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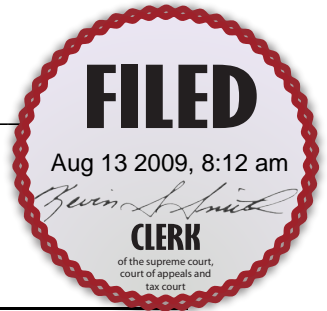
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**IN THE
COURT OF APPEALS OF INDIANA**



MYRON TOOLS,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0901-CR-86
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Jeff Mendes, Judge
Cause No. 49F07-0812-CM-275432

August 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Myron Tools appeals his conviction for public intoxication as a class B misdemeanor.¹ Tools raises two issues, which we revise and restate as follows:

- I. Whether the trial court violated Tools's due process right to a fair trial when it sought additional evidence from the State after both parties had rested; and
- II. Whether the evidence was sufficient to support Tools's conviction.

We reverse.

The relevant facts follow. On December 3, 2008, around 2:30 a.m., Indianapolis Metropolitan Police Department Officer William Engelmann came across Myron Tools, who was not wearing a coat despite the temperature being around twenty degrees. Officer Engelmann noticed a strong odor of alcohol on Tools's breath, that Tools was staggering, that Tools's speech was slurred, and that Tools's eyes were glassy. When Officer Engelmann asked Tools for his identification, Tools initially indicated his name was Jason Tools. Tools later admitted that "his name was Myron Tools and that he had a warrant." Transcript at 13. Officer Engelmann was of the opinion that Tools was intoxicated.

On December 3, 2008, the State charged Tools with public intoxication as a class B misdemeanor. A bench trial was held on December 29, 2008. The State presented evidence, through the testimony of Officer Engelmann, that Tools was walking on the street at 2:30 a.m. in the morning with temperatures in the mid-twenties wearing no coat. The State also presented evidence, through Officer Engelmann's testimony, that Tools

¹Ind. Code § 7.1-5-1-3 (2004).

lied about his name, was staggering, had slurred speech, smelled of alcohol, and had glassy red eyes. At trial, Tools claimed that he was an asthmatic and that he used an inhaler, which contains alcohol, as medication for his condition. After both parties presented evidence and rested, but while Officer Engelmann was still on the witness stand, the following exchanges occurred:

[The Court]: Now Officer when you arrested him did he have his inhaler on him?

[Officer Engelmann]: Sir, I don't recall. I do not recall, but it's possible.

[The Court]: He had car keys in his left pocket which were taken when you apprehended him. Do you have an inventory list? I think you guys inventory anything that you take off a person.

[Officer Engelmann]: It should have went with him to the A.P.C.

[Prosecutor]: It is listed in the probable cause. It says that keys were found in his pocket.

[The Court]: Keys only.

[Officer Engelmann]: I don't remember sir if there was an inhaler.

[Defense Counsel]: If you would like me to ask the witness under oath I can do so?

[The Court]: Well, he doesn't remember finding it. Did you have it on you?

[Defendant]: It's still right here in my pocket.

[The Court]: No, when you got arrested?

[Defendant]: Yes, sir.

[Defense Counsel]: Where was it located?

[Defendant]: In my hand.

[The Court]: Can you get me a copy of that property list?

[Officer Engelmann]: I actually don't have a copy of it. It was sent with him to A.P.C.

[Prosecutor]: Do you remember anything in his hands?

[Officer Engelmann]: I don't remember. I do know that he was breathing heavy so maybe it was asthma but honestly I don't remember.

[The Court]: Is there a way to find out if he had the asthma inhaler?

[Officer Engelmann]: It would have been on the property slip but I don't have a copy of that.

* * * * *

[The Court]: I would like to see that list because that is going to make my decision in this case.

* * * * *

[The Court]: Are you still the arresting officer on this case?

[Officer Engelmann]: Yes, sir.

[The Court]: Did you submit the property, the keys?

[Officer Engelmann]: It wasn't to the property room. It was actually to the A.P.C. with him as his personal property. So it's not in as evidence or anything like that.

[The Court]: Do you have it?

[Officer (Unknown)]: Your Honor, I am his F.T.O., his field training officer. When he was arrested all of his property went into a bag and it was going to be in his personal possession and it went with him to A.P.C. At that point we are out of the loop. That property stays connected with him through the jail system. So to be honest I don't know that he would even have a way of accessing that information. That would be something

through the jail system because they would have his property prior to his release.

[Officer Kevin Vice]: It should be downstairs.

