IN THE
INDIANA COURT OF APPEALS [OR SUPREME COURT]

Case No. ___2017-JL0-172_____*

[MICHAEL DVORAK], _____ Appellant,	)	Appeal [or Interlocutory Appeal, Petition for Review] from the _____ [name of trial court or administrative agency]
v.	)	Case No. ___2017-JL0-172_____ [Trial court or administrative agency case no.]
[STATE OF INDIANA], _____ Appellee.	)	

BRIEF FOR APPELLANT

Vincent Laguardia Gambini III
Brooklyn Academy of Law
250 Joralemon St.
Brooklyn, NY 11201
718-625-2200

Attorney for [Michael Dvorak]**
 # 625055859

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States v. Weatherspoon,
410 F.3d 1142 (9th Cir. 2005)

Wells v. State,
772 N.E.2d 487, 490 (Ind.Ct.App.2002)

United States v. Williams,
112 F. App'x 581 (9th Cir. 2004)

Constutution:

Ind. Const. art. 1, §11

U.S. Const. amend. XIV.

Rule:

Indiana Evidence Rule 704(b)

ABA Standard for Criminal Justice 4-7.8(c)

I.

PRELIMINARY STATEMENT

Appellant Michael Dvorak appeals the lower court's ruling of guilty on the count of violating Section 35-48-4-1.1 of the Indiana Code. The lower court erred by (1) admitting into evidence items that were improperly seized based on a lack of reasonable suspicion and (2) permitting prosecutorial misconduct throughout the trial proceedings which resulted in fundamental error warranting reversal of the conviction.

II.

ISSUES PRESENTED

A. Did the trial court err by denying the motion to suppress the trash pull on the basis of reasonable suspicion constituting a question of the factual findings of the judge and possibly plain error?

B. Did the prosecutor's conduct and closing comments during trial along with an abuse of discretion by the judge for failure to correct the behavior of the prosecution constitute reversible error?

III.

STATEMENT OF THE CASE

A. Procedural History

Pretrial motions were filed on behalf of Michael Dvorak resulting in a suppression hearing and memoranda being filed. Defendant's motion for suppression was denied based on the trash being taken in a substantially same manner as trash collectors and the police having reasonable suspicion

to support the search of the trash. The trial began on March 14, 2017. The Defendant was found guilty on March 17, 2017 of violating Section 35-48-4-1.1 of the Indiana Code. Defendant now appeals his judgment of conviction on the grounds that the trial court improperly admitted the evidence seized from the house, as the police lacked reasonable suspicion for the trash pull; and the prosecutor's closing comments during trial constitute reversible error. The parties stipulate that if the evidence from the trash pull is suppressed, then all seized evidence will be excluded from trial.

B. Statement of Facts

Privacy is guaranteed to every American, and in Indiana, unreasonable searches or seizure laws offer a higher standard that the United States Constitution in protecting this inalienable right. Ind. Const. Art. I, § 11. Mr. Dvorak is a resident of Bloomingham, Indiana and is enrolled at Ivy Tech Community College. R. at 12-14. Mr. Dvorak voluntarily entered into and successfully completed the diversion program for first-time drug offenders in the fall of 2015. Id. Mr. Dvorak was supervised, regularly visited at home, without any violations during his time in the program, and never charged with the production of methamphetamines. Id.

The Anonymous Tip, Search & Seizure

On December 28, 2016 at approximately 8:35am, an anonymous caller to the Bloomingham Police Department claimed "suspicious activity" occurred at Mr. Dvorak's residence the previous two Sunday nights. R. at 1. The caller claims two vehicles arrived, and that after a short visit would depart carrying their belongings. Id. The caller refused to identify herself twice. Id. On January 4, 2017, Probation Officer George Hughes received a copy of the police report and visited Mr. Dvorak the following day without incident. R. at 14. On January 5, 2017, P.O.

