APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 19-3077

RAYMOND MARLING,

Petitioner-Appellee,

v.

FRANK LITTLEJOHN, Deputy Warden, Wabash Valley Correctional Facility,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.
No. 2:19-cv-00002-JRS-DLP —
James R. Sweeney II, *Judge*.

ARGUED APRIL 28, 2020 — DECIDED JULY 13, 2020

Before EASTERBROOK, RIPPLE, and SCUDDER, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. After Raymond Marling was arrested, on a warrant, while driving his car, police in Indiana took an inventory of its contents. The trunk held a locked box. An officer opened the box with a screwdriver and found illegal drugs. Together

with other evidence (including the fact that Marling was armed, despite felony convictions that made this unlawful), these drugs played a role in his convictions and 38-year sentence, which includes a 20-year enhancement for being a habitual criminal.

Marling's lawyer asked the trial court to suppress the contents of the box, arguing that opening it was improper. That argument lost in the trial court and lost again on appeal. *Marling v. State*, 2014 Ind. App. Unpub. LEXIS 1305 (Sept. 30, 2014). He filed a collateral attack, this time arguing that his trial and appellate lawyers had furnished ineffective assistance by not presenting the best reasons for objecting to the box's opening. He contended that counsel should have argued that opening his box damaged it, violating the police department's policy. The post-conviction court held a hearing, took evidence, and rejected this contention. The court of appeals affirmed, concluding among other things that counsel's omission was not prejudicial because the record did not show that the box had been damaged. 2018 Ind. App. Unpub. LEXIS 610 (May 25, 2018). But a federal district court issued a writ of habeas corpus, 2019 U.S. Dist. LEXIS 163777 (S.D. Ind. Sept. 24, 2019), ruling that a photograph in the record shows damage to the box's lock. This meant, the judge stated, that the state court's finding had been rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A factual mistake by a state court does not support collateral relief, unless a correction shows that the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Ineffective assistance of counsel suffices, because it violates the Sixth Amendment

(applied to the states by the Fourteenth). Indiana has assumed that failure of counsel at trial and on appeal to choose the best argument in support of a motion can violate the Sixth Amendment, despite many cases holding that it is essential to evaluate counsel's overall performance rather than find a single error. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 691–96 (1984); *Williams v. Lemmon*, 557 F.3d 534, 538–40 (7th Cir. 2009). Because Indiana has not made this potential argument we do not pursue it. See *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020). Still, it remains necessary to show that counsel's decision was both substantively deficient and prejudicial. The state's appellate court applied the *Strickland* standard, and our review of the outcome under § 2254(d) has been called "doubly deferential". *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

The district judge found both deficient performance and prejudice because *Florida v. Wells*, 495 U.S. 1 (1990), holds that the validity of an inventory search depends on the police department having a policy about when to take inventories. The judge read *Wells* to say that compliance with this policy is essential, which implies that a violation of a local policy also violates the Constitution. The judge read the local policy at issue to forbid damage to a container, which led him to find a constitutional error, which counsel had failed to call to the state court's attention. We think that the judge has misunderstood both *Wells* and the local policy.

Wells holds that a policy is important, but not because the Constitution demands that states suppress evidence acquired through violations of state or local rules. *That* possibility was rejected in *Virginia*

v. Moore, 553 U.S. 164 (2008), among many other decisions. See also, e.g., *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (federal court may not issue a writ under § 2254 based on an asserted error of state law). *Wells* explained why a policy matters:

> Our view that standardized criteria or established routine must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime.
>
> But in forbidding uncanalized discretion to police officers conducting inventory searches, there is no reason to insist that they be conducted in a totally mechanical "all or nothing" fashion. "[I]nventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself. Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers

> determine they are unable to ascertain from examining the containers' exteriors. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment.

495 U.S. at 4 (cleaned up). Thus "open all containers" is a valid policy. So is "exercise discretion". What matters is that there be *some* policy that makes the inventory something other than a search based on belief that it will turn up evidence of crime. The Justices did not suggest that every departure from any policy violates the Fourth Amendment. Suppose a local policy calls for opening a locked box with a hammer and chisel, while one officer uses a lockpick instead. Or suppose a policy says that items are to be stored in evidence bags, while one officer put them in boxes. Such departures from a policy lack constitutional significance under the rationale of *Wells*.

The North Vernon Police Department, whose officers stopped Marling's car and opened the box, has an inventory policy. Section 49.3.2 of General Order 49 provides:

> Inventory the contents of suitcases, boxes, and other containers.
>
> …
>
> Closed and/or Locked Containers - Inventory all closed or locked containers. If a situation exists that requires extreme measures (extensive time, manpower and equipment), and/or unreasonable potential damage to property, the officer should avoid opening the container, but should document why the container was not opened.

This says that all locked containers are to be opened and inventoried, though the officer "should avoid" opening a container when that would cause "unreasonable potential damage" to property. The policy is valid under *Wells*: it combines a presumptive rule of opening everything with a discretionary ("should") exception when the damage would be "unreasonable" in the officer's judgment. And because the policy is valid, the search is valid too. A federal judge's disagreement with how an officer exercises discretion under a local policy does not make a search unconstitutional in retrospect. See *United States v. Cartwright*, 630 F.3d 610, 616 (7th Cir. 2010). Any other understanding would amount to using the Constitution to enforce the details of local law, which *Moore* and many other decisions say is improper.

It follows that the district judge's disagreement with the state judiciary about whether the officer followed the local policy is not a sufficient ground for collateral relief. And, for what it is worth, we do not see a violation of the local policy.

The judge included in his opinion a picture showing some damage to the box's lock. That was enough, he thought, to establish the policy's violation, even though Marling did not draw this picture to the attention of the state's appellate court. Let us suppose that the judges should have examined the picture anyway. Still, the policy does not forbid *all* damage; it forbids *unreasonable* damage. This box was intact, and the lock could have been fixed or replaced. Why was the damage "unreasonable"? The judge did not say. Then there is the discretionary language in the General Order. The judge apparently understood *Wells* to forbid the use of discretion, such as evaluating

when a potential for damage would be "unreasonable". Yet the principal holding of *Wells* is that discretion about inventory searches is compatible with the Fourth Amendment. The Justices wrote:

> Nothing in *South Dakota v. Opperman*, 428 U.S. 364 (1976), or *Illinois v. Lafayette*, 462 U.S. 640 (1983), prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.

Wells, 495 U.S. at 3–4 (cleaned up), quoting from *Colorado v. Bertine*, 479 U.S. 367, 375 (1987). The officer who opened and inventoried the contents of this box acted within the scope of discretion granted by General Order 49. As *Wells* requires, discretion under the policy is unrelated to beliefs about the container's contents. If the officer did too much ("unreasonable") damage, that could have been the basis for a tort claim under state law. It is not a basis for a conclusion that the Fourth Amendment required the suppression of incriminating evidence. It follows that counsel did not violate the Sixth Amendment by omitting this line of argument.

REVERSED

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

RAYMOND MARLING, Petitioner, v. DICK BROWN, Respondent.	)	No. 2:19-cv-00002-JRS-DLP

Order Granting Petition for a Writ of Habeas Corpus

Petitioner Raymond Marling was convicted in an Indiana state court of various drug and firearm offenses. Mr. Marling now seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his convictions for possession of cocaine with intent to deliver, possession of cocaine and a firearm, and possession of a Schedule IV controlled substance. He argues that his trial and appellate counsel were ineffective for not arguing that key evidence should have been suppressed because the North Vernon Police failed to follow their own written procedures in executing an inventory search. Mr. Marling's petition is **granted**.

I. Background

The Indiana Court of Appeals summarized the relevant facts and procedural history as follows:

> [T]here was an active arrest warrant for Marling from Jackson County [and reason to believe] that Marling might be involved in drug activity and that he might be in possession of a handgun. Detective Sandefur told local police departments to look for Marling.
>
> * * *
>
> North Vernon Police Officer Jeffrey Day responded and initiated a traffic stop on County Road 350 North. Marling stopped the vehicle in the traffic lane, so that only the oncoming traffic lane was passable. Officer Day ordered Marling to step out of the car, and Detective Sandefur handcuffed him. Marling was wearing an empty shoulder holster under his shirt.
>
> Officer Day looked inside of the vehicle and saw that there were no passengers. He observed a handgun between the driver's seat and the console; the hammer of the handgun was cocked, but the safety lock was on. Marling told Officer Day that he did not have a permit for the handgun. Officer Day took Marling to jail, where $686 was inventoried from Marling's billfold. Marling asked Officer Day to contact his mother to ask if she could remove money from a black bag in the Avenger and remove the vehicle from impoundment.
>
> North Vernon Police Sergeant Craig Kipper conducted a search of the Avenger prior to impoundment in accordance with North Vernon

Police General Order 49, which provides for an inventory search prior to the impoundment of a vehicle if a driver was arrested and was driving the vehicle immediately before arrest. The inventory search included a search of the vehicle in all locations where items of value may be located, including closed and locked containers.

During his search, Sergeant Kipper first took possession of the handgun. He then found several cellphones with chargers, a clear bag with several syringes, four Clonazepam pills, a schedule IV drug, and a clear container with white powder residue. He also found a prescription pill bottle containing Intuniv, a legend drug, one Hydroxyine, a legend drug, and one Vyvanse, a schedule II drug. In the passenger compartment, Sergeant Kipper found $1,000 secured with a rubber band inside a laptop bag. In the trunk, the Sergeant found two rifles, a duffel bag containing .9mm ammunition, a box of syringes, thirty-two loose syringes, and a digital scale that looked like a cell phone. Sergeant Kipper also discovered a metal combination lockbox in the trunk; he opened the box with a screwdriver. The box held a clear baggie containing .51 grams of cocaine, various capsules containing dimethyl sulfone, a cutting agent, four baggies with white residue, and one Clonazepam.

* * *

On May 1, 2013, the State charged Marling with Count I, class B felony possession of cocaine with intent to deliver; Count II, class C felony possession of cocaine and a firearm; Count III,

> class C felony carrying a handgun without a license; Count IV, class D felony possession of a schedule IV controlled substance; Count V, class D felony possession of a schedule II controlled substance; Counts VI and VII, two counts of class D felony possession of a legend drug; and Count VIII, class D felony unlawful possession of a syringe.

Marling v. State, 2014 WL 4854995, at *1–2 (Ind. Ct. App. Sept. 30, 2014) ("*Marling I*") (citations omitted).

Before trial, defense counsel moved to suppress all evidence found in the lockbox. Tr. App'x Vol. I at 51. Relying on *State v. Lucas*, 859 N.E.2d 1244 (Ind. Ct. App. 2007), counsel argued that the police were not permitted to open locked boxes during an inventory search.[1] *Id.* The State responded by noting that *Lucas* does not prohibit police from opening a locked container; instead, "[t]he officers have to be following a procedure by their department and that's what [the officer] did in this case." Tr. Trans. Vol. II at 48. And North Vernon Police Department General Order 49 directs officers to

> [i]nventory all closed and locked containers. If a situation exists that requires extreme measures

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[1] Counsel cited *George v. State*, 901 N.E.2d 590 (Ind. App. Ct. 2009), not *Lucas*. But *George* repeats *Lucas*'s key holding: "In *Lucas*, the object of the search—contraband inside a locked box—had not been lawfully seized because the policy was silent regarding whether the officers were authorized to open locked containers." *Id*. at 595. And aside from restating that holding, *George* offered no support for Mr. Marling's argument. *See id*. at 596–97 (holding that laboratory analysis of pills found in closed but unlocked container was not an additional Fourth Amendment "search").

> (extensive time, manpower and equipment), and/or unreasonable potential damage to property, the officer should avoid opening the container, but should document why the container was not opened.

Marling II, 2018 WL 2375769, at *2. Despite apparent damage to the lockbox from the search, counsel did not argue that the police had violated their inventory search procedures. The trial court denied Mr. Marling's motion to suppress, relying on General Order 49. Tr. App'x Vol. I at 70 ("North Vernon had a duly promulgated Impoundment Procedure in effect . . . which authorized the search and opening of closed and locked containers within vehicles.").

After a jury trial, Mr. Marling was convicted of two counts of possession of a legend drug and one count each of possession of cocaine with intent to deliver, possession of cocaine and a firearm, possession of a schedule IV controlled substance, unlawful possession of a syringe, and possession of a handgun by a felon. *Id.* at *2. The trial court sentenced him to a total of 38 years in prison, including a 20-year enhancement for habitual offender status. *Id.* at *2–3.

Mr. Marling appealed, arguing (among other things) that the trial court erred in denying his motion to suppress. Dkt. 14-5 at 11–13. The appellate court affirmed, *Marling I*, 2014 WL 4854995, at *7, and the Indiana Supreme Court denied leave to transfer, dkt. 14-3 at 7.

Mr. Marling next filed a state post-conviction petition, arguing (among other things) that trial and appellate counsel were ineffective for not arguing that the lockbox evidence should have been

suppressed because Sergeant Kipper failed to follow General Order 49. Dkt. 15-2 at 31–33. The trial court denied the petition, and the Indiana Court of Appeals affirmed. *Marling v. State*, 2018 WL 2375769, at *3–6 (Ind. Ct. App. May 25, 2018) ("*Marling II*"). The Indiana Supreme Court denied Mr. Marling's petition to transfer. Dkt. 14-4 at 10.

Mr. Marling then filed a petition for a writ of habeas corpus in this Court. His operative petition in this action is the amended petition filed February 26, 2019. Dkt. 12.

II. Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). Where a state court has adjudicated the merits of a petitioner's claim, a federal court cannot grant habeas relief unless the state court's adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "If this standard is

difficult to meet, that is because it was meant to be." *Id.* at 102.

"The decision federal courts look to is the last reasoned state-court decision to decide the merits of the case." *Dassey v. Dittmann*, 877 F.3d 297, 302 (7th Cir. 2017) (en banc). If the last reasoned state court decision did not adjudicate the merits of a claim, or if the adjudication was unreasonable under § 2254(d), federal habeas review of that claim is *de novo*. *Thomas v. Clements*, 789 F.3d 760, 766–68 (7th Cir. 2015).

III. Discussion

Police may not open locked containers during a warrantless inventory search unless they are following reasonable standardized procedures. *Florida v. Wells*, 495 U.S. 1, 4 (1990). Whether an officer followed reasonable standardized procedures during an inventory search is a question of fact. *United States v. Cartwright*, 630 F.3d 610, 613 (7th Cir. 2010).

Mr. Marling argues that trial and appellate counsel were ineffective for not arguing that the lockbox evidence should have been suppressed because Sergeant Kipper failed to follow General Order 49. Specifically, he argues that opening the lockbox with a screwdriver created "unreasonable potential damage to property." Dkt. 12 at 23.

The Indiana Court of Appeals did not find that trial or appellate counsel made a strategic decision to not argue that Sergeant Kipper failed to follow General Order 49. Instead, the court relied exclusively on a factual finding that Sergeant Kipper followed General Order 49:

> To the extent Marling argues that his trial and appellate counsel failed to argue that the State did not follow its written policy because the box was damaged, we observe that Marling asserts that, "[b]y the State's own evidence, the police report of Officer Kipper, he had to break open the locked box with a screw driver, causing damage to the property." However, page 51 of the Appellant's Appendix, cited by Marling, merely states: "In the trunk was a silver square combination lock box. The box was locked. The locked box was opened with a screw driver. In the locked box was more syringes and several items that are used for the ingestion of illegal substances." We cannot say that this document alone establishes that the box was damaged.

Id. at *5 (citations omitted); *see also id.* at *5 n.1 ("Given that the State presented its inventory procedure and the portion of the record cited by Marling does not reveal damage to the box and he does not point elsewhere in the record for any damage to the box, we cannot say that the police failed to perform the search in conformity with their procedures.").

The state court's factual finding that the lockbox was not damaged[2] is both unreasonable under 28 U.S.C. § 2254(d)(2) and rebutted by clear and convincing evidence, as required by 28 U.S.C. § 2254(e)(1). State's Exhibit 26 is a picture of the

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[2] The state appellate court's exclusive focus on actual damage to the lockbox—instead of "unreasonable potential damage" as General Order 49 provides—was misguided but not unreasonable. In practice, actual damage and "unreasonable potential damage" may track very closely to each other.

lockbox that reveals a damaged (and likely inoperable) latch:

While Mr. Marling did not cite Exhibit 26 in his post-conviction appellant's brief, the State cited it multiple times in their appellee's brief. *See* dkt. 14-10 at 12, 20, 21. The respondent does not argue that the Indiana Court of Appeals could ignore the exhibit merely because the State (and not Mr. Marling) brought it to the court's attention.

The state appellate court's decision thus relied on an unreasonable factual determination, which means this Court must review Mr. Marling's claim *de novo*. *Thomas*, 789 F.3d at 766–68. To prevail, Mr. Marling must show "both that his attorney's performance fell below an objective standard of reasonableness and that there was a reasonable probability that the outcome of the relevant proceedings . . . would have been different but for his counsel's failings." *Monroe v.*

Davis, 712 F.3d 1106, 1116 (7th Cir. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

The first question is whether counsel's performance was deficient. It was. Counsel, relying on *Lucas*, moved to suppress the lockbox evidence merely because Sergeant Kipper opened the locked container during the search. But when the State argued that, unlike the inventory search policy in *Lucas*, General Order 49 directed officers to open locked containers in an inventory search, counsel failed to raise the obvious rejoinder that the police had failed to comply with General Order 49. This failure was an unreasonable "lapse in professional judgment," not a strategic decision that is entitled to deference. *Monroe*, 712 F.3d at 1118.

Trial counsel's performance was also prejudicial. There is a reasonable probability that the trial court would have granted Mr. Marling's motion to suppress as to the lockbox evidence if counsel had argued that Sergeant Kipper violated General Order 49. The respondent argues that counsel's performance was not prejudicial because prying open the latch on a lockbox was "hardly an extreme measure or one that would foreseeably cause 'unreasonable potential damage' to the property." Dkt. 14 at 12. The Court takes no position on this argument except to find a reasonable probability that the state trial court could have disagreed with it. Indeed, the trial court on post-conviction review appeared to find that prying open the lockbox *was* an extreme measure. Dkt. 15-2 at 128 ("These facts justified extreme measures necessitating opening a lockbox with a screwdriver.").

Three of Mr. Marling's convictions—those for possession of cocaine with intent to deliver, possession of cocaine and a firearm, and possession of a Schedule IV controlled substance—relied on evidence found in the lockbox. If the trial court had granted Mr. Marling's motion to suppress that evidence—and there is a reasonable probability it would have—the outcome of his trial on these counts very likely would have been different. Thus, there is a reasonable probability that Mr. Marling's trial outcome would have been different, so *Strickland*'s prejudice prong is satisfied.

Because trial counsel's performance was deficient and prejudicial, Mr. Marling's petition for a writ of habeas corpus is **granted**. The Court need not address his related ineffective assistance of appellate counsel claim.

IV. Remedy

Mr. Marling asks this Court to order a new trial. But if the state trial court again denies Mr. Marling's suppression motion, a new trial would be unnecessary. Accordingly, **within 90 days of this Order, the State shall either (1) reopen proceedings in the state trial court and allow Mr. Marling to file a new motion to suppress, (2) announce their intent to retry Mr. Marling, or (3) release Mr. Marling from custody on the convictions for possession of cocaine with intent to deliver, possession of cocaine and a firearm, and possession of a Schedule IV controlled substance.**

Final judgment shall now enter.

IT IS SO ORDERED.

Date: 9/24/2019

/s/ James R. Sweeney II
JAMES R. SWEENEY II,
JUDGE
United States District Court
Southern District of Indiana

Distribution:

RAYMOND MARLING
995571
WABASH VALLEY - CF
WABASH VALLEY CORRECTIONAL FACILITY -
Inmate Mail/Parcels
Electronic Service Participant - Court Only

Andrew A. Kobe
INDIANA ATTORNEY GENERAL
andrew.kobe@atg.in.gov

APPENDIX C

STATE OF INDIANA	)	IN THE JENNINGS
	) SS:	CIRCUIT COURT
COUNTY OF JENNINGS	)	
	)	
		CAUSE NO. 40C01-1504-PC-001

RAYMOND MARLING,

Petitioner,

-vs-

STATE OF INDIANA,

Respondent.

ORDER ON AMENDED PETITION FOR POST-CONVICTION RELIEF

The Petitioner, Raymond Marling, appears in person, and by counsel Calvin Brent Martin. The Respondent, State of Indiana, appears by Chief Deputy Prosecuting Attorney, Drew Dickerson, for hearing on November 1, 2017, on Petitioner's Amended Petition for Post-Conviction Relief filed March 6, 2017, and this Court, having taken evidence, and heard oral argument, now finds as follows:

1.) After a jury trial in October of 2013, Petitioner was convicted of

Dealing in Methamphetamine, a Class A felony;
Unlawful Possession of A Schedule IV Controlled Substance, a Class D felony;
Two (2) convictions for Unlawful Possession of a Legend Drug, each a Class D felony;
Unlawful Possession of Syringe;
Carrying a Handgun With a Prior felony conviction, a Class C felony.

