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IN THE COURT OF APPEALS OF INDIANA

Luis Posso, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

November 30, 2021

Court of Appeals Case No. 21A-CR-369

Interlocutory Appeal from the Monroe Circuit Court

The Honorable Christine Talley Haseman, Judge

Trial Court Cause No. 53C03-1905-MR-602

Crone, Judge.

Case Summary

[1] Luis Posso, Jr., drove to the emergency room with his badly bruised, emaciated son, who was pronounced dead a short time later. Posso was questioned by law enforcement officers at the hospital and at the sheriff's office, and he signed

consent forms authorizing them to search his motel room, van, and cell phone. Posso was arrested and charged with murder, level 1 felony neglect of a dependent, level 5 felony neglect of a dependent, level 5 felony criminal confinement, and level 5 felony battery. Posso filed a motion to suppress the evidence seized during the searches, arguing that under the Indiana Constitution, he was entitled to the presence and advice of counsel before he made the decision to sign the consent forms, and he was not advised of this right. Posso also moved to suppress his statements to the officers, arguing that he was subjected to an impermissible "question-first" interrogation in violation of the United States Constitution. The trial court denied Posso's motion.

[2] In this interlocutory appeal, Posso argues that the trial court erred in denying his motion to suppress. Finding a state constitutional violation but not a federal constitutional violation, we affirm in part, reverse in part, and remand for further proceedings.

Facts and Procedural History

[3] On May 24, 2019, Posso drove his twelve-year-old son, E.P., to a Bloomington hospital. Posso parked his van outside the emergency room entrance and carried E.P. inside at 2:42 a.m. E.P. was unconscious and not breathing, and Posso's shirt was stained with E.P.'s vomit. At 3:05 a.m., E.P. was pronounced dead. His body was emaciated and covered in bruises, pressure ulcers, and other injuries. Hospital staff contacted the coroner and law enforcement.

[4] Bloomington Police Department Officer Elliott Jordan was the first officer to respond. Officer Jordan's time-stamped bodycam video, which started at 3:33 a.m.,[1] shows the officer and a hospital security guard standing outside the open door of an examination room, where Posso sat in a chair against the far wall next to the bed, facing the door. The guard asked Posso if his wife was on her way to the hospital, and Posso responded that she did not have a vehicle because he took it. The guard left the doorway, and Officer Jordan entered the room. The officer asked Posso for his name and said, "Tell me what happened, bub." State's Ex. 1 at 00:00:26. Posso replied that he was sleeping, was awakened by a choking sound, and went to check on E.P., who was gagging. Posso said that he picked up E.P., who vomited on him, and took him to the emergency room. Officer Jordan asked if E.P. had any health issues. Posso said no. The officer asked if E.P. had "been complaining about anything else that was wrong, not feeling well?" *Id*. at 00:01:34. Posso stated that his wife had told him that E.P. "had a little bit of a headache about five days ago, but that went away, and then today he fell in the shower in the morning[.]" *Id*. at 00:01:40. Posso claimed that he gave E.P. an aspirin, and E.P. was "perfectly fine all day, ate, everything." *Id*. at 00:01:52. They went to sleep "five hours ago[,]" and then Posso "heard [E.P. gagging] in the middle of the night[.]" *Id*. at 00:02:00. Officer Jordan asked where Posso was staying, and he replied that he was

[1] The time stamp on Officer Jordan's bodycam video matches the time shown on the wall clock in Posso's room.

staying in a motel "near the speedway[.]" *Id*. at 00:02:10. The officer asked where Posso was from and how long he had been in the area. Posso replied that he was from Florida and had been in the area four days. Officer Jordan told Posso, "[H]ang tight, okay, […] obviously we gotta talk to you a little more, okay?" *Id*. at 00:02:26. Posso asked if he could see E.P., and he was told that he needed to wait until the coroner completed his investigation. Officer Jordan left the room, and a hospital staff member went in to ask Posso some questions. The officer's bodycam video shows two security guards standing down the hall from Posso's room and ends at 3:36 a.m.

