IN THE

Indiana Supreme Court

Supreme Court Case No. 20S-CR-655

Michael D. Johnson
Appellant (Defendant below)

–v–

State of Indiana
Appellee (Plaintiff below)

Argued: June 29, 2020 | Decided: December 1, 2020

Appeal from the Madison Circuit Court,
No. 48C01-1602-F5-402
The Honorable Angela G. Warner Sims, Judge

On Petition to Transfer from the Indiana Court of Appeals,
No. 19A-CR-975

Opinion by Justice Massa

Chief Justice Rush and Justices David and Goff concur.

Justice Slaughter dissents with separate opinion.

Massa, Justice.

Michael Johnson offered to sell a substance he called "white girl" to a stranger at Hoosier Park Casino in Anderson. After the solicited patron reported the incident to security, and the account was verified by video surveillance, a Gaming Enforcement Agent led Johnson back to an interview room. Once they entered the room, the agent told Johnson that he would need to pat him down. Upon this pat-down, the agent immediately felt what he deemed a "giant ball" in Johnson's pocket. Consistent with his training, the agent immediately believed this lump was packaged drugs, and after removing the baggie containing white powder from Johnson's pocket, placed him under arrest.

At his trial, the court admitted, over Johnson's objection, the evidence stemming from the pat-down. Because we find that the agent had reasonable suspicion that criminal activity was afoot (so he could stop Johnson), that Johnson could be armed and dangerous (so he could pat Johnson down after entering a confined space), and the lump in Johnson's pocket was immediately apparent as contraband (so it could be seized), we affirm the admission of the evidence because the search and seizure proceeded within the bounds of the Fourth Amendment.

Facts and Procedural History

After hours of playing quarter slots with a friend at Hoosier Park Casino in Anderson, Brett Eversole was tired and fighting to stay awake on November 8, 2015. Just before he began to doze off, Eversole was approached by a stranger—Michael Johnson, the defendant in this case—who offered to sell him some "white girl." Tr. Vol. 2, pp. 87–89. Believing that this slang referred to cocaine, or less likely in his view a prostitute, and having no interest in either, Eversole rejected Johnson's offer. Rebuffed, Johnson walked away. After consulting with his friend about what "white girl" might mean, Eversole decided to tell security officers that a "man approached me when I was sitting at a slot machine and offered to sell me some drugs, I believe, and he called it white girl." *Id.*, p.92. A security supervisor then sought video surveillance that would

show the encounter and "notified the gaming commission[,] who are law enforcement on the property." *Id.*, p.100.

After viewing the soundless video and conferring with Eversole, Gaming Enforcement Agent Zach Wilkinson—who was a thirteen-year law enforcement veteran specially trained in "issues inside the casino," including "drug trends" and "criminal issues"—quickly located Johnson because the Casino "wasn't super crowded at that moment" and Johnson was easy to identify from Eversole's description and the video's depiction. *Id.*, pp. 103–04, 109. Agent Wilkinson then told him that there had been "a report of him attempting to sell drugs to casino patrons," and Johnson "voluntarily [went] back to the [gaming commission's] interview room." *Id.*, p.111.

After entering the room, Agent Wilkinson informed Johnson that he "needed to pat him down." [1] *Id.* Upon this pat-down, Agent Wilkinson skimmed over a lump that—through his mandated yearly "training for identification of drug[s] by feel or by sight"—felt like a "ball of drugs." *Id.*, pp. 113–14. After Agent Wilkinson removed a baggie filled with "white powder" from Johnson's pocket, he placed him under arrest. *Id.*, p.114. Although this substance appeared to be cocaine, later testing merely revealed it to be sodium bicarbonate, also known as baking soda. The State later charged Johnson with "dealing in a look-a-like-substance," a Level 5 felony under Indiana Code section 35-48-4-4.6. After unsuccessfully moving to suppress the admission of any evidence flowing from the search, a jury convicted Johnson of the charge, and he appealed, renewing his argument under the Fourth Amendment.

The Court of Appeals reversed. While stating that "[i]t is incumbent upon the State to prove that the measures it used to conduct a search and seize evidence were constitutional," the panel also implied that the State must parry every constitutional attack by refuting any claim that

[1] Although Johnson's attorney asserted during oral argument that the pat-down occurred outside the room, Agent Wilkinson repeatedly testified that it occurred inside the room. This discrepancy does not impact the outcome.

"suggests alternative scenarios" for how evidence was obtained. *Johnson v. State*, 137 N.E.3d 1038, 1043–44 (Ind. Ct. App. 2019), *reh'g denied*, *vacated*. Ultimately, even though "Agent Wilkinson would arguably have . . . developed probable cause for an arrest," the court concluded that "the evidence does not dispel concern that the ball of powder retrieved from Johnson's pocket was obtained in violation of his Fourth Amendment right to be free from an unlawful search and seizure." *Id.* at 1044.

The State sought transfer, which we now grant.

Standard of Review

"The trial court has broad discretion to rule on the admissibility of evidence." *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017) (citation omitted). Ordinarily, we review evidentiary rulings for an abuse of discretion and reverse only when admission is clearly against the logic and effect of the facts and circumstances. *Id.* But when a challenge to an evidentiary ruling is based "on the constitutionality of the search or seizure of evidence, it raises a question of law that we review *de novo*." *Id.*

Discussion and Decision

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.[2] The Fourth Amendment, then, generally requires warrants for searches and seizures, and any "warrantless search or seizure is per se unreasonable." *Jacobs v. State*, 76 N.E.3d 846, 850 (Ind. 2017) (quotation omitted). "As a deterrent mechanism, evidence obtained in violation of

[2] Although Johnson offhandedly mentioned Article 1, Section 11 of our Indiana Constitution, he has waived the assertion for lack of specific argument.

this rule is generally not admissible in a prosecution against the victim of the unlawful search or seizure absent evidence of a recognized exception." *Clark v. State*, 994 N.E.2d 252, 260 (Ind. 2013). While the State can overcome this bar to admission by proving "that an exception to the warrant requirement existed at the time of" a warrantless search, *Bradley v. State*, 54 N.E.3d 996, 999 (Ind. 2016) (quotation omitted), it need not disprove every alternative explanation forwarded by a defendant.

Although the parties and the courts below largely focused on whether there was probable cause to arrest Johnson at the time of the search (potentially bringing the seizure within the search-incident-to-arrest exception to the Fourth Amendment), there is a clearer path to sustaining the evidence's admission: "the encounter was along the lines of a *Terry* stop." Appellant's Br. at 10. To determine, then, whether the evidence here should be suppressed, we must resolve three issues: (1) whether Agent Wilkinson had justification to stop Johnson under *Terry*; (2) whether Agent Wilkinson could perform a *Terry* frisk of Johnson; and (3) whether Agent Wilkinson could seize the baggie felt in Johnson's pocket. Answering yes to each in turn, we hold the evidence admissible.

I. Agent Wilkinson was justified in stopping Johnson under *Terry* after watching the video and talking to Eversole.

An officer can stop a person if the officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). While this stop requires less than probable cause, an officer's reasonable suspicion demands more than just a hunch: "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Id.* at 21.

Agent Wilkinson knew that Eversole, a disinterested third-party, informed security officers that Johnson had tried to sell him "white girl," which he believed to be cocaine and believed was offered because the

stimulating effect of the drug could perk him up when he was nearly asleep. *See Adams v. Williams*, 407 U.S. 143, 146 (1972) ("The informant here came forward personally to give information that was immediately verifiable at the scene."). Eversole stayed at the scene, and confirmed this account with Agent Wilkinson, subjecting himself to false informing if he concocted the story. *See Illinois v. Gates*, 462 U.S. 213, 233–34 (1983) ("[I]f an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary."); *Kellems v. State*, 842 N.E.2d 352, 355 (Ind. 2006) ("[T]he prospect of prosecution for making a false report heightens the likelihood of the report's reliability."), *rev'd on reh'g on other grounds*; Ind. Code § 35-44.1-2-3(d) (2015) ("A person who . . . gives a false report of the commission of a crime or gives false information in the official investigation of the commission of a crime, knowing the report or information to be false . . . commits false informing."). Because "informants who come forward voluntarily are ordinarily motivated by good citizenship or a genuine effort to aid law enforcement officers in solving a crime," *Duran v. State*, 930 N.E.2d 10, 17 (Ind. 2010), there is scant reason to doubt the veracity of Eversole's account.