He received an aggregate sentence of 38 years. He was represented at trial by Bradley K. Kage, an experienced attorney with some 34 years of trial practice experience and a former Prosecutor.

2.) Petitioner filed a direct appeal to the Indiana Court of Appeals in 40A01-1403-CR-109 via R. Patrick Magrath, himself experienced appellate counsel. Among the numerous issues raised on direct appeal was the legality of an inventory search of Petitioner's vehicle, including a locked lockbox found in the trunk of that vehicle, an issue also addressed in an earlier Motion to Suppress and at trial.

3.) The Court of Appeals specifically addressed the inventory search, including the search of the locked lockbox, and ultimately affirmed Petitioner's convictions and sentences on September 30, 2014 in a Memorandum Decision.

4.) Petitioner now claims both trial and appellate counsel were ineffective in failing to argue that law enforcement officer Craig Kipper did not follow written departmental policy regarding opening locked containers found in vehicles. The relevant portion of that policy reads as follows:

> *North Vernon Police Department, General Order 49, Impoundment: 49.3.2 Areas to be Inventoried*
> *Closed and/or Locked Containers-Inventory all closed or locked containers. If a situation exists that requires extreme measures (extensive time, manpower and equipment), and/or unreasonable potential damage to property, the officer should avoid opening the container, but should document why the container was not opened.*

5.) Kipper opened the box with a screwdriver and found many incriminating items. Also in the trunk were two (2) rifles, cash and syringes. Marling, when stopped, was wearing an empty shoulder holster. In plain view inside the vehicle was a cocked handgun (safety on).

6.) Ineffective assistance of counsel claims are evaluated under the test found in *Strickland v. Washington, 466 US. 668, 104 S.Ct.2052, 80 L.Ed 2nd 674 (1984).* In this case, both of Petitioner's claims fail because had Kage and/or Magrath raised the argument Petitioner now claims they failed to make, the outcome of these proceedings would not have been different.

7.) Faced with someone who already had an outstanding arrest warrant, was a person of interest in missing person report, police discovered an armed individual when they pulled him over to serve the warrant. These facts justified extreme measures necessitating opening a lockbox with a screwdriver, a fact the Court of Appeals also knew when it affirmed Petitioner's convictions.

8.) Finding that Kage and Magrath's failure to make this specific argument was not ineffective assistance of counsel, the Court denies the Amended Petition for Post-Conviction Relief.

SO ORDERED THIS DAY 6th OF NOVEMBER, 2017.

/s/ Jon W. Webster
JON W. WEBSTER, Judge
Jennings Circuit Court

cc:
Prosecuting Attorney
C. Brent Martin,
Office of the Public Defender of Indiana
One North Capitol, Suite 800,
Indianapolis IN 46204-2026

APPENDIX D

MEMORANDUM DECISION
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT	ATTORNEYS FOR APPELLEE
Stephen T. Owens Public Defender of Indiana	Curtis T. Hill, Jr. Attorney General of Indiana
C. Brent Martin Deputy Public Defender Indianapolis, Indiana	Caryn N. Szyper Deputy Attorney General Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Raymond Marling, *Appellant-Petitioner*, v. State of Indiana, *Appellee-Respondent*.	May 25, 2018 Court of Appeals Case No. 40A01-1711-PC-2620 Appeal from the Jennings Circuit Court

The Honorable Jon W. Webster, Judge

Trial Court Cause No. 40C01-1504-PC-1

Brown, Judge.

Raymond Marling appeals the post-conviction court's denial of his petition for post-conviction relief. He raises one issue which we revise and restate as whether the post-conviction court erred in denying his petition. We affirm.

Facts and Procedural History

The relevant facts as discussed in Marling's direct appeal follow:

> In April 2013, police were investigating the whereabouts of a missing person. Matt Loper was identified as a person of interest in that investigation, and North Vernon Police Detective Ivory Sandefur discovered that Loper and Marling were friends. Detective Sandefur also discovered that Marling drove a black Dodge Avenger and found there was an active arrest warrant for Marling from Jackson County. The detective also ascertained that Marling might be involved in drug activity and that he might be in possession of a handgun. Detective Sandefur told local police departments to look for Marling.
>
> On April 25, 2013, Detective Sandefur was investigating leads in the missing person case, along with Indianapolis Police Detective Jerry

Gentry. They were driving when they were passed by a black Dodge Avenger. The detectives turned around and followed the vehicle; they also ran the license plate, which returned to Marling and his wife. The windows of the vehicle were tinted, but Detective Sandefur confirmed that the male driver appeared to be Marling. At that point, Detective Sandefur radioed to a uniformed police officer to conduct a traffic stop.

North Vernon Police Officer Jeffrey Day responded and initiated a traffic stop on County Road 350 North. Marling stopped the vehicle in the traffic lane, so that only the oncoming traffic lane was passable. Officer Day ordered Marling to step out of the car, and Detective Sandefur handcuffed him. Marling was wearing an empty shoulder holster under his shirt.

Officer Day looked inside of the vehicle and saw that there were no passengers. He observed a handgun between the driver's seat and the console; the hammer of the handgun was cocked, but the safety lock was on. Marling told Officer Day that he did not have a permit for the handgun. Officer Day took Marling to jail, where $686 was inventoried from Marling's billfold. Marling asked Officer Day to contact his mother to ask if she could remove money from a black bag in the Avenger and remove the vehicle from impoundment.

North Vernon Police Sergeant Craig Kipper conducted a search of the Avenger prior to impoundment in accordance with North Vernon Police General Order 49, which provides for an

inventory search prior to the impoundment of a vehicle if a driver was arrested and was driving the vehicle immediately before arrest. The inventory search included a search of the vehicle in all locations where items of value may be located, including closed and locked containers.

During his search, Sergeant Kipper first took possession of the handgun. He then found several cellphones with chargers, a clear bag with several syringes, four Clonazepam pills, a schedule IV drug, and a clear container with white powder residue. He also found a prescription pill bottle containing Intuniv, a legend drug, one Hydroxyine, a legend drug, and one Vyvanse, a schedule II drug. In the passenger compartment, Sergeant Kipper found $1,000 secured with a rubber band inside a laptop bag. In the trunk, the Sergeant found two rifles, a duffel bag containing .9mm ammunition, a box of syringes, thirty-two loose syringes, and a digital scale that looked like a cell phone. Sergeant Kipper also discovered a metal combination lockbox in the trunk; he opened the box with a screwdriver. The box held a clear baggie containing .51 grams of cocaine, various capsules containing dimethyl sulfone, a cutting agent, four baggies with white residue, and one Clonazepam.

Two days later, Marling called his wife from jail and told her to take the $1000 and to get everything out of storage, unless she wanted "up north" to take it. Tr. p. 447–49. He also told her that the situation was serious, that she should be scared, and that she should leave the house. He told her that if "up north comes down take him

> with you to collect the 2gs and show him where Dennis and Maria are staying and you can collect the 2gs from them." Tr. p. 483.

Marling v. State, No. 40A01-1403-CR-109, slip op. at 2–5 (Ind. Ct. App. September 30, 2014), *trans. denied*.

On May 1, 2013, the State charged Marling with: Count I, class B felony possession of cocaine with intent to deliver; Count II, class C felony possession of cocaine and a firearm; Count III, class C felony carrying a handgun without a license; Count IV, class D felony possession of a schedule IV controlled substance; Count V, class D felony possession of a schedule II controlled substance; Counts VI and VII, two counts of class D felony possession of a legend drug; and Count VIII, class D felony unlawful possession of a syringe. *Id.* at 5. Additionally, the State alleged that Marling was an habitual offender. *Id.*

On September 30, 2013, Marling filed a motion to suppress all the evidence discovered during the vehicle stop and subsequent inventory search. *Id.* The motion asserted that "[o]nce the officer opened the trunk and found a box, he was not permitted to open it with a screwdriver" and that "[a] warrant should have been obtained," and cited *George v. State*, 901 N.E.2d 590 (Ind. Ct. App. 2009), *trans. denied*. Appellant's Direct Appeal Appendix Volume 1 at 51. The trial court held a hearing on the motion on October 16, 2013. *Marling*, slip op. at 5. At the hearing, the court admitted a document titled "North Vernon Police Department General Order 49 IMPOUNDMENT," which stated:

> 49.3.2. Areas to be Inventoried

> Inventory the contents of suitcases, boxes and other containers. Inventory articles in:
>
> * * * * *
>
> * Closed and/or Locked Containers – Inventory all closed or locked containers. If a situation exists that requires extreme measures (extensive time, manpower and equipment), and/or unreasonable potential damage to property, the officer should avoid opening the container, but should document why the container was not opened.

State's Exhibit 5. The court denied the motion the next day. *Marling*, slip op. at 5.

On October 21–24, 2013, the court held a jury trial. *Id.* During trial, Marling's counsel objected to admission of evidence found in the locked box in part based upon its opening with a screwdriver and the necessity of having a warrant as stated in *George v. State*, and the court overruled the objection and admitted the evidence. At the close of the State's evidence, the court dismissed Count V, class D felony possession of a schedule II controlled substance. *Marling*, slip op. at 5. The jury found Marling guilty of class B felony possession of cocaine with intent to deliver, class C felony possession of cocaine and a firearm, class A misdemeanor carrying a handgun without a license, class D felony possession of a schedule IV controlled substance, both counts of class D felony possession of a legend drug, and class D felony unlawful possession of a syringe. *Id.* at 5–6. In a second phase, the jury found Marling guilty of class C felony possession of a handgun by a felon, the felony enhancement to class A misdemeanor possession of a handgun without a license. *Id.* at 6. In the third and

final phase, Marling was found to be an habitual offender. *Id*. The court sentenced Marling to an aggregate sentence of thirty-eight years. *Id*.

On direct appeal, Marling argued that the trial court erred when it admitted evidence obtained as a result of a pretextual inventory search, the evidence was insufficient to support his conviction for possession of cocaine with intent to deliver, and the trial court erred when it determined that he was an habitual offender, and this Court affirmed. *Id*. at 2. Specifically, this Court held that the decision to impound the vehicle was reasonable and lawful, that Sergeant Kipper was required to search the vehicle in all locations where items of value may be located pursuant to North Vernon Police Order 49 which "mandates, '[i]nventory all closed or locked containers,'" and that the search was conducted in accordance with standard police procedures. *Id*. at 10 (quoting State's Exhibit 5). The Court also concluded that the inventory search was reasonable under a totality of the circumstances under Article 1, Section 11 of the Indiana Constitution. *Id*. at 9–12.

On April 10, 2015, Marling, *pro se*, filed a verified petition for post-conviction relief. On March 6, 2017, Marling's counsel filed a Motion for Leave to Amend Petition for Post-Conviction Relief asserting that he received ineffective assistance of trial and appellate counsel. Marling also asserted that "the Officer permanently damaged the lock box by prying the lid open with a screw driver" and the State could not prove that the search was conducted in conformity with their written regulations because "Officer Kipper caused unreasonable damage to property, the lock

box, in violation of the written policy." Appellant's Appendix Volume 2 at 32.

That same day, Marling, by counsel, filed a motion for summary disposition. An affidavit of Marling's appellate counsel attached to the motion for summary disposition stated: "I did not consider challenging the admission of the cocaine based on the State's failure to follow its own written procedures for conducting an inventory search. Had I considered it I would have raised the issue based on the decision in *Fair v. State*, 627 N.E.2d 427 (Ind. 1993)." *Id*. at 97. On March 15, 2017, the post-conviction court denied Marling's motion for summary disposition. Marling appealed, and this Court dismissed the appeal without prejudice and remanded for further proceedings on June 30, 2017.

On November 1, 2017, the post-conviction court held an evidentiary hearing. The court admitted the record from the direct appeal as Petitioner's Exhibit 1. Marling's post-conviction counsel asserted that he had an affidavit that was attached to the motion for summary disposition from Marling's appellate counsel "essentially admitting, this was a good argument, I should have made it." Post-Conviction Transcript at 11. Marling's counsel acknowledged that he did not have an affidavit from Marling's trial counsel but argued "there's not strategy for not making this argument." *Id*. Marling's trial and appellate counsel did not testify at the hearing. On November 6, 2017, the post-conviction court denied Marling's petition.

Discussion

Before addressing Marling's allegations of error, we note the general standard under which we review a

post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher*, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.* "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.*

Marling argues that he received ineffective assistance of both trial and appellate counsel when they failed to "make an obvious argument in support of the denied Motion to Suppress and against the subsequent admission of the cocaine." Appellant's Brief at 13. He acknowledges that the initial stop and the impoundment of his vehicle were proper, but argues that his trial and appellate counsel failed to argue that the State did not follow its written policy and that the locked box was damaged. He asserts that the language of the regulations "is mandatory that the officer ***shall*** avoid opening the container if it could cause potential damage or requires extreme measures." *Id.* at 15.

The State maintains that the policy does not include the word "shall" as stated by Marling and contemplates some permissible level of damage that may occur in certain circumstances when officers complied with the general mandate that all locked containers must be opened and inventoried. It argues that Sergeant Kipper's ability to pop open the box with a screwdriver was hardly an extreme measure and nothing in the record reflects any damage to the box or suggests that opening a locked box with a screwdriver would cause unreasonable damage. The State asserts that the photograph of the box admitted at trial does not reveal any actual damage to the box and Marling never complained of any damage. It also contends that opening the box fulfilled one of the administrative purposes of the inventory search, the protection of police from possible danger.

Generally, to prevail on a claim of ineffective assistance of counsel a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), *reh'g denied*). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong

will cause the claim to fail. *French*, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

When considering a claim of ineffective assistance of counsel, a "strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Morgan v. State*, 755 N.E.2d 1070, 1072 (Ind. 2001). "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002). Evidence of isolated poor strategy, inexperience, or bad tactics will not support a claim of ineffective assistance of counsel. *Clark v. State*, 668 N.E.2d 1206, 1211 (Ind. 1996), *reh'g denied*, *cert. denied*, 520 U.S. 1171, 117 S. Ct. 1438 (1997). "Reasonable strategy is not subject to judicial second guesses." *Burr v. State*, 492 N.E.2d 306, 309 (Ind. 1986). We "will not lightly speculate as to what may or may not have been an advantageous trial strategy as counsel should be given deference in choosing a trial strategy which, at the time and under the circumstances, seems best." *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998). In order to prevail on a claim of ineffective assistance due to the failure to object, the defendant must show a reasonable probability that the objection would have been sustained if made. *Passwater v. State*, 989 N.E.2d 766, 772 (Ind. 2013) (citing *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001), *cert. denied*, 535 U.S. 1019, 122 S. Ct. 1610 (2002)).

We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel.

Williams v. State, 724 N.E.2d 1070, 1078 (Ind. 2000), *reh'g denied*, *cert. denied*, 531 U.S. 1128, 121 S. Ct. 886 (2001). Ineffective assistance of appellate counsel claims fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013). "To show that counsel was ineffective for failing to raise an issue on appeal thus resulting in waiver for collateral review, 'the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential.'" *Id.* (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260–261 (Ind. 2000), *reh'g denied*, *cert. denied*, 534 U.S. 1164, 122 S. Ct. 1178 (2002)). "'To evaluate the performance prong when counsel waived issues upon appeal, we apply the following test: (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are 'clearly stronger' than the raised issues." *Id.* (quoting *Timberlake v. State*, 753 N.E.2d 591, 605–606 (Ind. 2001), *reh'g denied*, *cert. denied*, 537 U.S. 839, 123 S. Ct. 162 (2002)). "If the analysis under this test demonstrates deficient performance, then we evaluate the prejudice prong which requires an examination of whether 'the issues which . . . appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial.'" *Id.* (quoting *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997), *reh'g denied*, *cert. denied*, 525 U.S. 1021, 119 S. Ct. 550 (1998)).

We observe that Marling's trial counsel filed a motion to suppress asserting that the traffic stop was improper, that the impoundment of the vehicle and resulting inventory search violated Article 1, Section

11 of the Indiana Constitution because the vehicle did not pose any threat or harm to the community or itself, that "[o]nce the officer opened the trunk and found a box, he was not permitted to open it with a screwdriver," and that "[a] warrant should have been obtained." Appellant's Direct Appeal Appendix Volume 1 at 51. During trial, Marling's trial counsel also objected to the evidence in the box.

Marling's appellate counsel raised the issues of "[w]hether the discovery of a small undivided amount of cocaine is sufficient to support a conviction for dealing in cocaine," "[w]hether a habitual offender enhancement may be sought for a dealing in cocaine conviction when the defendant has no prior dealing convictions," and "[w]hether evidence obtained as a result of pretextual inventory search that included locked containers should have been excluded from presentation to the jury." Appellant's Direct Appeal Brief at 1. Appellate counsel argued that the search of the locked box in the trunk was unreasonable under the Indiana Constitution. Thus, both trial and appellate counsel challenged the search of the locked box.

To the extent Marling argues that his trial and appellate counsel failed to argue that the State did not follow its written policy because the box was damaged, we observe that Marling asserts that, "[b]y the State's own evidence, the police report of Officer Kipper, he had to break open the locked box with a screw driver, causing damage to the property." Appellant's Brief at 15 (citing Appellant's Appendix at 51). However, page 51 of the Appellant's Appendix, cited by Marling, merely states: "In the trunk was a silver square combination lock box. The box was locked. The locked

box was opened with a screw driver. In the locked box was more syringes and several items that are used for the ingestion of illegal substances." Appellant's Appendix Volume 2 at 51. We cannot say that this document alone establishes that the box was damaged.

Marling does not point elsewhere in the record in support of the assertion that the box was damaged. We cannot say that Marling has demonstrated that his trial or appellate counsel were deficient or that he was prejudiced.[1]

Conclusion

For the foregoing reasons, we affirm the post-conviction court's denial of Marling's petition for post-conviction relief.

Affirmed.

Bailey, J., and Crone, J., concur.

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[1] To the extent Marling cites *Fair*, we find that case distinguishable. In *Fair*, the Indiana Supreme Court held that a search must be conducted pursuant to standard police procedures and the procedures must be rationally designed to meet the objectives that justify the inventory search. *Fair*, 627 N.E.2d at 435. The Court also held that searches in conformity with such regulations are reasonable under the Fourth Amendment and that to defeat a charge of pretext the State must establish the existence of sufficient regulations and that the search at issue was conducted in conformity with them. *Id.* Given that the State presented its inventory procedure and the portion of the record cited by Marling does not reveal damage to the box and he does not point elsewhere in the record for any damage to the box, we cannot say that the police failed to perform the search in conformity with their procedures.

APPENDIX E

In the
Indiana Supreme Court

Raymond Ryan Marling, Appellant(s), v. State Of Indiana, Appellee(s).	Court of Appeals Case No. 40A01-1711-PC-02620 Trial Court Case No. 40C01-1504-PC-1

ORDER

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 10/15/2018.

/s/ Loretta H. Rush
Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

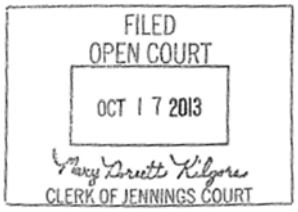
APPENDIX F

STATE OF INDIANA	)	IN THE JENNINGS CIRCUIT COURT
	)	
COUNTY OF JENNINGS	) SS:	
	)	CAUSE NO. 40C01-1305-FA-7

STATE OF INDIANA,
Plaintiff

-vs-

RAYMOND RYAN MARLING,
Defendant



ORDER ON MOTION TO SUPPRESS

The State of Indiana appears by its Chief Deputy Prosecuting Attorney, Drew Dickerson. The Defendant, Raymond Ryan Marling, appears in person, and by counsel, Bradley K. Kage, for hearing on October 16, 2013 on the Defendant's Motion to Suppress filed September 20, 2013, and this Court, having heard and seen evidence, and having considered the arguments of counsel, now finds as follows:

1. On April 25, 2013, Detective Ivory Sandefur of the North Vernon Police Department and Detective Gentry of the Indiana State Police were investigating the report of a missing female. Marling was a person of interest in her disappearance and they knew he may

be driving a black Dodge Avenger and he may be armed.[1] They were also aware that Marling was a convicted felon.

2. By chance, while looking for Marling, Sandefur and Gentry passed a black Dodge Avenger with a male driver.[2] The plate on the Avenger came back to Marling. Being out of uniform and in an unmarked vehicle, Sandefur called for a uniformed unit to stop the vehicle. This was done by Officer Jeff Day from the North Vernon Police Department. Sandefur and Gentry stayed behind the vehicle the entire time until the stop was made by Day on a rural county paved road.

3. The reason for the stop was because Sandefur and Gentry had an active felony criminal arrest warrant from the Jackson Circuit Court (36C01-1112-FD-340) for Marling and they were justified in asking Day to stop the vehicle registered to Marling being driven by a male.

4. After Day approached the vehicle and secured Marling, it was determined by Sandefur during a pat down search that Marling was wearing an empty shoulder holster. Day then located, in plain view, a 45 automatic handgun in the vehicle with the hammer cocked, placed between the console and the driver's seat.

