IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 25, 2023 Session

STATE OF TENNESSEE v. DAVID EUGENE DUNLAP, ALIAS

Appeal from the Criminal Court for Knox County
No. 116683 Steven W. Sword, Judge

No. E2022-00593-CCA-R3-CD

The defendant, David Eugene Dunlap, Alias, appeals his Knox County Criminal Court jury convictions of possession with intent to sell or deliver .5 grams or more of methamphetamine in a drug-free zone, possession of a firearm after having been convicted of a crime of violence, possession of a firearm with intent to go armed during the commission of a dangerous felony, simple possession of marijuana, and possession of drug paraphernalia, arguing that the trial court erred by denying his motion to suppress evidence, that the evidence was insufficient to support his conviction for possession with intent to sell or deliver, and that the trial court erred by declining to sentence him under the amended Drug-Free Zone statute. Discerning no error, we affirm.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER, and TOM GREENHOLTZ, JJ., joined.

Mike Whalen, Knoxville, Tennessee, for the appellant, David Eugene Dunlap, Alias.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Charme P. Allen, District Attorney General; and TaKisha Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Knox County Grand Jury charged the defendant with one count each of possession with intent to sell or deliver .5 grams or more of methamphetamine in a drug-free zone,[1] possession of a firearm after having been convicted of a crime of violence,

[1] Count 1 originally charged the defendant with possession of more than 300 grams of methampetamine with intent to sell or deliver in a drug-free zone. Prior to trial, the State amended the amount to .5 grams or more.

possession of a handgun after having been convicted of a felony, possession of a firearm with intent to go armed during the commission of a dangerous felony, simple possession of marijuana, and possession of drug paraphernalia for offenses occurring on December 26, 2018.

At the September 2021 trial, Knoxville Police Department ("KPD") officer Jordan Hardy testified that on December 26, 2018, he responded to a call of "two individuals passed out, possibly overdosed, in a vehicle parked at Big Oak [Apartment] complex." He located the vehicle and saw the defendant in the driver's seat of the vehicle, who "appeared to be passed out, possibly suffering from an overdose" and a female, later identified as Christina Richards, in the front passenger seat, "who appeared the same, passed out, possibly suffering from an overdose." He described the defendant as having "his eyes closed, kind of leaned back in this seat with his head up and his mouth open wide." Based on how the two occupants "were sitting in the car," he "believed that both parties were overdosing." KPD Officer Anthony Bradley knocked on the driver's window and began talking with the defendant, and Officer Hardy described the defendant's speech as "very slow, lethargic, slurred speech." When the defendant exited the vehicle, "he was also unsteady on his feet." Officer Hardy conducted a pat-down search of the defendant and found a "plastic baggie" with "a crystal, rocky-like substance, consistent with meth[amphetamine]" in the defendant's pocket. He said that the substance in the defendant's pocket "was over half a gram, which is quite a bit," noting that most methamphetamine users "don't carry . . . that amount" and that it was "a significant amount of meth[amphetamine] for a regular drug user." He also recovered "a glass pipe" from the defendant's pocket that "was immediately apparent as drug paraphernalia." Officer Hardy believed that the defendant "was possibly selling narcotics" and arrested the defendant. Upon a more thorough search of the defendant, he found "a bullet and a large amount of money," totaling $2,225. The officers then searched the defendant's vehicle and discovered a firearm and "a large black bag that contained a large amount of meth[amphetamine], some scales, baggies[,] and some other paraphernalia and some other narcotics." Officer Hardy said that the firearm was "in the driver's floorboard, not under the seat, but, . . . you could see it in plain view."

During cross-examination, Officer Hardy said that the defendant's speech sounded lethargic and not "country." Despite the defendant's ability to answer Officer Bradley's questions, Officer Hardy "believe[d] he was suffering from an overdose" because the area was "known for overdoses," the defendant's "appear[ing] to be passed out in the driver's seat," and the defendant's "talking slow and lethargic." Officer Hardy said that the defendant appeared to be passed out and not simply asleep.

Officer Bradley testified that he responded to Big Oak Apartments to a call of "two people being passed out in a vehicle in the parking lot." Upon arrival, he was

