinon received a call from dispatch to investigate the report. Officer Guinon did not immediately locate the van. And he received a subsequent dispatch, informing him that the vehicle had been seen leaving a liquor store. As Officer Guinon responded to the latter dispatch, he observed a grey Voyager van, which he believed to be Musselman's, driving south on Madison Avenue. Officer Guinon turned his cruiser around and followed Musselman but did not activate his emergency lights.

Musselman turned into an empty parking lot and parked the van. Officer Guinon followed and parked his cruiser behind Musselman's van, perpendicular to the van but leaving sufficient room for Musselman to back out. Officer Guinon exited his cruiser, but he did not approach Musselman or request Musselman to exit her van. Musselman

then exited her van. Officer Guinon noticed that Musselman staggered as she walked, and he smelled alcohol about her. He then administered three field sobriety tests, which Musselman failed. Musselman agreed to submit to a blood alcohol test at the Greenwood Police Department, which revealed a BAC of .154.

The State charged Musselman with operating a vehicle while intoxicated, as a Class D felony; Operating a Vehicle While Intoxicated Endangering, as a Class A misdemeanor; Operating a Vehicle with a BAC of .15 or more, as a Class A misdemeanor; Operating a Vehicle While Intoxicated, as a Class C misdemeanor; and Operating a Vehicle with a BAC of .08 or more, as a Class C misdemeanor. The State also filed an information alleging that Musselman was an habitual offender.

Musselman filed a motion to suppress all evidence found by the law enforcement officers, alleging unlawful search and seizure. After a hearing, the trial court denied the motion. Musselman then filed a motion for reconsideration or, in the alternative, to certify the issue for interlocutory appeal. The trial court also denied that motion. This court then denied Musselman's subsequent request that we accept jurisdiction over an interlocutory appeal.

Before trial, the parties stipulated in writing ("Stipulation") to the following facts:

> 1. On or about December 31, 2004, [Musselman] agreed to submit to a blood alcohol test.
>
> 2. On or about December 31, 2004, medical personnel drew [Musselman's] blood in a manner acceptable under established medical and investigatory requirements.
>
> 3. The Indiana Department of Toxicology performed tests on the blood samples drawn from [Musselman] in a manner acceptable under established medical and investigatory requirements.

> 4. The tests performed by the Indiana Department of Toxicology revealed the Blood Alcohol Content of the samples drawn from [Musselman] to be .154%.

Appellant's App. at 58.

The court held a bench trial on September 12, 2006. The Stipulation was admitted at trial subject to the continuing defense objection that Officer Guinon's stop and questioning of Musselman violated her Fourth Amendment right to be free from unreasonable search and seizure and her argument that the evidence obtained as a result of the stop and seizure be excluded. At the conclusion of the trial, the court convicted Musselman of operating a vehicle while intoxicated, as a Class D felony, and adjudicated her to be an habitual offender. The court sentenced Musselman to three years for the offense, enhanced by five years for the habitual offender status. The court suspended 1645 days of the enhancement, leaving 180 days of the enhancement to be executed. Musselman now appeals her conviction and her habitual offender adjudication.

**DISCUSSION AND DECISION**

**Issue One: Admission of Evidence**

Musselman contends that the trial court abused its discretion when it denied her motion to suppress evidence obtained by Officer Guinon. But Musselman is challenging the admission of evidence following her conviction. Thus, the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), trans. denied. A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only upon a showing of an abuse of

discretion. Id. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id.

Musselman maintains that the admission of evidence obtained by Officer Guinon resulted from an unlawful stop. Specifically, she argues that Officer Guinon seized her when he pulled into the parking lot after her and parked behind her "in such a way so as to trap her in the parking spot." Appellant's Brief at 10. We cannot agree.

The Fourth Amendment to the United States Constitution provides in pertinent part that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The Fourth Amendment's protection against unreasonable searches and seizures has been extended to the States through the Fourteenth Amendment. See Berry v. State, 704 N.E.2d 462, 464-65 (Ind. 1998). The Fourth Amendment prohibits unreasonable searches and seizures by the government, and its safeguards extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. Moultry v. State, 808 N.E.2d 168, 170 (Ind. Ct. App. 2004).

However, not all police-citizen encounters implicate the Fourth Amendment. Bentley, 835 N.E.2d at 305 (citing, e.g., Terry v. Ohio, 392 U.S. 1, 19 n.16 ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude a 'seizure' has occurred."); Molino v. State, 546 N.E.2d 1216, 1218 (Ind. 1989)). "A person is seized for Fourth Amendment purposes when, considering all the surrounding circumstances, the police conduct 'would have communicated to a reasonable person that the person was not free to decline the officers'

requests or otherwise terminate the encounter.'" Bentley, 846 N.E.2d at 305. This court has determined that not "'every street encounter between a citizen and the police'" is a seizure. Id. (quoting Overstreet v. State, 724 N.E.2d 661, 664 (Ind. Ct. App. 2000), trans. denied.).