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[1] Mr. Marling had allegedly told others he was not going back to jail.

[2] The windows of this vehicle were tinted and none of the officers could tell for sure if Marling was the driver, but they could tell it was a male driver.

5. The Avenger, once stopped, was nearly entirely on the traveled portion of the roadway. No one else was in the vehicle and Marling was going to jail.

6. The North Vernon Police Department then conducted an "inventory search" of the vehicle once it was impounded, where they found, among other things, the 45 automatic handgun with hollow point ammunition, a Mosin Nagant 7.62 caliber rifle with bayonet, a 7.62 Saiga rifle, night vision goggles, 9 mm ammunition, one thousand dollars ($1,000.00) in cash, many pills, corner cut baggies, thirty-six (36) syringes in a box, what appeared to be methamphetamine, several spoons with residue, a scale, a pipe, a laptop, four (4) cell phones, some located in the console, some in the trunk and some in locked containers in the trunk.

7. Based upon the totality of the evidence and circumstances, specifically a matching vehicle description, a male driver, a license plate confirmation coming back to the Defendant, and an active criminal warrant for Marling, Officer Day was more than justified in stopping the vehicle and looking in the passenger compartment for the missing handgun which he saw in plain view.

8. The City of North Vernon had a duly promulgated Impoundment Procedure in effect on April 25, 2013 which authorized the search and opening of closed and locked containers within vehicles. See State's exhibit 5.

10. The stop being clearly lawful, the Court must then move to the legality of the inventory search of the vehicle, the trunk, and the container(s) therein.

11. The Defendant's argument is that the State should have secured a warrant to search any container found in the trunk of the vehicle.

12. The Court disagrees. The vehicle had to be impounded. It was almost entirely in the road with no alternate driver. Once impounded, the vehicle and the contents had to be inventoried and the search and discovery of the contents of the trunk and the containers therein was lawful.

13. The Motion to Suppress is **denied**.

SO ORDERED THIS 17th DAY OF OCTOBER, 2013.

/s/ Jon W. Webster
JON W. WEBSTER, Judge
Jennings Circuit Court

CC:
RJO
Prosecuting Attorney
Bradley K. Kage

APPENDIX G

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

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ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

RAYMOND RYAN MARLING,
Appellant-Defendant,
)
)
)

vs. STATE OF INDIANA, Appellee-Plaintiff.	))))))	No. 40A01-1403-CR-109

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-1305-FA-7

September 30, 2014

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Raymond Marling appeals his convictions and thirty-eight-year aggregate sentence for Possession of Cocaine with Intent to Deliver,[1] a class B felony; Possession of a Schedule IV Controlled Substance,[2] a class D felony; two counts of Possession of a Legend Drug,[3] class D felonies; Unlawful Possession of a syringe,[4] a class D felony; and Possession of a Handgun by a Felon,[5] a class C felony. Marling argues that the trial court erred when it admitted evidence obtained as a result of a pretextual inventory search, and asserts that the evidence was insufficient to

[1] Ind. Code § 35-48-4-1(a)(2)(C).

[2] I.C. § 35-48-4-7.

[3] Indiana Code § 16-42-19-13.

[4] I.C. § 16-42-19-18.

[5] Indiana Code § 35-47-2-23(c)(2)(B).

support his conviction for possession of cocaine with intent to deliver. He also maintains that the trial court erred when it determined that he was an habitual offender. Finding that the trial court did not err in admitting the evidence found during the inventory search, that the evidence is sufficient to support Marling's conviction for possession of cocaine with intent to deliver, and that trial court properly denied Marling's motion to dismiss, we affirm the judgment of the trial court.

FACTS

In April 2013, police were investigating the whereabouts of a missing person. Matt Loper was identified as a person of interest in that investigation, and North Vernon Police Detective Ivory Sandefur discovered that Loper and Marling were friends. Detective Sandefur also discovered that Marling drove a black Dodge Avenger and found there was an active arrest warrant for Marling from Jackson County. The detective also ascertained that Marling might be involved in drug activity and that he might be in possession of a handgun. Detective Sandefur told local police departments to look for Marling.

On April 25, 2013, Detective Sandefur was investigating leads in the missing person case, along with Indianapolis Police Detective Jerry Gentry. They were driving when they were passed by a black Dodge Avenger. The detectives turned around and followed the vehicle; they also ran the license plate, which returned to Marling and his wife. The windows of the vehicle were tinted, but Detective Sandefur confirmed that the male driver appeared to be Marling. At that

point, Detective Sandefur radioed to a uniformed police officer to conduct a traffic stop.

North Vernon Police Officer Jeffrey Day responded and initiated a traffic stop on County Road 350 North. Marling stopped the vehicle in the traffic lane, so that only the oncoming traffic lane was passable. Officer Day ordered Marling to step out of the car, and Detective Sandefur handcuffed him. Marling was wearing an empty shoulder holster under his shirt.

Officer Day looked inside of the vehicle and saw that there were no passengers. He observed a handgun between the driver's seat and the console; the hammer of the handgun was cocked, but the safety lock was on. Marling told Officer Day that he did not have a permit for the handgun. Officer Day took Marling to jail, where $686 was inventoried from Marling's billfold. Marling asked Officer Day to contact his mother to ask if she could remove money from a black bag in the Avenger and remove the vehicle from impoundment.

North Vernon Police Sergeant Craig Kipper conducted a search of the Avenger prior to impoundment in accordance with North Vernon Police General Order 49, which provides for an inventory search prior to the impoundment of a vehicle if a driver was arrested and was driving the vehicle immediately before arrest. The inventory search included a search of the vehicle in all locations where items of value may be located, including closed and locked containers.

During his search, Sergeant Kipper first took possession of the handgun. He then found several cellphones with chargers, a clear bag with several syringes, four Clonazepam pills, a schedule IV drug, and a clear container with white powder residue. He

also found a prescription pill bottle containing Intuniv, a legend drug, one Hydroxyine, a legend drug, and one Vyvanse, a schedule II drug. In the passenger compartment, Sergeant Kipper found $1,000 secured with a rubber band inside a laptop bag. In the trunk, the Sergeant found two rifles, a duffel bag containing .9mm ammunition, a box of syringes, thirty-two loose syringes, and a digital scale that looked like a cell phone. Sergeant Kipper also discovered a metal combination lockbox in the trunk; he opened the box with a screwdriver. The box held a clear baggie containing .51 grams of cocaine, various capsules containing dimethyl sulfone, a cutting agent, four baggies with white residue, and one Clonazepam.

Two days later, Marling called his wife from jail and told her to take the $1000 and to get everything out of storage, unless she wanted "up north" to take it. Tr. p. 447–49. He also told her that the situation was serious, that she should be scared, and that she should leave the house. He told her that "if up north comes down take him with you to collect the 2gs and show him where Dennis and Maria are staying and you can collect the 2gs from them." Tr. p. 483.

On May 1, 2013, the State charged Marling with Count I, class B felony possession of cocaine with intent to deliver; Count II, class C felony possession of cocaine and a firearm; Count III, class C felony carrying a handgun without a license; Count IV, class D felony possession of a schedule IV controlled substance; Count V, class D felony possession of a schedule II controlled substance; Counts VI and VII, two counts of class D felony possession of a legend drug; and Count VIII, class D felony unlawful possession of a syringe. Additionally, the State alleged

that Marling was an habitual offender. On September 30, 2013, Marling filed a motion to suppress all the evidence discovered during the vehicle stop and subsequent inventory search. The trial court held a hearing on the motion on October 16, 2013. It denied the motion the next day.

Marling's jury trial took place on October 21–24, 2013. At the close of the State's evidence, the trial court dismissed Count V, class D felony possession on a schedule II controlled substance. The jury found Marling guilty of class B felony possession of cocaine with intent to deliver, class C felony possession of cocaine and a firearm, class A misdemeanor carrying a handgun without a license, class D felony possession of a schedule IV controlled substance, both counts of class D felony possession of a legend drug, and class D felony unlawful possession of a syringe. In a second phase, the jury found Marling guilty of class C felony possession of a handgun by a felon, the felony enhancement to class A misdemeanor possession of a handgun without a license. In the third and final phase, Marling was found to be an habitual offender.

The trial court held a sentencing hearing on February 20, 2014. It merged the handgun convictions and imposed the following sentence: thirteen years for class B felony possession of cocaine with intent to deliver with a twenty year enhancement for the habitual offender finding, twenty-one months for each count of class D felony possession of a legend drug, twenty-one months for class D felony possession of a schedule IV controlled substance, twenty-one months for class D felony unlawful possession of a syringe, and five years for the class C felony possession of a handgun by a felon. The five-year sentence for

possession of a handgun by a felon was ordered to run consecutively to the thirty-three year sentence for possession of cocaine with intent to deliver, and the twenty-one month sentences for each count of possession of a legend drug, possession of a schedule IV controlled substance, and unlawful possession of a syringe were ordered to run concurrently with each other and with the other sentences. Marling's aggregate sentence was thirty-eight years.

DISCUSSION AND DECISION

I. Admission of Evidence

Marling argues that the trial court erred when it admitted evidence obtained as a result of the inventory search. He contends that the trial court should have excluded the evidence because the impoundment was improper and the inventory performed by Sergeant Kipper exceeded the scope of a proper inventory search.

A trial court has broad discretion in ruling on the admissibility of evidence, and, on review, we will disturb its ruling only on a showing of an abuse of discretion. *Sparkman v. State*, 722 N.E.2d 1259, 1262 (Ind. Ct. App. 2000). When reviewing a decision under an abuse of discretion standard, we will affirm if there is any evidence supporting the decision. *Id.* A claim of error in the admission or exclusion of evidence will not prevail on appeal unless a substantial right of the party is affected. Ind. Evidence Rule 103(a). In determining whether error in the introduction of evidence affected a defendant's substantial rights, we assess the probable impact of the evidence on the jury. *Sparkman*, 722 N.E.2d at 1262.

The Fourth Amendment to the United States Constitution protects persons from unreasonable search and seizure and this protection has been extended to the states through the Fourteenth Amendment to the Unites States Constitution. *Mapp v. Ohio*, 367 U.S. 643, 650 (1961). The paramount concern of the Fourth Amendment is the reasonableness of the State's intrusion into the privacy of its citizens. *Adams v. State*, 762 N.E.2d 737, 740 (Ind. 2002). The reasonableness of a search is determined by balancing the degree to which it intrudes upon an individual's privacy with the degree to which it is needed for the promotion of legitimate governmental interests. *Lockett v. State*, 747 N.E.2d 539, 542 (Ind. 2001). Put another way, the fundamental purpose of the Fourth Amendment "is to protect the legitimate expectations of privacy that citizens possess in their persons, their homes, and their belongings." *Taylor v. State*, 842 N.E.2d 327, 330 (Ind. 2006). We note that seizures conducted outside the judicial process, without prior approval by a judge or a magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. *Warner v. State*, 773 N.E.2d 239, 245 (Ind. 2002).

A valid inventory search is a well-recognized exception to the warrant requirement. *Taylor*, 842 N.E.2d at 330. The underlying rationale for the inventory exception is three-fold: (1) protection of private property in police custody; (2) protection of police against claims of lost or stolen property; and (3) protection of police from possible danger. *Gibson v. State*, 733 N.E.2d 945, 956 (Ind. Ct. App. 2000).

When analyzing the propriety of an inventory search, the threshold question is whether the impoundment itself was proper. *Taylor*, 842 N.E.2d at 331 (citing *Woodford v. State*, 752 N.E.2d 1278, 1281 (Ind. 2001). An impoundment is warranted when it is part of routine administrative caretaking functions of the police or when it is authorized by statute. *Id.* To prove a valid inventory search under the community caretaking function, the State must demonstrate the following: (1) the belief that the vehicle posed some threat or harm to the community or was itself imperiled was consistent with objective standards of sound policing, and (2) the decision to combat that threat by impoundment was in keeping with established departmental routine or regulation. *Id.* The question is not whether there was an absolute need to dispose of the vehicle, but whether the decision to do so was reasonable in light of the applicable standard. *Fair v. State*, 627 N.E.2d 427, 433 (Ind. 1993).

Marling argues that the impoundment of his vehicle was not warranted under the community caretaking function. He maintains that, as his vehicle was "partially pulled off the roadway," other vehicles were able to pass. Appellant's Br. p. 8. However, evidence at trial established that the vehicle constituted a traffic hazard. Sergeant Kipper testified that the vehicle "was on the roadway so it was a traffic hazard." Tr. p. 254. Moreover, the videotape of the traffic stop shows that the vehicle was almost entirely blocking one lane of a two-lane road. Ex. 2. The fact that other drivers could pass by using part of the oncoming traffic lane does not mean that impoundment was unwarranted; the vehicle would have been left

unattended in a public thoroughfare after Marling's arrest, therefore the decision to impound was reasonable and lawful. *See Stephens v. State*, 735 N.E.2d 278 (Ind. Ct. App. 2000) (holding that an impoundment was reasonable and lawful when a van would have been left unattended in a public thoroughfare following Stephens's arrest).

Having determined that the vehicle was reasonably impounded, we next examine the reasonableness of the search. Marling argues that the search of the duffel bag and lockbox exceeded the scope of a proper inventory search. To pass constitutional muster, an inventory search must be conducted pursuant to standard police procedures, as evidenced by the circumstances surrounding the search. *Stephens*, 735 N.E.2d at 282. Mere testimony of an officer is insufficient. *Id.*

Here, pursuant to North Vernon Police Order 49, Sergeant Kipper was required to search the vehicle in all locations where items of value may be located; Order 49 mandates, "[i]nventory all closed or locked containers." Ex. 5. Therefore the search was conducted in accordance with standard police procedures.

Marling also argues that the search was a violation of his rights under Article I, Section 11 of the Indiana Constitution. Article I, Section 11 provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated . . . ." Our Supreme Court has stated that vehicles are among the "effects" protected by Article I, Section 11. *Brown v. State*, 653 N.E.2d 77, 79 (Ind. 1995). Under Article I, Section 11,

the validity of a search turns on an evaluation of the reasonableness of the officers' conduct under a totality of the circumstances. *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005). In determining whether the police behavior was reasonable under Section 11, we consider each case on its own facts and construe the constitutional provision liberally so as to guarantee the rights of people against unreasonable searches and seizures. *Brown*, 653 N.E.2d at 79. The reasonableness of a search turns on a balance of "1) the degree of concern, suspicion, or knowledge that a violation has 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." *Litchfield*, 824 N.E.2d at 361.

Here, Marling argues that the degree of intrusion in opening the duffel bag and lockbox was high. He maintains that, because "[he] was pulled over as a result of a warrant and no violations of law had actually been observed by the arresting law enforcement," the degree of concern or suspicion was "low or nonexistent." Appellant's Br. p. 9.

However, Marling is incorrect to analyze the degree of concern or suspicion at the time of the stop. Instead, we must focus on the time at which Sergeant Kipper opened the duffel bag and the lockbox, which were in the trunk. *See Moore v. State*, 637 N.E.2d 816, 820 (Ind. Ct. App. 1004) (holding that the fact that an officer's suspicion arose during the course of an inventory search did not render the search pretexual); *see also Fair*, 627 N.E.2d at 436 n.7 ("so that as long as the impoundment is pursuant to the community caretaking function and is not a mere subterfuge for investigation, the coexistence of investigatory and

caretaking motives is permissible"). At the time that Sergeant Kipper searched the trunk, he had already discovered a loaded weapon, several cell phones with chargers, a clear bag containing syringes, four Clonazepam pills, a pill bottle containing Intuniv, Hydroxyzine, and Vyvanse, and a clear container with white powder residue. Tr. p. 257–61, 275, 278–80, 361–65, 367. In addition, he had discovered $1,000 inside a laptop bag in the passenger compartment as well as two rifles in the trunk. Tr. 273, 275. Therefore, Sergeant Kipper 1) had reason to believe more items of value might be located inside the duffel bag and lockbox, and that he needed to open them to ensure that he protected private property in police custody, and 2) had a high level of suspicion that Marling was involved in illegal drug activity. Therefore, we find that the inventory search was reasonable under a totality of the circumstances.

II. Sufficiency of the Evidence

Marling next argues that his conviction for possession of cocaine with the intent to deliver was not supported by sufficient evidence.

When reviewing challenges to the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *Bond v. State*, 925 N.E.2d 773, 781 (Ind. Ct. App. 2010). Rather, we consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom, and we will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the verdict. *Id.* Reversal is appropriate only when a reasonable trier of fact would not be able to form

inferences as to each material element of the offense. *Id.*

In order to prove that Marling had possessed cocaine with the intent to deliver, the State was required to prove that 1) Marling possessed the cocaine 2) with the intent to deliver. Ind. Code § 35-48-4-1. Marling does not argue that he did not possess the cocaine. Rather, he argues that the amount he possessed, .51 grams, was insufficient to show that he had the intent to deliver.

As intent is a mental state, absent an admission, the trier of fact must resort to reasonable inferences based upon an examination of the surrounding circumstances to determine whether, from the person's conduct and the natural consequences thereof, a showing or inference of intent to commit that conduct exists. *Stokes v. State*, 801 N.E.2d 1263, 1272 (Ind. Ct. App. 2004). Marling concedes that intent to deliver may be proved by circumstantial evidence. *Id.* But he maintains that there was not enough circumstantial evidence to allow a reasonable trier of fact to infer that he intended to deliver the cocaine.

The State presented evidence that the following indicators of intent to deliver were present: 1) a digital scale masquerading as a cell phone, 2) multiple cell phones for single use and disposal, 3) a large amount of cash, 4) firearms, 5) a large amount of a cocaine cutting agent, and 6) empty baggies. Tr. p. 292–98, 305. This Court has held that possession of a large quantity of drugs, money, plastic bags, and other paraphernalia is circumstantial evidence of intent to deliver. *Wilson v. State*, 754

N.E.2d 950 (Ind. Ct. App. 2001). While Marling is correct that a large quantity of drugs can constitute circumstantial evidence, it is clearly not the only circumstantial evidence that can support a conviction. When considering the evidence presented, we find it sufficient to support Marling's conviction for possession of cocaine with intent to deliver.

III. Habitual Offender Finding

Marling also maintains that the trial court could not find him to be an habitual offender under Indiana Code section 35-50-2-8(b)(3). A question of statutory interpretation is a matter of law to be determined de novo. *Maynard v. State*, 859 N.E.2d 1272, 1274 (Ind. 2007).

Marling argues that the trial court should not have found him to be an habitual offender because, at the time he was sentenced, Indiana Code section 35-50-2-8(b)(3)[6] did not allow for a habitual offender enhancement when all of the following applied:

(A) The offense is an offense under IC 16-42-19 or IC 35-48-4.

(B) The offense is not listed in section 2(b)(4) of this chapter

(C) The total number of unrelated convictions that the person has for

(i) dealing in a legend (drug under IC 16-42-19-27;

(ii) dealing in or cocaine or a narcotic drug (IC 35-48-4-1);

---

[6] Indiana Code section 35-50-2-8 was amended effective July 1, 2014.

(iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
(iv) dealing in a schedule IV controlled substance (IC 35-48-4-3); and
(v) dealing in a schedule V controlled substance (IC 35-48-4-4);

does not exceed one (1)

Marling notes that because his offense falls under Indiana Code chapter 35-48-4 and he has no prior dealing convictions under Indiana Code section 35-50-2-8(b)(3)(C), the only question is to determine whether his offense is listed in Indiana Code section 35-50-2-2(b)(4).

As previously stated, the felony offense at issue here is possession of cocaine with intent to deliver under Indiana Code section 35-48-4-1. One of the offenses listed in Indiana Code section 35-50-2-2(b)(4) is "dealing in cocaine or a narcotic drug . . . if the court finds that the person possessed a firearm at the time of the offense. Ind. Code § 35-50-2-2(b)(4)(O). Here, at the time of Marling's motion to dismiss, the jury had already found that he possessed a firearm at the time he possessed the cocaine with the intent to deliver. Appellant's App. p. 81–82; Tr. p. 553–54. The trial court made the same finding when it denied the motion to dismiss. Appellant's App. p. 82. Therefore, subsection (b)(3)(B) did not apply, and it was not error for the habitual offender enhancement to be attached to Count I, possession of cocaine with intent to deliver. The trial court did not err in denying Marling's motion to dismiss.

The judgment of the trial court is affirmed.

KIRSCH, J., and ROBB, J., concur.

APPENDIX H

Supreme Court of Indiana

Raymond Ryan Marling
v.
State of Indiana

Court of Appeals Case No. 40A01-1403-CR-109
Trial Court Case No. 40C01-1305-FA-7
January 06, 2015

Opinion
Transfer denied. All Justices concur.

APPENDIX I

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 17, 2020

Before

FRANK H. EASTERBROOK, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 19-3077

RAYMOND MARLING,
Petitioner-Appellee

v.

