ATTORNEY FOR APPELLANT

Susan D. Rayl
Hand Ponist Smith & Rayl
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Caroline G. Templeton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

I.G.,
Appellant-Respondent,

v.

State of Indiana,
Appellee-Petitioner

September 10, 2021

Court of Appeals Case No.
21A-JV-479

Appeal from the
Marion Superior Court

The Honorable
Geoffrey Gaither, Judge

Trial Court Cause No.
49D09-2012-JD-1032

Vaidik, Judge.

Case Summary

[1] While conducting a traffic stop of a car with three occupants, a police officer smelled burnt and raw marijuana. The officer searched I.G., finding a handgun on his person. The State alleged I.G. was a delinquent child for committing

what would be Class A misdemeanor carrying a handgun without a license if committed by an adult. At the fact-finding hearing, I.G. objected to the admission of the handgun, arguing the search violated his rights under the Fourth Amendment of the United States Constitution. The juvenile court overruled his objection, admitted the handgun, and entered a true finding.

[2] I.G. now appeals. The State asks us to affirm the juvenile court because the officer had probable cause to arrest I.G. for possession of marijuana based on the odor of marijuana in the car (although no evidence was presented that marijuana was found) and therefore properly conducted a search incident to arrest. We, however, find that the odor of marijuana, by itself, was not enough to establish probable cause to arrest I.G. for possessing marijuana. The search of I.G. was not a valid search incident to arrest, and the court erred in admitting the handgun into evidence. We therefore reverse I.G.'s true finding.

Facts and Procedural History

[3] On the afternoon of December 29, 2020, Officer De'marquies Harvey with the Indianapolis Metropolitan Police Department pulled over a car for failing to signal. A second officer arrived on the scene shortly after Officer Harvey. The car had three occupants, including fifteen-year-old I.G. sitting in the front-passenger seat. When Officer Harvey approached the car, he smelled burnt and raw marijuana; however, it was "hard to distinguish the two." Tr. p. 12. Officer Harvey asked the occupants for their identifications and went back to his patrol car to check BMV records. Upon running the check, Officer Harvey learned

that the driver had a warrant for his arrest for a "traffic offense." *Id.* at 13. Officer Harvey returned to the car and had the occupants get out. The occupants were "calm" and "[a]bsolutely cooperative," and they didn't make any furtive movements or give Officer Harvey "any cause or concern" for his safety. *Id.* at 15, 16, 17. Nonetheless, after handcuffing the driver of the car for the outstanding warrant, Officer Harvey conducted a pat down of I.G. for officer "safety," finding a handgun and "an extra magazine" on his person. *Id.* at 32. I.G. was arrested for having the gun.

[4] The State filed a petition alleging I.G. was a delinquent child for committing what would be Class A misdemeanor carrying a handgun without a license if committed by an adult. At the fact-finding hearing, Officer Harvey testified he smelled burnt and raw marijuana in the car; however, the State presented no evidence that marijuana was found either in the car or on the occupants. Officer Harvey also testified it was his practice to do "a safety check on absolutely every person [he] pull[s] out of the vehicle." *Id.* at 25. When Officer Harvey testified about the pat-down search he conducted on I.G., defense counsel objected to the admission of the handgun on the ground the search violated I.G.'s Fourth Amendment rights. Specifically, defense counsel argued there were no "articulable facts to support a reasonable belief by [Officer Harvey] that [I.G. was] armed and dangerous." *Id.* at 19. The juvenile court overruled the objection, admitted the handgun, and entered a true finding.

[5] I.G. now appeals.

Discussion and Decision

[6] I.G. contends the juvenile court erred in admitting the handgun because the pat-down search violated his Fourth Amendment rights.[1] The trial court has broad discretion in ruling on the admissibility of evidence. *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). However, when a challenge to the admissibility of evidence is predicated on the constitutionality of a search, our review is de novo. *Id.*

[7] The Fourth Amendment protects against unreasonable searches and seizures. *Combs v. State*, 168 N.E.3d 985, 991 (Ind. 2021). A warrantless search or seizure is per se unreasonable, and the State must prove that one of the well-delineated exceptions to the warrant requirement applies. *Id.* The exception that Officer Harvey relied on, and that the State argued at the fact-finding hearing, was a pat down for officer safety. "After making a *Terry* stop, an officer may, if he has reasonable fear that a suspect is armed and dangerous, frisk the outer clothing of that suspect to try to find weapons." *Johnson v. State*, 157 N.E.3d 1199, 1205 (Ind. 2020) (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)), *cert. denied*. "The purpose of this protective search 'is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.'" *Id.* (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993)). "The officer need not

[1] I.G. also argues his rights under Article 1, Section 11 of the Indiana Constitution were violated. However, given our resolution of the issue under the Fourth Amendment, we do not address I.G.'s argument under the Indiana Constitution.

be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. Here, Officer Harvey testified the occupants did not give him any reason to fear for his safety; however, he patted down I.G. anyway because he pats everyone down. Appropriately, the State has abandoned this theory on appeal.

