

IN THE
COURT OF APPEALS OF INDIANA

No. 22A-CR-2524

BRIONE JACKSON,
Appellant-Defendant,

v.

STATE OF INDIANA,
Appellee-Plaintiff.

Appeal from the Hamilton Superior
Court,

No. 29D03-2203-F4-1271,

The Honorable William J. Hughes,
Judge.

BRIEF OF APPELLEE

THEODORE E. ROKITA
Indiana Attorney General
Attorney No. 18857-49

ROBERT M. YOKE
Deputy Attorney General
Attorney No. 28141-49

OFFICE OF THE INDIANA ATTORNEY
GENERAL TODD ROKITA
Indiana Government Center South
302 West Washington Street, Fifth Floor
Indianapolis, Indiana 46204-2770
317-233-3059 (telephone)
robert.yoke@atg.in.gov

Counsel for Appellee

TABLE OF CONTENTS

Table of Authorities 3

Statement of the Issues..... 5

Statement of the Case 5

Statement of the Facts 5

Summary of the Argument..... 8

Argument

 Police lawfully searched Jackson’s car 9

 A. The search did not violate the Fourth Amendment..... 9

 B. The search did not violate Article 1, Section 11 14

Conclusion 16

Certificate of Service 16

TABLE OF AUTHORITIES

Cases

<i>Austin v. State</i> , 997 N.E.2d 1027 (Ind. 2013).....	15
<i>Bell v. State</i> , 13 N.E.3d 543 (Ind. Ct. App. 2014)	12
<i>Bunnell v. State</i> , 172 N.E.3d 1231 (Ind. 2021).....	11, 14
<i>California v. Acevedo</i> , 500 U.S. 565 (1991).....	10
<i>California v. Carney</i> , 471 U.S. 386 (1985)	12
<i>Campos v. State</i> , 855 N.E.2d 590 (Ind. 2008).....	9
<i>Carroll v. United States</i> , 267 U.S. 132 (1925)	9
<i>Combs v. State</i> , 168 N.E.3d 985 (Ind. 2021).....	9
<i>Edmond v. State</i> , 951 N.E.2d 585 (Ind. Ct. App. 2011)	12
<i>Harbaugh v. State</i> , 96 N.E.3d 102 (Ind. Ct. App. 2018)	14, 15
<i>Holloway v. State</i> , 69 N.E.3d 924 (Ind. Ct. App. 2017).....	14
<i>Johnson v. United States</i> , 333 U.S. 10 (1948)	11, 12
<i>K.K. v. State</i> , 40 N.E.3d 488 (Ind. Ct. App. 2015).....	13
<i>Litchfield v. State</i> , 824 N.E.2d 356 (Ind. 2005).....	14
<i>Marcum v. State</i> , 843 N.E.2d 546 (Ind. Ct. App. 2006)	11, 14
<i>Marshall v. State</i> , 117 N.E.3d 1254 (Ind. 2019)	15
<i>Meek v. State</i> , 950 N.E.2d 816 (Ind. Ct. App. 2011)	11, 14
<i>Moody v. State</i> , 448 N.E.2d 660 (Ind. 1983)	9
<i>Sebastian v. State</i> , 726 N.E.2d 827 (Ind. Ct. App. 2000).....	13
<i>State v. Hawkins</i> , 766 N.E.2d 749 (Ind. Ct. App. 2002).....	11, 12, 14
<i>State v. Hobbs</i> , 933 N.E.2d 1281 (Ind. 2010).....	15
<i>United States v. Kiszart</i> , 967 F.3d 693 (7th Cir. 2020)	13

State of Indiana
Brief of Appellee

United States v. Ross, 456 U.S. 798 (1982)..... 10
Wyoming v. Houghton, 526 U.S. 295 (1999) 10

Other Authorities

Fourth Amendment to the United States Constitution..... 8, 9, 13
Fifth Amendment to the United States Constitution 8
Article 1, § 11 of the Indiana Constitution 8, 13, 14
Article 1, § 13 of the Indiana Constitution 8

STATEMENT OF THE ISSUE

Whether the trial court erred when it denied Jackson's motion to suppress.

STATEMENT OF THE CASE

Nature of the Case

Jackson challenges the trial court's denial of his motion to suppress in an interlocutory appeal.