[The Court]: All right, here is what I am going to do: I am going to take this under advisement. I want to see if there is a property list and I want to see if he had the inhaler on him

* * * * *

[The Court]: This is the actual inhaler that you had with you [at the arrest]?

[Defendant]: Yes, it is.

[Defense Counsel]: I don't know how that's going to go.

[The Court]: They would never let him keep that? He says that that is the one that he had on him when he was arrested.

[Officer Kevin Vice]: I don't believe so sir. It goes into their personal property. He has to fill out a request. He has to give that request to the C.O. and the C.O. will give it to whomever he is requesting such as a mother, a father, a sister or whatever and then that person has to go to the jail and get the property in order for it to get released to them so I don't believe so.

[The Court]: I know stranger things have happened but the key is no matter what that would have been identified on the property list when he got arrested?

[Officer Kevin Vice]: Yes, sir it should have been.

[The Court]: That's what I want to see. . . .

Transcript at 20-24.

The trial court then called a brief recess and sent Officer Engelmann downstairs in the courthouse to find a copy of the property list. When Officer Engelmann reported that he could not find the property list downstairs, the trial court then stated:

Well, let's do it this way. . . . [I]n balancing both the defense and State's evidence in the case the Court believes that the State has proven this case just a little more beyond a reasonable doubt in that the individual was indeed guilty of the public intoxication charge and those factors being that normally an individual to be on an inhalant would not be staggering and would not have red and bloodshot eyes. As forth [sic] the ruling is guilty as to Count One (1) public intoxication.

Id. at 27. The trial court then sentenced Tools to time served (twenty-seven days) with no probation.

I.

The first issue is whether the trial court violated Tools's due process right to a fair trial by seeking additional evidence from the State after both parties had rested. Tools's counsel did not object to the trial court's actions at trial. Generally, a specific objection is required to preserve an issue for appeal, but because "a fair trial by an impartial judge [] is an essential element in due process," the Indiana Supreme Court "refused to apply the waiver doctrine to unobjected incidents of improper judicial intervention." Decker v. State, 515 N.E.2d 1129, 1131 (Ind. Ct. App. 1987) (quoting Kennedy v. State, 258 Ind. 211, 218, 280 N.E.2d 611, 615 (1972)). Thus, the fundamental error doctrine applies to claims of improper judicial intervention at a criminal trial. Id. "[Fundamental error] is error that makes 'a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process . . . presenting an undeniable and substantial potential for harm.'" Sobolewski v. State, 889 N.E.2d 849, 856 (Ind. Ct. App. 2008) (quoting Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006)) (alteration in original).

In determining whether a claimed error denies the defendant a fair trial, we consider whether the resulting harm or potential for harm is substantial.

The element of harm is not shown by the fact that a defendant was ultimately convicted. Rather, it depends upon whether the defendant's right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he would have been entitled.

Ritchie v. State, 809 N.E.2d 258, 273-274 (Ind. 2004) (Rucker, J., concurring in part and dissenting in part) (citing Townsend v. State, 632 N.E.2d 727, 730 (Ind.1994)), reh'g denied, cert. denied, 546 U.S. 828, 126 S. Ct. 42 (2005).

Generally, "A trial judge must maintain an impartial manner and refrain from acting as an advocate for either party." Beatty v. State, 567 N.E.2d 1134, 1136 (Ind. 1991) (citing Peek v. State, 454 N.E.2d 450, 456 (Ind. Ct. App. 1983)).

[W]hile a trial judge may not assume an adversarial role in any proceeding, we have held that the judge may intervene in the fact-finding process and question witnesses in order to promote clarity or dispel obscurity. The purpose of allowing the judge to question witnesses is to permit the court to develop the truth or present facts which may have been overlooked by the parties. As long as the questioning is conducted in an impartial manner and the defendant is not prejudiced, such questioning is within the discretion of the court.

Isaac v. State, 605 N.E.2d 144, 148 (Ind. 1992) (citing Fox v. State, 497 N.E.2d 221, 227 (Ind. 1986)), cert. denied, 508 U.S. 922, 113 S. Ct. 2373 (1993). The judge has greater discretion to question a witness in a bench trial versus a trial before a jury. Ware v. State, 560 N.E.2d 536, 539 (Ind. Ct. App. 1990), trans. denied; see also Kennedy v. State, 258 Ind. 211, 226, 280 N.E.2d 611, 620-621 (1972) (noting that a jury has "an awesome respect" for a trial judge and "this can lead them to accord great and perhaps decisive significance to the judge's every word and intimation").