And ensuing police work bolstered the impartial tip. Surveillance video confirmed Eversole's narrative, and the man in the video matched his earlier description of Johnson. *See McGrath v. State*, 95 N.E.3d 522, 528 (Ind. 2018) (holding that an "independent investigation to confirm the street address, the color of the house, the names of the occupants, and the bright light" sufficiently augmented an **anonymous** tip to form **probable cause** that a house was being used to grow marijuana). Relatively few patrons populated the casino, narrowing the field of suspects who could match the specific description and depiction of Johnson. *Abel v. State*, 773 N.E.2d 276, 279 (Ind. 2002) (finding reasonable suspicion supported when suspect "fit the general description of the sought-after person, was in the general area, and it was the early morning hours") (quotation omitted). When "a tip from an identified informant or concerned citizen [is] coupled with some corroborative police investigation," an officer has "reasonable

suspicion for an investigative stop." *Kellems*, 842 N.E.2d at 353. Agent Wilkinson had reasonable suspicion to stop Johnson under *Terry*.

II. Agent Wilkinson could perform a *Terry* frisk of Johnson after they entered the interview room because it was reasonable to believe he was armed and dangerous.

On appeal, Johnson asserted that even if reasonable suspicion supported a *Terry* **stop**, "the pat down **search** that revealed the substance exceeded the allowable legal scope" because "there was no evidence in the record that would have led officers to believe that Johnson was either armed or dangerous." Appellant's Br. at 11–12 (emphasis added). Not so. After making a *Terry* stop, an officer may, if he has reasonable fear that a suspect is armed and dangerous, frisk the outer clothing of that suspect to try to find weapons. *Terry*, 392 U.S. at 27. The purpose of this protective search "is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (quotation omitted). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. To determine whether an officer acted reasonably, we consider the specific, reasonable inferences that the officer, in light of his experience, can draw from the facts. *Id.* Here, the facts supported the reasonableness of the pat-down: Agent Wilkinson suspected Johnson of trying to sell drugs and was about to interview him one-on-one in a small windowless room early in the morning.

"[C]ourts have often considered evidence of drug involvement as part of the totality of the circumstances contributing to an officer's reasonable belief that a subject is armed and dangerous." *Patterson v. State*, 958 N.E.2d 478, 486 (Ind. Ct. App. 2011). While our Court of Appeals has held that evidence of marijuana **use** by a driver may not create a reasonable fear that a suspect is armed, *see Rybolt v. State*, 770 N.E.2d 935, 941 (Ind. Ct.

App. 2002) (holding pat-down unjustified when officer merely believed "that individuals who use narcotics also carry weapons"), *trans. denied*, further evidence of other criminal activity can, *see, e.g.*, *Durstock v. State*, 113 N.E.3d 1272, 1277 (Ind. Ct. App. 2018) (holding pat-down search justified when officers, among other things, believed that a suspect "was involved in drug activity" and other evidence revealed that the situation could be dangerous—a loaded gun was found in an adjacent bathroom the suspect had just left), *trans. denied*. What's more, "the right to frisk is automatic whenever the suspect has been stopped upon the suspicion that he has committed, was committing, or was about to commit a type of crime for which the offender would likely be armed," in that case, a burglary. *N.W. v. State*, 834 N.E.2d 159, 165–66. (Ind. Ct. App. 2005) (cleaned up), *trans. denied.*

Based on the facts of this case, a reasonably prudent officer in Agent Wilkinson's position would believe that his safety was potentially in danger. All information available to Agent Wilkinson suggested that Johnson, unlike the defendant in *Rybolt*, was trying to **sell** drugs—a crime for which Johnson could possibly be armed—to strangers on a casino floor. As the Supreme Court has acknowledged, officers know that it is "common for there to be weapons in the near vicinity of narcotics transactions." *Illinois v. Wardlow*, 528 U.S. 119, 122 (2000); *see also Parker v. State*, 662 N.E.2d 994, 999 (Ind. Ct. App. 1996) ("Based on the informant's tip, he believed that narcotics would be present. . . . [The officer] knew . . . that firearms were frequently present in drug transactions."), *trans. denied*. "[F]irearms are 'tools of the trade.'" *United States v. Gilliard*, 847 F.2d 21, 25 (1st Cir. 1988) (quoting *United States v. Trullo*, 809 F.2d 108, 113 (1st Cir. 1987)); *see also Swanson v. State*, 730 N.E.2d 205, 211 (Ind. Ct. App. 2000) (acknowledging that "it is not uncommon for drug dealers to carry weapons"), *trans. denied*. Agent Wilkinson's suspicion that Johnson attempted to sell drugs—supported by Eversole's statements and surveillance footage—helped justify the pat-down.

Whether a *Terry* stop occurs in a confined space can impact the reasonableness of the subsequent pat-down. *See United States v. Post*, 607 F.2d 847, 852 (9th Cir. 1979). An experienced officer, "enclosed in a small room with a man he reasonably suspects to be a dealer in narcotics, [does

not have to] be certain that a suspect is armed before he can make a limited pat-down for weapons." *Id.* Here, Agent Wilkinson spoke with Johnson alone in the "pretty small" windowless interview room. Tr. Vol. 1, p.77. Given his "close proximity" to Johnson as they were about to discuss the attempted drug sale, it was reasonable for Agent Wilkinson to pat down Johnson. *United States v. $109,179 in U.S. Currency*, 228 F.3d 1080, 1086–87 (9th Cir. 2000); *see also United States v. $84,000 U.S. Currency*, 717 F.2d 1090, 1099 (7th Cir. 1983). The fact that another agent helped escort Johnson to the room and was, presumably, in the area does not make Agent Wilkinson's decision any less reasonable. *See Post*, 607 F.2d at 852 (finding a pat-down reasonable even after "[f]our agents stopped and accompanied [the suspect] to the interview room" when only one agent entered the room with the suspect). The one-on-one nature of the interview also increased the danger for Agent Wilkinson. *See id.; $84,000 U.S. Currency*, 717 F.2d at 1099 (finding a pat-down justifiable when agents were "in a two-on-two situation" in a confined space). In a small confined space, it would have been easy for a suspect to attack Agent Wilkinson. Here, being alone with Johnson—suspected of trying to sell drugs—in the small interview room supports the reasonableness of Agent Wilkinson's pat-down.

Courts also consider "the time of day" to evaluate the reasonableness of a *Terry* frisk. *United States v. Johnson*, 921 F.3d 991, 998 (11th Cir. 2019) (en banc), *cert. denied*, 140 S. Ct. 376. Whether a frisk occurs early in the morning may impact its reasonableness. *See id.* (upholding frisk after considering that police found the suspect after 4:00 A.M.); *Abel*, 773 N.E.2d at 279; *N.W.*, 834 N.E.2d at 166 (a pat-down was justified partially because "it was early in the morning"). Here, the attempted sale took place a little before 7:00 A.M., and Agent Wilkinson first learned of it at 7:15 A.M. Because Agent Wilkinson had limited, if any, knowledge about Johnson's activities earlier that morning and the previous evening, it was reasonable for him to believe Johnson may have been armed and dangerous. Of course, not every act—nor every suspected crime—that occurs at an early hour automatically allows for a pat-down. But here, when combined with the suspected crime of selling drugs and the small interview room, the time furthers the pat-down's reasonableness.

