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IN THE COURT OF APPEALS OF INDIANA

THOMAS GREEN, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0705-CR-400
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Michael Morrissey, Judge
Cause No. 79D06-0509-FD-265

December 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Thomas Green, Jr. appeals his conviction for operating a vehicle while intoxicated while having a prior conviction for operating a vehicle while intoxicated[1] as a Class D felony. He raises two issues, which we restate as:

I. Whether the trial court abused its discretion when it allowed evidence of Green's intoxication to be admitted; and

II. Whether sufficient evidence was presented to support his conviction for operating a vehicle while intoxicated.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 27, 2005, at approximately 11:40 p.m., Jacob Smith, the manager of an Arby's restaurant in Lafayette, Indiana, called 911 to report a possible drunk driver in the drive-thru lane of the restaurant. Smith told the dispatcher that he smelled alcohol coming from the driver, who was later identified as Green. Smith gave the dispatcher the location of the restaurant, described the vehicle Green was driving as a blue, Dodge Dakota truck, and gave the license plate number. Smith also told the dispatcher that he was intentionally delaying Green's food to give the police time to get there.

At approximately 11:45 p.m., Officer Lonnie Wilson of the Lafayette Police Department received the dispatch regarding a possible intoxicated driver driving a blue, Dodge Dakota truck in the drive-thru lane of the Arby's. Officer Wilson arrived at the restaurant and saw the truck in the drive-thru lane. He parked his patrol car and approached the passenger side of the truck on foot. He motioned to Green and shined his flashlight to get Green's attention. Officer Wilson told Green to pull into a parking spot. After Green

[1] *See* IC 9-30-5-3.

parked, Officer Wilson asked him to step out of the vehicle. Officer Wilson smelled a strong odor of alcohol on Green's breath and noticed that his eyes were bloodshot and watery. Green's balance was unsteady, and he leaned against the truck to maintain his balance. Green told the officer that he had been at a friend's house and was headed home. Officer Wilson asked Green if he had anything to drink, and Green stated that he had one beer. Officer Wilson then conducted a horizontal gaze nystagmus test, which Green failed. Officer Andrew McCormick arrived at the scene and interviewed the two women who were passengers in the truck. Green consented to a search of the truck, and the officers found a duffle bag that contained three bottles of alcohol inside, one of which was open.

Green was transported to the Lafayette Police Department. Once there, he agreed to take additional sobriety tests. He failed the one-leg stand and the walk-and-turn tests. At approximately 1:21 a.m., Green consented to a chemical breath test, which showed that his blood alcohol content ("BAC") was .10. He was then arrested.

The State charged Green with Count I operating while intoxicated as a Class A misdemeanor, Count II operating a vehicle with at least .08 BAC but less than .15 BAC as a Class C misdemeanor, Count III operating a vehicle while intoxicated while having a prior conviction for operating while intoxicated as a Class D felony, and Count IV an open container violation as a Class C infraction. Green filed a motion to suppress, which was denied by the trial court. A jury trial was held on April 24, 2006, and the jury found Green guilty of Counts I, II, and IV. Green waived a jury for phase two, operating a vehicle while intoxicated as a Class D felony. The trial court heard evidence and entered judgment on Count III, operating a vehicle while intoxicated while having a previous conviction as a Class

D felony, and Count IV, the open container violation, a Class C infraction. Green was sentenced to three years with six months executed, one and a half years on house arrest, and one year on supervised probation. He now appeals.

DISCUSSION AND DECISION

I. Admission of Evidence

The admission or exclusion of evidence is a determination entrusted to the discretion of the trial court.[2] *Farris v. State*, 818 N.E.2d 63, 67 (Ind. Ct. App. 2004), *trans. denied*. We will reverse a trial court's decision only for an abuse of discretion. *Id*. A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before it. *Id*.

Green argues that the trial court abused its discretion when it allowed evidence of his intoxication obtained after he was stopped by the police to be admitted at his trial. He contends that his rights under the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution were violated when Officer Wilson conducted an investigatory stop of his vehicle because Officer Wilson did not have reasonable suspicion that Green had committed a crime when the stop occurred.[3]

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[2] We note that Green frames this issue as whether the trial court abused its discretion in denying his motion to suppress. However, Green did not seek an interlocutory appeal after the denial of his motion to suppress. Rather, he proceeded with his trial and objected to the admission of the evidence at trial. Therefore, the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. *See Packer v. State*, 800 N.E.2d 574, 578 (Ind. Ct. App. 2003), *trans. denied*.

[3] Although Green argues that his rights under Article 1, Section 11 of the Indiana Constitution were violated by the investigatory stop, he does not perform a separate analysis of the circumstances under the Indiana Constitution. "A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record." *Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005), *trans. denied* (2006); *see also* Ind. Appellate Rule 46(A)(8). He has therefore waived this argument.

The Fourth Amendment protects persons from unreasonable search and seizure, and this protection has been extended to the states through the Fourteenth Amendment. U.S. Const. amend. IV; *Krise v. State*, 746 N.E.2d 957, 961 (Ind. 2001). "The police may stop an individual for investigatory purposes if, based on specific, articulable facts, the officer has a reasonable suspicion that criminal activity is afoot." *State v. Murray*, 837 N.E.2d 223, 225 (Ind. Ct. App. 2005). Such reasonable suspicion must be comprised on more than hunches or unparticularized suspicions. *Id*. at 225-26. A police officer must be able to point to specific facts giving rise to a reasonable suspicion of criminal activity. *Id*. at 226. On review, we consider whether "the facts known by the police at the time of the stop were sufficient for a man of reasonable caution to believe that an investigation is appropriate." *Id*.