To support his claim of fundamental error, Tools points to Owens v. State, 750 N.E.2d 403 (Ind. Ct. App. 2001). In that case, after both parties had rested, the trial court called the investigating officer back to the stand and questioned him. 750 N.E.2d at 406. After questioning the officer, the trial court stated “I feel that the evidence is incomplete at this particular point,” and requested additional evidence from the defense and the State. Id. Two weeks later, the parties returned to court and presented additional evidence requested by the trial court, and upon hearing the additional evidence, the trial court found the defendant guilty of burglary, two counts of robbery, and two counts of criminal confinement. Id. at 407. The defendant in that case brought an ineffective assistance of counsel claim because his trial counsel failed to object to this improper judicial intervention by the trial court. Id. at 405. On appeal, the court found that the trial counsel’s failure to object to the improper judicial intervention at trial, and the appellate counsel’s failure to raise the ineffective assistance of counsel issue on appeal, fell below the reasonable standard for counsel and that these errors prejudiced the defendant. Id. at 409-410.

However, Owens is distinguishable from the instant case. Initially we note that Owens involved a claim of ineffective assistance of counsel case while this case is a question of whether the trial court made a fundamental error. More importantly, the court in Owens found that “[a]t the time the parties rested, the trial judge was still not convinced beyond a reasonable doubt that [the defendant] had committed the crimes.” Id. at 410. For this reason, the trial court ordered both parties to engage in additional

discovery and present additional evidence that hurt the defendant's credibility. Id. at 409. Two weeks later, after obtaining additional evidence and testimony from both parties, the trial court found defendant guilty. Id. at 407. The court noted that the trial court's actions prejudiced the defendant and that the results of the trial would have been different if the trial court had not acted improperly, and that this denied the defendant his right to a fair trial. See id.

Here, like in Owens, the trial court asked additional questions after the parties had rested. The trial court also ordered additional investigation like the trial court in Owens. However, we cannot say that the trial court's actions prejudiced the defendant. First, the trial court in Owens gave the parties two weeks to gather evidence and then heard the new evidence before making its decision. Owens, 750 N.E.2d at 407. In this case, the trial court merely asked some questions about the inventory list to try to clear up whether Tools had an inhaler on him when he was arrested. Also, the trial court never actually obtained any further evidence after the parties rested. After the trial court was told that the inventory list could not be found, it found Tools guilty based on the evidence the State did present at trial. Specifically, the trial court noted that when Officer Engelmann discovered Tools, he was only wearing "a thin black sweater," that Officer Engelmann noticed Tools had "bloodshot eyes" and was "staggering," and that Officer Engelmann "smell[ed] what he believe[d] to be alcohol, coming from Mr. Tools' breath." Transcript at 27. The trial court also stated that even if Tools's contention that his inhaler contained alcohol was true, a person "would not be staggering and would not have red and

bloodshot eyes” from an inhaler, and found that the State had proved its case beyond a reasonable doubt. Id. Because the trial court relied only on the evidence the State presented at trial, the trial court’s improper post-trial investigation did not prejudice Tools and does not constitute fundamental error. See, e.g., Ford v. State, 704 N.E.2d 457, 461 (Ind. 1998) (holding that the “error in question cannot be said to so prejudice [the defendant’s] rights as to make a fair trial impossible”), reh’g denied.

II.

The next issue is whether the evidence was sufficient to sustain Tools’s conviction for public intoxication as a class B misdemeanor. When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh evidence. Id. We affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)).

The offense of public intoxication is governed by Ind. Code § 7.1-5-1-3 which provides that “[i]t is a Class B misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication caused by the person’s use of alcohol or a controlled substance.” Thus, to convict Tools, the State had to prove that Tools was in a public place or place of public resort in a state of intoxication caused by Tools’s use of alcohol or a controlled substance.

At trial, the State presented evidence that Tools was walking on a public sidewalk at 2:30 a.m., was not wearing a coat in twenty degree weather, lied about his name when asked for identification by Officer Engelmann, was stumbling, had red glassy eyes, had slurred speech, and smelled of alcohol. Based on our review of the record, we conclude that evidence of probative value exists from which the trial court could have found that Tools committed public intoxication as a class B misdemeanor. See, e.g., Fought v. State, 898 N.E.2d 447, 451 (Ind. Ct. App. 2008) (holding that the evidence presented by the State was sufficient to prove that defendant was intoxicated in a public place or place of public resort).

For the foregoing reasons, we affirm Tools's conviction for public intoxication as a class B misdemeanor.

Affirmed.

MAY, J., and CRONE, J., concur.