"being flagged down by some bystanders in regards to which vehicle it was," and when he saw the vehicle, he saw that both occupants had their "[h]ead[s] to the side, mouth[s] open," and he thought that "they were unconscious." He said that he had previously responded to other overdose calls, including some at the same apartment complex. He knocked on the driver's window, and the defendant "woke up," but Ms. Richards "still wasn't fully awake." He said that he "could see that they were lethargic . . . in talking to them, kind of slow to wake." Medical first responders arrived, and Officer Bradley asked the defendant to exit the vehicle, and Officer Hardy did a pat-down search of the defendant "and finds what he finds." When the defendant exited the vehicle, Officer Bradley "saw in the floorboard of the car a little baggie by . . . the pedals" and "a muzzle of a firearm at the driver's seat." Based on what he saw in the vehicle and what Officer Hardy found on the defendant, Officer Bradley determined "that we had more than just possible overdose, that we're heading in the direction of a drug investigation." The officers arrested the defendant and searched the vehicle, finding in the passenger side floorboard a black backpack "contain[ing] a gallon freezer bag about a quarter of the way full with a clear, crystal substance that we believed to be methamphetamine." They also found "a little container" with the same type of substance; "a small baggie with five white pills . . . that we identified as antibiotic"; "a small baggie with small, white rocks that we believed to be crack cocaine"; "a bag of a green, leafy substance that we believed to be marijuana"; a loaded nine-millimeter firearm; a scale with white residue; two cellular telephones; two computer tablets; an additional "glass methamphetamine pipe[]"; and other "baggies." Officer Bradley explained that scales are commonly "used to weigh out narcotics" and that baggies "are used to package narcotics." He said that the substance in the large gallon size bag weighed 170.4 grams and tested positive as methamphetamine. The leafy green substance weighed 7.8 grams, the two small bags containing what appeared to be methamphetamine weighed 3.8 and 3.4 grams respectively, and the small bag of what appeared to be cocaine base weighed one gram.

During cross-examination, Officer Bradley acknowledged that drug users also carry scales to weigh the product that they are purchasing. He also acknowledged that the officers did not photograph the evidence at the scene. He said that the methamphetamine found in the defendant's pocket appeared to be the same as what was found inside the backpack. He said that the cash in the defendant's pocket "[h]ad rubber bands around it," which he said was "a trait that people who are dealing drugs use to separate their money."

Sean Kitts, an employee of KGIS, "a mapping service," testified that the location where the defendant was arrested was within 1000 feet of Buck Tom Park. During cross-examination, he said that the KGIS maps are "accurate within one to three feet."

Nathan Nease, the athletic coordinator for the City of Knoxville Parks and

Recreation Department, testified that Buck Tom Park "is an open space" that the city "own[s] and operate[s]." He described it as "a passive recreation area" and acknowledged that it did not have a "playground, [or] anything like that." He said that it was a park on December 26, 2018.

Caroline Simpson, a special agent with the Tennessee Bureau of Investigation, testified as an expert in drug identification. She determined that the "crystalline substance that was in a large Ziploc" was methamphetamine, an "open cellophane wrapper" contained 3 grams of methamphetamine, the plastic container with a blue lid contained .1 grams of methamphetamine, and the "Ziploc that contained a white, rock-like substance" was .7 grams of cocaine base.

KPD Investigator Jacob Wilson testified as an expert in narcotics identification and investigation. He said that factors that indicate that a drug is for sale include a "larger quantity of a particular type of drug," "the way that the drug's packaged," "paraphernalia for distribution of drugs that coincides with the drugs," "digital scales that are used to weigh quantities of drugs," "baggies, [and] sandwich baggies," "possession of a firearm with . . . drugs," and "a large amount of money . . . with drugs." He said that a typical "user will use about .1 to .2 grams of methamphetamine at a time" but may use more throughout a day. He explained that methamphetamine "is a stimulant" that causes the user to feel "a sense of euphoria" and "strength," noting that the user will "oftentimes, become excited and stay awake for long periods of time." He said that in his experience, "I've seen that, oftentimes, with methamphetamine, in particular, . . . that users will sometimes sell the drug itself, as well, to obtain enough money to maintain their habit of that drug." He said that heroin is a depressant and that people high on heroin "will become drowsy to the point of sometimes falling asleep or losing consciousness."

Investigator Wilson interviewed the defendant after his arrest, and the interview was video recorded. During the interview, the defendant rested his head on the table but responded to the investigator's questions. The defendant said that he met Ms. Richards a few days prior through a mutual friend and that they had gone to the Big Oak Apartments to "drop a pack of cigarettes off" to someone and that he "fell asleep for a few minutes" while waiting for the person to arrive. He acknowledged using methamphetamine or "whatever it was that I bought" and said that he had smoked it prior to arriving at the Big Oak Apartments. He denied that he was delivering drugs. He also denied knowing that the large bag of methamphetamine was in the car and said that he had never seen it before. He said that prior to arriving at Big Oak Apartments, he had driven to the Hiawassee Square Apartments where Ms. Richards got out of the car, got into a white car, and returned to the defendant's car with shopping bags, a "pinkish colored bookbag," and a "black bag." He again denied selling methamphetamine or any other drug. He said that the "little bit of money" found on him was from his odd jobs doing handyman work and

from his family for Christmas. He said that "Miss Susie" from a church would refer him to people for odd jobs and that he recently tore down a garage for $450 cash. The defendant claimed ownership of the small bag of methamphetamine that was in his pocket, the marijuana, and the antibiotic pills. He acknowledged that his fingerprints could be found on the large bag of methamphetamine because he had "handled everything" in the car, explaining that when Ms. Richards returned to the car at the Hiawassee Square Apartments, she handed him a heavy Ziploc bag but that he did not know what was in it. The defendant said that his cellphone had recently been stolen. He also said that someone had given him the firearm "weeks ago" but said that he didn't carry it for protection, rather he kept it so that it would not fall into the wrong hands. He reiterated that he was a drug user and not a dealer. Investigator Wilson said that that the defendant also told him that he would meet "Glove" at the Hiawassee Square Apartments and that he understood "Glove to be a methamphetamine trafficker."

