

[CAPTION]

MOTION TO SUPPRESS EVIDENCE (SEARCH INCIDENT TO ARREST)

The Defendant, by counsel, respectfully requests this Court to suppress certain evidence that was unlawfully seized. In support of this Motion, the Defendant states the following:

1. Defendant is charged in this cause with [insert offense(s)].
2. On [insert date], police officers or other governmental agents or officials, without lawful authority, searched the Defendant and seized [insert items and property seized].
3. The search and seizure was without lawful authority because:

[select appropriate paragraphs]

- a. At the time of his/her arrest, the police lacked probable cause that the Defendant was violating any law either federal, state or local, Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). Thus, the arrest and the subsequent search violated the Fourth Amendment of the U.S. Constitution.
- b. The arrest was for a misdemeanor not committed in the presence of the arresting officers and, thus, was made without any warrant in violation of I.C. § 35-33-1-1.
- c. The arrest warrant did not substantially comply with the statutory requirements for a telephonic arrest warrant, and thus, was invalid.
- c. The Defendant was arrested by unlawful means, and thus, the arrest and subsequent search violated the Fourth Amendment of the U.S. Constitution.
- d. Even if probable cause may have existed to make the arrest, the search and subsequent seizure was outside the scope of the area within Defendant's immediate control at the time of his/her arrest. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Thus, the subsequent search and seizure violated the Fourth Amendment of the U.S. Constitution.
- e. Even if probable cause may have existed to make the arrest, the search and subsequent seizure were not substantially contemporaneous with the arrest,

Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and other exigent circumstances did not exist to justify the search and seizure without a warrant. Thus, the subsequent search and seizure violated the Fourth Amendment of the U.S. Constitution.

- f. Considering the totality of the circumstances, the arrest and search of the Defendant was unreasonable, and thus, violated Article I, Section 11 of the Indiana Constitution. Brown v. State, 653 N.E.2d 77 (Ind. 1995).

WHEREFORE, the Defendant requests this Court to:

1. Suppress and bar from use as evidence in the trial of this cause all of the evidence seized, as described above;
2. Suppress and bar from use in the trial of this cause all testimony relating to the items described above which are sought to be suppressed; and
3. Enter an order returning the items described above to the Defendant.

(Signature)

REFERENCES

CASEBANK Z.3.a

U.S. Constitution, 4th Amendment

Ind. Constitution, Article I, Section 11

I.C. 35-33-2-1 (requirements for an arrest warrant).

I.C. 35-33-1-1 (requirements for warrantless arrests).

I.C. 9-30-2-2 (prohibiting officer not in uniform or in marked car to make an arrest).

CASE LAW

SCOPE AND TIMING OF SEARCH

Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) (search can be incident to arrest only if it is substantially contemporaneous with arrest and is confined to immediate vicinity of arrest). See also Murrell v. State, 421 N.E.2d 638 (Ind. 1981).

Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990) (a search incident to an arrest may not precede the arrest). See also Perkins v. State, 695 N.E.2d 612 (Ind.Ct.App. 1998).

Gonser v. State, 843 N.E.2d 947 (Ind.Ct.App. 2006) (search of the Defendant's vehicle did not occur contemporaneously in both time and place with his arrest).

Ceroni v. State, 559 N.E.2d 372 (Ind.Ct.App. 1990) (search of a satchel found in a drawer in a motel room was not a permissible search incident to arrest of occupants after marijuana was observed on the table).

Tata v. State, 486 N.E.2d 1025 (Ind. 1986) (where the Defendant had been removed from the apartment, search of laundry hamper was unconstitutional).

Vanzo v. State, 738 N.E.2d 1061 (Ind.Ct.App. 2000) (listing factors to consider when determining whether a search for safety was necessary; here, search was unconstitutional).

Smith v. State, 565 N.E.2d 1059 (Ind. 1991) (protective sweep of house upon execution of arrest warrant did not justify warrantless search of locked storage room), *overruled on other grounds*, McGregor v. State, 725 N.E.2d 840 (Ind. 2000).

State v. Estep, 753 N.E.2d 22 (Ind.Ct.App. 2001) (protective sweep and search incident to arrest was improper where the Defendant stated no one was in the residence and arrest occurred at the front door). See also Cudworth v. State, 818 N.E.2d 133 (Ind.Ct.App. 2004).

Smith v. State, 889 N.E.2d 836 (Ind.Ct.App. 2008) (search of toilet tank in bathroom of motel where the Defendant was being arrested exceeded the scope of a reasonable search incident to an arrest; the Defendant was no longer a safety risk and the police only believed, based on a porcelain-to-porcelain sound they heard prior to entering the room, that the Defendant hid, not destroyed, drugs).

Arizona v. Gant, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (rejecting a broad reading of New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) and holding that police may search the

passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest; search of car after Defendant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car violated the Fourth Amendment).

Chest v. State, 922 N.E.2d 621 (Ind.Ct.App. 2009) (search of D's car was unreasonable because the only evidence relevant to refusing to identify charge was D's actual refusal to identify himself, and there was no probable cause that D had committed other crimes); See also Hathaway v. State, 906 N.E.2d 941 (Ind.Ct.App. 2009).

Gibson v. State, 733 N.E.2d 945 (Ind.Ct.App. 2000) (where the Defendant was in a parking lot, walking towards a store when he was arrested, a search of his van was not justified). See also Edwards v. State, 768 N.E.2d 506 (Ind.Ct.App. 2002).