[5] Additional law enforcement officers began arriving at the hospital. Officer Jordan briefed Monroe County Sheriff's Office (MCSO) Deputy Sergeant Stephen Hale, who then briefed MCSO Deputy Cole Chitwood. Sergeant Hale's time-stamped bodycam video shows him following Deputy Chitwood into Posso's room at 3:47 a.m. State's Ex. 2 at 00:05:42.[2] Deputy Chitwood approached Posso and advised him of his constitutional right to remain silent and right to counsel pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), while Sergeant Hale stood near the doorway with another deputy. Deputy Chitwood asked if Posso understood those rights, and Posso nodded and gave a thumbs-up gesture. Deputy Chitwood then asked if Posso would talk "just a little bit about what's been going on tonight[,]" and Posso nodded. State's Ex. 2 at

[2] The time stamp on Sergeant Hale's bodycam video matches the time shown on the wall clock in Posso's room.

00:06:26. Sergeant Hale asked Posso for his motel room number and asked if anyone was still there. Posso gave his room number and stated that his wife and their other children were at the motel.[3] The sergeant informed Posso that detectives were "on the way" to the motel, *id*. at 00:07:10, told him to talk with Deputy Chitwood, and left the room at 3:49 a.m.

[6] Deputy Chitwood sat in a chair at the foot of the bed, facing Posso, and asked him about his wife and their surviving children. Posso used his cell phone to inform his family that officers would be coming to their motel room. Deputy Chitwood asked Posso what happened with E.P., and Posso gave a more detailed version of the story that he had given to Officer Jordan. The other deputy in the room told Posso, "Just hang tight, detectives will be here in a second." State's Ex. 3 at 00:06:54. The deputy asked if Posso had the keys to his van and extended his hand toward Posso, who gave the keys to him. Deputy Chitwood and the other deputy left Posso's room at 3:54 a.m.[4] The two deputies and Sergeant Hale convened in a room down the hall where E.P.'s body was located, and they conferred with hospital staff and MCSO Detective Andrew Rushing. The detective and the others left that room at 4:24 a.m. and immediately went to Posso's room. *Id*. at 00:38:08.

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[3] Posso has a daughter and a son with his wife, and his wife has a son from another relationship. All three children are younger than E.P., who was Posso's son from another relationship.

[4] The time stamp on Deputy Chitwood's bodycam video matches the time shown on the wall clock in Posso's room.

[7] Detective Rushing sat in the chair that Deputy Chitwood had used, introduced himself to Posso, and said, "You know you don't have to talk to me without an attorney, right?" State's Ex. 5 at 00:00:21.[5] Posso replied, "Yes, sir." *Id*. at 00:00:25. The detective placed his bodycam on the bed facing Posso and stated, "I need for you to tell me about how the beginning of yesterday went, all the way up until this point. Could you do that? 'Cause I just want to understand kind of a day in the life of you guys and everything about it." *Id*. at 00:00:40. Posso stated that he distributes advertisements for a circus, and he basically repeated the story that he had told the other officers. Detective Rushing asked if there was "any blood in the shower" or on E.P. after E.P. fell. *Id*. at 00:03:35. Posso said "[y]es" and that E.P. "banged his head a little bit[,]" which he had not mentioned earlier. *Id*. at 00:03:38. Posso claimed that he "cleaned it up" with cotton tissues and that E.P. was "fine" and "wasn't dizzy." *Id*. at 00:03:45. He also stated that he gave E.P. an ibuprofen—not an aspirin, as he had stated earlier—"just in case." *Id*. at 00:03:56. The detective then questioned Posso about E.P.'s eating habits, which Posso claimed were unremarkable. Detective Rushing told Posso, "We're here to just try and help you figure out what happened. I want to help you to understand all this because I […] can't imagine how difficult this is for you." *Id*. at 00:05:05. He further stated that the

[5] The starting time stamp on Detective Rushing's bodycam video is 6:23:26 p.m., November 15, 2012. When questioned about this glaring inaccuracy at the suppression hearing, the detective replied, "I do not possess the technical ability to change such things and that camera as long as it records I try not to worry about it too much because I'm not that great with electronics." Tr. at 30.

authorities were going to have Posso's wife and children come to the hospital so that they could talk to them.