During cross-examination, Investigator Wilson acknowledged that drug users "sometimes . . . carry scales" to "verify the weight that they're trying to purchase." He also acknowledged that some individuals would "sell drugs to support their own habits." He said that the "unique thing about methamphetamine . . . especially at a time this offense occurred, . . . is that [it] was so abundant and so cheap that it wasn't uncommon at all to find users with larger amounts of drugs." He acknowledged that some "methamphetamine users do sometimes experience what's coined as a crash" after prolonged use and will become "lethargic or sleepy." He said that he "believe[d] that [the defendant] was untruthful" when the defendant said that the cash found on him came from working odd jobs. The investigator acknowledged, however, that he did not follow up with anyone for whom the defendant said that he had worked.

During redirect examination, Investigator Wilson said that he was able to extract the data from one of the cellular telephones found in the defendant's vehicle and that he believed the telephone belonged to the defendant based on its contents. He said that a person identified in the telephone as "Suzie" texted the defendant on December 15, 2018, and asked "Can you find a sub anywhere?" and later, "You good yet?" Investigator Wilson explained that a "sub" referred to "a Suboxone strip or a Subutex strip," which are "prescription-only opiate treatments" that people who "use heroin will also use . . . typically to kind of tie themselves over till they can get more heroin, which is a stronger high." He also explained that "when someone asks . . . a drug dealer if they're good, that means, do they have drugs." He said that the defendant responded to Suzie's texts with, "Only cream," which he said was a reference to methamphetamine.

The parties stipulated that on the date of the offenses, the defendant "had a previous felony crime of violence conviction" and "had a previous felony conviction which would have prohibited him from possessing a handgun."

The State rested. After a *Momon* colloquy, the defendant elected not to testify and did not present additional proof.

On this evidence, the jury convicted the defendant of all six counts as charged, and, after a sentencing hearing, the trial court sentenced him to an effective 32 years' incarceration.

Following a timely but unsuccessful motion for new trial, the defendant filed a timely notice of appeal. In this appeal, the defendant argues that the trial court erred by denying his motion to suppress, that the evidence is insufficient to support his conviction of possession of methamphetamine with intent to sell or deliver, and that the trial court erred by declining to sentence him under the amended Drug-Free School Zone statute.

I. Suppression

The defendant contends that the trial court erred by denying his motion to suppress the evidence recovered from his person and his vehicle, arguing that the officers exceeded the scope of their community caretaking duties when they removed him from the vehicle and conducted the pat-down search. The State argues that the officers' directing the defendant to exit the vehicle was justified under the community caretaking doctrine and that the pat-down search was justified under *Terry v. Ohio*, 392 U.S. 1 (1968).

At the February 17, 2021 hearing on the defendant's motion to suppress,[2] Christine Mullan, a senior crime analyst with KPD, testified that KPD maintains an "overdose database" and an "arrest database." She said that from December 1, 2016 to December 28, 2018, officers responded to nine drug-related arrests and 10 overdose calls at or near the Big Oak Apartments.

Michael Alan Mays, a 9-1-1 records specialist with Knox County, testified that when a 9-1-1 caller reports a potential overdose, an ambulance is automatically dispatched, as one was in this case. The 9-1-1 caller in this case reported that two people were "nodded off, I'm guessing on heroin" in the parking lot of the Big Oak Apartments and had been there for "over an hour." The caller described the vehicle as "dark greenish," "like a car but has a long backend," and parked next to a red Jeep Renegade. The caller said that a male was in the driver's seat and a female was in the front passenger's seat.

[2] The hearing was held via Microsoft Teams pursuant to our Supreme Court's order suspending in-person procedings but allowing courts to hold proceedings by video and teleconference during the COVID-19 pandemic. *In Re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. Mar. 25, 2020) (order); *In Re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. Feb. 12, 2021) (order) (extending suspension of in-person proceedings until March 15, 2021).