Course of Proceedings

On March 1, 2022, the State charged Jackson with Level 4 felony unlawful possession of a firearm by a serious violent felon (App. Vol. II 32). Jackson filed a motion to suppress, and the trial court held a hearing on July 29, 2022 (App. Vol. II 39-46). The trial court denied the motion to suppress on September 6, 2022, and denied Jackson's motion to correct errors (App. Vol. II 39-46). Jackson filed a motion to certify an interlocutory appeal of the order denying the motion to suppress, which was granted on September 26, 2022 (App. Vol. II 26-31). Jackson filed a motion to accept jurisdiction in this Court that was marked received on October 24, 2022, and filed on November 2, 2022 (Docket). This Court accepted jurisdiction on December 5, 2022 (Docket). On December 12, 2022, Jackson filed a notice of interlocutory appeal (Docket).

STATEMENT OF THE FACTS

On March 1, 2022, at approximately 2:40 a.m., Officer Thomas Szybowski was on duty in his fully marked police vehicle (Tr. Vol. II 9). Szybowski was driving through the parking lot of the of the Extended Stay of America Hotel in Carmel,

State of Indiana
Brief of Appellee

where he had a “significant history of investigating criminal activit[y] that occur[red] in this parking lot,” that included drug-related activity (Tr. Vol. II 9-10). As he drove, he observed a silver Lexus that was backed into a parking space along the back of the parking lot behind the hotel and occupied by a male driver, Brione Jackson, who was the sole occupant (Tr. Vol. II 10-11, 13). Szybowski observed that Jackson “looked like a deer in headlights” when he drove past, and that “at 2:40 in the morning it’s uncommon for people to be out and about in that parking lot unless they are up to criminal activity,” so Szybowski circled the parking lot to see if Jackson drove away or entered the hotel (Tr. Vol. II 10; Ex. 1 at 6:45-7:15). When Szybowski returned to the rear of the hotel, Jackson was still in his car (Tr. Vol. II 10). Szybowski decided to approach the car (Tr. Vol. II 10-11). He did not turn on his police vehicle’s emergency lights or siren (Tr. Vol. II 11).

Szybowski parked his police vehicle near Jackson’s car, exited, and walked toward Jackson (Tr. Vol. II 11). As he approached, Szybowski waved at Jackson and noticed that all the windows in Jackson’s car were closed (Tr. Vol. II 11-12). Jackson opened the driver’s door to speak to Szybowski, and Szybowski “was immediately met with the odor of marijuana emanating from the interior of that vehicle” (Tr. Vol. II 12; Ex. 1 at 1:00-1:30). The odor appeared to be burnt marijuana based on Szybowski’s training and experience, which included 12 years as a drug task-force officer (Tr. Vol. II 6-8, 30). Szybowski also saw several loose pills in the driver’s door armrest (Ex. 1 at 5:50, 6:45-7:15, 9:45-10:15).

State of Indiana
Brief of Appellee

Szybowski asked Jackson, “Are you alright?” (Ex. 1 at 1:00-1:10). Jackson replied that he was, and Szybowski told Jackson, “I smell weed” (Ex. 1 at 1:00-1:20). Jackson responded, “Ain’t no smell of weed in here I ain’t been smoking” (Ex. 1 at 1:20-1:30). Szybowski inquired further if there was marijuana currently in Jackson’s car and asked when the car last had marijuana in it (Ex. 1 at 3:20-3:50). Jackson told Szybowski that there was not currently marijuana in the car, but there was marijuana in the car “probably like a week ago” (Ex. 1 at 3:20-3:50).

Szybowski decided to conduct an investigatory stop due to the odor of marijuana, so he asked for Jackson’s identification, returned to his police vehicle, and called for additional officers to respond to the scene (Tr. Vol. II 12-13). Szybowski researched Jackson’s identification and learned that he had a prior conviction for carjacking that qualified Jackson as a serious violent felon (Tr. Vol. II 15; Ex. 1 at 4:00-4:35, 6:00, 6:45-7:15). After additional officers arrived, Szybowski returned to Jackson’s car (Ex. 1 at 4:45-5:20). Jackson said, “I don’t have nothing else, I see you called backup” (Ex. 1 at 4:45-5:20). Szybowski told Jackson he was being detained while police searched his car for contraband and placed Jackson inside a police vehicle (Tr. Vol. II 13-14; Ex. 1 at 5:25-6:30).

Szybowski searched the passenger compartment and seized the loose pills he had observed (Ex. 1 at 9:45-10:15). After searching the remainder of the passenger compartment, Szybowski moved toward the trunk to search there (Ex. 1 at 15:05). “[Jackson] was banging on the window [and] was real nervous when [Szybowski] [was] going in the trunk” (Ex. 1 at 17:40-17:45). Szybowski found a handgun in the

trunk (Tr. Vol. II 14-15; Ex. 1 at 16:50-16:55). Police seized the firearm and arrested Jackson (Tr. Vol. II 14-15; Ex. 1 at 16:50-16:55).