Hughes conducted surveillance on Mr. Dvorak's home. R. at 2. P.O. Hughes documented two vehicles arriving five minutes apart from each other, leaving approximately forty-five minutes later with Mr. Dvorak. Id. After conducting a query of the license plates of both vehicles, neither vehicle's owners had any criminal history. Id.

On January 9, 2017 at approximately 6:00am, twelve days after receiving the original anonymous phone call alleging "suspicious activity", Officer Ralph Thibault of the Bloomington Police Department drove in his police vehicle to Mr. Dvorak's Clinton Street residence. R. at 3, 16-20. Officer Thibault is not a detective, was not dispatched to the residence, and along with a fellow armed agent arrived quietly, without emergency lighting or siren active. R. at 18. Officer Thibault entered onto the "fenced in and private property" of Mr. Dvorak. R. at 1. Officer Thibault proceeded between twenty and thirty feet onto the land with the purpose of taking Mr. Dvorak's bags that were adjacent to the home's detached garage in such a manner "that Dvorak wouldn't realize his trash was pulled." R. at 19. Officer Thibault took possession of Mr. Dvorak's items from inside containers and departed with them in his police vehicle. Id. The contents of the items taken by Officer Thibault resulted in the acquisition of a search warrant of Mr. Dvorak's residence on January 9, 2017. R. at 4, 5. Officer Thibault inappropriately cited reasonable suspicion while applying for a search warrant of Mr. Dvorak's residence. Id.

Pre-Appellate Proceedings

Pretrial motions were filed on behalf of Michael Dvorak resulting in a suppression hearing and memoranda being filed. R. at 3-6. Defendant's motion for suppression was denied based on the trash being taken in a substantially same manner as trash collectors and the police having reasonable suspicion to support the search of the trash. Id. The trial began on March 14, 2017. R.

at 27. The prosecutor referred to Mr. Dvorak as a "meth-head" in the opening and closing statements. R. at 27, 41. The prosecutor inaccurately stated that the expert witness Professor Nye indicated Mr. Dvorak was a "cook". R. at 32-33, 40. The prosecutor placed the members of the jury in the shoes of being a victim by asking them to imagine how they would feel if their family became addicted to meth because men like Mr. Dvorak. R. at 41.

The judge did not intervene in the prosecution's name calling, misrepresentation of fact by the expert witness, or comments during closing arguments. R. at 40, 41. The judge did not address these concerns in the jury instructions to ensure a fair trial. R. at 43, 44. The Defendant was subsequently found guilty of violating Section 35-48-4-1.1 of the Indiana Code.

IV.

SUMMARY OF ARGUMENT

I.

The police lacked reasonable suspicion when they conducted a trash pull based on an anonymous tip. The necessary elements justifying reasonable suspicion, though lesser than that of probable cause, are required to warrant a search or seizure. An anonymous tip provided information that was available to the general public and did not consist of any activity that was criminal in nature. Subsequent surveillance yielded no evidence or information that was not already provided by the anonymous caller, making the corroboration meaningless. Without any element of illegal or criminal activity, reasonable suspicion is unable to be established. Therefore, since there is no reasonable suspicion, the trash pull should have never occurred or been admitted into evidence.

II.

Remarks made by the prosecution included vouching, inflaming the jury, mischaracterizing evidence, and name calling. Independently, each warrants prosecutorial misconduct and trial error. The judge failed to correct this behavior when it occurred, as well as during jury instructions. Therefore, this created a fundamental error making it impossible to reach a fair finding.

V.

ARGUMENT

A. Failure to Establish Reasonable Suspicion for the Trash Pull

I. Requirements for Reasonable Suspicion Were Not Met.

The trial court improperly admitted into evidence items from petitioner's residence collected without a warrant on the wrongful premise of reasonable suspicion. Reasonable suspicion requires an articulable individualized suspicion be present to justify a search of petitioner's trash. Litchfield v. State, 824 N.E.2d 356, 357 (Ind. 2005). Alternatively, Baldwin makes clear that "[r]easonable suspicion exists where the facts known to the officer, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe that criminal activity has or is about to occur." Baldwin v. Reagan, 715 N.E.2d 332, 337 (Ind. 1999).