Officer Bradley testified much as he did at trial and said that he and Officer Hardy responded to Big Oak Apartments to a possible overdose call. When he arrived, Officer Bradley located a vehicle that was parked next to "a red Jeep" and made "contact with [the defendant] and female passenger," both of whom were "passed out in the seats." He said that he had to knock on the window "several times to get them to wake up." He said that he "could tell that [the defendant] was under the influence of something," noting that "[h]e was very lethargic, slurred speech, eyes pinpoint." Ms. Richards appeared to be in the same state. He believed that this was an overdose situation and "asked [the defendant] to step out of the vehicle" because he "was unable to give us ID" and because the officers "were going to let [medical responders] check him out, make sure, if it was an overdose, that we get him the correct treatment at the time." When the defendant exited the car, Officer Hardy "conducted a *Terry* pat of his person." Officer Bradley saw Officer Hardy remove "a clear, rock-like substance, consistent with methamphetamine" from the defendant's front pants pocket. Officer Hardy then arrested the defendant and conducted a more thorough search of the defendant, recovering $2,225 in cash, "a pipe, and a bullet." Because the defendant had a bullet on him, the officers "started . . . looking for a firearm." While Officer Bradley was standing outside the open driver's door of the vehicle, he saw "the muzzle of the firearm sticking out of the driver's seat . . . out from under it." He also saw "a clear plastic [b]aggie" in the floorboard of the driver's seat. Based on "what we had in plain view" in the vehicle, the officers "conducted a search of the vehicle," recovering additional narcotics and "several items of paraphernalia." Officer Bradley said that they determined that the defendant had an outstanding warrant for a parole violation and prior felony convictions before seizing the firearm.

Video captured by Officer Bradley's in-vehicle camera showed the officers' asking the defendant whether the defendant had identification then telling the defendant to exit the vehicle. An officer can be heard asking the defendant, "Got anything on you, needles or anything like that?" They also asked the defendant, "Did you take anything?" When asked whether he needed medical attention, the defendant replied that he did, and an officer told him that he could get checked out but that he was not going to the hospital.

During cross-examination, Officer Bradley said that he asked the defendant whether he had taken something because "I felt like he had slurred speech and was slow talking to me, responding to my questions." He acknowledged, however, that he was not familiar with the defendant's usual speech pattern. He also acknowledged that he did not know whether the defendant was asleep or simply had his eyes closed and that the defendant responded immediately when the officer knocked on the window. He described the defendant's vehicle as being a light silver or gray colored hatchback and acknowledged that the 9-1-1 caller described a dark green vehicle with a "long back on it." He said that he took the defendant's keys so that the defendant "didn't drive off" and acknowledged

that the defendant was not free to leave. He said that he had the defendant exit the vehicle to get him medical attention but said that Officer Hardy did a pat-down search because it is "very common" that individuals who are overdosing have needles on them. He reiterated that before the officers found the narcotics in the defendant's pocket, they were treating the encounter as an overdose but acknowledged that the defendant was not free to leave.

Officer Hardy testified that when he arrived at the scene, Officer Bradley was "interviewing the defendant" and had "asked the defendant to step out" of the vehicle. Officer Hardy said that he did a pat-down search of the defendant "[d]ue to the nature of the call . . . , the area we were in," and the fact that "both the defendant and the female in the car seemed to have been suffering from a possible overdose." He explained, "In my training and experience, a lot of times, people that overdose can have needles on their person. And a needle could be used as a weapon against me, my partner[,] or the ambulance crew." He also said that the area was "a high crime, high drug area. We have a lot of overdose calls there, a lot of drug arrests" "in that particular apartment complex." During the pat-down search, Officer Hardy "felt a hard, rocky substance in [the defendant's] front left pocket," which the officer said was "immediately apparent as a form of narcotic." He recovered the "plastic baggie that contained meth[amphetamine]" and arrested the defendant. A further search produced "a glass pipe, a bullet[,] and a large amount of U.S. currency."

During cross-examination, Officer Hardy said that he did not hear Officer Bradley's conversation with the defendant because "I was a little bit farther away" and speaking with the medical responders. When he approached the vehicle, he saw the defendant and Ms. Richards "with their head[s] against the headrest. The defendant had his mouth open." Officer Hardy said that when the defendant exited the vehicle, "[h]e was unsteady on his feet" and the officer "could tell that he was a little lethargic in his movements and his speech." He acknowledged that he did not know anything about the defendant's usual speech or mannerisms.

The trial court took the matter under advisement, and in its written order denying the motion, the court found that the officers were concerned for the safety of the vehicle's occupants and believed they were dealing with an overdose situation. The court found that Officer Bradley had the defendant exit the vehicle to check his identification and to have him medically evaluated. The court found that Officer Hardy conducted a pat-down search because overdose cases often involve needles which can be used as weapons and that Officer Hardy recognized the rocky substance in the defendant's pocket as a narcotic from his experience. Finally, the court found that the Big Oak Apartments had been the site of several prior overdose calls. The court concluded that the community caretaking exception to the warrant requirement justified the officers' initial engagement with the defendant and their asking him to exit the vehicle. The court concluded that the

Terry pat-down search was justified because of the involvement of needles or knives in overdose and drug cases. The court concluded that Officer Hardy's seizure of the rocky substance from the defendant's pocket was justified under the plain feel doctrine. Finally, the court concluded that the gun that was discovered under the driver's seat was in plain view.