[8] The following exchange then occurred:

> **Detective Rushing:** Basically, as per our protocol to help you guys kind of figure out what happened, we are generally gonna try and ask for your consent to do a search of the whole place, because that's now considered a scene of a death.
>
> **Posso:** It's not mine, it's the hotel's.
>
> **Detective Rushing:** Yeah, I know. But you still have the privacy rights there. So I'll have you sign a piece of paper if it's okay with you that explains that you have the right to require me to get a search warrant, and … but if you just want to go ahead and sign the paper then I won't have to get a search warrant. It can help speed things up a little bit.
>
> **Posso:** I don't understand what it's for, but yes sir. I don't care.
>
> **Detective Rushing:** So basically, I have to make sure you understand. And I know this is a hard, I know this is not the thing you're caring about right now, but you have the right to not allow me to look through the room you guys are staying in. You have the right to ask me to get a search warrant, but because of what happened I have to be able to look around, to see, to help you understand what happened, so ….
>
> **Posso:** By all means.
>
> **Detective Rushing:** I'm gonna have you sign a paper, if you're cool with that, and that'll explain your rights to you and allow us to go in there and look. I just have to make sure that you know that you don't have to let me in there and you have the right to require I get a search warrant. Okay?

> **Posso:** No sir, go ahead.
>
> **Detective Rushing:** Okay. I appreciate it. We'll get to that paper here in just a second.

Id. at 00:05:56. The detective then questioned Posso about E.P.'s eating habits, the family's sleeping arrangements, E.P.'s fall in the shower, and E.P.'s medical history. The detective also mentioned the bruises on E.P.'s body and asked Posso about how he disciplined E.P. Posso claimed that E.P. had hit his sister three days earlier and that he punished E.P. by striking him five times on the legs with a belt, which he had done on only four other occasions.

[9] Detective Rushing stood up and started filling out a preprinted consent form. The detective asked Posso for information about the motel and his van and whether he had his driver's license, and Posso stated that another officer had taken it.[6] The detective approached Posso with the form and stated, "So what I have here is that paper we were talking about, and it just explains that you have the right to require me to get a search warrant, but that we have to look there to see, to help you understand what happened." *Id.* at 00:20:05. The detective placed the form on the bed for Posso to sign, and Posso stated, "By all means, please … I'll go to the table." *Id.* at 00:20:15. Posso stood up and walked out of the range of Detective Rushing's bodycam.

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[6] The record suggests that Officer Jordan took the driver's license at some point after he questioned Posso. State's Ex. 3 at 00:58:25.

[10] Fortunately, for purposes of our review, Deputy Chitwood happened to be standing in the doorway of Posso's room at that point. His bodycam video shows Posso walking up to a table to the right of the doorway and taking a pen from Detective Rushing. The detective told Posso, "If you'll just sign there and write your name next to your signature." State's Ex. 3 at 00:59:30. Posso did so, barely glancing at the form, as the detective watched. Detective Rushing stated, "And this is also, just so I'm not hiding anything, I just wanna make sure we're all on the same page, this is also for your vehicle, is that okay? So we can see in there?" *Id.* at 00:59:38. Posso answered affirmatively, told the detective where he had parked the van, and mentioned that another officer had the keys. The detective thanked Posso and told him,

> I'm a detective, so when I get involved with things, I slow things down. I come and I make sure that we're doing everything that we need to do and that everybody is getting done what they need to get done, so that way we can figure out the best way to help you figure out what happened.

Id. at 01:00:31. Detective Rushing then left the room.

[11] Eventually, Posso was allowed to view E.P.'s body. Afterward, Deputy Chitwood transported Posso to the Monroe County Sheriff's Office in a marked police vehicle and locked him in an interview room, which had a video camera, at 5:24 a.m. State's Ex. 11 at 00:00:19. Detective Rushing went in and out of the room several times, asking Posso for information about his other children and whether he wanted something to drink. Posso asked if his family was there.

The detective told him that his wife was in the room "right next door" and that "we'll get you guys together as soon as we talk to you, okay?" *Id*. at 00:22:19.

[12] At 7:43 a.m., Detective Rushing entered the room, placed a document on the table at which Posso was sitting, and said,

> Luis, I know that you've already signed one of these consent to searches, but your wife is letting us look through her phone to kind of get a better idea of what was going on and the timeline and everything. Do you have your cell phone with you? Is it okay if I look at your phone, too?