FRANK LITTLEJOHN, Deputy Warden, Wabash Valley Correctional Facility,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

No. 2:19-cv-00002-JRS-DLP
James R. Sweeney II, *Judge*.

Order

Petitioner-Appellee filed a petition for rehearing and rehearing en banc on July 31, 2020. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX J

NORTH VERNON POLICE DEPARTMENT

General Order 49
IMPOUNDMENT

Issuing Authority: Public Safety Board
City of North Vernon
Annual Review Date: May

Purpose

Impoundment of motor vehicles is a necessary part of serving the residents of North Vernon. Such vehicles may be abandoned, lost, stolen, or recovered. It is our responsibility to take custody of vehicles as necessary and to arrange proper storage and security. The North Vernon Police Department must keep timely and accurate records on all custody tows and make dispositions promptly.

We help with other vehicle tows at request of victims of crime or traffic problems, such as traffic accidents. These noncustody tow requests must be handled in a fair and equitable manner for victims and the businesses supplying such services.

Policy

The North Vernon Police Department makes custody tows as necessary, maintains security of property, and promptly makes proper disposition. The department assists the public with noncustody tow requests in an equitable manner, following a wrecker rotation list.

Procedures

49.1 Custody Tows

Use towing companies specified on the custody rotation list and complete a Towing/Inventory Report for each custody tow. Handle towing and impounding motor vehicles as follows:

49.1.1 Driver Arrested with Tow

When you make an arrest and a motor vehicle remains unattended, impound and tow the motor vehicle under the following conditions:

* Driver Arrested - Arrestee was driving vehicle immediately before arrest.
* Occupant Arrested - Arrestee was in the vehicle, stopped or parked, immediately before arrest and the owner is not available or known.
* Arrestee States Responsibility - Arrestee was in immediate vicinity of vehicle just before arrest, and states responsibility for the vehicle.
* Vehicle Condition - Condition of the vehicle will not permit operation without violating City ordinances or Indiana Code.
* Vehicle Location - If a vehicle is in an area that poses a threat to other citizens and/or if the vehicle will be left for such a length of time that it could be vandalized or stolen, remove to a secured location.

49.1.2 Driver Arrested without Tow

Officers may choose to not tow vehicles after arresting a person under the following circumstances:

* Vehicle at Residence - When arrestee's vehicle is parked at the owner's residence. However, remove the ignition key and lock the vehicle (if it can be locked).
* Vehicle in Custody of Owner - When arrestee does not own the vehicle, and the owner is present and able to take custody. The vehicle may be released to custody of the owner.
* Vehicle in Custody of Other Proper Person - When arrestee is owner of the vehicle, and requests to leave vehicle in custody of another person. If that person is present and able to take custody, the officer may then release the vehicle to custody of the designated person.
* Vehicle in Private Parking Lot - The officer may choose not to tow if the vehicle is on a private parking lot and does not pose a danger to others or itself, and with the consent of the property owner and/or designee.

49.1.3 Stolen Motor Vehicle

Take the following steps when you find a vehicle previously reported stolen or taken without owner's consent:

* Investigation of Incident - Make a preliminary investigation, trying to identify the suspect. This includes processing the vehicle and scene for physical evidence and if you have reason to believe the suspect will probably return, surveillance of the vehicle.
* Disposition of Vehicle - If possible, avoid towing or impounding a vehicle. If a vehicle can be properly released in a reasonable time to the

owner or a person named by the owner, do not tow it. If you have arrested a suspect, however, the vehicle may become physical evidence.

49.1.4 Abandoned Motor Vehicle

You are authorized to remove and impound vehicles abandoned on the streets or other public places under the following circumstances:

* Bridges, Viaducts, Etc. - When a person leaves a vehicle unattended on any bridge, viaduct, or causeway or in any tunnel and such vehicle is an obstruction to traffic.
* Traffic Obstruction - When a person leaves a vehicle unattended upon a street and is an obstruction to the normal movement of traffic or obstructs the use of any trafficway or alleyway adjoining said street.
* Unlawful Parked - When a vehicle is parked in a prohibited area as designated by signs or other official markings.
* Invalid License Plates - When a vehicle is parked upon a street without having valid license plates properly displayed thereon.
* Overtime Parking - When a vehicle is parked upon any property owned, maintained or operated by the City for parking of motor vehicles and a person leaves the vehicle parked longer time than lawfully permitted.
* City Property - When a person leaves a motor vehicle unattended on any property owned or controlled by the City that is not designated for parking of motor vehicles.

* Abandoned Vehicle - When a vehicle meets the Indiana Abandoned Vehicle Requirements. The vehicle shall be removed pending the state law requirements.

49.1.5 Driver Hospitalization

Impound and tow a vehicle when persons are hospitalized and unable to provide for custody or removal of their disabled vehicle from a street or highway.

49.1.6 Evidence of a Crime

Impound and tow a vehicle known or believed used in committing a crime and has evidentiary value.

49.1.7 Other Circumstances for Custody Tows

Impound and tow a vehicle when state or federal laws call for the vehicle to be seized and impounded. Such cases include:

* Controlled Substances - Vehicles transporting controlled substances unlawfully;
* Untaxed Commodities - Vehicles transporting untaxed liquor or cigarettes;
* Explosive Devices - Vehicles transporting unregistered explosive devices;
* Vehicle Identification Numbers - Vehicles bearing an altered or defaced VIN, or where someone has removed the VIN.
* Improper Registration - False registration, improper transfer, expired registration, violation of residency requirements, etc.

49.1.8 Stolen Checks

When you impound a motor vehicle, promptly check attached state registration plates, any state license

plates found inside the vehicle, and vehicle identification number through the Indiana Data and Communications System (IDACS) and NCIC to determine if someone has reported it stolen.

49.2 Release of Impounded Vehicles

49 2.1 Ownership of Vehicle

The owner must come to the wrecker service in person and establish proof of ownership by a title or bill of sale, before the vehicle can be released. If the legal owner is unavailable, the designee must report to the North Vernon Police Department and an officer shall determine if this person has standing to obtain the vehicle.

All vehicles must be properly registered and insured before they can be released from the wrecker service. Any exceptions must be approved by an officer of the North Vernon Police Department.

49.3 Inventory of impounded Motor Vehicles

When you impound a vehicle from an arrest scene or other location, make an inventory of the contents and of any obvious damage to it. Use the police department Impounded Vehicle Inventory Report as well as the State Impounded Vehicle Report (S.F. 4166). (See attachments)

Note: Use the word inventory in narrative of all reports.

49.3.1 Time and Location of Inventory

Inventory at the scene when it can be done safely. If the vehicle location is hazardous you may conduct the inventory immediately following the tow at the custody storage site. Once the initial inventory has

been completed any return inspection will require a search warrant.

49.3.2 Areas to be Inventoried

Inventory the contents of suitcases, boxes and other containers. Inventory articles in:

* Trunk and Cargo Areas - Inventory trunk and cargo areas.
* Passenger Areas - Inventory passenger areas, including glove compartments and consoles.
* Engine Compartment - Inventory under the hood of the vehicle to insure that obvious motor parts are on the vehicle.
* Wheels - Do not remove hubcaps and wheel covers for inventory purposes unless directed by a supervisor.
* Closed and/or Locked Containers - Inventory all closed or locked containers. If a situation exists that requires extreme measures (extensive time, manpower and equipment), and/or unreasonable potential damage to property, the officer should avoid opening the container, but should document why the container was not opened.
* Attached Trailer or Vehicle - Inventory all trailers or vehicles that are attached to the primary vehicle.

49.3.3 Articles of Value

When you find articles with an apparent value of fifty dollars ($50) or more during the inventory, list them separately on the Inventory Report.

* Articles of Concern to Arrestee - List separately and include any article specifically mentioned by the arrestee.

49.3.4 Witnesses to Inventory

You should conduct inventories in the presence of a witness. This would normally be the vehicle owner or operator (who should be present when possible), or another officer or city employee. Use the tow truck driver as a witness if no one else is available.

49.3.5 Property Removed from Vehicle

When discovered during an inventory, seize and remove the following articles from a vehicle before towing:

* Articles for Safekeeping - Do not leave small articles particularly susceptible to loss or theft in the vehicle. Bring those articles in for property storage and release to the owner. Include these items and others as necessary:
    1. Currency
    2. Jewelry
    3. Credit Cards
* Unlawful Articles - Seize articles unlawful to possess and bring them in for property storage as evidence. Write an investigative report and seek criminal charges when proper. Include these items and others as necessary:
    1. Concealed Weapons
    2. Stolen Property
    3. Contraband (controlled substances, illegal firearms untaxed liquor or cigarettes, etc)
    4. Alcoholic beverages in possession of minors

49.3.6 Vehicle Damage

If you see damage to the vehicle or contents during the inventory, make a record of the damage on the Towing Report.

49.4 Noncustody Tows

Noncustody tows are requests by citizens for aid to remove their vehicles. Tow service operators are responsible for removal of debris from the streets at the scene as directed by the officer in charge. Notify proper agencies to dean up large spills of solid materials, liquids calling for special equipment, and hazardous materials.

49.4.1 Noncustody Towing Procedures

Contact the tow company that a person chooses for help.

* Person has no Preference - If persons do not request a specific tow company, give them the next name from the current rotation list.
* Do Not Recommend Tow Services - Do not recommend a tow company.

49.4.2 Requesting Noncustody Wreckers

When requesting a noncustody tow, tell communications approximate size and condition of the vehicle and other details as necessary.

49.4.3 Business with Tow Company

Owners or persons in charge of vehicles may direct the tow truck operator to tow their vehicle to any location including the tow company's storage facility.

* Payment of Tow Services - Arrangements for payment of tow and storage charges is strictly a

matter of civil process between the owner or person in control of the towed vehicle and the tow company.

* Safe Movement of Traffic - Do not intervene except to ensure prompt removal of a vehicle obstructing and blocking traffic.

49.5 Tow Records and Notices

49.5.1 Temporary Towed Vehicle File

Forward finished Towing Reports to the office for the towed vehicle file. Keep the original Towing Report in the temporary towed vehicle file until the department releases the vehicle.

49.5.2 Permanent File

Impound Inventory sheets shall be maintained as a permanent record within the department.

References

Commission on Accreditation for Law Enforcement

CALEA sets out the following mandatory standards for law enforcement agencies (4th ed.) with l to 24 employees.
61.4.3

Authorization

Policy promulgated and approved by the Common Council for the City of North Vernon, September 24, 2007.

Policy amended and approved by the Common Council for the City of North Vernon, May 23, 2011.

ABANDONED / IMPOUNDED VEHICLES REPORT

State Form 4166 (R13 / 4-04) / BMV Form 3228

4000158

FOR BMV USE ONLY	
DATE RECEIVED	FILE NUMBER

Indiana Code 9-22-1-6 and 9-22-1-19 require the impounding agency or towing operator to submit the top copy of this report to the Bureau of Motors within 72 hours of removing an impounded or abandoned vehicle. Return this portion of the completed form to the address on the right.

Bureau of Motor Vehicles
Abandoned Vehicles Department
100 North Senate Avenue, Room N404
Indianapolis, IN 46204

LOCATION AND DESCRIPTION OF ABANDONED / IMPOUNDED VEHICLE

Street address and, if applicable, rental property name				County		City		Date towed

Make of vehicle	Year	Style	Model	Color	Vehicle Identification Number (VIN)

License plate number	Issue year	State	Plate color	Vehicle odometer reading

Vehicle owner's name as determined by (1) plate or (2) VIN (circle source of information)	Last person in possession of vehicle, if known
Address (number and street)	Address (number and street)

City	State	Zip code	City	State	ZIP code

Reason for the tow *(circle the appropriate category)*: (1) Abandoned, (2) Expired plate, (3) Narcotic arrest, (4) Parking violation, (5) Stolen, (6) Wrecked, or (7) Other *(explain the reason)*

TO BE PREPARED BY IMPOUNDING OFFICER, IF APPLICABLE

Police agency name	Is the total value of the vehicle $500 or more?

General condition of the vehicle *(Please indicate whether each of the following parts are: (1) Good, (2) Fair, (3) Poor, or (4) Missing)*

Frame _____ Engine _____ Transmission _____ Tires _____
Wheels _____ Seats _____ Battery _____ Shell _____
Windshield _____ Radiator _____

Name(s) of arrested person(s), if applicable	Charge, Indiana Code Citation, UTT Number, if applicable

TO BE PREPARED BY GARAGE OWNER

Name of person who towed the vehicle	Name of towing company	Telephone number

Address (number and street)	City	State	ZIP code

Tow lot ID number	Daily storage fee	Date(s) stored	Time wrecker was called am / pm	Time wrecker arrived am / pm

Vehicle Status *(circle the appropriate category)* (1) Junk (impounding officer determined vehicle's value is less than $500) (2) Mechanic's lien (3) Public sale by city, town, or county (4) Released to owner or lien holder (5) Police hold (6) Other hold

Name of impounding officer (if applicable)	Impounding officer's signature and identification number	Date signed

Name of property owner who requested towing (if applicable)	Signature of property owner	Date signed

Name of tow company representative	Signature of tow company representative	Date signed

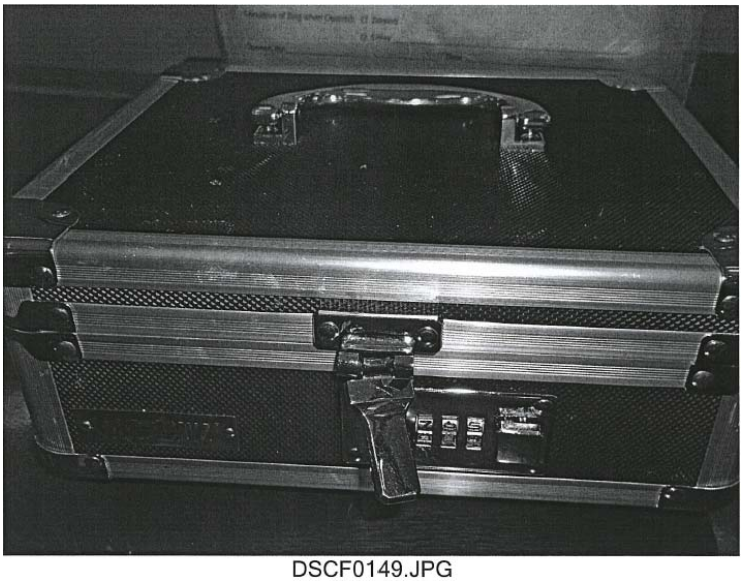
BUREAU OF MOTOR VEHICLES COPY

APPENDIX K

State's Ex. #5

* * *

* * *



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APPENDIX L

STATE OF INDIANA	IN THE JENNINGS CIRCUIT COURT
COUNTY OF JENNINGS, SS:	CAUSE NO. 40C01-1305-FA-007

STATE OF INDIANA,

Plaintiff,

-vs-

RAYMOND RYAN MARLING,

Defendant.

FILED
SEP 20 2013
Mary Bennett Kilgore
CLERK OF JENNINGS COURTS

MOTION TO SUPPRESS

Comes now the Defendant, Raymond Ryan Marling, by counsel, Bradley Kage, and respectfully requests that all evidence seized in this matter on April 25, 2013 be suppressed.

In support thereon, the Defendant will show:

1.) The traffic stop in this matter was improper as the officer did not have specific and articulable facts supporting it.

2.) The impound of the vehicle and the resulting inventory search violated Article I, Section 11 of the Indiana Constitution in that the vehicle did not pose any threat or harm to the community

or itself and the decision to combat that threat was not in keeping with established North Vernon Police Department policy. Further, under the "Fruit of the Poisonous Tree" doctrine, the impound and the inventory search flowed from the illegal traffic stop.

3.) Once the officer opened the trunk and found a box, he was not permitted to open it with a screwdriver. A warrant should have been obtained. *See* George v. State, (Ind. App. 2009), 901 N.E. 2d 590, transfer denied 915 NE 2d 990.

WHEREFORE, the Defendant respectfully requests that the evidence above be suppressed for the reasons set out above.

Respectfully submitted,

/s/ Bradley Kage
Bradley Kage,
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served upon Drew Dickerson, Deputy Prosecuting Attorney, P.O. Box 392, Vernon, Indiana 47282 on this 20th day of September, 2013, by personal service.

/s/ Bradley Kage
Bradley Kage,
Attorney for Defendant

Bradley Kage
Attorney at Law
814 South State Street
Post Office Box 328
North Vernon, Indiana 47265
(812) 346-6566
Attorney #5539-40

APPENDIX M

STATE OF INDIANA	)	IN THE JENNINGS CIRCUIT COURT
	) SS:	
COUNTY OF JENNINGS,	)	CAUSE NO. 40C01-1405-FA-007
	)	

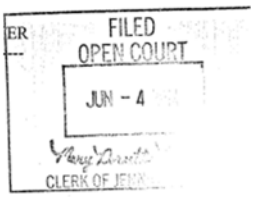
STATE OF INDIANA,

Plaintiff,

-VS-

RAYMOND RYAN MARLING,

Defendant.



TRANSCRIPT OF PROCEEDINGS
IN THE ABOVE-CAPTIONED CAUSE
BEFORE THE HONORABLE
JON W. WEBSTER

Hearing on Motion to Suppress

October 16, 2013

LINDA D. BUCHANAN
OFFICIAL COURT REPORTER

VOLUME II OF V

The Court:

We are before the court this morning for a motion to suppress hearing in the matter of The State versus Raymond Ryan Marling. Mr. Marling is here with his attorney Bradley Kage. The State by its Chief Deputy Prosecuting Attorney Drew Dickerson. I believe, Mr. Kage, this was a warrantless search.

Counsel Bradley Kage:

That's right, Your Honor.

The Court:

This shifts the burden to you, Mr. Dickerson. Call your first witness.

Counsel Bradley Kage:

Judge, before we start, I just have two things briefly. Number one, there's a typographical error in my Motion to Suppress. If you look at paragraph number two, line three, see where it says the decision to combat that threat, I said was in keeping with established policy. It should be was not. There should be a not after the was.

The Court:

Very well.

Counsel Bradley Kage:

And then we are also moving for a separation of witnesses, Your Honor.

Counsel Drew Dickerson:

I ask to have Detective Day assist me and I was going to call Ivory Sandefur as my first witness.

The Court:

Okay. Officer Sandefur, come forward. Do you have other witnesses, Mr. Kage?

Counsel Bradley Kage:

I will not have any witnesses, no.

The Court:

Have a seat. Raise your right hand. Do you swear or affirm under the pains and penalties of perjury that the testimony you shall give will be the truth and the whole truth? If so, say I do.

Ivory Sandefur:

I do.

The Court:

Have a seat. Mr. Kage. Mr. Dickerson.

DIRECT EXAMINATION OF IVORY SANDEFUR
BY COUNSEL DREW DICKERSON

Counsel Drew Dickerson:

Detective, would you state for the record your name and occupation please?

Detective Ivory John Sandefur:

My name is Ivory John Sandefur. I'm a detective with the North Vernon Police Department.

Q: Okay. Was that your position on April twenty-fifth of this year?

A: Yes.

Q: Okay. Going to that date, were you working a missing person's case involving somebody named Sara Maggard.

A: Yes.

Q: Alright. And, uh, in the course of that investigation, did you identify anybody that was what you would classify as a person of interest?

A: Yes.

Q: Who was that?

A: Uh, to start, we had Matthew Loper who was, uh, the person that Sara Maggard had been seen leaving the city park with.

Q: Okay.

A: Now...

Q: Well, let me just stop you there. Uh, in your investigation, would it be fair to say that you were trying to locate Matt Loper?

A: Yes.

Q: Alright. And in doing that, uh, did you or other officers, uh, investigate who his associates were? Who he hung around with?

A: Yes.

Q: Okay. Uh, did the name, uh, Raymond Ryan Marling come up in that investigation as somebody that hung out with Matt Loper?

A: Yes.

Q: Okay. And, but, for the record, what other detectives and agencies were helping you on this, uh, missing person's case?

A: The missing person's case actually started out as a Jennings County Sheriff's Department case with Detective Jim Blevins. He called me when, uh, he had information that Sara was possibly dead and possibly had died in the city limits. After I got involved, I wanted another opinion and we called Detective Gentry, Jerry Gentry of the Indiana State Police, and the three of us was working it.

Q: Okay. Do you remember who gave you the information that Ryan Marling, uh, was a friend of Matt Loper?

A: No.

Q: Okay. Did, when you got the name then of Ryan Marling, did you do some, uh, background or investigation on him?

A: Yeah. We did some standard checks on him and found out there was a warrant out of Jackson County on him. Detective Gentry found out, uh, some additional information that he was possibly

involved in some drug activity, carrying a gun and things of this nature.

Q: Okay. First of all, you mentioned a warrant. Let me show you what's marked for identification, State's Exhibit One. Can you identify that exhibit?

A: It's a failure to appear warrant on, uh, Ryan Marling.

Q: And is State's Exhibit One a copy of the warrant that, uh, you found to be in effect, uh, when you were doing this missing person's investigation?

A: I believe so. Yes.