A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, questions of credibility, the weight and value of the evidence, and the resolution of conflicting evidence are matters entrusted to the trial judge, and this court must uphold a trial court's findings of fact unless the evidence in the record preponderates against them. *Odom*, 928 S.W.2d at 23; *see also* Tenn. R. App. P. 13(d). The application of the law to the facts, however, is reviewed de novo on appeal. *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998).

Both the federal and state constitutions offer protection from unreasonable searches and seizures with the general rule being "that a warrantless search or seizure is presumed unreasonable and any evidence discovered subject to suppression." *State v. Talley*, 307 S.W.3d 723, 729 (Tenn. 2010) (citing U.S. Const. amend. IV; Tenn. Const. art. I, § 7). "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357, (1967)); *see also State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997) ("[A] warrantless search or seizure is presumed unreasonable."). "The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'" *Coolidge,* 403 U.S. at 455 (quoting *Jones v. United States,* 357 U.S. 493, 499 (1958); *McDonald v. United States,* 335 U.S. 451, 456 (1948)).

When, as here, officers seize a defendant without a warrant, the State bears the burden of demonstrating the applicability of an exception to the warrant requirement. *See, e.g.*, *State v. Cox*, 171 S.W.3d 174, 179 (Tenn. 2005); *State v. Keith*, 978 S.W.2d 861, 865 (Tenn. 1998). One such exception is when an officer is acting within the community caretaking function. *State v. McCormick*, 494 S.W.3d 673, 675 (Tenn. 2016) (holding "that the community caretaking doctrine is . . . an exception to the state and federal constitutional warrant requirements"). Whether the exception applies is a two-part analysis:

> [T]he State must show that (1) the officer possessed specific and articulable facts, which, viewed objectively and in the totality of the circumstances, reasonably warranted a

> conclusion that a community caretaking action was needed; and (2) the officer's behavior and the scope of the intrusion were reasonably restrained and tailored to the community caretaking need.

Id. "[W]hen the community caretaking exception is invoked to validate a search or seizure, courts must meticulously consider the facts and carefully apply the exception in a manner that mitigates the risk of abuse." *Id.* at 688 (citing *State v. Smathers*, 753 S.E.2d 380, 386 (N.C. Ct. App. 2014)). Factors to consider in "determining whether police action is objectively reasonable in light of the circumstances" include "the nature and level of distress exhibited by the citizen, the location, the time of day, the accessibility and availability of assistance other than the officer, and the risk of danger if the officer provides no assistance." *Id.* at 687-88 (quoting *State v. Moats*, 403 S.W.3d 170, 195-96 (Tenn. 2013) (Clark and Koch, JJ., dissenting)).

A second exception to the warrant requirement is the brief investigatory stop and frisk authorized by *Terry v. Ohio*, 392 U.S. 1 (1968). Pursuant to *Terry*, police officers are constitutionally permitted to conduct a brief investigatory stop supported by specific and articulable facts leading to reasonable suspicion that a criminal offense has been or is about to be committed. *Terry*, 392 U.S. at 20-23; *Binette*, 33 S.W.3d at 218. Whether reasonable suspicion existed in a particular case is a fact-intensive, but objective, analysis. *State v. Garcia*, 123 S.W.3d 335, 344 (Tenn. 2003). The likelihood of criminal activity that is required for reasonable suspicion is not as great as that required for probable cause and is "considerably less" than would be needed to satisfy a preponderance of the evidence standard. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). A court must consider the totality of the circumstances in evaluating whether a police officer's reasonable suspicion is supported by specific and articulable facts. *State v. Hord*, 106 S.W.3d 68, 71 (Tenn. Crim. App. 2002). The totality of the circumstances embraces considerations of the public interest served by the seizure, the nature and scope of the intrusion, and the objective facts on which the law enforcement officer relied in light of his experience. *See State v. Pulley*, 863 S.W.2d 29, 34 (Tenn. 1993). The objective facts on which an officer relies may include his or her own observations, information obtained from other officers or agencies, offenders' patterns of operation, and information from informants. *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn. 1992).

Additionally, when a defendant has been lawfully seized pursuant to *Terry*, officers may conduct "a reasonable search for weapons for the protection of the police officer," *Terry*, 392 U.S. at 27, if the "suspected crime might typically involve the use of a weapon," *State v. Winn*, 974 S.W.2d 700, 703 (Tenn. 1998) (citations omitted); *State v. Cothran*, 115 S.W.3d 513, 523 (Tenn. 2003) ("A law enforcement officer may perform a protective frisk of a suspect where the officer has reasonable suspicion that the suspect is

armed.") (citations omitted); *see also Terry*, 392 U.S. at 27 (search for weapons reasonable when officer "has reason to believe that he is dealing with an armed and dangerous individual"). The search "must . . . be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry*, 392 U.S. at 29. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* (citation omitted). The standard here is likewise an objective one, relying on "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* (citations omitted).