In Bentley, an individual at a tobacco store reported to law enforcement that four suspicious individuals were sitting in a retail parking lot in the late afternoon in a large, four-door dark car believed to be a Crown Victoria or an Oldsmobile. Stores in the area had been robbed several times, and Officer Clupper had personally taken three of six robbery reports for one of the nearby stores. When Officer Clupper and Officer Peirce arrived at the lot, Officer Peirce spoke to the caller in the tobacco store while Officer Clupper spoke with the individuals in the parked car. Officer Clupper asked the occupants of the car their reason for remaining in the parking lot, and one passenger turned and looked at Officer Peirce. The driver eventually gave a reason that had nothing to do with the area businesses, which made Officer Clupper suspicious.

Officer Clupper asked the four individuals for identification, but the right rear passenger ignored him. Officer Clupper then asked all four to keep their hands visible, but the right rear passenger kept placing his hands down next to his legs and stuffed something in the seat. For safety purposes, the officers ordered everyone out of the car, at which point they saw Bentley try to stuff a crack pipe between the seats. They arrested all of the occupants of the car, including Bentley. In searching Bentley, the officers found another crack pipe. Bentley was subsequently convicted of possession of cocaine, as a Class D felony, and possession of paraphernalia, as a Class D felony.

Bentley appealed, arguing that all evidence seized during the encounter was inadmissible because there was no reasonable and articulable suspicion for his detention by Officer Clupper. But this court affirmed his convictions, holding that the encounter began as consensual. The court reasoned:

> The record does not indicate, for instance, that the officers drew their weapons, spoke in an intimidating fashion, or otherwise restricted Bentley and the other individuals from leaving the area. . . . [T]he consensual encounter escalated into a seizure for purposes of the Fourth Amendment when the passenger placed his hands near his legs and the officers ordered all occupants out of the vehicle.

Id. at 307 (emphasis in original).

Our opinion in Overstreet also involved a consensual encounter that escalated into a seizure. There, an officer observed Overstreet look into a mailbox, close the mailbox, then hurriedly walk to a parked car and drive away. Overstreet then drove to a gas station, stopped his vehicle, and exited the vehicle to pump air into one of its tires. The officer pulled his car in behind Overstreet's car at the gas station and, without activating his flashing lights, exited his car and walked up to Overstreet. The officer asked Overstreet what he had been doing at the mailbox and for his identification. Overstreet volunteered that his license was suspended. The court reasoned that the initial encounter did not implicate the Fourth Amendment. Overstreet, 724 N.E.2d at 663. Overstreet had already stopped his vehicle, and, when the officer approached him, Overstreet was using an air hose to fill a tire. Id. Overstreet was not detained, nor was his movement restricted in any way. Id.

Like the encounters in Bentley and Overstreet, Officer Guinon's encounter with Musselman began as consensual. Officer Guinon did not activate his lights or siren, and

he did not coerce Musselman's stop in the parking lot. Musselman parked, and Officer Guinon merely pulled in after her and parked behind her van, leaving enough space for her to back out and drive away if she wished. Musselman exited her vehicle after Officer Guinon exited his cruiser but not in response to any request or order. Officer Guinon did not draw his weapon, speak in an intimidating fashion, or otherwise restrict Guinon from leaving the area. Thus, we conclude that Officer Guinon's conduct in parking behind Musselman's van and engaging her in conversation was not a stop that implicated Fourth Amendment protections.[1]

**Issue Two: Habitual Offender Enhancement**

Musselman contends that her adjudication as an habitual offender was not supported by sufficient evidence. Specifically, she maintains that the State's evidence was insufficient to show that she had been convicted of two prior felonies. We cannot agree.