"[T]o pursue his investigation without fear of violence," *Dickerson*, 508 U.S. at 373 (quotation omitted), Agent Wilkinson patted down Johnson after they entered the interview room. Johnson's suspected crime, the small interview room, and the early morning hour all support finding Agent Wilkinson's decision to pat down Johnson was reasonable.

III. Agent Wilkinson could seize the baggie when he immediately identified the lump as contraband the moment he grazed Johnson's pocket.

Johnson urged that the "pat down exceeded the scope of a pat down [u]nder *Terry*" when Agent "Wilkinson testified that upon feeling the item in Johnson's pocket he knew that it was not a weapon." Appellant's Br. at 11–12. But this argument ignores later Supreme Court development of *Terry*, notably *Dickerson*. "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent"—even if that item is not a weapon—"there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *Dickerson*, 508 U.S. at 376.

When, for example, an officer performing a pat-down search for weapons "felt a 'tubular object' in [a suspect's] pocket that was 'consistent with being a syringe,'" it could be seized under *Terry* because its "identity was immediately apparent." *Durstock*, 113 N.E.3d at 1278. Contraband was properly seized when officers "testified they immediately recognized [it], based on their experience and training, to be marijuana based on its feel." *Holbert v. State*, 996 N.E.2d 396, 400 (Ind. Ct. App. 2013), *trans. denied*. When an officer during a lawful pat-down "felt an object located in [a suspect's] right front pants pocket, which she immediately recognized as 'narcotics' . . . due to its texture, describing it as 'lumpy' and 'wadded,'" the seizure tracked the Fourth Amendment's strictures. *Patterson*, 958 N.E.2d at 487–88. When, during a weapons frisk, an officer "felt an object, located in [a suspect's] left front pants pocket, which he recognized, based on its packaging, shape, and feel to be rock cocaine," the unlawful nature of the object was again immediately apparent and its seizure permissible.

Wright v. State, 766 N.E.2d 1223, 1233–34 (Ind. Ct. App. 2002). When an officer "conducted a pat down search for weapons" and "noticed a hard object" in a suspect's left front shorts pocket, he "immediately determined its incriminating character" as cocaine, justifying its seizure. *Parker*, 662 N.E.2d at 999. And when an officer "determined contemporaneously with his patdown search for weapons that the item in [a suspect's] pocket was marijuana," its seizure was *Terry*-authorized. *Bratcher v. State*, 661 N.E.2d 828, 832 (Ind. Ct. App. 1996).

On the other hand, if an officer must manipulate or further examine an object before its nature as contraband becomes apparent, the search exceeds *Terry*'s scope. *See Dickerson*, 508 U.S. at 378 (holding search unreasonable when "the officer determined that the lump was contraband only after squeezing, sliding and otherwise manipulating the contents of the defendant's pocket—a pocket which the officer already knew contained no weapon") (quotation omitted). In other words, "the reasonable suspicion that gives authority to a *Terry* stop does not, without more, authorize the **examination** of the contents of items carried by the suspicious person." *Berry v. State*, 704 N.E.2d 462, 466 (Ind. 1998) (emphasis added). A seizure violated the Fourth Amendment, for example, when an officer "did not claim that he could detect, from the limited touch, the incriminating nature of the object," but instead just "suspected the object was something illegal[,] . . . 'possibly a weapon.'" *Peele v. State*, 130 N.E.3d 1195, 1200 (Ind. Ct. App. 2019) (quotation omitted). An unlawful seizure occurred when an officer felt and removed a pen cap from a suspect then, "'upon further investigation and looking at it,' he saw a baggie hanging from the pen cap, and based on previous experiences of finding narcotics in baggies in pen caps, he suspected that this baggie contained narcotics." *Clanton v. State*, 977 N.E.2d 1018, 1026 (Ind. Ct. App. 2012). And a seizure exceeded *Terry* when an officer removed a bottle from a suspect's "pocket during a patdown for weapons, but the contraband was detected only after [the officer] shined a light into the bottle and opened it." *Harris v. State*, 878 N.E.2d 534, 539 (Ind. Ct. App. 2007), *trans. denied*.

During the pat-down in the interview room, Agent Wilkinson quickly encountered something that "felt like a giant ball" in Johnson's pocket. Tr.

Vol. 2, p.113. Agent Wilkinson immediately recognized, consistent with his training and knowledge of the situation at hand, all the apparent hallmarks of narcotics packaged for sale: the lump felt "like a ball of drugs." *Id.* Once the contour or mass is at once identified as contraband, as here, "its warrantless seizure [is] justified." *Dickerson*, 508 U.S. at 375–76. Because Agent Wilkinson discerned the lump to be contraband as soon as he felt it without further manipulation, he was justified in seizing the powder-filled baggie from Johnson's pocket. This "patdown search did not run afoul of the Fourth Amendment, and therefore the trial court did not abuse its discretion in admitting evidence obtained as a result." *O'Keefe v. State*, 139 N.E.3d 263, 268 (Ind. Ct. App. 2019).

Conclusion

Agent Wilkinson lawfully removed the baggie from Johnson's pocket after immediately identifying it as contraband during the reasonable pat-down search. Because this seized evidence was properly admitted under the Fourth Amendment, we need not entertain any alternative explanations that could theoretically foreclose the baggie's admission. We affirm.

Rush, C.J., and David and Goff, JJ., concur.
Slaughter, J., dissents with separate opinion.

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Slaughter, J., dissenting.

The Court holds that the officer's frisk of defendant, Michael Johnson, did not violate the Fourth Amendment. I agree with the Court that this is a close case. But I cannot join the Court's careful analysis and write briefly to explain why.

The issue here is when a law-enforcement officer can search a person's outer clothing for weapons during an investigative stop—commonly known as a *Terry* stop and frisk. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court struck a fragile balance between a person's rights under the Fourth Amendment and legitimate law-enforcement needs. Balancing these interests, *Terry* mandates that law enforcement may use a "self-protective search for weapons"—a frisk—only if an officer can "point to particular facts from which he reasonably inferred that the individual was armed and dangerous." *Sibron v. New York*, 392 U.S. 40, 64 (1968).

Under this framework, the Court finds that Johnson's frisk was permissible for three reasons. One, the officer received a tip that Johnson offered to sell "white girl"—a street term for cocaine—to a casino patron. Two, the tip occurred about 7 a.m. Three, the officer was one-on-one with Johnson in a small room. *Ante*, at 7. As the Court recognizes, Johnson's suspected drug activity is the most suggestive that he might be armed and dangerous. *Id.* at 8. But, as the Court also recognizes, this alone is not enough. *Id.* at 7–8; *United States v. Lopez*, 907 F.3d 472, 486 (7th Cir. 2018) ("The authority to frisk is not automatic in a drug investigation.").

Unlike the Court, I do not find that Johnson's suspected drug activity, in combination with the time of the encounter and the fact that the officer was alone in a room with Johnson, gives rise to the crucial inference *Terry* requires. These facts do not suggest that Johnson was armed and dangerous. As to the timing, nothing in the record connects the early morning with any likelihood that Johnson (or any other casino patron) was armed. For instance, there is no evidence that 7 a.m. is a unique time when casino patrons, or even drug dealers in casinos, are more likely to be armed. As to the location, while a weapon may be more dangerous in a small, closed-off space, this location does not suggest that Johnson was armed in the first place. Yet that is the necessary inference. Because

neither the time nor the location gives rise to the inference that Johnson was armed, *Terry*'s critical link is missing, and this protective weapons search was unconstitutional.