> Officers may seize contraband felt during a lawful pat-down search if
>
> > 1) a prior valid reason exists for the intrusion, i.e., the pat down must be permissible under *Terry*; 2) the contraband is detected while the *Terry* search for weapons legitimately is still in progress; and, 3) the incriminating nature of the object perceived by the officer's sense of touch is immediately apparent giving the officer probable cause to believe the object is contraband.

State v. Bridges, 963 S.W.2d 487, 494 (Tenn. 1997) (citations omitted). "Probable cause that an item is contraband exists when the officer's knowledge of the facts and circumstances sufficiently warrant a person of reasonable caution to believe the object may be contraband." *Cothran*, 115 S.W.3d at 524 (citing *Texas v. Brown*, 460 U.S. 730, 742 (1983); *Bridges*, 963 S.W.2d at 494). "In determining whether probable cause exists, courts must consider the totality of the circumstances including the officer's testimony and factual knowledge based upon prior law enforcement experience." *Bridges*, 963 S.W.2d at 494 (citing *Brown*, 460 U.S. 730, 742 (1983)). The officer's testimony is only one factor to be considered in determining the legality of the seizure and "is not dispositive to the court's decision." *Cothran*, 115 S.W.3d at 524.

Here, the circumstances known to the officers at the time of the initial seizure of the defendant was that a man and woman had been passed out or asleep in a vehicle in the parking lot of an apartment complex for over an hour. The officers were familiar with the apartments as an area known for drug overdoses and drug offenses. Based on the defendant's slurred speech and lethargic demeanor, the officers reasonably believed that he was under the influence of narcotics when he was found seated in the driver's seat of a parked vehicle with the key in the ignition, a circumstance equating to driving under the influence. *See* T.C.A. § 55-10-401(1); *see also State v. Lawrence*, 849 S.W.2d 761, 765 (Tenn. 1993) (holding that defendant who was asleep in a parked vehicle "was in physical

control of his automobile" when he was "behind the wheel, and had possession of the keys"). Consequently, objectively reasonable suspicion justified the officers' ordering the defendant out of the vehicle to briefly investigate whether he was under the influence of narcotics while in control of the vehicle. *Terry*, 392 U.S. at 20-23; *Binette*, 33 S.W.3d at 218. Although the officers testified that they did not suspect the defendant of a crime when they ordered him from the vehicle and instead were concerned only with his welfare, their subjective reasons for having him exit the vehicle are immaterial to our determination of whether the conduct was objectively lawful. *See McCormick*, 494 S.W.3d at 675; *Garcia*, 123 S.W.3d at 344; *cf. Whren v. United States*, 517 U.S. 806, 813 (1996) ("[C]onstitutional reasonableness of traffic stops" does not "depend[] on the actual motivations of the individual officers involved.").

Because the officers were justified in removing the defendant from the vehicle under suspicion of being under the influence of narcotics, they were also authorized to perform a pat-down search for weapons. *Terry*, 392 U.S. at 27; *Bridges*, 963 S.W.2d at 492. The trial court found that needles were commonly found on suspects in overdose and drug cases, and the evidence does not preponderate against that finding. Because a needle is a sharp instrument that could be used to harm an officer, it may be considered a weapon for the purpose of a *Terry* search. *See Terry*, 392 U.S. at 29 ("The sole justification of the search . . . is the protection of the police officer and others nearby . . . ."); *Commonwealth v. Kondash*, 808 A.2d 943, 948 (Pa. 2002) (a "limited pat down for needle possession" authorized under *Terry* "to promote the officer's safety"); *State v. Gonzalez*, 704 N.E.2d 375, 384-85 (1998) (*Terry* search authorized for "guns, needles or knives").

Finally, Officer Hardy was justified in removing the substance from the defendant's pocket under the plain feel doctrine. Officer Hardy properly confined his search to patting the exterior of the defendant's clothing with the palm of his hand. The trial court found that Officer Hardy recognized the rocky substance in the defendant's pocket as a narcotic, and, again, the evidence does not preponderate against that finding. Because the substance was "immediately recognizable" to the officer as contraband, its seizure was lawful. *See Bridges*, 963 S.W.2d at 494.

The defendant raises the search of the vehicle in his statement of the issues but failed to present any argument on the matter. His failure to argue the issue constitutes waiver. *See* Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."); Tenn. R. App. P. 27(a)(7).

The trial court did not err by denying the defendant's motion to suppress.