In Fuqua v. State, the court concluded that the investigating detectives had reasonable suspicion to search Fuqua's trash, admitting seized evidence to be admissible. Fuqua v. State, 984 N.E.2d 709, 718 (Ind. Ct. App. 2013). There, two individuals identified Fuqua as their cocaine dealer in addition to a phone tip indicating they had seen Fuqua with a large sum of money hidden in a

compartment in the floor of the back bedroom. Id. Unlike Fuqua, the police lacked reasonable suspicion because there was neither an articulable individualized suspicion provided by either the phone tip or officer surveillance or any evidence that crime was afoot. There must be more than an inchoate or unparticularized hunch to conduct a search of one's trash. Id.

The court found in State v. Richardson that the officer's questioning of a defendant regarding an "unusual bulge" in his pocket during a traffic stop for a seatbelt violation exceeded the scope of police behavior permitted resulting in suppression of evidence. State v. Richardson, 927 N.E.2d 379 (Ind. 2010). Here, the police similarly, the police were operating outside of their scope by pulling Mr. Dvorak's trash without reasonable suspicion. A search of a refuse container on Mr. Dvorak's property was some 20-30 feet from the curb within the confines of fenced in private property. There was no evidence of a crime occurring or likely to occur, nor was there an articulable individualized suspicion. The wrongful search led to a subsequent warrant to search the entirety of his residence leading to his arrest. When the trial court's denial of a defendant's motion to suppress concerns the constitutionality of a search or seizure, however, it presents a question of law, addressing the question de novo. Robinson v. State, 5 N.E.3d 362, 365 (Ind. 2014).

II. Requirements for Anonymous Tips Were Not Met.

Anonymous tips must be accompanied by specific indicia of reliability or must be corroborated by a police officer's own observations to pass constitutional muster." Wells v. State, 772 N.E.2d 487, 490 (Ind.Ct.App.2002). In Sellmer v. State, the court reversed the admissibility of evidence due to an anonymous telephone tip lacking reasonably articulable suspicion to criminal activity. Sellmer v. State, 842 N.E.2d 358 (Ind. 2006). There, the defendant was convicted of felony

possession of marijuana. Id. The ruling was reversed, as there was no justification to detain the defendant which resulted in the discovery of evidence. Id. Here, an anonymous tip without any articulable suspicion to criminal activity initiated the investigation and subsequent search and seizure based on reasonable suspicion by the police. Additionally, Aguilar v State of Texas indicates that while a known informant with a history of providing information to the police may constitute reasonable suspicion, this does not apply to an anonymous tip by an unidentified individual as seen here. Aguilar v. State of Tex., 378 U.S. 108, 119. Here, the caller was unnamed and failed to provide information that was neither publicly accessible nor criminal in nature.

Although there was surveillance in this case, unlike Fuqua where the police corroboration yielded evidence of criminal activity, this did not occur here. Here, the corroboration by the probation officer was meaningless because it was exactly the same thing the caller had seen which was benign in nature.

B. Prosecutorial Misconduct Was Such that it Created Fundamental Error

We believe prosecutorial misconduct and judicial error created a fundamental error. Misconduct occurred in closing remarks because the Prosecutor vouched for witnesses, inflamed the jury by telling them to imagine they were in the shoes of the victim, mischaracterized evidence, and resorted to Mr. Dvorak in derogatory terms. Although we failed to object at trial, we are now appealing under the heightened standard of review of fundamental error. We will show (1) misconduct and (2) fundamental error occurred. Fundamental error was so egregious as to not provide a fair trial, consistent with Brummett v. State. Brummett v. State, 24 N.E.3d 965, 966 (Ind. 2015).

I. Misconduct Existed on the part of the Prosecutor.

The prosecutor is not permitted to present argument beyond reasonable inferences which may be drawn from the evidence and may not misstate the evidence. Davis v. Johnson, 661 F. App'x 869, 873 (6th Cir. 2016). Here, misconduct existed because numerous remarks made by the prosecution included vouching, inflaming the jury, mischaracterizing evidence, and name calling.