Q: I move to admit State's Exhibit One.

Counsel Bradley Kage:

I don't have any objection on that as to cross-examination, Your Honor.

The Court:

One is admitted.

Counsel Drew Dickerson:

So you had the information that there was a warrant for Ryan Marling. You had information that he was possibly armed. Is that correct?

Ivory Sandefur:

That is correct.

Q: Did you instruct, uh, uniformed officers that worked for your department, uh, to be on the lookout for Ryan Marling?

A: Yes, I did.

Q: Did you instruct them that there was a warrant out for him?

A: Yes.

Q: Okay. Did you also pass on information that he might be armed?

A: Yes.

Q: Um, in the course of your investigation into Ryan Marling and how to maybe find him, did you, did

you receive any information on, to what he might be driving, vehicle wise?

A: Yes.

Q: Okay. What was your understanding of possible cars that he might be driving?

A: A black Avenger.

Q: Okay. Now, specif..., and did you pass that information on to the other officers?

A: Yes. Yes.

Q: Okay. Now, back on April twenty-fifth then, um, did you see, did you see a car, uh, well, first of all, did you come into contact with Ryan Marling on that date?

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A: Yes, we did.

Q: Okay. Can you tell us, can you back track and tell us, uh, how that came about?

A: We'd been following up on different leads on where Sara Maggard might have been. Um, some information trying to narrow down the chain of information that we was gettin'. Some of the information that I was gettin' was like fifth or sixth hand and I was trying to shorten that chain back down, you know, to the person that had more firsthand knowledge. Uh, as we was doing that we went out to Country Squire Lakes and we crossed the, uh, low water bridge on the side where the clubhouse is, going up through there, and we passed a black Avenger going the other way. It was heading out toward the clubhouse.

Q: When you say we, who are you talking about?

A: Uh, I was riding with Detective Jerry Gentry of the Indiana State Police. When we saw the vehicle, you know, we looked at each other and said, you know, that vehicle matches the description and he turned around and we caught up to it just before it got to the clubhouse and I was able to get the license number and run it through dispatch at which time he turned off on a side road and he came back out on

to the main road coming in.

Q: The Avenger did or Jerry did?

A: Jerry did. The Avenger went on up to the tee, turned left and came right past us, right in front of us heading toward the main gate, and the, uh, plate had come back to Mr. Marling, him and his wife.

Q: Okay. And, um, did you guys, you and Gentry continue to follow the Avenger then?

A: Yeah. Then we dropped in behind him and followed him, um, I started calling officers to stop him because it was his car and we had a male driving matching his description. Had every reason, there was a warrant out on him, a very good reason to believe that it's him.

Q: Okay. And you're, you were not in uniform and Gentry was not in uniform.

A: No. We was going in plain clothes and we was driving an unmarked vehicle.

Q: Okay. And you got, were you able to see the driver, get a look at him?

A: Just that it was a male driver as he went by us.

Q: Okay. And did, well, you said earlier something about it matching his description.

A: I've known Mr. Marling from previous times and, yeah...

Q: It looked like him?

A: It looked like him.

Q: Okay. Um, so at that point then you broadcast for a uniformed officer.

A: Yes.

Q: To make a stop. You advised of the location and all of that?

A: Yes.

Q: Okay.

A: And which direction we was traveling.

Q: Okay. Uh, Officer Day was, Officer Day made a traffic stop then of the Avenger a short time later. Is that right?

A: That's correct.

Q: Where did that occur?

A: That happened on three fifty north, uh, right beside St. Anne's golf course.

Q: Okay. And, uh, did he make that stop at your direction?

A: Yes.

Q: And were you following the Avenger the whole time? Were you present at the traffic stop?

A: Yes.

Q: Okay. After Officer Day made the stop, can you tell the court what happened after the Avenger was stopped?

A: When it was stopped, because of the information we had of him carrying a gun and also had information, Detective Gentry had information that he had made statements he wasn't going back to jail, a felony stop was conducted where he was ordered out of the car and back to where he could be secured away from the vehicle, to make sure that he didn't have weapons and when I went forward to handcuff him and he was wearing an empty shoulder holster at the time and I believe a handgun was found in the vehicle.

Q: Alright. When, uh, when the defendant was, after the defendant was placed in the cuffs, I assume the Avenger was cleared to see if there was any other passengers and that sort of thing. Is that right?

A: Yes.

Q: Okay. Uh, was the defendant transported from the scene of the traffic stop to another location then?

A: He was transported to the Jennings County Jail by Officer Day.

Q: Alright. And where did you go after the defendant was taken from the scene?

A: Sergeant Kipper was left with the vehicle to impound and inventory it. Uh, Detective Gentry and I went to the jail to interview Mr. Marling about Sara Maggard.

Q: Okay.

A: If he had any information on where we could find her.

Q: Okay. Now, you were not present then for any search of the Avenger. Is that fair to say?

A: That is correct. I was not present.

Q: Okay. Um, but did you instruct Officer Kipper or Sergeant Kipper to do an inventory of the vehicle?

A: Inventory of a vehicle is, uh, standard policy for any vehicle for impounding.

Q: Okay. Uh, and you couldn't do it 'cause you were going to go do an interview.

A: That's correct.

Q: And Jeff Day couldn't do it because...

A: He was transporting him.

Q: Alright. Uh, Kipper apparently had shown up on the scene. Who else do you remember being there?

A: There was some county officers showed up, but I don't remember who they were.

Q: Okay. Um, and then, uh, I know there were different agencies involved in a missing person's

case, but with respect to this vehicle, did it kind of become a North Vernon City case because Jeff made the traffic stop?

A: Yeah. He was, he made the traffic stop off a warrant which then developed further with items they found in the vehicle.

Q: Okay. Uh, can you give us an overview of the chain of custody procedures of evidence at the department?

A: Okay. An officer will collect the evidence. The officer brings it in, packages it and puts it into, uh, the property lockers which are then locked. The only people who have a key to those property lockers on those locks are the, um, detectives. There's three of us now. At the time there was only two. There was, well, there would have only been one. There was me and Detective Gary Driver. There was only two keys but Detective Driver went back to the road about that time. I may have been the only one with a key.

Q: Okay.

A: To the property lockers. Then I process it from the property locker into the property room. Then if it needs to go the lab or whatever, then I make calls and make the arrangements for it from there.

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Q: Is there, is there, uh, a property record kept or any other kind of field work that's done?

A: Yes.

Q: When a uniformed officer turns in property to you?

A: Yes.

Q: Okay. And then from the time that you put it in the evidence room, if it's taken to a lab or something, that's your responsibility.

A: Yeah. That's correct.

Q: I want to show you what I have marked for identification as State's Exhibit Five. Can you identify that document?

A: It's North Vernon Police Department General Order Forty-nine, Impoundment of Vehicles.

Q: Was State's Exhibit Five in effect at the City Police Department on April twenty-fifth of 2013?

A: Yes.

Q: And then I want to show you what's marked for identification as State's Exhibit Six. Can you identify that document?

A: It's property room record of evidence turned into the property room reference the case five sixty-nine.

Q: And is that the case we're here on today?

A: I believe it is. Yes.

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Q: And this property, is this report filled out, uh, by yourself and Officer Kipper and Officer Day?

A: Yes. It's, uh, it has here on the top entering officer. This top one here says Jeff Day, recovering officer Jeff Day, investigating officer Jeff Day. Um, the second one is Craig Kipper. On down through here. The officer fills this out when they turn it in and they list here at the bottom, you know, that they've turned it in and then I list below that what I've done with the property, when I moved it from the property locker to the property room.

Q: Okay. So...

A: And here on the second page is, there's some items I sent from the property room to the ISP lab.

Q: Okay. So the property that Kipper would have turned in as a result of the inventory search, that's listed on State's Exhibit Six.

A: Yes.

Q: Okay. Judge, I would move to admit State's Exhibits Five and Six.

Counsel Bradley Kage:

No objection, Your Honor.

The Court:

Five and Six are admitted.

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Counsel Drew Dickerson:

Um, I don't have any further questions.

QUESTIONS BY THE COURT

The Court:

Officer Sandefur, a couple of questions before we go to Mr. Kage. Neither you or Gentry were in uniform.

Ivory Sandefur:

That is correct.

The Court:

And he was in an unmarked unit.

Ivory Sandefur:

That is correct.

The Court:

Which is why you called for a marked unit.

Ivory Sandefur:

That is correct.

The Court:

And you, did you approach the vehicle first?

Ivory Sandefur:

No.

The Court:

After it was stopped?

Ivory Sandefur:

No. When it was stopped I became a cover officer for Officer Day. I went to the passenger side.

The Court:

Okay. Did you, did you observe the shoulder holster?

Ivory Sandefur:

Yes. I felt him. When he, when he backed him out of the car, he had him get out of the car and walk backwards to go to his knees, I went forward, handcuffed him, at which time I did a quick pat down and he had an empty shoulder holster on him at that time.

The Court:

Was it under a shirt or a coat or something?

Ivory Sandefur:

Yes. Under a shirt.

The Court:

Then where did the handgun come into play? Did you then look back in the car?

Ivory Sandefur:

I believe Officer Day went forward to the car at that time to clear it.

The Court:

Okay.

Ivory Sandefur:

And I stayed with Mr. Marling.

The Court:

Okay. And you indicated that at one point in time that Gentry got up behind the vehicle and got the plate number.

Ivory Sandefur:

Yes. We got up close enough to read the plate number.

The Court:

Did you see, did you or he call that in?

Ivory Sandefur:

Yes, I did.

The Court:

And it came back to who?

Ivory Sandefur:

Uh, Mr. Marling and his wife.

The Court:

Okay. Very well. Do those questions raise any for your Mr. Dickerson?

CONTINUATION OF DIRECT EXAMINATION OF IVORY SANDEFUR BY COUNSEL DREW DICKERSON

Counsel Drew Dickerson:

Um, yeah. At the scene of the traffic stop, you yourself didn't actually look in the Avenger. Right? You stayed with, uh, the defendant.

Ivory Sandefur:

Yeah, I stayed with him until it was secured.

Q: Alright. Uh, that was my only question.

CROSS-EXAMINATION OF IVORY SANDEFUR
BY COUNSEL BRADLEY KAGE

Counsel Bradley Kage:

Officer Sandefur, the failure to appear warrant from Jackson County for a misdemeanor. Correct?

Ivory Sandefur:

That is correct.

Q: You've indicated that Mr. Marling, you believe, was driving in CSL but the vehicle made a turn. Was that a shortcut that could be taken there, where he turned?

A: Where he turned?

Q: Yeah.

A: No, um, he actually stayed on the main road. There's a road that comes in from Highway Seven, comes down to a tee.

Q: Yes.

A: And then it makes a big loop.

Q: Okay.

A: He was on the loop. He went up to where the tee was and hung a left and then...

Q: Alright. So he, I guess my thought was, he didn't take any, the vehicle didn't take any evasive action driving?

A: No. No.

Q: Did the, uh, to try to avoid anybody. Alright. Did the vehicle have dark tinted windows?

A: Yes.

Q: Fairly hard to see inside?

A: Yes.

Q: So I guess your testimony would be, I think initially was, that all you could tell was that the person driving the vehicle was a male. Is that a correct statement?

A: Yes.

Q: And you couldn't specifically tell if it was Mr. Marling or not. Is that right?

A: No.

Q: Did you write a report on this particular case?

A: Yes.

Q: When the vehicle was stopped out by Saint Anne's, was it going, let me think of my directions, east or west?

A: It was going east away from Highway Three.

Q: Okay. Uh, probably towards somewhere back in there.

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A: Yes.

Q: So the stop was made on the right hand side of the road going east obviously?

A: I believe we took up the whole road when we made...

Q: I think that solves the question. Was the vehicle then pulled over off the traveled portion of the road or was some on the travelled portion of the road?

A: I don't think he could get off the travelled portion of the road through that stretch of road. I think he was still on the road. Now, you could of got a car past him.

Q: Okay.

A: You, I mean...

Q: Cars could have gone past.

A: Yeah, cars could have gone past. It was not...

Q: Was any of the vehicle off the travelled portion of the road, if you can remember?

A: Was it what, Mr. Kage?

Q: Any of the vehicle off the travelled portion?

A: I don't remember. I mean, if it was, it was just barely, barely off the road.

Q: Okay.

A: He would have just barely had some wheels off the road if he was off the travelled portion of the

road. I don't believe he was.

Q: And Officer Sandefur, just for the record, Sara Maggard later turned up, did she not?

A: Yeah, she turned up alive later.

Q: Sometime after April twenty-fifth I believe.

A: Yes.

Q: If I could have just a minute, Your Honor. It is my understanding that the inventory search was done by Officer Kipper.

A: That is correct.

Q: And there was a duffel bag that was found. Is that correct, from the trunk, during the inventory search? Do you know?

A: Without referring back to his report and the, uh, property, no, I don't.

Q: Okay. Uh, so any duffel bag or any box that would have been opened, would have been opened by Officer Kipper. Is that correct?

A: That is correct.

Q: Alright. That's all the questions, Your Honor.

Counsel Drew Dickerson:

I don't have any additional questions.

QUESTIONS BY THE COURT

The Court:

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Mr. Sandefur, Officer Sandefur, am I to understand then that the vehicle was towed from the county road to another location?

Ivory Sandefur:

Yes.

The Court:

And where was that?

Ivory Sandefur:

It's at Lucas Wrecker.

The Court:

And is that where the actual search took place?

Ivory Sandefur:

I do not know.

The Court:

You do not know. Okay. Mr. Dickerson, does that raise anything for you?

Counsel Drew Dickerson:

No.

The Court:

Mr. Kage?

Counsel Bradley Kage:

No, Your Honor.

The Court:

Thank you, sir. Next witness.

Counsel Drew Dickerson:

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I call Jeff Day.

The Court:

He can stay there with you, Mr. Dickerson. Officer Day, you can stay with Mr. Dickerson or you can sit there. Wherever you'd like. It doesn't matter. Raise your right hand. Do you swear or affirm under the pains and penalties of perjury that the testimony you shall give will be the truth and the whole truth? If so, say, I do.

Jeff Day:

I do.

The Court:

Have a seat, Mr. Dickerson.

DIRECT EXAMINATION OF JEFF DAY
BY COUNSEL DREW DICKERSON

Counsel Drew Dickerson:

Would you state for the record your name and occupation please?

Jeff Day:

My name is Jeffrey S. Day. I'm a North Vernon police officer. I serve as a detective with the North Vernon Police Department.

Q: Okay. Now, uh, back on April twenty-fifth of 2013, uh, were you employed by the city police department ?

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A: I was.

Q: And at that time, were you a detective?

A: I was not.

Q: Okay. What were your duties at that time?

A: My duties at that point was a patrol officer. I worked the shift from six-thirty a.m. to six p.m., a twelve hour shift.

Q: Okay. On that date roughly a little after four in the afternoon, did you make a traffic stop of a car driven by the defendant in this case, Ryan Marling?

A: Yes, I did.

Q: Okay. Um, prior to that traffic stop, while on duty, had you received any information from Detective Sandefur concerning Ryan Marling?

A: Yes, I did.

Q: Do you remember what you were advised?

A: Yes. He had told me that, uh, Ryan Marling was wanted on a warrant. Um, that he was driving a black Avenger and was also carrying, uh, in possession or could be in possession of a gun and that he had made statements and it was relayed to me through Detective Sandefur that he had made comments that he would not go back to jail.

Q: Okay. Now, where specifically was your traffic stop made of the defendant on April twenty-fifth?

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A: The location?

Q: Yes.

A: It was, um, actually it was, um, County Road Three Fifty North, the intersection of Medical Drive. Um, Mr. Marling was in front of me heading eastbound, uh, down Three Fifty North, which would put Saint Anne's golf course on our left side. Um, I turned on the lights and siren and he pulled over to the right side of the road.

Q: Okay. And how did you happen to be at that location?

A: Um, Detective Sandefur had actually contacted me and radioed out that they were behind a black Avenger, um, so I started that way immediately.

Q: Okay. And did you initiate your traffic stop at Detective Sandefur's request?

A: That's correct.

Q: Okay. Now, were you in a marked police car at that point?

A: I was in a fully marked police car and in uniform.

Q: Alright. Now, when you made this traffic stop, uh, did you conduct it in what's known as felony stop and, if so, for the record, would you describe what that means?

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A: Um, yes, I did. I conducted it based upon what we police officers call a felony stop. Mainly for the safety of the officers involved and anyone taking a vehicle down in that nature due to the circumstances as in carrying a gun, maybe the statements that may have been made, uh, concerns of safety. Um, when you do that, basically you can do different positions, behind your police car, you can stay in the police car, you can call out on a P.A., um, you can step outside the door. I chose to step outside the door and give him verbal commands, loud verbal commands.

Q: Okay. And did you have your gun drawn?

A: I did.

Q: Alright. And that's different than a typical traffic stop. Is that correct?

A: Yes.

Q: Alright. Um, now, when you made this traffic stop, were you wearing any kind of recording device.

A: I was.

Q: And what were you wearing?

A: We have a small miniature type camera that, um , records audio and also video.

Q: Alright. And did you video and audio tape, tape's probably the wrong word, but did you video and

audio record this traffic stop in your encounter on Three Fifty North?

A: Yes, I did.

Q: Now, I want to show you what's been marked for identification as State's Exhibit Two. Can you identify that exhibit?

A: That's a copy of the DVD that we went over and that you showed me and that I signed. Those are my initials and the date I put on there.

Q: And that, this accurately reflects the actual traffic stop. Is that right?

A: Yes, it does.

Q: Okay. Um, you, uh, the Avenger pulled over and you ordered the defendant out of the, out of the car. Is that right?

A: Um, I did.

Q: And did he get out of the car?

A: Um, I commanded him to actually put his hands up high and open up the door from the outside, but it was locked. Um, so then I had him put his hands back inside to unlock it and then step out of the car and then to interlock his fingers and walk back towards us and then go to his knees so then we could advance up onto him. While covering him, I, actually Detective Sandefur advanced up onto him.

Q: Okay. And Ivory handcuffed then. Is that right?

A: That's correct.

Q: Okay. What, once the defendant was handcuffed, what did you do next?

A: Then I went to the right side of the car and just did a quick clearance of the car just looking for anybody else that may be laying down in the backseat that I couldn't see or could have been hunched down on the floorboard somewhere.

Q: Okay. Now, do you remember who else was present at the time of the stop?

A: Um, at that particular time, Detective Gentry was with, um, Detective Sandefur and whenever I approached the car, Detective Gentry from the state police also came up to the car with me.

Q: Okay. Uh, were there any other passengers or occupants in the car?

A: There was nobody else in there.

Q: Alright. Did you see any weapons in there, in the compartment, in the driver's compartment of the car?

A: Yeah. When I went up and I opened up the door, um, actually on the video camera, I pointed out the gun just to make the other officer aware that there was a gun there. Um, it appeared to be some type of

Colt Forty-five, 1911, uh, structure, 'cause I noticed the hammer was what we call or what I know as cocked and locked, where the hammer is drawn all the way back. Normally, the safety is put up to hold it back and it was tucked between the console and the driver's seat on the lower portion of the seat where they would sit.

Q: Okay. Let me show you what's marked for identification as State's Exhibit Three. Is this a fair and accurate depiction of the gun as you saw it?

A: Yes.

Q: In the Avenger on that date?

A: That's correct.

Q: Okay. At some point during the traffic stop, did you ask the defendant if he had a handgun permit?

A: I did ask him, um, when he was with Detective Sandefur, if he had a handgun permit and he told me no.

Q: Alright. Um, okay, so the first cleared, the defendant is in custody at this point outside of the Avenger. Is that right?

A: Yes.

Q: What are you trying to do next?

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A: Um, my duty at that point would be to go ahead and transport him down to the jail.

Q: And did you do that?

A: I did.

Q: Okay. And, uh, did you meet, at the jail did you meet Detectives Sandefur and Gentry, uh, who were there to interview the defendant?

A: Um, actually they got him into the book-in area and then they later came down.

Q: Alright. Okay. Uh, was Kipper on the scene before you left?

A: Yes. Sergeant Kipper was on the scene before I left.

Q: Okay. And did it become basically his function to do the inventory, well, to impound the car and do the inventory procedure and have it towed?

A: Yes.

Q: Okay. Judge, I would move to admit State's Exhibits Two and Three.

Counsel Bradley Kage:

For the purpose of this hearing, Your Honor, I don't have any objection. Obviously, the admissibility of the gun is one of the things that we are challenging in the motion to suppress through our paragraph number one.

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The Court:

Well, by looking at a picture of it, Mr. Kage, I'm not determining that...

Counsel Bradley Kage:

Okay.

The Court:

It's admissible.

Counsel Bradley Kage:

I just wanted to be clear on that on the record.

The Court:

Very good.

Counsel Bradley Kage:

But other than that...

The Court:

Two and Three are admitted.

Counsel Bradley Kage:

For the purposes of this hearing, no objection.