II. Sufficiency

The defendant asserts that the evidence is insufficient to support his conviction for possession of methamphetamine with intent to sell or deliver because the State failed to prove that the defendant possessed the methamphetamine found in the backpack. The State argues that the evidence sufficiently supports the conviction.

Sufficient evidence exists to support a conviction if, after considering the evidence—both direct and circumstantial—in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). This court will neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Dorantes*, 331 S.W.3d at 379. The verdict of the jury resolves any questions concerning the credibility of the witnesses, the weight and value of the evidence, and the factual issues raised by the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

As relevant here, "[i]t is an offense for a defendant to knowingly . . . [p]ossess a controlled substance with intent to manufacture, deliver or sell the controlled substance." T.C.A. § 39-17-417(a)(4); *see also id.* § 39-17-408(d)(2) (identifying methamphetamine as a Schedule II controlled substance). The term "possession" embraces both actual and constructive possession. *State v. Cooper*, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). In order for a person to "constructively possess" a drug, that person must have "the power and intention at a given time to exercise dominion and control over . . . [the drug] either directly or through others." *Id.* (quoting *State v. Williams*, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981)). Additionally, "it may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing." T.C.A. § 39-17-419. A violation of Code section 39-17-417 "that occurs . . . within one thousand feet (1,000') of the real property that comprises a public . . . park shall be punished one (1) classification higher than is provided in [section] 39-17-417(b)-(i) for such violation." *Id.* § 39-17-432(b)(1) (2018).

As an initial matter, we note that the defendant's brief is inadequate as to his argument on this issue. Other than providing a standard of review, he cites to no authority to support his argument that the State failed to prove that the defendant possessed the drugs found in the backpack. Consequently, this issue is waived. *See* Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by . . . citation to authorities . . . will be treated as waived in this court."); Tenn. R. App. P. 27(a)(7); *State v. Boling*, 840 S.W.2d 944, 949

(Tenn. Crim. App. 1992) (deeming an argument waived when defendant "cite[d] no authority" to support the argument).

Waiver notwithstanding, this issue lacks merit. The evidence taken in the light most favorable to the State established that the defendant had more than three grams of methamphetamine in his pocket and was in the driver's seat of the vehicle in which more than 170 grams of additional methamphetamine was found. That the backpack containing the larger quantity of drugs was found at Ms. Richardson's feet does not negate a finding that the defendant possessed the drugs. *See Peters v. State*, 521 S.W.2d 233, 235 (Tenn. Crim. App. 1974) (holding that all three occupants of a vehicle "were in control of the drugs" that were discovered underneath the passenger's seat and in the back of a van); *State v. Adam Dewayne Holmes*, No. W2021-00326-CCA-R3-CD, 2022 WL 35479, at *4-5 (Tenn. Crim. App., Knoxville, Jan. 4, 2022) (affirming a finding that the driver of a vehicle constructively possessed cocaine found under the front passenger's seat), *perm. app. denied*, Apr. 13, 2022. Moreover, the quantity of the drug; the presence of a scale, baggies, and a firearm; and the defendant's having $2,225 in cash on him supported the jury's finding that he possessed the methamphetamine with the intent to sell or otherwise distribute it. *See Adam Dewayne Holmes*, 2022 WL 35479, at *4-5 (citing *State v. Nash*, 104 S.W.3d 495, 500 (Tenn. 2003)).

III. Sentencing

Finally, the defendant argues that the trial court erred by failing to apply the Criminal Savings statute and sentence him under the amended Drug-Free School Zone statute. The State argues that the amended statute does not apply and that the trial court did not err.

At the December 9, 2021 sentencing hearing, the trial court concluded that the Criminal Savings statute did not mandate the application of the amended Drug-Free School Zone statute because the amendment took effect on September 1, 2020, "before we tried the case, but after the offense had been committed."

At the time of the defendant's offenses in December 2018, our Code provided that a conviction for possession of a controlled substance with intent to sell or deliver "that occurs . . . within one thousand feet (1,000′) of the real property that comprises a . . . park shall be punished one (1) classification higher than is provided in § 39-17-417(b)-(i) for such violation." T.C.A. § 39-17-432(b)(1) (2018). "[A] defendant sentenced for a violation of subsection (b) shall be required to serve at least the minimum sentence for the defendant's appropriate range of sentence." *Id.* § 39-17-432(c) (2018).

An amended version of the statute took effect on September 1, 2020—after

the commission of the offenses but before the defendant's trial—and provided that a conviction for possession of a controlled substance with intent to sell or deliver "may be punished one (1) classification higher than is provided in § 39-17-417(b)-(i) if the violation . . . occurs . . . [w]ithin five hundred feet (500′) of . . . the real property that comprises a . . . park. *Id.* § 39-17-432(b)(1) (Supp. 2020). The amended statute also created "a rebuttable presumption that a defendant is not required to serve at least the minimum sentence for the defendant's appropriate range of sentence" that may be overcome only if the trial court "finds that the defendant's conduct exposed vulnerable persons to the distractions and dangers that are incident to the occurrence of illegal drug activity." *Id.* § 39-17-432(c)(2) (Supp. 2020). The Act by which the statute was amended explicitly limited application of the amendments "to offenses committed on or after September 1, 2020." 2020 Tenn. Pub. Acts, ch. 803, § 12.