The State charged Jackson, and he filed a pretrial motion to suppress alleging that “the State...violated [his] rights under 4th and 5th Amendments to the U.S. Constitution as well as Article One, Section 13 and 11 of the Indiana Constitution” when police searched his car (App. Vol. II 32, 36-38). The trial court held a suppression hearing, and Jackson focused solely on the search of his vehicle (Tr. Vol. II 36-39). The trial court took the matter under advisement and issued a written order denying Jackson’s motion (App. Vol. II 39-46). The trial court reasoned:

[U]nder all the circumstances known to the police officer at the time of the search of the trunk, the search of the trunk was reasonable. In general where there is the smell of burnt marijuana at some prior time there was the smell of raw marijuana. When no marijuana residue or raw marijuana was located in the passenger compartment, it is reasonable to check the trunk of a stopped vehicle in those locations where raw marijuana may be found.

(App. Vol. II 45).

SUMMARY OF THE ARGUMENT

The trial court correctly denied Jackson’s motion to suppress. The search did not violate the Fourth Amendment because police had probable cause to search Jackson’s car based on the odor of marijuana emanating from inside. This allowed police to search the entire car—including the trunk and any containers inside—for additional marijuana and evidence of marijuana usage under the automobile exception. The search did not violate the Indiana Constitution because the police conduct—a vehicle search supported by probable cause—was reasonable. Jackson’s

arguments do not enjoy support in the law under the facts of this case. This Court should affirm the trial court and remand for trial.

ARGUMENT

Police lawfully searched Jackson's car.

A. The search did not violate the Fourth Amendment.

The police had probable cause to search Jackson's entire car. In an interlocutory appeal, this Court reviews a ruling on the constitutionality of a search or seizure de novo. *Campos v. State*, 855 N.E.2d 590, 596 (Ind. 2008). The appellate court grants deference to a trial court's determination of the facts unless they are clearly erroneous. *Id.* And this Court considers conflicting evidence most favorably toward the trial court's ruling and does not reweigh the evidence. *Id.*

Szybowski had probable cause to search Jackson's entire car when he detected the odor of marijuana emanating from it. "Probable cause exists 'when the totality of the circumstances establishes 'a fair probability' ... of criminal activity, contraband, or evidence of a crime.'" *Combs v. State*, 168 N.E.3d 985, 993 (Ind. 2021). Probable cause is reviewed in the totality of the circumstances from the viewpoint of an objectively reasonable police officer. *Id.*

Police may conduct a "warrantless search of an automobile where the searching officers have probable cause to believe the automobile contains the fruits or instrumentalities of a crime." *Moody v. State*, 448 N.E.2d 660, 663 (Ind. 1983); see *Carroll v. United States*, 267 U.S. 132 (1925). "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and

State of Indiana
Brief of Appellee

its contents that may conceal the object of the search.” *United States v. Ross*, 456 U.S. 798, 825 (1982). And “[t]he scope of a warrantless search of an automobile...is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.” *Id.* at 824. The scope of this search includes closed containers found inside the automobile. *California v. Acevedo*, 500 U.S. 565, 580-81 (1991); *Ross*, 456 U.S. at 824. “The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought.” *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) (citations omitted). And “[w]hen there is probable cause to search for contraband in a car, it is reasonable for police officers...to examine packages and containers without a showing of individualized probable cause for each one.” *Id.*

Szybowski had probable cause to search Jackson’s car—including the trunk—based on the totality of the circumstances. At 2:40 a.m. in a hotel parking lot, Jackson “looked like a deer in headlights” when he saw Szybowski drive past (Tr. Vol. II 10; Ex. 1 at 6:45-7:15). Szybowski approached Jackson’s car and asked Jackson if he was okay (Ex. 1 at 1:00-1:10). When Jackson opened his door to speak to Szybowski, Szybowski observed loose pills in the driver’s door armrest and the odor of burnt marijuana (Tr. Vol. II 12, 30; Ex. 1 at 1:00-1:30, 5:50, 6:45-7:15, 9:45-10:15). Szybowski recognized the odor based on his extensive training and