[8] Instead, the State contends a different exception applies: search incident to arrest. Specifically, the State argues Officer Harvey had probable cause to arrest I.G. for possessing marijuana based on the odor of marijuana in the car and therefore "the pat-down search of [I.G.'s] outer clothing was a valid search incident to arrest." Appellee's Br. p. 8. "[O]nce a lawful arrest has been made, authorities may conduct a 'full search' of the arrestee for weapons or concealed evidence." *Edwards v. State*, 759 N.E.2d 626, 629 (Ind. 2001). "[A]s long as probable cause exists to make an arrest, the fact that a suspect was not formally placed under arrest at the time of the search incident thereto will not invalidate the search." *State v. Parrott*, 69 N.E.3d 535, 543 (Ind. Ct. App. 2017) (quotation omitted)), *reh'g denied*, *trans. denied*. Probable cause to arrest arises when, at the time of the arrest, the arresting officer knows of facts and circumstances that would warrant a person of reasonable caution to believe that the defendant committed the criminal act in question. *Thomas*, 81 N.E.3d at 626. The amount of evidence necessary to satisfy the probable-cause requirement is evaluated on a case-by-case basis. *Id.*

[9] In support of its argument that Officer Harvey had probable cause to arrest I.G. for possessing marijuana and therefore properly conducted a search incident to arrest, the State relies on two cases, *Maryland v. Pringle*, 540 U.S. 366 (2003), and *Richard v. State*, 7 N.E.3d 347 (Ind. Ct. App. 2014), *trans. denied*. In *Pringle*, a car with three occupants was stopped in the early-morning hours for speeding. Joseph Pringle was sitting in the front-passenger seat. During the stop, the officer received consent to search the car and found a large sum of rolled-up cash in the glove compartment "directly in front of Pringle" and five baggies of cocaine behind the backseat armrest and "accessible to all three men." *Pringle*, 540 U.S. at 372. "[A]ll three men denied ownership of the cocaine and money" and were arrested. *Id.* at 368. Pringle later confessed that the cocaine belonged to him. Pringle moved to suppress his confession on the ground it was the product of an illegal arrest. The trial court denied Pringle's motion, finding the officer had probable cause to arrest him.

[10] The sole question addressed by the United States Supreme Court was whether the officer had probable cause to believe Pringle had committed a crime. The Court concluded:

> We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus, a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.

Id. at 372. The Court noted the result might have been different had one man admitted owning the money and cocaine. *See id.* at 374 ("No . . . singling out occurred in this case; none of the three men provided information with respect to the ownership of the cocaine or money.").

[11] *Pringle* doesn't support the proposition that the odor of marijuana, by itself, provides probable cause to arrest the occupants of a car for possessing marijuana. Unlike *Pringle*, where money and cocaine were found in a car before the front-seat passenger was arrested, here no evidence was admitted that marijuana was found.

[12] In the second case, *Richard*, a police officer pulled over a car for crossing the center line. The car had two occupants, the driver and Charla Richard. The officer arrested the driver on an outstanding warrant and then had his trained canine walk around the car. When the canine alerted, the officer asked Richard to step out of the car. In searching Richard, the officer noticed she appeared to favor one side. When the officer asked Richard to raise her arm, a tin containing methamphetamine fell to the ground. Richard was arrested for possessing methamphetamine.

[13] On appeal, Richard argued "her mere presence as a passenger in the suspected vehicle was not enough to establish probable cause" to arrest her and conduct a search incident to arrest. *Richard*, 7 N.E.3d at 349. A panel of this Court found the canine's "positive alert provided probable cause to believe there were drugs in the vehicle" and there was "no indication that [the driver], and only [the

driver], was involved in narcotics activity." *Id.* at 349-50. The panel held it was "an entirely reasonable inference that any of the vehicle's occupants had at least constructive possession of drugs" and therefore Richard's arrest and the subsequent search were constitutional. *Id.* at 350.

[14] However, the Indiana Supreme Court later disagreed with the result in *Richard*. In *Thomas*, police officers with a drug task force received a tip from "a credible confidential informant" that two men from Chicago were traveling to Grant County in a white minivan with a temporary Illinois license plate to sell drugs and could be found at Comfort Suites in Marion. 81 N.E.3d at 622. The officers conducted surveillance of a minivan fitting the description and observed two men enter the minivan and drive away. The officers pulled over the minivan for changing lanes without signaling and asked the driver and front-seat passenger, Will Thomas, for their identifications and why they were driving through Marion. Although the men told the officers they were visiting family, neither man could identify where in Indiana their family lived. In addition, the driver had no form of identification. During the stop, the officers had a trained canine walk around the minivan. When the canine alerted, the officers removed the men from the minivan and conducted a pat down for officer safety. No drugs or weapons were found during the pat down.