After the defendant's sentencing hearing but before the hearing of this appeal, the statute was again amended to include a provision that "the court that imposed a sentence for an offense committed under this section that occurred prior to September 1, 2020, may, upon motion of the defendant or the district attorney general or the court's own motion, resentence the defendant pursuant to subsections (a)-(g)." T.C.A § 39-17-432(h)(1) (Supp. 2022).

Generally, "a criminal offender must be sentenced pursuant to the statute in effect at the time of the offense." *State v. Keese*, 591 S.W.2d 75, 82 (Tenn. 2019) (quoting *State v. Smith*, 893 S.W.2d 908, 919 (Tenn. 1994)). However, "our legislature has enacted a Criminal Savings [s]tatute, which requires courts to apply a subsequent statute to a defendant's sentence if the subsequent statute 'provides for a lesser penalty.'" *Id.* (citing T.C.A. § 39-11-112). The Criminal Savings statute provides:

> When a penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, the offense, as defined by the statute or act being repealed or amended, committed while the statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. Except as provided under § 40-35-117, in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.

T.C.A § 39-11-112. However, when a defendant is tried and sentenced prior to the effective date of the amended statute, the Criminal Savings statute does not apply. *Keese*, 591 S.W.3d at 83 ("[T]he amended version of the theft grading statute cannot apply in the case before us because the defendant was sentenced prior to the Public Safety Act's

effective date."). "The language of the Criminal Savings [s]tatute does not change the long-standing rule that a statute or act of the legislature cannot become operative until its effective date, nor can 'the people . . . be compelled or permitted to act thereunder.'" *Id.* at 84 (quoting *Wright v. Cunningham*, 91 S.W. 293, 295 (Tenn. 1905)).

The defendant asks to be resentenced under the 2022 version of the Drug-Free School Zone statute that provides for its application to offenses committed prior to September 1, 2020. *See* T.C.A. § 39-17-432(h)(1) (Supp. 2022). At his sentencing hearing, the defendant sought to be sentenced under the 2020 version of the statute because the 2022 amendments had not yet been enacted. The 2020 amendments did not afford the defendant relief, however, because the legislature limited the application of those amendments to offenses committed on or after September 1, 2020. Although the 2022 amendment permits the statute's application to offenses committed before September 1, 2020, the proper vehicle for resentencing is by motion to the trial "court that imposed [the] sentence." *Id.*; *see also State v. Carrie Joann Hamlin*, No. E2022-00139-CCA-R3-CD, 2023 WL 177105, at *6 (Tenn. Crim. App., Knoxville, Jan. 10, 2023), *perm. app. denied*, May 10, 2023. This court cannot remand for the defendant to be resentenced under the 2022 version of the act because that is outside the scope of our appellate jurisdiction, and "we are without statutory authority to compel the trial court . . . to consider whether resentencing is appropriate pursuant to the 2022 amendments." *Carrie Joann Hamlin*, 2023 WL 177105, at *6 ("To the extent that the Defendant seeks resentencing, the power to file such a motion resides with her once this appeal is no longer pending."). This court's jurisdiction is appellate only, *see* T.C.A. § 16-5-108(a), and, accordingly, we may not consider the defendant's appellate argument as a motion to be resentenced under the 2022 amendments, *see Carrie Joann Hamlin*, 2023 WL 177105, at *6 (citing *State v. Comer*, 278 S.W.3d 758, 761 (Tenn. Crim. App. 2008), *overruled on other grounds by State v. Gevedon*, 671 S.W.3d 537 (Tenn. 2023)). He must first bring a motion in the trial court via the terms of the 2022 amendment.

Contrary to the defendant's argument, the Criminal Savings statute does not afford him relief. The Criminal Savings statute does not permit the application of a statute that was amended after the defendant was sentenced even when the amendment took effect before the hearing of the defendant's appeal. *Keese*, 591 S.W.3d at 84 (concluding that the Criminal Savings statute did not permit application of the amended theft grading statute because the defendant "was sentenced before the effective date" of the amended statute). Consequently, the trial court did not err by declining to apply the amended the Drug-Free School Zone statute. Our holding does not preclude the defendant from moving the trial court for resentencing in accordance with subsection (h)(1) of the 2022 amended statute. *See* T.C.A. § 39-17-432(h)(1) (Supp. 2022).

Conclusion

Accordingly, we affirm the judgments of the trial court.

JAMES CURWOOD WITT, JR., JUDGE