Counsel Drew Dickerson:

I don't have any other questions for the detective right now. Uh, unless Brad wants to do it differently, I just move to publish Two now.

Counsel Bradley Kage:

I don't have an objection and maybe I should do..., I don't have a lot of cross-examination. Maybe I should do that first and then we can watch it. It

is my understanding that it's about five minutes.

Counsel Drew Dickerson:

Well, the actual, the actual, the whole thing's nearly fifteen.

Counsel Bradley Kage:

Okay.

Counsel Drew Dickerson:

Well, the relative part for us is only going to be about five or so.

Counsel Bradley Kage:

For today.

Counsel Drew Dickerson:

Yeah.

Counsel Bradley Kage:

But when we move down the road, it'll be...

The Court:

Two is admitted.

Counsel Bradley Kage:

Okay.

The Court:

Go ahead with your questions.

Counsel Drew Dickerson:

I don't have anything further.

The Court:

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Cross.

CROSS-EXAMINATION OF JEFF DAY
BY COUNSEL BRADLEY KAGE

Counsel Bradley Kage:

Detective Day, I asked Ivory about this. The vehicle had dark tinted windows.

Jeffrey Day:

It had tinted windows.

Q: Okay. Was it hard to see inside to see exactly who was driving?

A: I could, I could see the silhouette of the person in there. Uh, to, from the side, 'cause I just saw the side at first and then when I came up on the rear of it then I was able to look through the tinted window also.

Q: Where did you first encounter this vehicle?

A: Um, actually I saw the vehicle go by because I came up Seventy-five West first which would be for common purposes, Dave O'Mara's Service Center.

Q: Okay.

A: That's Seventy-five West. And then when I came up here to the stop sign, so then when I came up and turned right and then caught up to him. We come up to the next stop sign which would be Three Fifty and Medical Drive.

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Q: And obviously there were no traffic violations or anything like that, no speeding.

A: Not that I observed. No evasive driving, erratic driving.

Q: Okay. I believe, if you'll take a look at your report, in your report you mentioned you had information about the warrant and the possibility of being in possession of a gun. Is that correct?

A: Yes.

Q: Okay. Um, and were you aware that that was a misdemeanor warrant as opposed to a felony warrant?

A: Um, actually I took it as being that it was a failure to appear when it was on a marijuana felony charge.

Q: Okay. You sure it wasn't, you sure it was a felony?

A: Um, from my understanding the, it was on the original charge of a felony, uh, marijuana.

Q: Okay.

A: But I may have looked, may have...

Q: I think you had testified here today that there were three things that you were told about this vehicle and I don't recall the third one. You said something about the possibility of there being warrant, in possession of a gun, and there was a

third thing that I think you indicated a few minutes ago. Do you recall what that was?

A: Um, other than, uh, Detective Sandefur passed along information that he had, that he had gotten information that he wouldn't go back to jail.

Q: Okay. And that's not reflected in your report, is it?

A: No.

Q: Alright. And, again, the inventory search after the impound was done by Officer Kipper. Is that correct?

A: I'm not sure of the process because once I left, I'm not sure at what point, you know, if he did the inventory prior to the actual impound or it went to the impound lot or how he did it.

Q: You were, uh, Ivory testified about how the vehicle was situated when it was stopped. Do you agree with his testimony?

A: Um, I don't recall it being off the edge of the roadway. Um, I think the video on my camera may show the position...

Q: Okay. So you think that would show it.

A: Um-hum.

Q: Do you agree with his testimony that obviously vehicles could have gotten around it?

A: Uhhh...

Q: On the other side.

A: At the point when we were there, I'm going to say that nobody could pass by because we occupied the

space with police officers. Um, yes, the vehicle was in a position that there was one lane maybe open.

Q: Let's forget about the police cars.

A: Okay.

Q: Then vehicles could have gotten around it. Correct?

A: Uhhh, with one lane.

Q: I understand. Now, your, uh, your audio video camera that you took this exhibit by, just so I know, did you keep that running the entire time down to the jail? Do you remember?

A: I had it on, but I think it went dead prior to us getting down there. At one point it went dead, I'm not sure.

Q: You're not sure. So when did you turn it on?

A: Um, actually it was just prior to the stop when I was coming up behind the vehicle.

Q: And then at some point after you took Mr. Marling into custody, then it went dead on the way to the jail.

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A: On the way, on the transport down, 'cause I had it on on some other cases.

Q: Alright. I don't have any, uh, further questions, Your Honor.

The Court:

Mr. Dickerson?

RE-DIRECT EXAMINATION OF JEFF DAY
BY COUNSEL DREW DICKERSON

Counsel Drew Dickerson:

Just, uh, some real quick. Where, where on your body was that, was that recorder?

Jeff Day:

Um, I had a police uniform shirt on, but I usually just put that right up on the chest, right on my chest so whenever I'm interviewing someone in close proximity, then it actually shows their faces, their chest area.

Q: Okay. So the perspective that's on the video is basically from your chest level.

A: Correct.

Q: I don't have any other questions.

The Court:

The Court:

Mr. Kage?

Counsel Bradley Kage:

Um, no other questions, Your Honor.

Counsel Drew Dickerson:

I move to publish then.

Counsel Bradley Kage:

I have no objection.

The Court:

Are you going to set that up on a laptop?

Counsel Drew Dickerson:

Yeah.

COURT REPORTER NOTE:

Judge leaves so record is off while DVD is being set up.

The Court:

Let the record show that we are back to play an audio video. Is there audio as well?

Counsel Drew Dickerson:

Yes.

The Court:

Well, audio, video, DVD, CD. Go ahead, Drew.

COURT REPORTER NOTE:

Audio video is available for review upon request.

Audio:

Officer Day to Dispatch:

by the golf course (inaudible).

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Dispatcher:

Are you by the golf course?

Officer Day: up by Calhoun's Corner.

VNV328. Driver, roll your window down. Roll your window down. Put your hands outside the window. What's your name?

Ryan Marling:

(inaudible)

Officer Day:

What's your name?

Ryan Marling:

Ryan Marling.

Officer Day:

Ryan Marling. Okay. Now what I want you to do is I want you to use your hands on the outside of the car. I want you to open up your door and I want you to walk out. Do you understand me?

Ryan Marling:

(inaudible)

Officer Day:

You keep your hands on the outside, grab that door handle and let yourself out.

Ryan Marling:

I can't unlock the door.

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Officer Day:

Reach in there very slowly. Unlock your door and then put your hands back out slowly. Alright. Now, do what I just told you. Left hand on the door handle. Open it up. Step out slowly. Keep walking back towards me backwards. Keep coming. Alright. Stop. Hands on top of your head, interlock your fingers now. Drop to your knees. Drop to your knees! There's going to be an officer approaching you. Do not make the wrong move.

Dispatch:

(inaudible)

Unknown Speaker:

It's on double lock.

Unknown Speaker:

Okay.

Officer Day:

Are there any other weapons besides what's in the car? Do you have any other weapons beside what's in the car? On your person?

Ryan Marling:

I don't want to...shoulder holster.

Officer Day:

Is the other weapon in the car?

Ryan Marling:

Yes.

Officer Day:

Do you have a permit for the weapon?

Ryan Marling:

No.

Officer Day:

What's that?

Ryan Marling:

No.

Officer:

Okay. The handgun in the front seat does not have a permit.

Unknown Speakers:

(inaudible)

Officer Day:

Last name Marling. First name Raymond Ryan.

Unknown Speakers:

(inaudible)

Counsel Drew Dickerson:

Basically the rest of it is...

Counsel Bradley Kage:

Yeah later but at trial.

The Court:

I'll take the DVD.

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The Court:

Mr. Dickerson, after watching the DVD CD, do you wish to recall Officer Day?

Counsel Drew Dickerson:

No.

The Court:

Mr. Kage, you have the opportunity, having watched that to talk to Officer Day further.

Counsel Bradley Kage:

No. No questions, Your Honor.

The Court:

Next witness.

Counsel Drew Dickerson:

Judge, I don't have any other witnesses. Uh, Kipper is in training and unavailable this morning. Uh, I do have one other exhibit. I'd offer State's Exhibit Four which is basically his police report.

Counsel Bradley Kage:

Uh, I was going to offer that. I do not have any objection to that either.

The Court:

State's Four is admitted.

Counsel Drew Dickerson:

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And also just to keep the record clear, I think it's referred to in that, in Kipper's report, but I want to stipulate, uh, that there was a, uh, locked container in the truck that was opened by Kipper with a screwdriver pursuant to the search.

Counsel Bradley Kage:

Your Honor, I do have an omitted question for Detective Day, if I may.

The Court:

You may.

RE-CROSS EXAMINATION OF JEFF DAY
BY COUNSEL BRADLEY KAGE

Counsel Bradley Kage:

Detective Day, I'm safe in saying that before you made the traffic stop, you didn't know specifically that this was Ryan Marling, did you?

Jeff Day:

Specifically, no.

Q: Okay. That's all the questions I have, Your Honor.

The Court:

Did that raise any for you, Mr. Dickerson?

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Counsel Drew Dickerson:

No, Your Honor.

The Court: Additional evidence?

Counsel Drew Dickerson:

We rest.

The Court:

Mr. Kage.

Counsel Bradley Kage:

Your Honor, I was going to offer Officer Kipper's report and that was going to be my evidence. We would rest on that.

The Court:

Do I have the entirety of his report? Is that correct?

Counsel Bradley Kage:

I believe you do.

The Court:

One page.

Counsel Bradley Kage:

Yes.

The Court:

It's the whole thing.

Counsel Bradley Kage:

Yes.

The Court:

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It's already in.

Counsel Bradley Kage:

Then I do have some, uh, I know, I know we're a little bit short of time today, but I do have three cases.

The Court:

Well, I'd like to hear argument.

Counsel Bradley Kage:

Okay.

The Court:

If you want to make, uh, and Mr. Dickerson, you have the burden here so you go first.

Counsel Drew Dickerson:

Um, first of all I would point out on, I think it's State's Exhibit Five. It's the, uh, the police department SOPs. On page four, uh, it describes the policy of impounding motor vehicles at the bottom of page four and then on to page five. Um, but in this case, uh, the car had to be impounded and I think it's obvious from the video, uh, why that is, but it couldn't be left on a county road in the position that it was. There were obviously no other licensed, uh, drivers to take possession of the car. Uh, nobody else was there with

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it. Uh, but then as far as the, what's to be inventoried when a car is impounded then, uh, specifically the trunk and cargo areas and that's what was addressed in the motion, and then this, uh, the important thing is this particular standard operating procedure has a specific provision for closed and/or locked containers and the officers are told that they have to inventory all closed or locked containers. The reason that's important is because in the defendant's motion, Mr. Kage cited *George versus State* and basically, uh, George relies heavily on a case, *Lucas versus State*. But both of

these Indiana cases deal with this concept of locked or closed containers, uh, and the gist of these, actually, in George the actual issue is a little different because in that one the evidence they're talking about was basically a pill bottle in a lidless condom box and the actual issue in that case, uh, wasn't this locked container issue that we have, but it was whether those officers could, when they found the pills, whether they could call poison control. But it does, it does talk

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about this issue and then it points us to the Lucas case. Both of these cases though basically say, they hold, uh, that when there's no, they want policies that don't give the officers, you know, discretion to just rummage and, uh, what's interesting, both of these cases came from Shelby County. *Lucas*, at the time of the Lucas search, which came first, the Shelby County Sheriff's Department policy didn't have any, it may have referenced, uh, closed containers but it made no reference to what the officers were supposed to do with locked containers and on page eight of that decision, uh, that's what the court said. Well, you know, you don't have, it made no reference to, uh, a locked container and so there's no clear department policy or procedure do mandate opening of a locked container as part of an inventory search. A couple of years later the same Sheriff's Department, and it's noted in the George opinion that they had changed their SOPs and it, now it did include locked containers. Um, and they talked about on page seven again that, um, if there's not, if

there's not something that says you can open a locked container then you can't do it. Uh, and then they also rely, they point us to the United States Supreme Court case of *Wells* there on page six they talk about permissible policies. I would point out in Wells I think, uh, they don't make a distinction between closed and locked. I think in Wells the container was actually locked and they only talk about it being closed. But anyway, in this issue as far as, as far as the box or anything in the trunk that was opened, here the police department's policy, it's clear Sergeant Kipper doesn't have this discretion to rummage through. He, he's got to follow his, uh, his standard operating procedures and that's what the *Opperman* case is, that started the inventory searches. The officers have to be following a procedure by their department and that's what Kipper did in this case. As far as the traffic stop in this case, um, paragraph one of the motion says the stopping officer didn't have specific and articulable facts supporting it. I suppose technically that's true. He didn't see any traffic

violations or anything like that, but he was the uniformed officer who was making this traffic stop at the direction of the detective, uh, who had every reason to believe that Ryan, that he had located Ryan Marling and Ryan Marling had an active felony warrant. State's Exhibit One, I think, is an FD cause number out of Jackson County. Um, the car was registered, according to dispatch the car was registered to the defendant. Ivory had seen the

defendant pass and it appeared to be him or possibly him driving the defendant's car. There's a warrant out and he also wanted to talk to him obviously about this other case, but regardless of how his name came up, the fact is, they're looking for him. There's a warrant and there's every reason to believe that that's who is driving this car so, uh, he's within, it's permissible for him to request a uniformed officer in a marked car to make a traffic stop. So I think, you know, based on the evidence, and we have the best evidence of how the traffic stop was conducted. Anyway, I mean, it's all there in State's Exhibit Two, but, uh, you know,

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there's a warrant, reason to believe it's him driving his car, uh, and we have a uniformed officer in a marked car making the actual stop and then Kipper's following the North Vernon policy. That's all.

Counsel Bradley Kage:

Your Honor, in terms of our motion to suppress, I'll argue this very briefly. In one, two and three as I've filed it in the motion, or as I set out in the motion, particularly the impounding in the traffic stop in this particular case as not being supported by, uh, specific and articulable facts. The case that I will cite that the court could look to for some rules would be *State versus Ritter* 801 N.E.2d 689. It's a 2004 Indiana Appellate Court case. I do not have a copy of that case unfortunately, but that set forth the rules concerning traffic stops. Secondly, the, uh, we are also challenging the impound and the

resulting inventory search, um, under the case of *Jones versus State* which is at N.E., I don't have that, yeah, I do have that.

The Court:

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If you have it there, Mr. Kage...

Counsel Bradley Kage:

I, I have it, I do have it the case, Your Honor, but just for the record it's 856 N.E.2d 758 (2006) Indiana Appellate Court case that basically says that's just showing that the vehicle was where they, uh, was a threat to the safety of the community as it was parked after the, uh, traffic stop here to justify the impound and the resulting inventory search and we don't believe that there's been a showing here by the, by the State on that. In fact, the language that I cited in paragraph two of the motion to suppress generally comes from that Jones case and we, and we think that the State has not shown the vehicle did pose any threat or harm to the community or itself. Um, and, therefore, that the impound and the inventory search should not been have done, should not have been done. Now, the George case is a case that I cited in support of our, um, intention that opening the duffel bag and opening the two boxes should not been, should not have been done. Despite the policy that the North Vernon Police Department has, if you

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will read the George case and specifically at 901 N.E.2d at page 597 towards the end of the case, the

Indiana Court of Appeals stated: police officers should not be burdened with a warrant requirement under such circumstances because as the State in its delay might result in someone missing a scheduled dosage of medication. That was, as Mr. Dickerson said, that was a pill bottle in that particular case that was opened. Here we had a duffel bag that was opened, two boxes that were opened and even another box that was locked and was opened with a screwdriver. Now, to say that the caretaking function of the State here would have been satisfied by opening those because somebody may have missed a scheduled medication dosage, I don't think there's any showing of that and, of course, the State bears the burden of proof here and we don't think that they have satisfied that burden of proof by showing that there's been an exception to the warrant clause and we continue to maintain and continue to argue that a warrant should have been obtained to open those boxes and those paragraphs relating

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to what was found in the trunk and what was opened by Officer Kipper are in the last two paragraphs, Your Honor, of I believe what was State's Exhibit Four, his report, and that a warrant should have been obtained for those because there really weren't any despite the policy, there was no showing that there was anything exigent and should have required opening those at that time and there should have been a warrant obtained to get those. The court will also note from its file, later there was a search warrant that was obtained for some cell phones and things like that and the

State could have as part of its affidavit, the police could have and the State as part of its affidavit in support of search warrant, in support of its search warrant could have asked that those items be opened, but they had already been done as part of the inventory despite that language in the George case and despite the policy, we contend that, uh, the North Vernon Police Department had, Your Honor. So, in terms of suppression, it kind of moves down the line. It kind of moves down the chain. We're asking that the gun be

suppressed as being a bad traffic stop as I argued briefly before. We're asking then that the inventory search, uh, everything found as a result of the inventory search be suppressed because of paragraph two of my motion and also because of the bad stop. I touched upon both of those in my motion, and then further, even if you would find that the stop was good and the decision to impound and make the inventory search was permissible under the Indiana Constitution and under the law, that only the containers was not permitted by the language in the George case. So there's, these are not contingent arguments and that would mean that the things that were found in the duffel bag, in the box and in the other locked box should then be suppressed even if you find that the original stop and the decision to impound and make the inventory proper, we believe then that there should have been warrants or a warrant, search warrant obtained for those things, Your Honor.

The Court:

Mr. Marling, the facts relevant to the suppression issue are really not much in

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dispute. They are what they are. I'm going to, Mr. Kage has given me two cases to read. Mr. Dickerson has given me three cases to read. They obviously feel those are important and I need to review them and I do need to read them. So I will be doing that tonight or tomorrow night and when I make a ruling in the next few days, because a trial is imminent here depending upon which way I go. The attorneys need to know where this suppression is going to end up. I'll let Mr. Kage know and he'll let you know and, Mr. Dickerson, I'll let you know as well.

Counsel Bradley Kage:

Thank you, Your Honor.

APPENDIX N

IN THE

COURT OF APPEALS OF INDIANA

No. 40A01-1403-CR-109

RAYMOND RYAN MARLING,	)	Appeal from the Jennings Circuit Court
Appellant,	)	
	)	Trial Court Case
v.	)	No.: 40C01-1305-FA-007
	)	
STATE OF INDIANA,	)	
	)	The Honorable Jon W. Webster
Appellee.	)	

APPELLANT'S BRIEF

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STATEMENT OF ISSUES

I. Whether evidence obtained as a result of a pretextual inventory search that included locked containers should have been excluded from presentation to the jury.

II. Whether the discovery of a small undivided amount of cocaine is sufficient to support a conviction for dealing in cocaine.

III. Whether a habitual offender enhancement may be sought for a dealing in cocaine conviction when the defendant has no prior dealing convictions.

STATEMENT OF CASE

On May 1, 2013, the State of Indiana filed with the Jennings Circuit Court an eight (8) count charging information under cause number 40C01-1305-FA-7 naming Raymond Marling as the Defendant. (App. 25–32). Specifically, Marling was charged with count I, dealing in cocaine as a class A felony; count II, possession of cocaine as a class C felony; count III, carrying a handgun without a license as a class C felony; count IV, possession of a controlled substance as a class D felony; count V, possession of a controlled substance as a class D felony; count VI, unlawful possession of a legend drug as a class D felony; count VII, unlawful possession of a legend drug as a class D felony; and count VIII, unlawful possession of a legend drug as a class D felony. (App. 25–32). Specifically, the probable cause affidavit alleged that on April 25, 2013 law enforcement found several pills without prescription, a hand gun and cocaine with a cutting agent during a search of Marling's vehicle. (App 23–24).

The State sought a habitual offender sentence enhancement on the allegation that Marling had two prior unrelated felony convictions. (App. 33). The State also sought an enhancement of count III, carrying a handgun without a license to C felony status on the allegation that Marling had a prior felony conviction for criminal recklessness. (App. 34).

On September 20, 2013, Marling filed a motion to suppress all evidence discovered as a result of the stop conducted on his vehicle and the subsequent inventory search. (App. 51). On October 16, 2013, the trial court held a hearing on Marling's motion to suppress. (App.

64, Tr. 1–55). On October 17, 2013, the trial court denied Marling's motion to suppress finding the stop of Marling's vehicle to be proper under the totality of the circumstances and finding the inventory search to be proper including the opening of locked containers. (App. 69–70). Marling renewed his objection to the evidence obtained as a result of the stop and search as an ongoing objection prior to the introduction of the evidence at trial. (Tr. 224–226). Marling preserved his objection at several additional points in the introduction of the evidence. (Tr. 230, 269, 336, etc.)

Also on October 16, 2013, the State amended the charging information to reduce count I, dealing in cocaine from a class A felony to a class B felony as a result of the weight of the cocaine seized. (App. 65).

Jury trial commenced on October 21, 2014 and continued from day to day through October 23, 2013. (Tr. 56–553). At the conclusion of the State's evidence Marling moved for dismissal of count III, possession of a handgun without a license on the basis of the statutory exception; the motion was denied. (Tr. 379–381). Marling also moved for dismissal of count V, possession of a controlled substance on the basis of the evidence that the evidence demonstrated that the substance in question was not "controlled" by Indiana law until after the date of the offense; the motion was granted and a directed verdict entered on count V. (Tr. 382–385). At the completion of the evidence, the jury returned a verdict of guilty on all of the remaining counts. (Tr. 553).