Id. at 02:19:15. Posso shrugged and reached into his back pocket for his phone, which the consent form describes as a "Samsung smart phone Galaxy S10+[.]" Ex. Vol. at 10. The detective pointed to the document and stated, "So this is just basically the same thing you read before. Would you like to read it again?" State's Ex. 11 at 02:19:32. Posso replied, "No, I believe you." *Id*. at 02:19:36. Detective Rushing stated, "Okay. And all it is is just giving me permission to look inside your phone. Okay?" *Id*. at 02:19:38. Posso shrugged, and the detective stated, "Okay. Is that okay with you?" *Id*. at 02:19:45. Posso replied, "Yeah, I just need to put my finger on it." *Id*. at 02:19:48. Posso used his thumb to unlock his phone and handed it to Detective Rushing. The detective examined the phone and asked if Posso could turn the lock or password off "so that my guy who knows data and knows computers can get the stuff that I need off of there." *Id*. at 02:20:42. Posso stated that he did not know how to do that, and the detective left the room with the phone and the unsigned consent form. A minute and a half later, the detective reentered the room with the form and

told Posso, "This is the paper like I explained, same thing that you read before, it just has that it's a cell phone, and if you'll sign by this line for me, just saying that you're okay with me looking at it." *Id*. at 02:22:26. Posso signed the form without reading it and handed it to Detective Rushing, who left the room.

[13] Several minutes later, the detective returned and asked Posso, "[Y]ou know you don't have to talk with me without a lawyer, right?" *Id*. at 02:26:30. Posso nodded, and the detective questioned him for forty minutes about the circumstances surrounding E.P.'s death. Over the next eight and a half hours, with occasionally lengthy breaks, the detective continued to question Posso. During one of the breaks, the local director of the Department of Child Services (DCS) informed Posso that her office had taken custody of his other children. She read aloud an advisement-of-rights form regarding the pending wardship proceeding, asked him if he had any questions, and gave him a copy of the form.[7]

[14] Later, MCSO Detective Lieutenant Jennifer Allen brought in a consent form for a DNA buccal swab, asked Posso to read it, and left the room. The interview room video shows Posso carefully reviewing the form, using a pen to trace his progress down the page, and then signing the form. *Id*. at 08:57:24. Lieutenant Allen retrieved the form and swabbed Posso's cheeks for DNA. Detective Rushing questioned Posso about photos of potentially incriminating

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[7] The DCS director asked Posso if he would prefer a form in English or in Spanish, and Posso chose the former. *See* State's Ex. 11 at 03:32:40 ("English, please."). Posso's wife speaks only Spanish.

items found in his motel room, including a locked box of food, chains, restraints, and an electric shock collar. Posso denied depriving E.P. of food or using those implements on him. Lieutenant Allen then questioned Posso about potentially incriminating text messages (for example, "[E.P.] almost took off the chains") that were found on either his phone or his wife's phone, which his wife had allowed officers to search. *Id*. at 10:26:49. Posso claimed that the chains were used to secure the motel room door to prevent E.P. from wandering. The lieutenant also questioned Posso about a video camera found in the motel bathroom, which he asserted was used by his wife to monitor their children in the shower. Finally, Lieutenant Allen asked Posso about marks found on E.P.'s ankles and wrists and text messages about those marks. At that point, Posso asked to speak to an attorney, and he was handcuffed and formally arrested at 5:05 p.m.

[15] The State charged Posso with murder, level 1 felony neglect of a dependent, level 5 felony neglect of a dependent, level 5 felony criminal confinement, and level 5 felony battery, and also filed notice of intent to seek life imprisonment without parole. In March 2020, Posso filed a motion to suppress the evidence seized during the searches,[8] as well as his statements to law enforcement officers. In January 2021, after an evidentiary hearing, the trial court issued an order summarily denying Posso's motion. This interlocutory appeal followed.

[8] The record does not disclose what, if any, potentially incriminating evidence was found in Posso's van.