State of Indiana
Brief of Appellee

experience that included 12 years as a drug task-force officer (Tr. Vol. II 6-8). And an odor of raw or burnt marijuana establishes probable cause for police to search a vehicle. *See Johnson v. United States*, 333 U.S. 10, 13 (1948) (an officer who detects an odor they know to be contraband has probable cause to search); *Bunnell v. State*, 172 N.E.3d 1231 (Ind. 2021); *Meek v. State*, 950 N.E.2d 816 (Ind. Ct. App. 2011); *Marcum v. State*, 843 N.E.2d 546 (Ind. Ct. App. 2006); *State v. Hawkins*, 766 N.E.2d 749 (Ind. Ct. App. 2002). When asked about the smell, Jackson immediately replied, “Ain’t no smell of weed in here I ain’t been smoking” (Ex. 1 at 1:20-1:30). But a short time later Jackson changed his story and told Szybowski that there was not currently marijuana in the car, but there was marijuana in the car “probably like a week ago” (Ex. 1 at 3:20-3:50). Jackson was detained in a police vehicle and Szybowski searched the car for contraband, seizing the loose pills and searching the remainder of the passenger compartment (Tr. Vol. II 13-14; Ex. 1 at 5:25-6:30, 9:45-10:15). When Szybowski moved to the trunk to search it, “[Jackson] was banging on the window [and] was real nervous” (Ex. 1 at 17:40-17:45). Szybowski’s observations, which were supported by his training and experience and Jackson’s suspicious answers and actions, provided probable cause for Szybowski to believe there was additional drug-related contraband in Jackson’s car, triggering the automobile exception to the warrant requirement.

Jackson incorrectly frames the search of his car as a search for “burnt marijuana” (Appellant’s Br. 8). But any burnt marijuana was necessarily consumed when it was burned. When police conduct a search based on the odor of burnt

State of Indiana
Brief of Appellee

marijuana, they are searching for those things that logically accompany the odor of burnt marijuana, including paraphernalia and unconsumed marijuana. *See Johnson*, 333 U.S. at 13 (probable cause to search existed based on the odor of burnt opium); *Edmond v. State*, 951 N.E.2d 585, 588 n.3 (Ind. Ct. App. 2011) (“Even if the marijuana was smoked at some time in the past, it is not uncommon for officers to find marijuana residue or the ends of marijuana cigarettes after detecting the odor of burnt marijuana,” and “the odor of burnt marijuana is indicative that marijuana may yet be present in a car”). The reasonable inference is that the odor of burnt marijuana means that other drug-related contraband is nearby. *See Bell v. State*, 13 N.E.3d 543, 546 (Ind. Ct. App. 2014) (the odor of burnt marijuana provides probable cause that the person possesses marijuana).

Jackson’s argument that the trunk was outside the scope of the search rests on a faulty premise that all drug users keep all their drugs within arm’s reach as well as the unfounded premise that no drug user would ever use drugs in the trunk of their car (Appellant’s Br. 8-10). *See California v. Carney*, 471 U.S. 386, 391-92 (1985) (the automobile exception has allowed searches of “a locked car trunk, a sealed package in a car trunk, a closed compartment under the dashboard, the interior of a vehicle’s upholstery, [and] sealed packages inside a covered pickup truck”) (internal citations omitted); *State v. Hawkins*, 766 N.E.2d 749, 752 (Ind. Ct. App. 2002) (“[W]e have no hesitation in deciding that when a trained and experienced police officer detects the strong and distinctive odor of burnt marijuana coming from a vehicle, the officer has probable cause to search the vehicle. That is

State of Indiana
Brief of Appellee

true under both the Fourth Amendment of our federal constitution and under Article 1, Section 11 of the Indiana Constitution.”). To the extent that Tenth Circuit case law supports his argument regarding usage and the scope of the search, it has recently been described as anomalous, and appears inconsistent within the Tenth Circuit. *See United States v. Kizart*, 967 F.3d 693, 698-99 n.2 (7th Cir. 2020). This Court should reject Jackson’s faulty and unfounded premises, and instead continue to follow the logical reasoning that burnt marijuana provides probable cause to search for additional drug-related contraband. *See K.K. v. State*, 40 N.E.3d 488 (Ind. Ct. App. 2015) (odor of burnt marijuana provided probable cause to search vehicle and occupants); *Sebastian v. State*, 726 N.E.2d 827 (Ind. Ct. App. 2000) (odor of burnt marijuana provided probable cause to search vehicle).