[15] The driver gave the officers permission to search the minivan. The canine was brought back to the minivan but no longer alerted. The officers searched the minivan but found no drugs. The officers then asked the men if they would consent to a strip search. The driver agreed, but Thomas did not. The officers

took Thomas to the police station while they applied for a search warrant. The officers put Thomas in an interview room by himself and watched him on video-monitoring equipment. When Thomas removed something from his jacket pocket and put it in his mouth, the officers entered the room, forced his mouth open, and retrieved a small plastic baggie containing heroin. Thomas was convicted of Class A felony dealing in a narcotic drug.

[16] On appeal, the issue was whether probable cause to detain Thomas and transport him to the police station arose at any point during the traffic stop. The State asked our Supreme Court to "heed the reasoning of [the] Court of Appeals in *Richard* and adopt a rule that allows for the arrest of a vehicle's occupants where there is probable cause to believe that the occupants possess drugs." *Id.* at 627. The Court responded:

> To the extent that this is the rule in *Richard*, we are inclined to agree with the State, **but we depart from the *Richard* panel on the amount of evidence needed to establish probable cause.** We rely on numerous facts to make a probable cause determination, not just the canine's alert. In fact, we believe it is unlikely that any of the facts presented here would have, on their own, armed officers with the probable cause necessary to conduct a lawful arrest. The case we are presented with, however, offers much more than a single canine alert to support a probable cause finding.

Id. (emphasis added). The Court determined the officers had "knowledge of facts and circumstances which would warrant a person of reasonable caution to believe that Thomas was in possession of narcotics." *Id.* The Court then

detailed those facts and circumstances: (1) a reliable confidential informant provided the officers with specific information about "illicit activities being carried out and offered a detailed description of the vehicle involved"; (2) the officers confirmed the description of the minivan at the hotel; (3) Thomas "seemed nervous" during the stop; (4) neither man could identify where the family they were visiting lived; (5) the driver had no form of identification; and (6) a trained canine alerted to drugs while the men were inside the minivan but no longer alerted once they were removed. *Id.* at 627-28. The Court found "the sum of those facts" warranted "a reasonable person to believe at least one of the two occupants took the drugs with him when he exited the vehicle and likely still possessed narcotics." *Id.* at 628. The Court concluded transporting Thomas to the police station and detaining him to await the results of the search warrant did not violate his Fourth Amendment rights because the officers "had already attained the requisite probable cause to arrest Thomas and could have conducted a search incident to arrest." *Id*.

[17] The facts and circumstances that established probable cause in *Thomas* are simply not present here. Here, the only fact to warrant a person of reasonable caution to believe that I.G. possessed marijuana was the odor of burnt and raw marijuana in the car. But there were three people in the car, and no evidence was presented that the odor of marijuana was strong or came from I.G.'s person *Cf. Parrott*, 69 N.E.3d at 544 (concluding a police officer had probable cause to arrest the defendant for possessing marijuana because he was the only person in the car and the odor of raw marijuana was strong); *Edmond v. State*, 951 N.E.2d

585, 591 (Ind. Ct. App. 2011) (concluding a police officer had probable cause to arrest the defendant for possessing marijuana because he was the only person in the car and the officer smelled marijuana on his breath). Just as our Supreme Court found in *Thomas* that a canine alert, by itself, was not enough to establish probable cause, here too the odor of burnt and raw marijuana, by itself, was not enough to establish probable cause to arrest I.G. for possessing marijuana.[2] The search of I.G. was not a valid search incident to arrest, and the juvenile court erred in admitting the handgun into evidence. We therefore reverse I.G.'s true finding.

[18] Reversed.

Kirsch, J., and May, J., concur.

---

[2] Our Supreme Court recently held a police officer's detection of the scent of raw marijuana can supply probable cause **for a search warrant** if the detection is based on the officer's training and experience:

> Because the scent of raw marijuana is so distinctive, and because marijuana is one of the most ubiquitous drugs in today's society, we hold that a trained officer seeking a search warrant on this basis need not further detail their qualifications to recognize this odor beyond their basic "training and experience."

Bunnell v. State, No. 21S-CR-139, slip op. at 4 (Ind. Sept. 2, 2021). The issue in this case, however, is whether Officer Harvey had probable cause **to arrest** I.G. for possession of marijuana based on the odor of raw and burnt marijuana in a car with three occupants.