Discussion and Decision

Section 1 – Posso was entitled to be advised of his Indiana constitutional right to the presence and advice of counsel before making the decision to consent to the searches of his motel room, van, and cell phone, and he was not advised of this right.

[16] Posso contends that the trial court erred in denying his motion to suppress. "We deferentially review a trial court's denial of a defendant's motion to suppress, construing conflicting evidence in the manner most favorable to the ruling." *M.O. v. State*, 63 N.E.3d 329, 331 (Ind. 2016). "Although we do not reweigh the evidence, we will 'consider any substantial and uncontested evidence favorable to the defendant.'" *Id*. (quoting *Robinson v. State*, 5 N.E.3d 362, 365 (Ind. 2014)). "[T]o the extent the motion raises constitutional issues, our review is *de novo*." *Id*.

[17] The first constitutional issue we address is whether Posso's consents to the searches of his motel room, van, and phone were invalid, which would require the suppression of the evidence seized during those searches. *Sellmer v. State*, 842 N.E.2d 358, 365 (Ind. 2006). In *Dycus v. State*, our supreme court explained,

> The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects" from unreasonable searches and seizures. U.S. Const. amend. IV. It requires police to obtain a search warrant from a neutral, detached magistrate prior to undertaking a search of either a person or private property. *Katz v. United States*, 389 U.S. 347, 357 (1967). However, that requirement is subject to "certain carefully drawn and well-

> delineated exceptions." *Id*. One such exception occurs when a person consents to a search; in other words, a person's valid consent eliminates the need for a search warrant. Our State Constitution offers citizens parallel protections against unreasonable searches and seizures. For instance, Article 1, Section 11 provides that "[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 …."
>
> Although the wording of Section 11 is almost identical to that of the Fourth Amendment, our State Constitution's search and seizure clause is given an independent interpretation and application. *Myers v. State*, 839 N.E.2d 1146, 1153 (Ind. 2005). In fact, Indiana's Constitution sometimes offers broader protections than those offered by the U.S. Constitution. *Conley v. State*, 972 N.E.2d 864, 879 (Ind. 2012). Amongst those broader protections offered by our State Constitution is the requirement that, prior to obtaining consent to a search, police must explicitly advise a person in custody of her right to consult with counsel. It is unique to Indiana and has no federal counterpart.

108 N.E.3d 301, 304 (Ind. 2018) (parallel citation omitted); *cf. State v. Taylor*, 49 N.E.3d 1019, 1024 (Ind. 2016) (quoting *Taylor v. State*, 689 N.E.2d 699, 704 (Ind. 1997)) (noting that both Sixth Amendment of U.S. Constitution and Article 1, Section 13 of Indiana Constitution guarantee right to counsel at any critical stage of criminal proceeding where counsel's absence may derogate from accused's right to fair trial, but that "the Indiana right provides greater protection because it attaches earlier—upon arrest, rather than only when 'formal proceedings have been initiated' as with the federal right.").

[18] The *Dycus* court further noted that *Pirtle v. State*, 263 Ind. 16, 323 N.E.2d 634 (1975), "is the seminal case for Indiana's law on consent to searches" and that the *Pirtle* court "held that a person in police custody is entitled to the presence and advice of counsel prior to consenting to a search, and that the right, if waived, must be explicitly waived." *Dycus*, 108 N.E.3d at 305 (citing *Pirtle*, 263 Ind. at 29, 323 N.E.2d at 640). Over the years, appellate courts have limited the application of the *Pirtle* "rule only to the weightiest intrusions." *Id*. at 306 (quoting *Garcia-Torres v. State*, 949 N.E.2d 1229, 1238 (Ind. 2011)). According to the *Dycus* court,

> In deciding whether *Pirtle* advisements are necessary for a particular search, … we need not contemplate whether a person has a legitimate expectation of privacy, nor whether the State's intrusion was unreasonable. After all, those questions go to whether police must obtain a warrant—a question not at issue here. Moreover, a person may freely consent to even the most unreasonable of intrusions; where such consent is valid, no warrant is required. Rather, our concern in *Pirtle*, and in the ensuing cases, was that consent to certain weighty intrusions carries a great risk of involuntariness. This is especially true … for unlimited and general searches where police are given carte blanche to search for unspecified evidence. Searches of a home or a vehicle ordinarily require officers to specify what they are looking for and their reasons for believing that the suspect had those items in their home or in their vehicle. A person who consents to a search gives up those protections and subjects herself to a general search without probable cause. Because a person in custody may not fully appreciate the magnitude of what is at stake when authorizing police to freely search a home or a vehicle, we require police to explicitly inform persons in custody of their rights under our Constitution. Those concerns are not as strong when a search is narrowly focused.