State v. Moore, 796 N.E.2d 764 (Ind.Ct.App. 2003) (under the Indiana Constitution, it was unreasonable for the police to search the compartment of a vehicle when the police did not have a reasonable fear for their safety and the driver was being arrested for a licensing offense; the rule in New York v. Belton, *supra*, does not apply automatically under the Indiana Constitution).

Edwards v. State, 759 N.E.2d 626 (Ind. 2001) (strip searches of misdemeanor arrestees are unreasonable and impermissible under the Indiana Constitution in the absence of reasonable suspicion that the arrestee is concealing weapons or contraband). Cf. White v. State, 24 N.E.3d 535 (Ind.Ct.App. 2015) (strip search of Defendant at jail following his lawful arrest for leaving the scene of an accident did not violate his Fourth Amendment rights; although underlying arrest constituted a misdemeanor, strip search was justified because of lingering odor of raw marijuana which engulfed Defendant even after having been transported to jail).

VanPelt v. State, 760 N.E.2d 218 (Ind.Ct.App. 2001) (search incident to arrest exception, which typically applies when search and arrest are contemporaneous, also applies where law enforcement conducts lawful search but merely delays an otherwise valid arrest until after consultation with prosecutor; as long as probable cause exists to make arrest, fact that suspect was not formally placed under arrest at time of search incident thereto will not invalidate the search).

Kirk v. State, 974 N.E.2d 1059 (Ind.Ct.App. 2012) (warrantless search of contents of Defendant's cell phone, as incident to arrest for neglect of a dependent and public intoxication, was unreasonable under Indiana Constitution, where neither crime clearly implicated use of phone).

Garcia v. State, 47 N.E.3d 1196 (Ind. 2016) (under Indiana Constitution, once Defendant was lawfully arrested for driving without a license and officer was lawfully conducting pat-down search incident to arrest, officer could reasonably open cylinder container found on Defendant).

Guilmette v. State, 14 N.E.3d 38 (Ind. 2014) (police who were investigating a murder were not required to obtain a search warrant before conducting DNA tests on Defendant's bloody shoe that was unrelated to the alleged theft for which he was in custody).

Riley v. California, 134 S.Ct. 2473, 189 L.E.2d 430 (2014) (police must get a warrant prior to searching digital data of cell phone incident to arrest).

U.S. v. Edwards, 769 F.3d 509 (7th Cir. 2014) (police may search vehicle without warrant incident to recent occupant's arrest only if arrestee is within reaching distance of passenger compartment at time of

search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest); see also Smith v. State, 980 N.E.2d 346 (Ind.Ct.App. 2012).

UNLAWFUL ARREST

Jones v. State, 467 N.E.2d 1236 (Ind.Ct.App. 1984) (initial arrest must be lawful in order to have a valid search incident to arrest); see also Rhodes v. State, 996 N.E.2d 450 (Ind.Ct.App. 2013).

Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (where police had home surrounded and there was no suggestion that anyone inside home was in danger, entry into home to make warrantless arrest for aiding in murder was unconstitutional). See also Kirk v. Louisiana, 536 U.S. 635, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002).

Johnson v. State, 747 N.E.2d 623 (Ind.Ct.App. 2002) (police may not enter home to effectuate misdemeanor arrest absent exigent circumstances or another exception to the warrant requirement). See also Willis v. State, 780 N.E.2d 423 (Ind.Ct.App. 2002).

Barnes v. State, 946 N.E.2d 572 (Ind. 2011) (Indiana no longer recognizes common law right to reasonably resist unlawful police entry into a person's residence because public policy disfavors such a right), reh'g granted, 953 N.E.2d 473.

Casselman v. State, 472 N.E.2d 1310 (Ind.Ct.App. 1985) (police may not use force to enter home to execute a civil order of arrest).

Adkisson v. State, 728 N.E.2d 175 (Ind.Ct.App. 2000) (the police cannot cause a suspect to come to the threshold of the home and then enter the home without a warrant).

Best v. State, 817 N.E.2d 685 (Ind.Ct.App. 2004) (an unlawful arrest cannot be foundation of a lawful search; here, arrest warrant under which D had been previously detained was no longer valid, rendering D's arrest under warrant illegal and an egregious violation of D's right to due process).

Conwell v. State, 714 N.E.2d 764 (Ind.Ct.App. 1999) (police officer used excessive force when applying a choke hold to prevent Defendant from swallowing drugs); See also Grier v. State, 868 N.E.2d 443 (Ind. 2007).

Timmons v. State, 734 N.E.2d 1084 (Ind.Ct.App. 2000) (improperly issued arrest warrant required suppression of officer's observations of the Defendant upon arrest).

Kyles v. State, 888 N.E.2d 809 (Ind.Ct.App. 2008) (officer had probable cause to believe Defendant committed misdemeanor in officer's presence; officer's observation of crack pipe on driver's seat shortly after Defendant exited vehicle justified warrantless arrest for possession of paraphernalia).

Aslinger v. State, 2 N.E.3d 84 (Ind.Ct.App. 2014) (probable cause for arrest based on the odor of marijuana did not arise until after police had already seized hand-rolled cigarette from behind Defendant's ear, and thus was not search incident to arrest).

D.Y. v. State, 28 N.E.3d 249 (Ind.Ct.App. 2015) (Defendant's involuntary transport to police station amounted to an arrest and thus subsequent pat-down was unlawful because police lacked probable cause for arrest).