Admittedly, this is a fine point on which to disagree. But *Terry* draws an intentionally fine line—one I do not wish to see eroded. After all, a frisk is not merely a "petty indignity . . . [but] a serious intrusion upon the sanctity of the person," and one that can "inflict great indignity and arouse strong resentment." *Terry*, 392 U.S. at 17. Because law enforcement provides a vital service, this intrusion will often be worth the cost. But to protect rights guaranteed under the Fourth Amendment, we must respect *Terry*'s limitation.

For these reasons, I respectfully dissent.

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IN THE COURT OF APPEALS OF INDIANA

Michael D. Johnson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 19, 2019

Court of Appeals Case No. 19A-CR-975

Appeal from the Madison Circuit Court

The Honorable Angela G. Warner Sims, Judge

Trial Court Cause No. 48C01-1602-F5-402

Bailey, Judge.

Case Summary

[1] Michael D. Johnson ("Johnson") appeals his conviction for Dealing in a Look-a-like Substance, as a Level 5 felony.[1] Johnson presents the sole issue of whether the trial court abused its discretion in admitting evidence obtained in violation of his Fourth Amendment right to be free from an unreasonable search and seizure.[2] We reverse.

Facts and Procedural History

[2] On November 8, 2015, Brett Eversole ("Eversole") was a gambling patron at the Hoosier Park Casino in Anderson, Indiana. Eversole reported to a security officer that a black male wearing a white hat had approached him at a gambling machine and asked if he "wanted to buy white girl." (Tr. Vol. II, pg. 89.) Eversole assumed "white girl" meant cocaine. The security officer notified shift supervisor Matt Miller ("Miller"), who notified Gaming Enforcement Agent

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[1] Ind. Code § 35-48-4-4.6(a)(5).

[2] Johnson briefly references Article 1, Section 11 of the Indiana Constitution, Indiana's search and seizure clause, which is to be interpreted and analyzed independent of the Fourth Amendment to the United States Constitution. *Baniaga v. State*, 891 N.E.2d 615, 618 (Ind. Ct. App. 2008). However, Johnson does not develop a corresponding argument with respect to the factors to be balanced in determining the reasonableness of a search or seizure under the Indiana search and seizure clause. *See Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005) (determining that the reasonableness of a search or seizure turns upon a balance of (1) the degree of concern, suspicion, or knowledge that a violation had occurred; (2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities; and (3) the extent of law enforcement needs). Pursuant to Indiana Appellate Rule 46, Johnson has waived the issue for review.

Zach Wilkinson ("Agent Wilkinson").[3] Miller also requested video surveillance of the gaming floor.

[3] Agent Wilkinson reviewed surveillance footage, without audio, and "confirmed the interaction" of approximately thirty seconds between Eversole and a black male wearing a white hat. *Id.* at 106. He located Johnson, a black male wearing a white hat, and asked that he come to the gaming enforcement interview room. When they reached the interview room, Agent Wilkinson advised Johnson that he would "need a pat down." *Id.* at 111. Agent Wilkinson detected and removed from Johnson's pocket an object that "felt like a ball of drugs." *Id.* at 113. He placed Johnson in handcuffs and provided a *Miranda*[4] warning.

[4] An Indiana State Police chemist tested the white powder; she identified no drug but detected a chemical possibly derived from baking soda. On February 29, 2016, the State charged Johnson with Dealing in a Look-a-like Substance. On April 5, 2017, Johnson filed a motion to suppress the evidence obtained as a result of the warrantless search of his pocket. On April 24, 2017, the trial court conducted a hearing on the motion to suppress and the parties agreed to submit

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[3] Agent Wilkinson testified that a gaming enforcement agent has full police powers, including authority to make an arrest.

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

briefs regarding their respective positions on admissibility. On October 4, 2017, the trial court denied Johnson's motion to suppress.

[5] Johnson was brought to trial before a jury on January 23, 2019, and he objected to the admission of evidence garnered in the search of his pocket. Agent Wilkinson testified as follows: Johnson "voluntarily came back" to the interview room; Agent Wilkinson informed Johnson that he would need to submit to a pat-down; Johnson was "free to leave" when he submitted to the pat-down; Agent Wilkinson detected a bulge "likely some type of drug;" he "knew it wasn't a weapon;" and he handcuffed Johnson after removing the item. (Tr. Vol. II, pgs. 128-29.) Johnson took the position that law enforcement had unlawfully exceeded the scope of a pat-down. The State argued that Agent Wilkinson had probable cause to make an arrest when he removed the ball of powder from Johnson's pocket. The trial court agreed with the State that what had transpired was "a search incident to arrest." *Id.* at 148.

[6] Johnson was convicted as charged and sentenced to four years imprisonment, with three years suspended to probation. Johnson now appeals.

Discussion and Decision

[7] The trial court has broad discretion to rule on the admissibility of evidence. *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). Generally, evidentiary rulings are reviewed for an abuse of discretion and reversed when admission is clearly against the logic and effect of the facts and circumstances. *Id.* However, when

a challenge to an evidentiary ruling is predicated on the constitutionality of a search or seizure of evidence, it raises a question of law that is reviewed de novo. *Id.* The State has the burden to demonstrate that the measures it used to seize information or evidence were constitutional. *State v. Roger*, 883 N.E.2d 136, 139 (Ind. Ct. App. 2008). "When a search is conducted without a warrant, the State has the burden of proving that an exception to the warrant requirement existed at the time of the search." *Bradley v. State*, 54 N.E.3d 996, 999 (Ind. 2016).

[8] The Fourth Amendment "regulates all nonconsensual encounters between citizens and law enforcement officials." *Thomas*, 81 N.E.3d at 625. The Fourth Amendment guarantees that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Nonconsensual encounters "typically are viewed in two levels of detention: a full arrest lasting longer than a short period of time, or a brief investigative stop." *Clark v. State*, 994 N.E.2d 252, 261 (Ind. 2013). The former requires probable cause to be permissible, while the latter requires a lower standard of reasonable suspicion. *Id.* Determining whether there was a consensual encounter, or some level of detention turns upon an objective

evaluation of whether, under all the circumstances, a reasonable person would feel free to disregard the police and go about his business. *Id.*

[9] Agent Wilkinson testified that he asked Johnson to come into the interview room to explain "his side of the story" and Johnson "voluntarily came back." (Tr. Vol. II, pg. 111.) Agent Wilkinson explained that Johnson would "need a pat-down," *Id.* at 112, and Johnson submitted. The initial encounter between Johnson and Agent Wilkinson was akin to a *Terry*[5] stop. *See Clenna v. State*, 782 N.E.2d 1029 (Ind. Ct. App. 2003) (recognizing that an investigative stop by an officer responding to a report of suspicious activity in a drug store was a *Terry* stop).

[10] It is well-settled Fourth Amendment jurisprudence that a police officer may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if the officer has a reasonable suspicion that criminal activity "'may be afoot.'" *Id.* at 1032 (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). If the officer possesses a reasonable fear of danger when making a *Terry* stop, he or she may conduct a carefully limited search of the suspect's outer clothing in an attempt to discover weapons that might be used to assault the officer. *Granados v. State*, 749 N.E.2d 1210, 1213 (Ind. Ct. App. 2001). Johnson does not argue that Agent Wilkinson lacked a reasonable suspicion of

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

criminal activity and he does not challenge the decision to perform a pat-down search.

[11] But the encounter did not end with a pat-down. Agent Wilkinson reached into Johnson's pocket and retrieved a ball of a powdered substance, which he did not suspect to be a weapon. Generally, the Fourth Amendment to the United States Constitution prohibits a warrantless search. *Berry v. State*, 704 N.E.2d 462, 465 (Ind. 1998). One exception to this rule is a search incident to a lawful arrest. *Gibson v. State*, 733 N.E.2d 945, 953 (Ind. Ct. App. 2000). "Evidence resulting from a search incident to a lawful arrest is admissible at trial." *Id.* However, "[a]n unlawful arrest cannot be the foundation of a lawful search." *Id.* "Evidence obtained as a direct result of a search conducted after an illegal arrest is excluded under the fruit of the poisonous tree doctrine." *Id.* at 954.