Id.

[19] In this case, the threshold question is whether *Pirtle* advisements were necessary for the searches of Posso's motel room, van, and cell phone. With respect to the motel room and the van, the answer is definitively yes. *See Harper v. State*, 963 N.E.2d 653, 658 (Ind. Ct. App. 2012) (noting that "a hotel room is a 'home' for purposes of Article 1, Section 11 of the Indiana Constitution"), *clarified on reh'g*, 968 N.E.2d 843; *Dycus*, 108 N.E.3d at 306 (describing "unlimited and general searches" of homes and vehicles as "weighty intrusions" requiring *Pirtle* advisements). With respect to cell phones, no appellate court has yet had an opportunity to weigh in on the issue. Given that a cell phone – particularly a smartphone like Posso's – may contain substantially more evidence, both in kind and quantity, than a person's home or vehicle, we readily conclude that an unlimited and general search of a cell phone without probable cause is an equally weighty intrusion for which a *Pirtle* advisement is required. *See Riley v. California*, 573 U.S. 373, 396-97 (2014) (noting that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is."); *Seo v. State*, 148 N.E.3d 952, 960 (Ind. 2020) (parallel citation omitted) (quoting *Riley*, 573 U.S. at 393, and *United States v. Djibo*, 151 F. Supp. 3d 297, 310 (E.D.N.Y. 2015)) ("Today's smartphones 'could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums,

televisions, maps, or newspapers.' And they can contain, in digital form, the 'combined footprint of what has been occurring socially, economically, personally, psychologically, spiritually and sometimes even sexually, in the owner's life.'")

[20] We now must consider whether Posso was in custody when he signed the forms consenting to the searches. Posso argues that he was, and the State offers no response. "An appellee's failure to respond to an issue raised by an appellant is akin to failure to file a brief." *Vukovich v. Coleman*, 789 N.E.2d 520, 524 n.4 (Ind. Ct. App. 2003). "This circumstance does not, however, relieve us of our obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required. Controverting arguments advanced for reversal is an obligation that properly remains with counsel for the appellee." *Id*. (citation omitted). Accordingly, Posso need only make a prima facie showing that he was in custody when he signed the consent forms. *See id*. (mentioning prima facie error rule).[9] "Prima facie means at first sight, on first appearance, or on the face of it." *Id*. (italics omitted). "This standard prevents two evils that would otherwise undermine the judicial process." *Id*. By requiring the appellant to make such a showing, "we ensure that the court, not the parties, decides the law." *Id*. By allowing the appellant to prevail upon simply a

[9] The trial court in this case made no findings, and given the multistep analysis required with a *Pirtle* challenge, we have no way of knowing whether it actually erred on this particular issue.

prima facie showing, "we avoid the improper burden of having to act as advocate for the absent appellee." *Id*. (italics omitted).

[21] Courts determine whether a person is in custody by applying an objective test asking whether a reasonable person "under the same circumstances would believe that [he] was under arrest or not free to resist the entreaties of the police." *Sellmer*, 842 N.E.2d at 363. "[T]o be in custody …, one need not be placed under formal arrest. Rather, the determination is based upon whether the individual's freedom has been deprived in a significant way or if a reasonable person in the accused's circumstances would believe that he is not free to leave." *Peel v. State*, 868 N.E.2d 569, 577 (Ind. Ct. App. 2007) (citation omitted). In *Meredith v. State*, our supreme court noted that