The trial court held a second phase of trial on the enhancement of count III. (Tr. 556). The jury

returned a verdict of guilty on the count III enhancement. (Tr. 571).

On October 23, 2013, Marling filed a motion to dismiss the habitual offender enhancement, arguing that none of the counts could support a habitual offender finding by the jury under **Ind. Code Sec. 35-50-2-8**. (App. 79). On October 24, 2013, following the first two phases of trial, the trial court held hearing on Marling's motion to dismiss. (Tr. 575–580). The motion was denied on the basis of the trial court's determination that the verdicts were sufficient to support a habitual offender enhancement under **Ind. Code Sec. 35-50-2-2(b)(4)(O)**. (App. 81–82). Following a brief third phase of trial, the jury returned a verdict of guilty on the sentencing enhancement. (Tr. 620).

On February 20, 2014, the trial court held a hearing on sentencing. (Tr. 623). After the presentation of evidence the trial court entered sentencing as follows: thirteen (13) years executed on count I, dealing in cocaine, consecutive to twenty (20) years for the habitual offender enhancement, and five (5) years on the enhanced count III, possession of a handgun without a license with a prior conviction. (Tr. 691). On February 20, 2014, the trial court entered its sentencing order. (App. 88).

Marling filed his notice of appeal on March 7, 2014. (Docket). Notice of completion of the clerk's record was filed on April 23, 2014. (Docket). Notice of completion of the clerk's record was filed on June 4, 2014.

(Docket). Marling now timely files his appellant's brief on July 7, 2014[1].

STATEMENT OF FACTS

On April 25, 2013, Detective Sandefur of the North Vernon Police Department was investigating a missing persons report. (Tr. 3, 307). Sandefur was attempting to locate a man named Loper as a target of the investigation. (Tr. 3, 308). Sandefur testified that Marling's name came up in connection with Loper, although Sandefur could not remember how. (Tr. 4). Sandefur also testified that he learned that Marling had an active warrant for failure to appear. (Tr. 5, 309). Sandefur stated that he had heard that Marling had a gun and drove a black Avenger, again Sandefur did not disclose where he received this information. (Tr. 5–6, 309).

On the date in question, while looking for someone else, Sandefur saw a black Avenger and decided to follow it. (Tr. 7, 311). The windows were tinted and it was not possible to identify the driver. (Tr. 19, 332). Sandefur called in the license plate of the vehicle which came back to Marling. (Tr. 8, 312). Sandefur then radioed for a uniformed officer, Day, to conduct a stop on the vehicle. (Tr. 10, 314). The driver of the vehicle had not committed any traffic violations. (Tr. 34, 334).

Day initiated the stop on a county road by activating his lights and siren. (Tr. 220, 239). Marling did not make any attempt to evade Day and stopped. (Tr. 19, 239). Marling identified himself when asked. (Tr.

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[1] Marling's Brief was due on July 4, 2014 which is a state holiday. July 5 and 6 were a Saturday and Sunday respectively.

239). He complied with each of officer Day's orders to open the car door, back toward officer Day, place his hands behind his head and go to the ground. (Tr. 228–29). Marling was then taken into custody and transported to the county jail. (Tr. 233).

The black Avenger was then searched. Initially, officer Day searched the passenger compartment of the vehicle and found a handgun. (Tr. 28, 230). After Marling was taken into custody, Sergeant Kipper of the North Vernon Police Department conducted a full search of the vehicle and all containers there in. (Tr. 255). In the passenger compartment Kipper found syringes, assorted pills, cell phones and $1,000 in cash. (Tr. 258–263). In the trunk, Kipper found two rifles and a blue duffle bag. (Tr. 263). Kipper opened the blue duffle bag and found syringes and a locked metal box. (Tr. 263). Kipper opened the locked metal box and found syringes and a baggie containing powder. (Tr. 264).

The powder was tested and confirmed to be .51 grams of a cocaine benzocaine mixture. (Tr. 355). The amount was less than a teaspoon and there was no way to determine the ratio of cocaine to benzocaine. (Tr. 303, 369). The pills were tested in the lab and were confirmed to be controlled or prescribed medication including clonazepam, hydroxyzine and guanfacine. (Tr. 362, 366, 367). There was no evidence presented that Marling had a prescription for these medications.

Additional facts will be provided as necessary.

SUMMARY OF ARGUMENT

Marling was arrested on a failure to appear warrant. Law enforcement made no effort to allow Marling or anyone else to provide for removal of his vehicle from the roadway where he was pulled over. The state failed to meet its burden of demonstrating law enforcement's need to impound and inventory the vehicle. During the inventory, law enforcement pried open a locked container and opened a luggage bag. Law enforcement presented no need for invading these containers other than the desire to rummage for evidence. As a result of the improper impoundment and exceeding the scope of proper inventory, all evidence obtained as a result of the search should have been suppressed.

Marling was found to be in possession of almost ½ of a gram of cocaine. This amount was too small to infer the intent to distribute especially in light of this Court's prior case law that has overturned convictions where the defendant was in possession of three times as much cocaine. The state failed to provide sufficient evidence to support a conviction for possession of cocaine with intent to deal.

Marling was convicted for dealing cocaine. This was Marling's first conviction for dealing in a controlled substance. Marling was found to be a habitual offender although a first offense for dealing should not be subject to the sentence enhancement. The trial court's basis for allowing the enhancement was the presence of a handgun offense. The statutes that govern this issue are confusing and ambiguous. Under the rule of lenity, Marling's habitual offender enhancement should be reversed.

ARGUMENT

A. Whether Evidence Obtained From Closed and Locked Containers During an "Inventory Search" Should Have Been Excluded From Admission.

The standard used to review rulings on the admissibility of evidence is effectively the same whether the challenge is made by a pretrial motion to suppress or by a trial objection. *Burkes v. State*, 842 N.E.2d 426 (Ind. Ct. App. 2006), trans. denied. This Court will review a denial of a motion to suppress for abuse of discretion and reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Joyner v. State*, 678 N.E.2d 386 (Ind. 1997). Review does not include reweighing the evidence. *Burkes v. State*, 842 N.E.2d 426.

In order to conduct an inventory search, law enforcement must have a legitimate basis for impounding the vehicle. If law enforcement impounds a vehicle and conducts an inventory search when: 1.) there is no shortage of time or emergency, 2.) it is unlikely the car will be moved, and 3.) law enforcement is not involved in a valid community care taking function, then the impoundment and resulting search are unreasonable. *Brown v. State*, 653 N.E.2d 77 (Ind. 1995). Simply being parked illegally is not sufficient, it is the state's burden to demonstrate a vehicle constituted a public hazard. *Taylor v. State*, 842 N.E.2d 327 (Ind. 2006).

In Marling's case the state presented no evidence of the need for an impoundment and inventory of the vehicle. Marling's vehicle was partially pulled off of the roadway. (Tr. 20). Other vehicles were able to

pass the vehicle. (Tr. 20, 240). Law enforcement made no effort to remove the vehicle by means of a licensed driver and gave Marling no opportunity to provide an alternate driver. Under these circumstances the impoundment and inventory were unreasonable.

Despite being renamed as an "inventory," any search by law enforcement must pass constitutional muster. Under Article I, Section 11 of the Indiana Constitution, this court will consider the following factors in assessing reasonableness of a search: 1) the degree of concern, suspicion, or knowledge that a violation has 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. *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005).

In assessing an inventory search of a locked box this Court has previously held that such searches violate the Indiana Constitution. *State v. Lucas*, 859 N.E.2d 1244, 1251 (Ind. Ct. App. 2007). This Court agreed with the *Lucas* trial court that when officers had "control of the locked box and could have easily obtained a search warrant to open it" the warrantless search of the locked metal box was unreasonable under Article I, Section 11 of the Indiana Constitution.

In Marling's case the "inventory" search of the duffel bag and locked box in the trunk was unreasonable. For both items the degree of concern or suspicion was low or non-existent. Marling was pulled over as a result of a warrant and no violations of the law had actually been observed by the arresting law enforcement. (Tr. 34). The officer who conducted the search apparently had no knowledge about the basis

for the stop and was there only to log "items of value." (Tr. 255). Unless the state is willing to concede that the inventory search was merely a pretext for "rummaging around" to look for evidence, then there was no degree of concern or suspicion which would support the search.

The degree of intrusion into the privacy of a citizen is very high. While admittedly the degree of intrusion is slightly different when the method of obtaining access to a duffle bag involves only unzipping the bag, whereas the degree of intrusion into a locked box involves breaking the box open with a screw driver; in both cases the state is invading a closed container that on its face is intended to house personal possessions. The state cannot seriously contend that the degree of intrusion is low when the container itself must be broken to gain access. (Tr. 263–264).

The extent of law enforcement need was zero. As pointed out in *Lucas*, the state could have very easily obtained a search warrant for the containers. The only basis for the law enforcement need was "standard operating procedure." (Tr. 254). Yet, the SOP apparently allows for an "inventory search" in the event of an "abandoned care," or a "driver hospitalization." (Tr. 13 Ex. 5). What need law enforcement has for tearing open locked containers in these circumstances is not clear in the SOPs and was not presented at trial.

The reality is that law enforcement simply wanted access so that it could rummage through Marling's personal belongings in the search for incriminating evidence. Under the circumstances, the invasion of Marling's personal property was unreasonable. The

contents of the duffel bag and locked box should have been suppressed. These items contained a substantial portion of the evidence used to convict Marling of dealing and possession of cocaine charges. As a result these convictions should be reversed or alternatively the case should be remanded for retrial.

B. Whether the Evidence was Sufficient to Support a Conviction for Dealing

Marling's most serious conviction was count I, possession of cocaine with intent to deliver. Marling received a 13 year sentence on the associated B felony conviction. The evidence produced at trial supported, at best, a conviction for possession of approximately ½ of a gram of cocaine. As a result, Marling's conviction should be reversed and the case remanded for resentencing on the remaining counts.

Marling recognizes that the standard of review for sufficiency claims is well settled. This Court will neither reweigh the evidence nor judge the credibility of the witnesses. *Cox v. State*, 774 N.E.2d 1025, 1029 (Ind. Ct. App. 2002). Only the evidence most favorable to the judgment and the reasonable inferences that can be drawn therefrom will be considered. *Id.* Where there is substantial evidence of probative value to support the judgment, it will not be disturbed. *Armour v. State*, 762 N.E.2d 208, 215 (Ind. Ct. App. 2002), trans. denied.

The State bears the burden of proving intent to deliver beyond a reasonable doubt. This can be done by direct or circumstantial evidence. When attempting to prove the case by circumstantial evidence, weight of a controlled substance is a key fact in making an inferential leap that the person who

possessed the controlled substance intended to deal it. For example, in *Johnson v. State*, 594 N.E.2d 817 (Ind. Ct. App. 1992) the Court held that 1.76 grams of cocaine in the defendant's possession was insufficient to establish intent to deliver. *Id.* at 818.

Similarly, in *Isom v. State*, 589 N.E.2d 245 (Ind. Ct. App. 1992) a search of the defendant's vehicle revealed .88 grams. *Id.* at 247–248. The cocaine was found in ten plastic baggies which the Court noted is the type of container in which cocaine is commonly packaged for sale and the type of containers in which cocaine is commonly purchased. *Id.* 248. The Court held that the evidence as a matter of law was insufficient to reasonably support the inference that the defendant possessed the .88 grams of cocaine with the intent to deliver. *Id.*

In Marling's case there was no direct evidence of an intent to deal. Marling was not seen selling or transferring the controlled substance to another. Marling made no incriminating statements about dealing. No witness testified to having seen Marling deal cocaine or discuss dealing cocaine. Instead the State relied upon circumstantial evidence.

While it is true that Marling had more than $600 on his person and a handgun was found in the vehicle, the evidence regarding the cocaine itself was insufficient to support a conviction. (Tr. 234, 241). Marling was, at best, in possession of less than 0.6 grams of cocaine. (Tr. 303). This amount was approximately 1/3 of the amount discovered in the *Johnson* case and less than the amount discovered in the *Isom* case. The search of the vehicle also turned up metal spoons which, according to law enforcement, are consistent with use

of cocaine. (Tr. 296). Syringes were found, which again is consistent with use of the substance. (Tr. 279).

Taken together, even in the light most favorable to the judgment, Marling's possession of approximately ½ a gram of cocaine, in the context of possession of paraphernalia associated with use, is not sufficient to sustain a conviction for dealing in cocaine. Marling respectfully request the Court reverse his conviction on count I and remand for resentencing on the remaining counts.

C. Whether Marling's Sentence Could Be Enhanced For A First Time Dealing Offense

The State sought a habitual offender sentence enhancement on Marling's conviction under count I, possession of cocaine with intent to deliver. The State's request falls under **Ind. Code Sec. 35-50-2-8** which does not allow for a habitual offender enhancement when:

(3) all of the following apply:
- (A) The offense is an offense under IC 16-42-19 or IC 35-48-4.
- (B) The offense is not listed in section 2(b)(4) of this chapter.
- (C) The total number of unrelated convictions that the person has for:
  - (i) dealing in or selling a legend drug under IC 16-42-19-27;
  - (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);

(iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
(iv) dealing in a schedule IV controlled substance (IC 35-48-4-3); and
(v) dealing in a schedule V controlled substance (IC 35-48-4-4); does not exceed one (1).

Dealing in cocaine is an offense under **Ind. Code Sec. 35-48-4 et. al.** thus subsection (A) is satisfied. It is uncontested that Marling's prior felony history was comprised of a 1998 conviction for burglary, a 2007 conviction for felony handgun possession, a 2010 conviction for felony operating while intoxicated and a 2010 conviction for dissemination of matter harmful to minors. (Tr. 685–686, App. 116–121). None of these convictions were for dealing offenses, thus subsection (C) is satisfied. The only remaining question is whether or not Marling's offense falls under **Ind. Code Sec. 35-50-2-2(b)(4)**. If not, then Marling's sentence was improperly enhanced.

The State argued that Marling's conviction fell under **Ind. Code Sec. 35-50-2-2(b)(4)(O)** which lists the offense "dealing in cocaine or a narcotic drug (IC 35-48-4-1) if the court finds the person possessed a firearm (as defined in IC 35-47-1-5) at the time of the offense..." (Tr. 578). The trial court determined that the jury had in fact found that Marling "possessed a firearm at the time of the offense." (App. 81) the trial court reasoned that because the jury found Marling guilty of count II, possession of cocaine while in possession of a firearm, the jury necessarily must have determined that Marling possessed the firearm at the

time of the "dealing offense." (App. 82). The trial court went further to make its own finding that Marling did in fact "possess a firearm at the time of the offense," indicating that the statute seems to leave that determination in the hands of the trial court. (App. 82).

There is a limited amount of case-law addressing the language of **Ind. Code Sec. 35-50-2-2(b)(4)(O)**. The trial court expressed frustration with the statute as being in need of redrafting (Tr. 681). The problem is that subsection (O) is that the legislature seems to proscribing certain conduct. But the statute fails to clearly explain what conduct is proscribed although the legislator has demonstrated its ability to define the criminal conduct in other similar statutes.

For example, in the same statute, **Ind. Code Sec. 35-50-2-13** allows for the State to "seek, on a page separate from the rest of a charging instrument, to have a person who allegedly committed an offense of dealing in a controlled substance under IC 35-48-4-1…sentenced to an additional fixed term of imprisonment if the state can show beyond a reasonable doubt that the person knowingly or intentionally...possessed a...handgun in violation of IC 35-47-2-1." Similarly, **Ind. Code Sec. 35-48-4-6(b)(1)(B)** makes it a class C felony for "A person...knowingly or intentionally possesses cocaine...[and]...the person was also in possession of a firearm." In both of these circumstances the legislature has clearly stated what conduct is prohibited and how the State may go about charging and proving the offense.

Under the rule of lenity this Court will construe criminal statutes strictly against the state and resolve ambiguities in favor of the accused. *Shuai v. State*, 966 N.E.2d 619, 628 (Ind. Ct. App. 2012), trans. denied. A criminal defendant accused of a first time dealing in a controlled substance offense is faced with an ambiguous and confusing habitual offender statute. The legislature clearly knows how to proscribe possession of a handgun as an element of a substance offense, but did not do so in the case of dealing in a controlled substance. The legislature clearly knows how to set out the requisite standard of proof for possession of a handgun as a sentence modifier, but did not do so in the case of the habitual offender statute. In light of the inherent ambiguity the statute should be strictly construed against the state and Marling's habitual offender sentence enhancement should be reversed.

CONCLUSION

For each of the foregoing reasons Marling respectfully requests the Court reverse all of his convictions as flowing from an illegal search, reverse his conviction for dealing in a controlled substance and remand for resentencing on the remaining counts as a result of the insufficiency of the evidence, and reverse his habitual offender enhancement and order it removed from Marling's sentence.

Respectfully submitted,
ALCORN GOERING & SAGE, LLP

/s/ R. Patrick Magrath

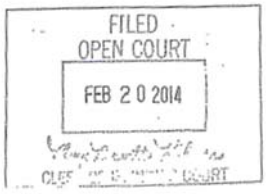
R. Patrick Magrath 26467-53
Attorney for Appellant
One West Sixth Street
Madison, Indiana 47250
(812) 273-5230 Fax (812) 273-6844

STATE OF INDIANA	)	IN THE JENNINGS CIRCUIT COURT
	) SS:	
COUNTY OF JENNINGS	)	CAUSE NO. 40C01-1305-FA-007

STATE OF INDIANA
Plaintiff,

-vs-

RAYMOND RYAN MARLING,
Defendant.



ORDER OF SENTENCE

The State of Indiana appears by its Chief Deputy Prosecuting Attorney, Drew Dickerson, and the Defendant, Raymond Ryan Marling, appears in person and by counsel, Bradley Kage. The Defendant having been found of guilty by a jury on October 23, 2013 of the following charges:

(Phase I):

Count I-Unlawful Possession of Cocaine With the Intent to Deliver, a Class B felony[1]*;*

Count II-Unlawful Possession of Cocaine While in Possession of a Firearm a Class C felony;

Count III-Carrying a Handgun Without a License, a Class A misdemeanor;

---

[1] This count was originally charged as an A felony, but amended to a B felony on October 16, 2013.

Count IV-Unlawful Possession of Controlled Substance, Schedule IV (Clonazepam), a Class D felony,

Count VI-Unlawful Possession or Use of a Legend Drug (Intuniv or Guanfacine), a Class D felony;

Count VII-Unlawful Possession or Use of a Legend Drug (Hydroxyzine), a Class D felony; and

Count VIII-Unlawful Possession of Syringe, a Class D felony;

and the Court having entered judgments of conviction for the above convictions;

and the jury having reconvened for Phase II on October 23, 2013, and having found the Defendant guilty of:

(Phase II):

Count IX-Possession of a Handgun By A Felon, a Class C felony;

and the Court having entered Judgment of Conviction on October 23, 2013 for Count IX;[2] and the jury having reconvened for Phase III on October 24, 2013, and having found:

(Phase III)

The Defendant is a Habitual Offender;

and the Court having entered judgment finding the Defendant to be a Habitual Offender on that date, the parties now appear for purpose of sentencing.[3]

---

[2] This charge was not originally labeled Count IX. The Court did so for clarity for the jurors.

[3] The Court erred on the side of caution and trifurcated this trial.

The Court, after hearing, now merges the conviction in Count II with Count I for purpose of sentencing and merges the conviction in Count III with Count IX for purpose of sentencing.[4]

The Court, having reviewed the Pre-sentence Investigation Report prepared by the Probation Department, having heard evidence, and having heard the arguments of counsel, finds the following aggravating factors: the Defendant has seven (7) prior misdemeanor convictions, four (4) prior felony convictions, four (4) successful revocations of probation, one (1) prior juvenile delinquency adjudication; the Defendant has no valid driver's license; previous substance abuse treatment at Richmond State Hospital failed; and the Defendant was out on bail from Jackson County when arrested in this case. The Court finds the following mitigating factors: the Defendant is a high school graduate; the Defendant has completed multiple programs while at the Jennings County Jail; the Defendant has been gainfully employed most of his adult life; and the Defendant assisted in locating a missing person in this County. The Court, in weighing the aggravating factors and the mitigating factors, finds the aggravating factors outweigh the mitigating factors and justify the imposition of a sentence in excess of the advisory sentence.

1.) The Defendant is sentenced to the Indiana Department of Correction as follows:

---

[4] The two (2) felonies used to support the Habitual and the felony used to support Count IX were all different.