[12] The salient inquiry is whether Agent Wilkinson had probable cause to arrest Johnson when the search occurred. "Probable cause exists where the facts and circumstances within the knowledge of the officer making the search, based on reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed." *Robles v. State*, 510 N.E.2d 660, 664 (Ind. 1987). The amount of evidence necessary to satisfy the probable cause requirement for a warrantless arrest is to be determined on a case-by-case basis. *Moffitt v. State*, 817 N.E.2d 239, 246 (Ind. Ct. App. 2004).

[13] Prior to detaining Johnson, Agent Wilkinson had interviewed Eversole, who reported a brief encounter in which a black male wearing a white hat tried to sell "white girl," a street term for cocaine. (Tr. Vol. II, pg. 89.) The agent's review of surveillance footage corroborated an encounter but no criminality.[6] However, he later learned that Johnson was in possession of a ball of something. Arguably, Eversole's report of criminal activity coupled with Johnson's apparent possession of contraband established probable cause for an arrest. But the very brief testimony elicited from Agent Wilkinson does not establish when he obtained the additional knowledge.

[14] Agent Wilkinson testified on direct examination as follows:

> Question: Okay and when you entered into the interview room did you inform him that you needed to pat him down?
>
> Agent: Yes. [Objection]
>
> Court: Sustained.
>
> Question: Were there any items that drew your attention?
>
> Agent: Yes.
>
> Question: Okay – tell us about that.

[6] There was no audio, and Agent Wilkinson did not see a transfer of anything.

> Agent: There was essentially it felt like a giant ball and so that's – and with the information I had with the report of him attempting to sell drugs to patrons it felt you know like a ball of drugs essentially so that was –
>
> Question: Okay you've had some basic drug recognition training?
>
> Agent: Yes. . . .
>
> Question: Okay so when you felt this – based on the information you already have – had did you remove it from his pocket?
>
> Agent: Yes.

(Tr. Vol. II, pgs. 111-114.)[7]

[15] The testimony suggests alternative scenarios as to how Agent Wilkinson discovered the apparent contraband. The agent may have been conducting "a carefully limited search of outer clothing to detect weapons," *Granados*, 749 N.E.2d at 1213, when he discerned characteristics consistent with contraband, notwithstanding the fabric barrier. Or Agent Wilkinson, having received information of an attempted sale of contraband, may have reached into Johnson's pocket and examined the item before concluding it was likely

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[7] Agent Wilkinson testified in a similar fashion at the suppression hearing. He was asked "what happened when you got into the room" and responded: "We got in the room I padded [sic] him down for weapons – and in his front, I believe, left pocket there was a giant ball and you know from the information I had and also with my training and experience I took that to be drugs or contrabands [sic] so – once that was discovered he was then placed under arrest." (Tr. Vol. 1, pg. 71.)

contraband. In the first scenario, Agent Wilkinson would arguably have, without exceeding the scope of a *Terry* pat-down for weapons, developed probable cause for an arrest. In the second scenario, Agent Wilkinson would have conducted the search before having probable cause for an arrest and thus the seizure did not take place in a search incident to arrest. It is incumbent upon the State to prove that the measures it used to conduct a search and seize evidence were constitutional. *Roger*, 883 N.E.2d at 139. Here, the State failed to satisfy its burden; the evidence does not dispel concern that the ball of powder retrieved from Johnson's pocket was obtained in violation of his Fourth Amendment right to be free from an unlawful search and seizure.

Conclusion

[16] The State did not establish that the measures used to seize the challenged evidence were constitutional. Accordingly, the trial court abused its discretion in admitting the evidence.

[17] Reversed.

Kirsch, J., and Mathias, J., concur.

STATE OF INDIANA)
)ss
COUNTY OF MADISON)

MADISON COUNTY CIRCUIT COURT
DIVISION I
2017 TERM

CAUSE NO. 48C01-1602-F5-402

STATE OF INDIANA,
Plaintiff,
VS.

MICHAEL D. JOHNSON,
Defendant.

ORDER DENYING MOTION TO SUPPRESS

Defendant, by counsel, Alexander Newman, filed his Motion to Suppress on 4/5/17. Hearing was held and concluded on 4/24/17. State's brief was filed 5/12/17 and Defendant's brief was filed 7/25/17.

COMES NOW THE COURT, having taken the matter under advisement, and hereby DENIES Defendant's Motion to Suppress.

SO ORDERED THIS October 4, 2017

MADISON COUNTY INDIANA CIRCUIT COURT SEAL
SM

Angela Warner Sims
AW

HON. ANGELA WARNER SIMS, JUDGE
MADISON COUNTY CIRCUIT COURT DIV I

Distribution: RJO/State/Newman

STATE OF INDIANA) IN MADISON COUNTY CIRCUIT COURT
)SS:
COUNTY OF MADISON) CAUSE NO. 48C01-1602-F5-402

STATE OF INDIANA,)
Plaintiff,)
v.)

MICHAEL D. JOHNSON)
Defendant.)

TRANSCRIPT OF MOTION TO SUPPRESS

BEFORE THE HONORABLE ANGELA WARNER SIMS,
JUDGE OF THE MADISON COUNTY CIRCUIT COURT I.
DATE: 4/24/2017

MELISSA DETRICK
OFFICIAL COURT REPORTER
MADISON COUNTY CIRCUIT COURT

APPEARANCES

ON BEHALF OF THE STATE OF INDIANA:

MR. T. GREY CHANDLER
DEPUTY PROSECUTOR
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(765) 641-9585

ON BEHALF OF THE DEFENDANT, [MICHAEL JOHNSON]

MR. ALEXANDER NEWMAN
ATTORNEY AT LAW
924 MERIDIAN STREET
ANDERSON, IN 46016
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THE COURT CONVENED ON APRIL 24, 2017 AND THE FOLLOWING EVIDENCE WAS PRESENTED:

PRESENT:

ALEXANDER NEWMAN, Defense Counsel
T. GREY CHANDLER, Deputy Prosecutor
HON. ANGELA WARNER SIMS, Judge

THE COURT: State of Indiana versus Michael Johnson, 48C01-1602-F5-402. Mr. Johnson - is he going to be with us today Mr. Newman?

MR. ALEXANDER NEWMAN: Judge I don't think so.

THE COURT: Okay - Mr. Johnson does not appear today although he does appear by counsel, Mr. Newman, State of Indiana appears by Deputy Prosecutor, Mr. Chandler. Today's matter is set before the Court on Defense counsel's Motion to suppress evidence that was filed with the court on April the 4th. Do we intend then to still proceed with that motion today Mr. Newman?

MR. ALEXANDER NEWMAN: Yes Your Honor.

THE COURT: Okay the Court has reviewed the motion to suppress, it would appear from the motion that the defense is alleging illegal search - looks like based on Mr. Johnson's - detainment there at the casino by the

Indiana Gaming Commission. It would appear, based on by what I've reviewed, that it was - the search or the item seize in this case was a result of a Terry search or at least that's what's alleged. I guess what we would start with - I can't see anything on the docket or case that would indicate a warrant was ever obtained so are we all in agreement that there was not a warrant, or the search was not done pursuant to a warrant?

MR. GREY CHANDLER: Correct Your Honor.

THE COURT: Okay so to that extent from the Court's - review I would say that the State then would then have the burden to show that an exception to the warrant requirement was applicable to the facts in this case in order to sustain the search and the item seized. So with that does the State - well let me ask do you want to make any other opening statements or do we just want to proceed with evidence?

MR. ALEXANDER NEWMAN: I'm ready to just proceed Judge.

MR. GREY CHANDLER: I would like to make a brief opening statement.