A prosecutor may not ensure the credibility of law enforcement officers' testimony. United States v. Weatherspoon, 410 F.3d 1142 (9th Cir. 2005). In US v. Williams, the prosecutor improperly vouched for the veracity of the government's key witness, a police officer, both by stating his personal belief that the officer was not lying and by suggesting to the jury that the officer was credible because the prosecutor and the court were monitoring the truthfulness of his testimony and had the power to penalize the officer if he lied. United States v. Williams, 112 F. App'x 581 (9th Cir. 2004). Here, the prosecutor vouched for witnesses during closing arguments by stating, "They were here to tell you the truth and that is what they did." R. at 23.

It is misconduct to phrase final argument in a manner calculated to inflame the passions or prejudices of the jury, Limp v. State, 431 N.E.2d 784, 788 (Ind. 1982). Additionally, ABA Standard for Criminal Justice 4-7.8(c) indicates that a lawyer should not make arguments calculated to inflame the passions or prejudices of the jury. In Lawson v. State, the court stated that argument should not be phrased in a manner calculated to inflame the passions or prejudices of the jury. Lawson v. State, 171 Ind. App. 163, 165, 355 N.E.2d 274, 275 (1976). There, during proceedings for the charge of attempted armed robbery, the prosecutor stated the defendant,

"…has had the audacity to sit on the stand, after taking the oath to tell the truth, and lie blatantly…" Id. The court then admonished the jury to disregard the remark. Id. Here, the prosecutor placed the members of the jury in the shoes of being a victim by asking them to imagine how they would feel if their family became addicted to meth because men like Mr. Dvorak. R. at 41.

"[T]he prosecutor has an equal right to argue the State's side of the case forcefully and to discuss the evidence pertinent thereto. We can perceive nothing unfair or prejudicial about permitting the prosecutor to argue his case in such a manner so long as his statements are reasonably calculated to sway the jury to the State's point of view in light of the evidence adduced at trial, and so long as he makes no deliberate distortions or improper comments." Morris v. State, 270 Ind. 245, 384 N.E.2d 1022, 1026–27 (1979). There, the court made clear the parties may not make deliberate distortions or improper comments. Id. Here, the prosecution included a fiction in his closing argument that the expert, Professor Nye, stated that "Mr. Dvorak is a cook." R. at 32-33, 40. Further, the prosecution referred to Mr. Dvorak as a "meth head" and a "drug addict". R. at 41. This constitutes prosecutorial misconduct for the mischaracterization of evidence.

The prosecution has committed misconduct because of vouching, inflaming the jury, mischaracterizing evidence, and name calling.

II. Legal and Judicial Errors Resulted in Fundamental Error.

Even if none of these elements are so egregious independently, together they create a fundamental error. For error to be fundamental, the error claimed must make a fair trial impossible. U.S. Const. amend. XIV. Fundamental error is an extremely narrow exception to the waiver requirement. Here, the prosecutor's errors cumulatively equal fundamental error despite a failure to object on the part

of the defense. In Ryan, the convictions were affirmed because the defendant failed to contemporaneously object to the prosecutorial misconduct and that the prosecutor's misconduct did not warrant application of the doctrine of fundamental error because there was only one instance of misconduct. Ryan v. State, 992 N.E.2d 776, 783 (Ind. Ct. App.). "In Brummett v. State, the Court of Appeals reversed several convictions, finding prosecutorial misconduct and concluding that its cumulative effect amounted to fundamental error, thus precluding procedural default." Brummett v. State, 10 N.E.3d 78 (Ind.Ct.App.2014). Despite the misconduct, the judge failed to correct this both during proceedings and in the jury instructions. R. at 43, 44.

VI.

CONCLUSION

The admission of evidence collected without reasonable suspicion along with prosecutorial misconduct resulting in fundamental error warrants reversal of the conviction.