Count I-Unlawful Possession of Cocaine With the Intent to Deliver-thirteen (13) years, to be served consecutively to the Habitual Offender and Count IX and 36C01-1112-FD-340, but concurrently to Counts IV, VI, VII and VIII;

Habitual Offender (attached to Count I)-twenty (20) years to be served consecutively to Count I and Count IX and 36C01-1112-FD-340, but concurrently to Counts IV, VI, VII and VIII;

Count IV-Unlawful Possession of Controlled Substance-twenty-one (21) months, to be served consecutively to 36C01-1112-FD-340 and concurrently to Counts I, VI, VII, VIII and IX and Habitual Offender;

Count VI-Unlawful Possession or Use of a Legend Drug (Intuniv or Guanfacine)- twenty-one (21) months, to be served consecutively to 36C01-1112-FD-340 and concurrently to Counts I, IV, VII, VIII and IX and Habitual Offender;

Count VII-Unlawful Possession of Use of a Legend Drug (Hydroxyzine), twenty-one (21) months, to be served consecutively to 36C01-1112-FD-340 and concurrently to Counts I, IV, VI, VIII and IX and Habitual Offender;

Count VIII-Unlawful Possession of Syringe- twenty-one (21) months, to be served consecutively to 36C01-1112-FD-340 and concurrently to Counts I, IV, VI, VII, and IX and Habitual Offender;

Count IX-Possession of a Handgun by a Felon-five (5) years, to be served consecutively to Count I and Habitual Offender and 36C01-1112-FD-304, and concurrently to Counts IV, VI, VII and VIII;

2.) The Defendant shall receive credit for three hundred one (301) actual days for days served in the Jennings County Jail (4/25/13 – 2/19/14).

3.) The Defendant shall, within seven (7) days from the date of sentencing, provide a DNA sample as arranged by the Probation Department. Failure to comply with this requirement is a violation of probation.

4.) The Defendant shall pay the sum of One Hundred Dollars ($100.00) as a fine and One Hundred Sixty-six Dollars ($166.00) as court costs, a Forty-five Dollar ($45.00) Jennings Courts Security Fund Fee, and a Drug Abuse Prosecution and Interdiction Fee of Two Hundred Dollars ($200.00).

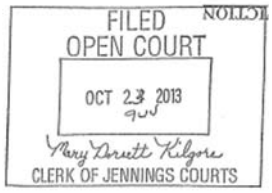
5.) The Defendant shall pay the sum of One Hundred Dollars ($100.00) to the Supplemental Public Defender's Fund.

STATE OF INDIANA	)	IN THE JENNINGS CIRCUIT COURT
	) SS:	
COUNTY OF JENNINGS	)	CAUSE NO. 40C01-1305-FA-007

STATE OF INDIANA
Plaintiff,

-vs-

RAYMOND RYAN MARLING,
Defendant.



JUDGMENTS OF CONVICTION

The State of Indiana appears by its Chief Deputy Prosecuting Attorney, Drew Dickerson, and the Defendant, Raymond Ryan Marling, appears in person and by counsel, Bradley Kage.

The jury returns into open court with the following verdicts:

"We the jury, find the Defendant, Raymond Ryan Marling, guilty of the charges of

"Count I-Unlawful Possession of cocaine With the Intent to Deliver, a Class B felony;

Count II-Unlawful Possession of Cocaine While in Possession of a Firearm, a Class C felony;

Count III-Carrying a Handgun Without a License, a Class A misdemeanor;

Count IV-Unlawful Possession of Controlled Substance, Schedule IV (Clonazepam), a Class D felony;

Count VI-Unlawful Possession of Use of a Legend Drug (Intuniv or Guanfacine), a Class D felony;

Count VII-Unlawful Possession or Use of a Legend Drug (Hydroxyzine), a Class D felony;

Count VIII-Unlawful Possession of Syringe, a Class D felony;

IT IS NOW ORDERED AND ADJUDGED by the Court that the Defendant, Raymond Ryan Marling, is a competent male person, thirty-three (33) years of age, is guilty of the charges above.

ALL OF WHICH IS ORDERED THIS 23rd DAY OF OCTOBER, 2013.

/s/ Jon W. Webster
JON W. WEBSTER, Judge
Jennings Circuit Court

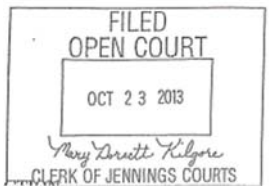
cc:
File
Prosecuting Attorney
Bradley Kage
Probation Dept.
Sheriff, Jennings Co.

STATE OF INDIANA	)		IN THE JENNINGS CIRCUIT COURT
	)	SS:	
COUNTY OF JENNINGS	)		CAUSE NO. 40C01-1305-FA-007

STATE OF INDIANA
Plaintiff,

-vs-

RAYMOND RYAN MARLING,
Defendant.



JUDGMENT OF CONVICTION

The State of Indiana appears by its Chief Deputy Prosecuting Attorney, Drew Dickerson, and the Defendant, Raymond Ryan Marling, appears in person and by counsel, Bradley Kage.

The jury returns into open court with the following verdicts:

"We the jury, find the Defendant, Raymond Ryan Marling, guilty of the charge of Possession of a Handgun by A Felon, a Class C felony."

ALL OF WHICH IS ORDERED THIS 23rd DAY OF OCTOBER, 2013.

/s/ Jon W. Webster
JON W. WEBSTER, Judge
Jennings Circuit Court

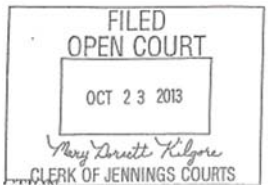
cc:
File
Prosecuting Attorney
Bradley Kage
Probation Dept.
Sheriff, Jennings Co.

STATE OF INDIANA	)	IN THE JENNINGS CIRCUIT COURT
	) SS:	
COUNTY OF JENNINGS	)	CAUSE NO. 40C01-1305-FA-007

STATE OF INDIANA
Plaintiff,

-vs-

RAYMOND RYAN MARLING,
Defendant.



JUDGMENT OF CONVICTION

The State of Indiana appears by its Chief Deputy Prosecuting Attorney, Drew Dickerson, and the Defendant, Raymond Ryan Marling, appears in person and by counsel, Bradley Kage.

The jury returns into open court with the following verdicts:

"We the jury, find the Defendant, Raymond Ryan Marling, guilty of the charge of Possession of a Handgun by A Felon, a Class C felony."

ALL OF WHICH IS ORDERED THIS 23rd DAY OF OCTOBER, 2013,

/s/ Jon W. Webster
JON W. WEBSTER, Judge
Jennings Circuit Court

cc:
File
Prosecuting Attorney
Bradley Kage
Probation Dept.
Sheriff, Jennings Co.

APPENDIX O

North Vernon Police Department
101 N. Madison AVE
North Vernon, IN 47265
Phone 812-346-1466 Fax 812-346-0903
Incident / Offense Report
CN2013-0569

Print Date/Time:
4/26/2013 12:20

Narrative Type:	**Topic:**
Supplement	
Narrative Officer:	**Narrative Date/Time:**
Kipper, Craig 16	4/26/2013 10:15

I, Sergeant Craig Kipper, arrived to assist with the traffic stop. I arrived as Mr. Marling was being placed into Officer Day's patrol vehicle. I was told that there was a handgun between the drivers seat and the center console.

After the scene was secure, I, Sergeant Kipper began an inventory of the vehicle per our departments policy. I secured the handgun and make it safe and removed it from the vehicle.

In the center console of the vehicle were several cell phones with chargers. A cell phone was also found in the passenger side glove box. Another cell phone was found in the trunk of the vehicle.

In the center console of the vehicle was an Olympus digital voice recorder (VN8000PC) and a San Disk SD memory card in a plastic case.

In the floor board of the passenger side was a black computer bag. The bag contained a Dell laptop. The black bag contained three memory sticks. A black Star Wars Jump Drive memory stick, a black San Disk 8 GB, and a red PNY 8 GB memory stick. Also in the computer bag was a San Disk SD memory card in a plastic case. The bag also contained one thousand ($1000) dollars wrapped in rubber bands.

In the center console of the vehicle was a clear plastic bag that contained several syringes. Also in the console were two white round oblong pills that were later identified as Clonazepam (Schedule IV) as well as two yellow round pills that were also identified as Clonazepam (Schedule IV).

Also in the center console was a prescription bottle that belonged to Hunter Bailey. The pill container contained twelve white oblong pills that were later identified as Intuniv (Legend Drug), a pink and yellow capsule identified as Hydroxyzine (Legend Drug), and a blue and white capsule identified as Vyvanse (Schedule II).

In the trunk of the vehicle were two firearm cases. One case contained a black Saiga 7.62X39 rifle. The other contained a Russian 7.62x54 wooden rifle with black scope.

The trunk also had a blue duffle bag. The duffle bag had several zipper pouches. Inside four different pouches, syringes were located. Inside the duffle bag was a box that contained several unopened bags of syringes.

In the trunk was a silver square combination lock box. The box was locked. The locked box was opened with a screw driver. In the locked box was more

syringes and several items that are used for the ingestion of illegal substances. The box also contained a white substance in a clear plastic bag. The substance was packaged in a way that is consistent with the dealing of illegal substances. The substance later field tested positive for Cocaine.

Narrative Type: Supplement	**Topic:** Search Warrant
Narrative Officer: Day, Jeffrey 06	**Narrative Date/Time:** 4/26/2013 11:58

At about 7:30 PM, 04/25/2013, I [COVERED] an Affidavit for Search Warrant. In particular I requested a Search Warrant be granted [COVERED], Dell Lap Top Computer, Three Jump Drives, Two Micro Sandisks and a Olympus Audio Recorder.

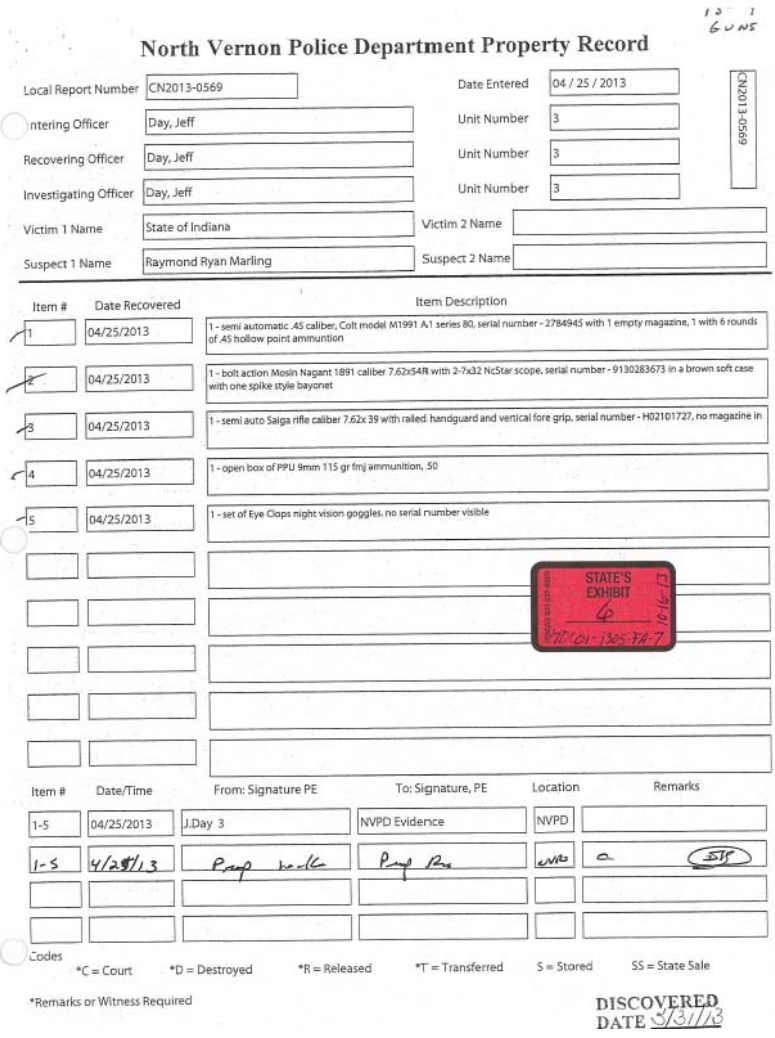
Once I contacted Jude Jon Webster and finished the Affidavits, I went to his personal residence at about 8:00PM. Judge Jon Webster consented and granted by signing the prepared documents.

I left the residence at about 8:15 PM, 04/23/2013.

I brought the documents back to the police station where Richard T. Roseberry, Indiana State Police administered a search for media contained in the above mentioned items. This was initiated at about 8:30 PM.

Nothing Further.

APPENDIX P



1 5 1
GUNS

North Vernon Police Department Property Record

CN2013-0569

Local Report Number	CN2013-0569	Date Entered	04 / 25 / 2013
ntering Officer	Day, Jeff	Unit Number	3
Recovering Officer	Day, Jeff	Unit Number	3
Investigating Officer	Day, Jeff	Unit Number	3
Victim 1 Name	State of Indiana	Victim 2 Name	
Suspect 1 Name	Raymond Ryan Marling	Suspect 2 Name	

Item #	Date Recovered	Item Description
1	04/25/2013	1 - semi automatic .45 caliber, Colt model M1991 A1 series 80, serial number - 2784945 with 1 empty magazine, 1 with 6 rounds of .45 hollow point ammuntion
2	04/25/2013	1 - bolt action Mosin Nagant 1891 caliber 7.62x54R with 2-7x32 NcStar scope, serial number - 9130283673 in a brown soft case with one spike style bayonet
3	04/25/2013	1 - semi auto Saiga rifle caliber 7.62x 39 with railed handguard and vertical fore grip, serial number - H02101727, no magazine in
4	04/25/2013	1 - open box of PPU 9mm 115 gr fmj ammunition, 50
5	04/25/2013	1 - set of Eye Clops night vision goggles, no serial number visible

STATE'S EXHIBIT
49
10-16-13
49T01-1305-FA-7

Item #	Date/Time	From: Signature PE	To: Signature, PE	Location	Remarks
1-5	04/25/2013	J.Day 3	NVPD Evidence	NVPD	
1-5	4/28/13	Pmp [illegible]	Pmp [illegible]	NVPD	a SS

Codes
*C = Court *D = Destroyed *R = Released *T = Transferred S = Stored SS = State Sale

*Remarks or Witness Required

DISCOVERED DATE 5/31/13

North Vernon Police Department Property Record

13-2
13-6

CN2013-0569

Local Report Number	CN2013-0569	Date Entered	Apr 26, 2013
Entering Officer	Kipper, Craig	Unit Number	13
Recovering Officer	Kipper, Craig	Unit Number	13
Investigating Officer	Kipper, Craig	Unit Number	13
Victim 1 Name	State of Indiana	Victim 2 Name	
Suspect 1 Name	Ryan Marling	Suspect 2 Name	

Item #	Date Recovered	Item Description
6	Apr 25, 2013	$1000 in cash
7	Apr 25, 2013	Two yellow pills and two white pills both identified as Clonazepam (Schedule IV)
8	Apr 25, 2013	(12) twelve white oblong pills identified as Intuniv (Legend Drug); a pink and yellow capsule identified as Hydroxyzine (Legend Drug); a blue and white capsule identified as Vyvanse (Schedule II)
9	Apr 25, 2013	One corner cut clear plastic bag with white residue
10	Apr 25, 2013	One corner cut clear plastic bag with white residue (0.6 grams)
11	Apr 25, 2013	One box containing 36 syringes
12	Apr 25, 2013	Seven capsules containing a white substance and four empty capsules
13	Apr 25, 2013	Clear plastic Ziploc bag containing a white crystal substance field testing positive for methamphetamine
14	Apr 25, 2013	One green and one blue baby spoon with white residue.
15	Apr 25, 2013	One large metal spoon with white residue and small piece of cotton.

Item #	Date/Time	From: Signature PE	To: Signature, PE	Location	Remarks
1-15	4/26/13 3:22 pm	[signature]	Property Locker	B	
1-15	4/26/13	Prop Locker	Prop Room	UVA	S SS
10, 12	5/13/2013	NVPD	ISP LAB	—	T SS

Codes

*C = Court *D = Destroyed *R = Released *T = Transferred S = Stored SS = State Sale

*Remarks or Witness Required

North Vernon Police Department Property Record

Local Report Number	CN2013-0569	Date Entered	Apr 26, 2013	CN2013-0569
Entering Officer	Kipper, Craig	Unit Number	13	
Recovering Officer	Kipper, Craig	Unit Number	13	
Investigating Officer	Kipper, Craig	Unit Number	13	
Victim 1 Name	State of Indiana	Victim 2 Name		
Suspect 1 Name	Ryan Marling	Suspect 2 Name		

Item #	Date Recovered	Item Description
16	Apr 25, 2013	One large metal John Deere spoon with white residue and small piece of cotton
17	Apr 25, 2013	Small blue handled Great Smokey Mountains spoon with crystal residue
18	Apr 25, 2013	One digital scale in the form of an IPhone
19	Apr 25, 2013	Two corner cut baggies with white residue
20	Apr 25, 2013	Metal spoon with broken handle with residue
21	Apr 25, 2013	Glass smoking pipe white residue and burn marks
22	Apr 25, 2013	One Ziploc bag containing a clear plastic bag with several cotton pieces
23	Apr 25, 2013	Clear plastic zipper pouch bag with metal clasp and white round pill identified as Clonazepam
24	Apr 25, 2013	Clear plastic corner cut baggie and red straw
25	Apr 25, 2013	One metal combination box with various items

Item #	Date/Time	From: Signature PE	To: Signature, PE	Location	Remarks
16-25	4/26/13 2:27p	Craig Kipper CK	Property Locker	8	
16-25	4/26/13	Prop Locker	Prop Rm	NVB	S (IJS)

Codes

*C = Court *D = Destroyed *R = Released *T = Transferred S = Stored SS = State Sale

*Remarks or Witness Required

North Vernon Police Department Property Record

CN2013-0569

Local Report Number	CN2013-0569	Date Entered	Apr 26, 2013
Entering Officer	Kipper, Craig	Unit Number	13
Recovering Officer	Kipper, Craig	Unit Number	13
Investigating Officer	Kipper, Craig	Unit Number	13
Victim 1 Name	State of Indiana	Victim 2 Name	
Suspect 1 Name	Ryan Marling	Suspect 2 Name	

Item #	Date Recovered	Item Description
26	Apr 25, 2013	One prescription bill bottle belonging to Hunter Bailey
27	Apr 25, 2013	One cylinder container with a white substance
28	Apr 25, 2013	One metal box containing a metal tin
29	Apr 25, 2013	One box of syringes (approximately 100)
30	Apr 25, 2013	One Dell laptop. Serial Number 00196-228-077-268
31	Apr 25, 2013	Three memory sticks. One black Darth Vader; one SanDisk 8GB; one red PNY 8GB
32	Apr 25, 2013	One Olympus digital voice recorder VN-8000PC
33	Apr 25, 2013	Two 32GB SanDisk SD cards in clear cases
34	Apr 25, 2013	Two Samsung flip cell phones
35	Apr 25, 2013	- One Samsung flip cell phone with camouflage stickers; one black Samsung cell phone

Item #	Date/Time	From: Signature PE	To: Signature, PE	Location	Remarks
26-29	4/26/13	[signature]	Property	B	
30-35	4/26/13	[signature]	Property Locker	9	
26-35	4/26/13	Prop Locker	Prop Rm	NVPD	S [signature]

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North Vernon Police Department Property Record

CN2013-0569

Local Report Number	CN2013-0569	Date Entered	Apr 26, 2013
Entering Officer	Kipper, Craig	Unit Number	13
Recovering Officer	Kipper, Craig	Unit Number	13
Investigating Officer	Kipper, Craig	Unit Number	13
Victim 1 Name	State of Indiana	Victim 2 Name	
Suspect 1 Name	Ryan Marling	Suspect 2 Name	

Item #	Date Recovered	Item Description
36	Apr 25, 2013	One black Samsung cell phone
37	Apr 25, 2013	One bottle of MSM joint sulfur
38	Apr 25, 2013	Clear plastic bag with several pieces of small velcro

Item #	Date/Time	From: Signature PE	To: Signature, PE	Location	Remarks
36	4/29/13	Craig Kipper	Property Locker	8	
37-38	4/29/13	Craig Kipper	Property Locker	9	
36-38	4/26/13	Prop Locker	Prop Room	PURG	5

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*Remarks or Witness Required

North Vernon Police Department Property Record

Local Report Number	CN2013-0569	Date Entered	Apr 26, 2013	CN2013-0569
Entering Officer	Sandefur	Unit Number	02	
Recovering Officer	Roseberry ISP	Unit Number		
Investigating Officer	Kipper, Craig	Unit Number		
Victim 1 Name		Victim 2 Name		
Suspect 1 Name	Ryan Marling	Suspect 2 Name		

Item #	Date Recovered	Item Description
11-050	04/26/2013	One sealed manila envelope containing one DVD and one CD containing information obtained from cell phones and computer of Mr. Marling per search warrant.

Item #	Date/Time	From: Signature PE	To: Signature, PE	Location	Remarks
11-050	4-26-13	[signature]	[signature]	PVB	S [signature]

Codes

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*Remarks or Witness Required