Indiana Code Section 35-50-2-8 provides that a person is an habitual offender if that person "has accumulated two (2) prior unrelated felony convictions." A felony conviction is "a conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year." Ind. Code § 35-50-2-1(b). Because this case presents a sufficiency question, we do not reweigh the

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[1] Because we conclude that Officer Guinon's encounter with Musselman began as consensual and only implicated Fourth Amendment protections after he independently observed her condition, we need not address Musselman's argument that Officer Guinon's detention of Musselman was not supported by a reasonable suspicion that criminal activity was afoot. See Overstreet, 724 N.E.2d at 663. Moreover, when Officer Guinon observed her gait and smelled alcohol about her, he had a reasonable suspicion to investigate further. See Bentley, 846 N.E.2d at 307 (holding that a consensual search escalated to a seizure when officers ordered occupants from a car based on furtive behavior by one occupant).

evidence but instead look at the evidence in the light most favorable to the verdict. See Brown v. State, 859 N.E.2d 1269, 1270 (Ind. Ct. App. 2007), trans. denied. An habitual offender determination must be vacated, however, if the appellate court deems the evidence insufficient to support the finding. Toney v. State, 715 N.E.2d 367, 369 (Ind. 1999).

Certified copies of judgments or commitments containing a defendant's name or a similar name may be introduced to prove the commission of prior felonies. Tyson v. State, 766 N.E.2d 715, 718 (Ind. 2002). While there must be supporting evidence to identify the defendant as the person named in the documents, the evidence may be circumstantial. Id.; See also Coker v. State, 455 N.E.2d 319, 322 (Ind. 1983). If the evidence yields logical and reasonable inferences from which the finder of fact may determine beyond a reasonable doubt that it was the defendant who was convicted of the prior felony, then a sufficient connection has been shown. Tyson, 766 N.E.2d at 718.

Here, the State offered into evidence the following documents:

(1) Cause Number 41H02-0109-CM-700 ("CM-700"): a 2001 probable cause affidavit; an accompanying information charging "Terri L Musselman" with two counts of operating a vehicle while intoxicated, as Class A misdemeanors; a corresponding 2002 plea agreement, in which Terri L. Musselman pleaded guilty to one count of operating while intoxicated, as a Class A misdemeanor; and a cover letter to the Johnson County Prosecutor's Officer, transmitting those documents and listing the defendant as "Terri L. Musselman[,]" with a birthdate of January 6, 1957, and her Social Security Number (collectively "Exhibit 1").

(2) Cause Number SCR2-86-909 ("909"): probable cause affidavits and a 1986 information charging Terri L. Musselman with operating a vehicle while intoxicated with a prior conviction, as a Class D felony, and operating a vehicle with .10 percent or more blood alcohol content with a prior conviction, as a Class D felony; a

complaint and summons for DWI issued to "Terri L Musselman" that was marked to indicate an admission of guilt; and a typed docket entry showing that Terry L. Musselman pleaded guilty in Cause Number 909 (collectively "Exhibit 2").

(3) Cause Number 49F04-9208-CF-101518: a 1992 information charging Terri L. Musselman with two counts of operating a vehicle while intoxicated, as Class A and Class C misdemeanors; a separate 1992 information charging "Terri L Musselman" with public intoxication, as a Class B misdemeanor; probable cause affidavits; and an order of judgment of conviction for one count of operating a vehicle while intoxicated, as a Class A misdemeanor (collectively "Exhibit 3").

The State also offered into evidence the remand slip prepared by Officer Guinon incident to Musselman's arrest in the instant case. The social security number and birthdate on the remand slip and on Exhibits 1, 2, and 3 are identical.

Musselman contends that the State did not prove that she is the same Terri L. Musselman who was convicted of operating a vehicle while intoxicated as shown in Exhibits 1, 2, and 3. In support, she argues that Officer Guinon, who prepared the remand slip, testified that he does not remember where he got the birthdate and social security number listed on the remand slip. If he obtained that information from the Bureau of Motor Vehicles, Musselman argues that such information is insufficient to prove that she is the same Musselman whose convictions are represented in Exhibits 1, 2, and 3. But Musselman does not cite to any authority in support of her argument. As such, the argument is waived. See Ind. Appellate Rule 46(A)(8)(a).

Waiver notwithstanding, Musselman's argument is without merit. As noted above, the remand slip listed a birthdate and social security number for Musselman. The presentence investigation report ("PSI") lists the identical birthdate and social security

number for Musselman. When asked about corrections or objections to the PSI, Musselman did not dispute the birthdate or social security number.[2] Thus, Musselman has, in effect, conceded the accuracy of the birthdate and social security number listed on the PSI. Because that data matches the birthdate and social security number on the remand report, Musselman is estopped to argue that the court could not have reasonably inferred that Exhibits 1, 2, and 3 prove that Musselman had prior convictions for operating a vehicle while intoxicated.

Affirmed.

BAILEY, J., and CRONE, J., concur.

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[2] When the court asked Musselman at the sentencing hearing about any corrections to the PSI, Musselman declined to discuss the accuracy or inaccuracy of the criminal history on the PSI because she intended to appeal issues related to her criminal history.