> *Pirtle* and its progeny police the line between ordinary investigative detentions [in which a person is momentarily not free to go but is ordinarily not considered in custody] and full-blown custodial interrogations by examining the circumstances for objectively overpowering, coercive, or restraining police behavior, such that the facts demonstrate "a degree associated with a formal arrest." *Melton v. State*, 705 N.E.2d 564, 566 (Ind. Ct. App. 1999) (internal quotation marks omitted). A non-exhaustive list of relevant factors our cases have identified includes: whether the defendant was read his *Miranda* rights, handcuffed, restrained in any way, or told that he was a suspect in a crime, *e.g.*, *Torres v. State*, 673 N.E.2d 472, 474 (Ind. 1996); how vigorous was the law enforcement interrogation, *e.g.*, *Sellmer*[, 842 N.E.2d at 363-65]; whether police suggested the defendant should cooperate, implied adverse consequences for noncooperation, or suggested that the defendant was not free to go about his business, *e.g.*, *id.*; *Clarke* [*v. State*, 868 N.E.2d 1114,

> 1120-21 (Ind. 2007)]; and the length of the detention, *e.g.*, *Cooley v. State*, 682 N.E.2d 1277, 1279 (Ind. 1997).

906 N.E.2d 867, 873-74 (Ind. 2009).

[22] When Detective Rushing presented Posso with the first consent form authorizing a search of his motel room and van, Posso had been advised of his *Miranda* rights and questioned by several officers about E.P.'s death, had been informed that officers were going to the motel and that his family would be brought to the hospital for questioning, had surrendered his van keys and driver's license, and was sitting in the corner of a room with multiple officers standing between him and the door and other officers and security guards visible outside. We have little trouble concluding that a reasonable person in Posso's circumstances would have believed that he was not free to resist the entreaties of the police, and therefore we conclude that Posso was in custody for purposes of *Pirtle* at that point. By the time Posso signed the second consent form authorizing a search of his phone, he had been transported to the sheriff's office in a marked police vehicle and locked in an interview room. Clearly, Posso was in custody at that point as well.[10]

[10] Before Posso signed the second consent form, he unlocked his phone and gave it to Detective Rushing. To the extent that this conduct was a separate manifestation of consent, we note that Posso was in custody at that time.

[23] The next question we must answer is whether Posso was adequately advised of his right to the presence and advice of counsel before he consented to the searches. Both consent forms contain the following language:

> PIRTLE WARNING:
>
> 1. YOU HAVE THE RIGHT TO REQUIRE THAT A SEARCH WARRANT BE OBTAINED BEFORE ANY SEARCH OF YOUR RESIDENCE, VEHICLE, OR OTHER PREMISES.
>
> 2. YOU HAVE THE RIGHT TO REFUSE TO CONSENT TO ANY SUCH SEARCH.
>
> **3. YOU HAVE THE RIGHT TO CONSULT WITH AN ATTORNEY PRIOR TO GIVING CONSENT TO ANY SUCH SEARCH.**
>
> 4. IF YOU CANNOT AFFORD AN ATTORNEY, YOU HAVE THE RIGHT TO HAVE AN ATTORNEY PROVIDED FOR YOU AT NO COST.
>
> FULLY AWARE OF MY RIGHTS, I HEREBY CONSENT, WITHOUT THREATS, COERCION, INDUCEMENTS, OR PROMISES OF ANY KIND, TO HAVE THE BELOW DESCRIBED PROPERTY SEARCHED BY MEMBERS OF THE MONROE COUNTY SHERIFF'S OFFICE.

Ex. Vol. at 8, 10 (emphasis added).

[24] Unlike the DCS director with her advisement-of-rights form, Detective Rushing did not read the consent forms aloud to Posso or otherwise verbally advise him

of his right to consult with an attorney prior to giving consent to search.[11] In fact, after Posso specifically told Detective Rushing that he did not understand what the first consent form was for, the detective made no effort to advise him of his right to counsel or to ensure that he was able to read and understand the form. Moreover, the video evidence establishes that Posso did not read either consent form before he signed them and that Detective Rushing was standing close enough to notice.[12] The State asserts that if Posso did not read the consent forms "before signing, that was his choice[,]" and that Article 1, Section 11 of the Indiana Constitution "regulates the reasonableness of police, not suspect, conduct." Appellee's Br. at 18. But, as Posso points out, *Pirtle* specifically places the burden on the State "to show that [the defendant's] waiver [of his right to counsel] was explicit," 263 Ind. at 29, 323 N.E.2d at 640, and the State failed to carry that burden here. *See Sims v. State*, 274 Ind. 495, 500, 413 N.E.2d 556, 559 (1980) (equating "explicitness" of *Pirtle* waiver of right to counsel with "the