THE COURT: Okay go ahead and give the Court a little bit of a overlay of what we got.

MR. GREY CHANDLER: Yes Your Honor. I'll start by saying that although I believe the officers

(indiscernible) will be the State's only witness today - may have put in his report that it was a Terry stop as the Court referred to it - um - that - just because an officer characterizes a certain legal issue a certain way it does not necessarily does that have to be a bases on which either the State argues that a search is reasonable, or the Court can find that - exception for the one (1) requirement - for a different reason. Just because an officer writes a certain reason doesn't mean that's the reason the Court has to go on. In fact, in this case that's not reason. Judge, the - the evidence is going to show that um Officer Wilkinson received information from a discernible, identifiable, patron - witness that was on the patron floor who um indicated exactly what happen. Everything that this patron said from um - if true was a criminal offense committed by the Defendant. That his information that he did provided was verified by video footage - floor footage before the officer ever went to the Defendant and had him in and searched him. He had probable cause at the time the Defendant was searched. And that is the theory under which we believe the search should be up held.

THE COURT: Okay - you want to call your first witness?

MR. GREY CHANDLER: State calls Zach Wilkinson.

THE COURT: Mr. Wilkinson if you could come up here to the witness stand for me sir. Do you each swear or affirm under the penalties of perjury any testimony you give will be the truthful?

STATE EVIDENCE

ZACH WILKINSON

Having been duly sworn to testify to the truth, the whole truth and nothing but the truth was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Grey Chandler, Deputy Prosecutor

Q Please state your name and spell for the record?

A Zach Wilkinson, Z-A-C-H W-I-L-K-I-N-S-O-N.

Q Sir how are you employed?

A I am a gaming enforcement agent with the Indiana Gaming Commission and I'm station at Hoosier Park Casino in Anderson.

Q Can you tell us what kind of training you received to be gaming enforcement?

A Um – we go to the Indiana Law Enforcement Academy and have Indiana Gaming Academy and it's just – it's like the Indiana basic law enforcement academy except we don't have EVOC which is a driving – we don't have traffic law, but we have criminal law and all the other stuff and we're um – we have full police powers in the casino

vested by the State of Indiana.
Q When did you go to the Academy?
A February 6, 2006 was my first day at the Academy.
Q When did you graduate?
A I forget the specific date but it was in April of 2006.
Q So that - so that's a - how long is the program?
A It has changed but I believe it was eight (8) - eight (8) weeks - eight (8) to twelve (12) weeks.
Q And upon graduation do you have arrest powers?
A Yes.
Q And - um - what's your experience?
A Um - first in 2006 and 2007 I was a gaming enforcement agent at Majestic Star Casino in Gary, Indiana and then once Hoosier Park open in Anderson I been a gaming enforcement agent at Hoosier Park in Anderson ever since 2008.
Q I'm going to direct your attention to Sunday, November 8th, 2015 um can you tell us what happen that day?
A I guess um best of my recollection and according to the case report that I had reviewed we were notified - I was notified specifically by Hoosier Park Casino security that a casino patron had made a complaint that another casino patron had attempted to sell him drugs.

Q Okay and - so you were working at um at the casino that day?
A Yes.
Q Here in Anderson?
A Yes.
Q How many agents are on duty at one (1) time?
A At that time there were two (2) agents on duty and typically there are two (2) agents on duty at all times, but there are always at least one (1) gaming enforcement agent at a casino in Indiana any given time.
Q And at the time that this happen it was yourself and another agent?
A Yes.
Q Who is the other agent?
A David Jenkins.
Q You said you were informed by security that there was a complaint made by one (1) of the patrons?
A Yes.
Q Tell us about um security - how many security are there?
A Well um it various for them but this was a security supervisor and usually they have two (2) supervisors at least - but there's always one (1) security supervisor there and then - in terms of security personnel there's - I don't know specifically but anywhere from five (5) to

ten (10) sometimes more.
Q This first came to your attention through one (1) of the security supervisors?
A Yes.
Q What information did the supervisor tell you at that time?
A The supervisor - the security supervisor came to our office and explained that the patron had come to them and explained that he had fallen asleep at a chair, he was woken up by a patron offering to sell him - said it was a white girl but well took that to mean the slang term for cocaine.
Q Are you familiar with white girl being a slang term for cocaine?
A Um I had heard that before and then my person working Dana Jenkins she actually had Google it to confirm the slang term and a lot of results had shown that it was referred to as cocaine.
Q Okay and so going back then the security um supervisor gave you this information what did you do next?
A Um - at first we immediately went to the surveillance office and we spoke with a surveillance supervisor and we found the video footage of this - the patrons story wanted to confirm the patrons story with

video surveillance footage and we saw that what he said appeared to be true - that he had been fallen asleep - the specific location it's in my report, I don't that off the top of my head, but then a patron came up and kind of woke him up and offered - and had a - there's no audio but on the video they have a brief interaction and then the suspect walks away.

Q Okay - at this point you had only spoken to somebody else who had spoken with the complaining patron?

A Correct - we had not yet spoken with the patron.

Q Okay and when you viewed the video you said there's no audio is that normal?

A Yes there's no audio on the casino floor but only video.

Q Okay - after you viewed this video footage on the - of the casino floor of this brief interaction what did you do?

A So then we went and found the person who had reported that, because we wanted to speak with him personally to see, you know to make sure that - the story was the same that he had given security and the same that had appeared on the video surveillance.

Q Were you able to locate him?

A Yes.

Q Where was he - where was he located?

A I believe he was at the same location - it's in my report the exact locations but it was in section six (6) of the casino, I know that for sure.

Q Do you remember what he was doing when you found him?

A Yeah he was just sitting there playing - playing a machine.

Q And what did you do when you approached him?

A I just identified myself and explained to him that we were following up on the report that another casino patron had attempted to sell him drugs of some sort.

Q And did you speak with him about his - about what he said happen?

A Yeah and he pretty much had told us what security had told us and what appeared on the video - that he had been fallen asleep and as a patron walked by and woke him up or you know kind of got his attention, he was in and out of sleep, and they had offered to sell him white girl-

MR. ALEXANDER NEWMAN: Judge I'm going to object to being nonresponsive at this point and ask for a motion to strike with everything that happened at the initial answer.

MR. GREY CHANDLER: Well I asked if he told him what happened.

THE COURT: He kind of went - I'm okay, overruled, go ahead.

Q What did this patron tell you what happened?

A Oh he said he was just sitting there and the - another casino patron had offered to sell him drugs and he told them that he didn't do drugs and it was a very short interaction and the patron, you know, went on his way, and then the patron um - that had the drugs attempted to be sold to him went and reported that to security then.

Q Did he tell you where this interaction occurred?

A Yeah he said it was at the machine that he had been playing all along so-

Q And did he identify, for you to be identify the specific location.

A Um - I believe so yeah, it was where he had been the whole time, so it came back to location after reporting it to security.

Q Did he give a description of the other patron that attempted to sell him white girl?

A Yeah he gave a description um he just said it was a black male with I believe he described it as a white hat, it's in my report, and then um - that's also what we had viewed on the video that it was a black male -

Q We'll get to that in a second.

A Okay.
Q But he told you it was a black male with a white hat?
A Yes.
Q Did you get this patrons name?
A Yes we had the name from casino security and then during our brief interaction, you know we just like to confirm the information.
Q What information did you confirm with him?
A Just his name, address, phone number.
Q And is that all information that you took down and put in your report?
A That is in an attachment to my report with the security supervisors report, that has the patrons information in it and I have that as an attachment to my report -
Q So that's in-
A - but it's not specifically in my narrative.
Q Okay - but that is information that was recorded that day by the casino-
A Yes.
Q -whether it was you or one (1) of the security agents?
A Yes.
Q Did he also have a player's club card?