An anonymous tip is not enough to support the reasonable suspicion necessary for a "Terry stop."[4] *Washburn v. State*, 868 N.E.2d 594, 599 (Ind. Ct. App. 2007). However, a tip from an identified or known informant can provide the basis for an investigatory stop if it contains sufficient indicia of reliability. *Id*. The Supreme Court has concluded that this is because "a known or identified informant's 'reputation can be assessed and . . . [they may] be held responsible if [their] allegations turn out to be fabricated . . . .'" *Kellems v. State*, 842 N.E.2d 352, 355 (Ind. 2006) (quoting *Florida v. J.L.*, 529 U.S. 266, 270, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000)). Whether a tip has sufficient indicia of reliability to establish reasonable suspicion is determined by looking at the totality of the circumstances. *Washburn*, 868 N.E.2d at 599.

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[4] *Terry v. Ohio*, 392 U.S. 1 (1968).

In *Kellems v. State*, a woman called to report a possibly intoxicated driver and provided the name of the driver, a description of the truck he was driving, the license plate number, where he was driving, and with whom he was driving. 842 N.E.2d at 353. The woman identified herself to the dispatcher by name and date of birth. *Id*. at 356. Our Supreme Court concluded that, under the totality of the circumstances, the information was sufficient to provide reasonable suspicion to conduct an investigatory stop of the vehicle. *Id*. at 356-57.

Here, Smith called 911 to report a possibly intoxicated driver in the drive-thru lane at the Arby's where he worked. He gave the dispatcher information regarding the location of and the color, make, model, and license plate number of the vehicle. He also gave the dispatcher his name, job title, and location of the restaurant where he was employed. Further, Smith stayed on the phone with the dispatcher until the officers arrived to conduct their investigation. He supplied sufficient identification information to be held criminally responsible for false reporting. *See id*. at 356. We therefore conclude that the information provided by Smith was sufficient to provide the police with reasonable suspicion to conduct an investigatory stop under the Fourth Amendment.

II. Sufficient Evidence

Green argues that insufficient evidence was presented to support his conviction for operating a vehicle while intoxicated as a Class D felony because there was not sufficient evidence to support underlying convictions for operating a vehicle while intoxicated as a Class A misdemeanor and operating a vehicle with at least a .08 BAC but less than a .15

BAC. Our standard of review for sufficiency claims is well settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Dickenson v. State*, 835 N.E.2d 542, 551 (Ind. Ct. App. 2005), *trans. denied*. We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. *Id*.; *Robinson v. State*, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). We will affirm the conviction if there is sufficient probative evidence to support the judgment of the trier of fact. *Dickenson*, 835 N.E.2d at 552; *Robinson*, 835 N.E.2d at 523.

Green first contends that insufficient evidence was presented to support a conviction for operating a vehicle while intoxicated as a Class A misdemeanor. To convict Green of this offense, the State was required to prove that he operated a vehicle while intoxicated in a manner that endangers a person. IC 9-30-5-2. He specifically claims that the State did not prove that he operated a vehicle in a manner that endangered a person. "'The element of endangerment is proved by evidence that the defendant's condition or manner of operating the vehicle could have endangered any person, including the public, the police, or the defendant.'" *Ashba v. State*, 816 N.E.2d 862, 867 (Ind. Ct. App. 2004) (quoting *Weaver v. State*, 702 N.E.2d 750, 753 (Ind. Ct. App. 1998)).

Here, the evidence showed that Green was driving a truck in the drive-thru lane of the Arby's, which contained two passengers. He smelled of alcohol, his eyes were watery and bloodshot, he was swaying, his speech was slurred, and he had to lean against the truck to maintain his balance. Green failed three field sobriety tests and registered a .10 BAC. This evidence permitted a reasonable inference that Green's condition could have endangered the

public, his passengers, the police, or Green himself. The evidence presented was sufficient to sustain a conviction for operating while intoxicated.

Green also contends that insufficient evidence was presented to support a conviction for operating a vehicle while intoxicated with at least a .08 BAC but less than a .15 BAC. He specifically argues that this is because he only had three drinks that night and because his expert witness testified that his BAC could have been below .10 at the time he was driving.

To convict Green of this offense, the State was required to prove that Green operated a vehicle with a BAC level of at least .08 but less than .15. IC 9-30-5-1(a). If the evidence establishes that a chemical test was performed within three hours after the officer obtained probable cause to believe that an offense had occurred and the defendant had a BAC of at least .08, the trier of fact shall presume that the defendant had a BAC of at least .08 at the time he operated the vehicle. IC 9-30-6-2(c); IC 9-30-6-15(b). This presumption may be rebutted. IC 9-30-6-15(b).

In the present case, the evidence demonstrated that Officer Wilson responded to the dispatch at approximately 11:49 p.m., and administered the chemical test at 1:21 a.m., which showed Green's BAC level to be .10. This test was administered well within three hours after Officer Wilson obtained probable cause that Green had committed the offense and permitted the reasonable inference that Green operated a vehicle with at least a .08 BAC. At trial, in an attempt to rebut the presumption, Green presented evidence that he only had three alcoholic beverages that night and expert testimony that concluded that Green's BAC could have been below .10 when he was driving. Despite this, the jury still found him guilty. His arguments on appeal are merely a request to reweigh the evidence, which we cannot do.

Dickenson, 835 N.E.2d at 551. Sufficient evidence existed to support a conviction for operating a vehicle with a BAC level of at least .08 but less than .15 thereby supporting his conviction for operating while intoxicated as a Class D felony.

Affirmed.

ROBB, J., and BARNES, J., concur.