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[11] The State notes that Posso was "told about his right to counsel when he was read his *Miranda* warnings[,]" Appellee's Br. at 17, but the record establishes that he was never told about this right as it relates to consent to search. In *State v. Keller*, we made the following observation about *Miranda* warnings that applies with equal force to *Pirtle* warnings and seems especially pertinent to this case:

> It is true that law enforcement officers are not under a burden to orally advise an individual of his rights in order to comply with *Miranda*. However, we emphasize that an oral advisement, whether or not accompanied by the use of a form, is the preferred method of ensuring an accused's constitutional rights. A colloquy between law enforcement officers and those accused of crimes does more than merely "mechanize a ritual" …. Rather, it avoids the loss in reality of rights declared by the words of the Constitution, and enforces them against overzealous police practices.

845 N.E.2d 154, 163 (Ind. Ct. App. 2006) (quoting *United States v. Van Dusen*, 431 F.2d 1278, 1280 (1st Cir. 1970)).

[12] Consequently, Detective Rushing's assurances that the second consent form was "the same thing [Posso] read before" ring hollow. State's Ex. 11 at 02:19:32, 02:22:26.

knowing quality of that waiver […] and not the voluntary quality of the decision to permit the search."), *overruled on other grounds by Wright v. State*, 658 N.E.2d 563 (Ind. 1995).[13] Consequently, we reverse the trial court's denial of Posso's motion to suppress the evidence seized during the searches of his motel room, van, and cell phone.

Section 2 – Posso was not subjected to an impermissible "question-first" interrogation.

[25] Posso also argues that the trial court should have suppressed his statements to law enforcement officers on the basis that he was subjected to an improper "question-first" interrogation in violation of the United States Constitution as articulated in *Missouri v. Seibert*, 542 U.S. 600 (2004). At issue in that case was "a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of *Miranda* …, the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time." *Id*. at 604. The question in *Seibert* was "the admissibility of the repeated statement[,]" and a

[13] Although we need not address it, we note that Posso also makes a compelling claim that his consents to the searches were not voluntary, especially given Detective Rushing's assertions that he had to be able to search Posso's motel room and vehicle to help Posso understand what happened, and his insinuation that he would obtain "a warrant regardless of consent, as though a warrant were a foregone conclusion[.]" *McIlquham v. State*, 10 N.E.3d 506, 512 (Ind. 2014).

plurality of the U.S. Supreme Court held that "a statement repeated after a warning in such circumstances is inadmissible." *Id*.

[26] The gist of Posso's argument is that he was in custody when he was first questioned by Officer Jordan, who did not give him *Miranda* warnings, and that his answers to those questions, as well as the answers that he gave to questions after he received *Miranda* warnings from Deputy Chitwood, should be suppressed. We disagree, because Posso was not in custody when he was questioned by Officer Jordan.[14] There is no indication that Posso was brought to or kept in the examination room against his will. At that time, Officer Jordan was the only other person in the room, Posso was unrestrained and still had the keys to his van and his driver's license, and the hospital security guards were down the hall and out of sight. The questioning lasted less than three minutes and was not aggressive or intimidating. Posso notes that Officer Jordan stated that "police would need to speak to him further[,]" Appellant's Br. at 23, but that statement was made at the end of their conversation. In sum, we cannot conclude that a reasonable person under the same circumstances would believe that he was under arrest or not free to resist the entreaties of the police.[15] *Sellmer*, 842 N.E.2d at 363. Therefore, we affirm the trial court's denial of

[14] Furthermore, unlike the defendant in *Seibert*, Posso never made a confession.

[15] Any sense of obligation on Posso's part to remain at the hospital until the coroner completed his investigation was not the product of police coercion.

Posso's motion to suppress his statements to law enforcement officers, and we remand for further proceedings consistent with this decision.

[27] Affirmed in part, reversed in part, and remanded.

Bailey, J., and Pyle, J., concur.