A Yes.
Q And did you verify that information with him as well?
A Yes.
Q Which means you also had his date of birth?
A Yeah, date of birth also, yes.
Q And his gaming history?
A The gaming history would be in there, yes.
Q What was his name?
A It's in my report, I can't remember off the top of my head.
Q Did you bring your report today?
A Yes it's all right there.
Q If I show that to you would that refresh your recollection?
A Yes, Brett Evrsole.
Q Can you spell that in case we need to type this up.
A B-R-E-T-T E-V-R-S-O-L-E.
Q After you were finished speaking with Mr. Evrsole what did you do next?
A After we spoke with him um -

MR. ALEXANDER NEWMAN: Judge I'm going to ask that he not be able to view his report while he's testifying..

THE COURT: Okay - yeah just let us know if you

need to look at it again - otherwise I need you to try to testify from memory - okay. Go ahead Mr. Chandler.

A At that time we attempted to locate the suspect that we had the information for, we knew it was black male with a white hat, it was earlier in the morning at the casino so it wasn't extremely crowded so it made it easier to find and we just started attempting to locate the suspect on the floor and we found him near the main entrance.

Q Did you look at the video footage at any point - of the floor?

A I believe - we were working with surveillance, I can't specifically remember if they were guiding us via - we're in constant radio contact with surveillance so they could have been helping guiding us, like I said since it was not super busy I think we just attempted to locate him ourselves on the floor, since-

Q Okay let me ask you this, before you said that the complaining patron said that the patron who tried to sell him drugs was wearing a white hat and was a black male and you said you confirmed that on the video, when did you confirm that on the video?

A We confirmed that prior to going to speak with Evrsole.

Q okay-

A So we had already seen a video of the person that we knew we were going to look for.
Q So did - and you saw the video yourself?
A Yes.
Q And you saw a black male with a white hat-
A Yes.
Q -approach the complaining patron?
A Yes.
Q Okay and did this happen where Brett Evrsole said it happen?
A Yes.
Q After listening to what Brett Evrsole told you and viewing the video was there anything that was different?
A Not that I can think of (inaudible - cross talking)
Q So even though there was no audio all the visual, all the video footage matched up with everything Brett Evrsole told you?
A Yes.
Q You said you were able to eventually locate the, at this point now, suspect um-
A Yes.
Q -but you didn't have a name?
A No I did not have a name at the time.
Q Okay - um but you were able to locate him somewhere in the casino?

A Yup - yes.
Q Do you remember where that was?
A It was near the main entrance - he wasn't at a specific game, he was just centrally - standing around the main entrance area of the casino.
Q And was he - was this individual wearing the same things that you saw the individual in the video footage wearing?
A Yes.
Q Including the white hat?
A Yes.
Q And he was a black male?
A Yes.
Q And you approached him?
A Yes.
Q Tell me about that encounter?
A I identified myself and I told him we'd like to speak with him in the IGC interview room, there was - we had a report of him attempting to sell drugs on the floor and we wanted to get his side of the story so-
Q Did he agree to go back with you?
A Yes.
Q He wasn't arrested out on the casino floor?
A Correct, no.
Q Um - what happens when you want to arrest somebody -

or when you decide it's appropriate to arrest somebody on the casino floor, what do you do?

A I - you essentially just, you know, you would go out there and tell them that they are under arrest and attempted to effect the arrest on the casino floor if you have to do that.

Q What do you mean if you have too?

A Just that if that's what the situation - each situation is different so if the unique circumstance of that situation calls for you to arrest that person on the floor where you think - you have enough probably cause to arrest them there you can arrest there, that way if you think they are going to run or you think they may potentially be resisting or fighting it may - you know each situation is different, it may be best to do it right there.

Q In this situation you didn't arrest him you asked him to come back with you to talk about it?

A Correct.

Q Why did you do that?

A We just wanted to get his side of the story, at that time, had just the patron's side of the story, or the other persons side of the story as well as the video surveillance footage so.

Q But he was willing to come back with you?

A Yes.
Q If he wasn't willing to come back with you would he have been free to leave?
A Um - it's possible I guess - hind side is 20/20 - but we had enough evidence we thought at the time-
MR. ALEXANDER NEWMAN: Objection, non-responsive at this point.
THE COURT: Alright ask a follow up question - he is kind of - that's okay, ask a follow up that you want.
Q You said it's possible?
A Yes.
Q Does that mean you don't know what decision you would have made if he refused to follow you?
A Yeah I mean it would have been totally different, I would have had to access the situation at that time because - at that time I had not seen him with any drugs, there is no video evidence of him having drugs - you know I don't want to be in a situation to where I would arrested him and the patrons, obviously, could have - what if they had a vindictive - something out for him or - you know - I didn't want to effect an arrest and then have it not be true-
Q But as you sit here today you had not made a decision about whether or not he was free to leave when you went out and ask him to come back with you?

A Correct.
Q He did end up coming back with you?
A Yes.
Q He followed you back to – where was it?
A The IGC interview room at Hoosier Park Casino – ah the Gaming Commission – we have our own interview room and it has audio and video so that's also why typically we want to have people come back there because with audio and video, you know, there's no discrepancies in what he said versus what she says or things like that, cause like I said there's no audio on the floor.
Q So anything that happens in that room is audio and video recorded?
A Yes.
Q What happen when you got into the room?
A Um – we got in the room I padded him down for weapons – and in his front, I believe, left pocket there was a giant ball and you know from the information I had and also with my training and experience I took that to be drugs or contrabands so – once that was discovered he was then placed under arrest.
Q A giant ball – would you describe that a little bit more?
A I guess it was a hard, (indiscernible) about – almost the size of a baseball in his front left pocket

and then like I said - with the information I had and from my previous experience and training I took that to be the cocaine that had been -

Q Okay and what - what was it, what did it end up being?

A Well we tested it and it got sent to the State Police lab-

Q Hold on - I mean the ball - like, when you pulled it out what did it look like, what was it?

A Oh it was a giant ball of a white powder like substance wrapped in a plastic bag.

Q Okay - wrapped in like clear plastic bag?

A Yes.

Q At that point he was placed in hand cuffs?

A Yes.

Q And mirandized?

A Yes.

Q And you asked him questions?

A (no verbal response)

Q And he answered those questions?

A Yeah, yes.

MR. GREY CHANDLER: I don't have any other questions Your Honor.

THE COURT: Cross examination

CROSS EXAMINATION

By Mr. Alexander Newman, Defense Attorney

Q Sir do you prefer to be called agent Wilkinson or Officer Wilkinson?

A Agent Wilkenson.

Q Okay Agent um - I want to talk just a little bit about your training. How long have you - where were you - where did you receive your training?

A At the Indiana Law Enforcement Academy in Plainfield.

Q Okay - how long were you there, sir?

A Um it was from February 6th, 2006 and I forget the specific date but it was mid to late April when we graduated.

Q Okay and while you were there did you receive some training regarding writing incident reports?

A Yes.

Q Okay and that training taught you to be through and accurate, correct?

A Yes.

Q Um - the report that you submitted regarding this - I'll use the word incident, were you through and were you accurate when you wrote it?

A Yes.

Q Okay and you included everything that happen that

day?
A To the best of my knowledge, yes.
Q Okay um - when you're at Hoosier Park what are you wearing while you are on duty?
A Um it varies day to day, but we have - for example I wear just like a khaki color pants, we have our firearm -
Q I'm going to interrupt you, I'm sorry. Let's go back to the specific day - what were you wearing that day?
A That day um - what I remember I had my khaki pants on, um I rotate between khaki and black pants - specifically I don't remember, pants, firearm um handcuffs, extra magazines, and I wear a black 5.11 jacket, cause that conceals the weapon on the floor, then just a button up collar type shirt.
Q Black 5.11 jacket is that just a normal - your saying - is that a normal jacket?
A Yeah - it's a - Gaming Commission issues it to us and it has flaps that can come out if we need them too that -
Q Okay do you have any verbiage anywhere on your - well what I'll call uniform or what you're wearing that identifies you as a Gaming -
A Yeah on that jacket it has a flap that comes out with a badge and I believe I had it out that day.
Q Okay -

A Specifically I like to have it out if I'm going to confront someone on the floor - I also show them my badge in my pocket and identify myself, but I think that helps with officer presence and they know who their talking too.

Q So you do have badge?

A Yes.

Q And you had a badge that day?

A Yes.

Q And did you show it to Mr. Johnson when you approached him?

A I believe so, yes.

Q And what was - Agent Jenkins wearing, do you recall?

A I can't specifically recall but similar - I believe he wears vest oppose to the jacket but he also does have a badge.

Q Okay - and does he also have a firearm?

A Yes.

Q Did he have a firearm that day?

A Yes.

Q Okay - um - you talked to the prosecutor about this issue before today?

A Today was actually the first day I have - discussed it.

Q Okay - in your report you didn't include that you

did a Google search for what the term "white girl" meant-
A Right Agent Jenkins has a supplemental report-
Q Hold on - I haven't asked you a question yet-
A So yes - sorry - my specific report-
Q -Hold on - hold on-
A -does not mention that-
Q -you're fine-
A Sorry.
Q -um - you testified today that Agent Jenkins did a Google search for the term "white girl" is that correct?
A Yes.
Q Um - he, you testified that he did that Google search before you watched the video, is that correct?
A Specifically, hind sight, I don't know specifically, I'd have to review his report, so I don't want to say something -
Q To the best of your recollection did he do that Google search before you took Mr. Johnson to the IGC interview room?
A I don't remember now.
Q Okay - alright - so he might have done the Google search after-
A It's possible.
Q Okay - would you tell us just a little bit about what this interview room looks like, how long it takes to

get there from the front of the casino from the entrance where you talked to Mr. Johnson and what you have to walk through to get there and also what it looks like, please?
A Okay from where we approached him the general main, entrance area of the casino, it's probably two hundred (200) yards, roughly, so the way we walked was - we walked through the casino, you're in front of the casino cage - you know there are casino games around then you go through employee entrance, and then you go down a hallway briefly turn left, there's another employee door entrance, you walk through there and this office would then be on the right and then it's a door and it's a very small interview room, I don't know the dimensions, but it's pretty small then there's two (2) chairs and one (1) table and then there's the video surveillance - and then there's a door to the outside hallway, and then there's a door then into our office, so there's two (2) doors.
Q There are no windows in this room?
A Correct.
Q Okay - is there a table?
A Yes there's one (1) table.
Q Okay - when you were walking with Mr. Johnson to this room were you in front of him, behind him, where was Officer Jenkins, how were you walking him there?
A From what I remember I believe we - one (1) was in

front, one (1) was behind but it could of - during the course of the trip from the front to the back that could of switched up at some point - perhaps.

Q Okay - you have arrest powers outside of the casino?

A Technically yes but we don't exert them only in the casino.

Q Okay -

A They want us to enforce the statutes.

Q Okay - and - when you got Mr. Johnson into this room and you padded him down you felt what - you felt the ball in front pocket-

A Yes.

Q -and you removed it from his pocket, correct?

A Yes.

MR. ALEXANDER NEWMAN: I have nothing further Judge.

THE COURT: Any redirect?

REDIRECT EXAMINATION

By Mr. Grey Chandler, Deputy Prosecutor

Q Who did the Google search for "white girl"?

A Agent David Jenkins.

Q He did his own report?

A Yes - it's supplement - as an attachment on my initial report.

Q And that's in his report?

A Yes.

MR. GREY CHANDLER: I don't have any other questions Your Honor.

THE COURT: Okay sir, thank you, you can step down, any other evidence from the State?

MR. GREY CHANDLER: No Your Honor, State rests.

THE COURT: Mr. Newman any evidence that you want to present sir?

MR. ALEXANDER NEWMAN: No Your Honor.

THE COURT: Does counsel want an opportunity to submit any case law or memorandum of law that the Court can take a look at before making its ruling? I'll start with Defense, it's your motion.

MR. ALEXANDER NEWMAN: I do Judge, yes.

THE COURT: Okay - let-

MR. ALEXANDER NEWMAN: Unless the Court is prepared to make a ruling today.

THE COURT: No I'd like to see - as I indicated when I opened the - opening dialogue I had at least tailored a little bit of my review to the - the ascertains that Defense counsel had made and based on my review of what I had in the record on - akin to a Terry stop, at least the State - from what I can deduce from the evidence and the statements made by Mr. Chandler is at least ask the court to possible consider a different

bases for an exception to the warrant requirement so I need to take a little bit closer look at that as well. So I would certainly welcome any other cases or argument that could be articulated by either side or a written memorandum would be helpful. What kind of timeframe do we want - (pause) two (2) weeks - I mean I'm trying to figure out because we're running up against that trial date but -

MR. ALEXANDER NEWMAN: Judge I would ask that the State's brief be due first - simply because I - I don't know what - I don't know what their argument is to justify the warrantless search and I would just ask for an opportunity to respond to that after their brief is due.

THE COURT: Is two (2) weeks enough time Mr. Chandler?

MR. GREY CHANDLER: Yes Your Honor.

THE COURT: At this point - since we have the standing trial date that we need to try at least see where we stand there. So that would be-

MR. ALEXANDER NEWMAN: Judge?

THE COURT: I'm sorry - go ahead.

MR. ALEXANDER NEWMAN: I'm sorry - I was just going to - I just ask for ten (10) days after the State submits his brief to submit mine.

THE COURT: Well let's see - well can we go maybe not quite two (2) weeks for the State - the 5th - how about that Friday - if I give you ten (10) days that's going to take us up onto the trial.

MR. ALEXANDER NEWMAN: Sevens (7) fine Judge - when is the trial, I'm sorry.

THE COURT: Well right now we're set the 17th.

MR. ALEXANDER NEWMAN: Okay.

THE COURT: If I give the State until the 5th of May and then gave you until Monday the 15th that would still give you at least two (2) weekends.

MR. ALEXANDER NEWMAN: That be fine Judge. I don't think it's terribly in depth.

THE COURT: Okay - yeah I don't think it's overly complicated (inaudible) factor - okay let's start with that and then if there is issues or we need to conference further on a timeframe then just let counsel approach the Court and let me know, but if now let's try to meet those requirements if we can. So the State's brief will be due by the 5th and the response from Defense will be due by the 15th of May.

MR. GREY CHANDLER: Thank you Your Honor.

THE COURT: Okay - okay any other record we need to make on the case before we close the record today?

MR. ALEXANDER NEWMAN: No Your Honor.

MR. GREY CHANDLER: No Your Honor.

THE COURT: Okay.

(WHICH WERE ALL THE HEARING HELD THIS DATE)

STATE OF INDIANA) IN MADISON COUNTY CIRCUIT COURT
)SS:
COUNTY OF MADISON) CAUSE NO. 48C01-1602-F5-402

STATE OF INDIANA,)
Plaintiff,)
v.)

MICHAEL D. JOHNSON)
Defendant.)

REPORTER'S CERTIFICATE

I, Melissa Detrick, Reporter of the Madison Circuit Court, Madison County, State of Indiana, do hereby certify that I am the Official Court Reporter of said Court, duly appointed and sworn to report the evidence of causes tried therein.

That I prepared the foregoing transcript from the machine recordings, and certify that the transcript is a true and correct transcript of the hearing held on the 24th day of April, 2017.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my official seal this 4th day of June, 2019.

/S/ MELISSA DETRICK
MELISSA DETRICK
MADISON COUNTY CIRCUIT COURT

Melissa Detrick
Court Reporter
Madison County Circuit Court
Resident of Madison County