To the extent Jackson argues that police need probable cause plus something else according to *Kizart* to search his trunk, his argument is not supported by the evidence (Appellant’s Br. 9-10). *See Kizart*, 967 F.3d 693. In *Kizart*, the Seventh Circuit noted that Kizart’s behavior changed when police finished searching the passenger compartment of his vehicle and moved to the trunk, and included this behavioral change as part of the totality of the circumstances. *Kizart*, 967 F.3d at 697-99. Jackson’s case is similar, but his argument omits that “he was banging on the window [and] was real nervous when [Szybowski] [was] going in the trunk” (Appellant’s Br. 9-10; Ex. 1 at 17:40-17:45). Police had probable cause to conduct a warrantless search of Jackson’s car based on the totality of the circumstances, and this Court should affirm.

B. The search did not violate Article 1, Section 11.

The search of Jackson's car was reasonable under Article 1, Section 11. The legality of a search under the Indiana Constitution is determined by evaluating "the reasonableness of the police conduct under the totality of the circumstances."

Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005). "Reasonableness of a search depends 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." *Holloway v. State*, 69 N.E.3d 924, 931 (Ind. Ct. App. 2017) (citing *Litchfield*, 824 N.E.2d at 361).

The degree of concern, suspicion, or knowledge that a violation had occurred was high. At 2:40 a.m. in a parking lot that was known for drug-related activity, Jackson "looked like a deer in headlights," and Szybowski immediately smelled the odor of marijuana when Jackson opened his car door (Tr. Vol. II 9-10; Ex. 1 at 6:45-7:15). And an odor of marijuana gives police officers probable cause to search. See *Bunnell*, 172 N.E.3d at 1234; *Meek*, 950 N.E.2d 816; *Marcum*, 843 N.E.2d 546; *Hawkins*, 766 N.E.2d at 752. Probable cause that Jackson or his car contained marijuana was established, which gave Szybowski had a high degree of concern, suspicion, or knowledge that a crime had occurred.

The interior search of Jackson's car did impose a degree of intrusion into his ordinary activities. See *Harbaugh v. State*, 96 N.E.3d 102, 107 (Ind. Ct. App. 2018). But the degree of these intrusions was low. Szybowski informed Jackson of the

State of Indiana
Brief of Appellee

reason he approached and asked him for his driver's license, a routine procedure (Tr. Vol. II 12-13; Ex. 1 at 1:00-3:45). *See Marshall v. State*, 117 N.E.3d 1254, 1262 (Ind. 2019) (routine traffic stop procedure was reasonable). And Szybowski imposed no additional intrusion when he smelled marijuana after Jackson opened the door (Tr. Vol. II 12; Ex. 1 at 1:00-1:30). Once probable cause to search was established, the degree of intrusion of the search itself remained low because the officers merely searched the passenger compartment and trunk, areas easily accessible without tools (Tr. Vol. II 13-15; Ex. 1 at 9:35-17:00). And Jackson's detention in handcuffs while police searched his vehicle was reasonable because officers knew he had a prior conviction for carjacking, a violent offense (Tr. Vol. II 15; Ex. 1 at 4:00-4:35, 6:00, 6:45-7:15).

Finally, the degree of law enforcement needs was high. When Szybowski immediately smelled marijuana consistent with drug-related activity, he had a compelling need to further investigate Jackson's car for narcotics because drugs are highly fungible, a vehicle is inherently mobile, and the evidence needed to be secured. *See Austin v. State*, 997 N.E.2d 1027, 1036-37 (Ind. 2013) (law enforcement needs are high when attempting to apprehend drug traffickers); *State v. Hobbs*, 933 N.E.2d 1281, 1287 (Ind. 2010) ("the same considerations underlying the federal automobile exception support permitting the officers to secure the evidence without delay"); *Harbaugh*, 96 N.E.3d at 102 (law enforcement need was high because driver could abscond with the vehicle). So, the balance of factors strongly weighed in favor of a search, and the police conduct during the search was reasonable.

State of Indiana
Brief of Appellee

Police lawfully searched Jackson’s car under both the federal and Indiana constitutions, and his motion to suppress was accordingly denied. This Court should affirm and remand for this case to proceed to trial.

CONCLUSION

This Court should affirm the trial court.

Respectfully submitted,

THEODORE E. ROKITA
Indiana Attorney General
Attorney No. 18857-49

By: /s/ Robert M. Yoke
Robert M. Yoke
Deputy Attorney General
Attorney No. 28141-49

Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on February 13, 2023, the foregoing document was electronically filed and served on the appellant at the address below using the Indiana E-filing System (“IEFS”).

Denise L. Turner

/s/ Robert M. Yoke
Robert M. Yoke
Deputy Attorney General

OFFICE OF THE INDIANA ATTORNEY
GENERAL TODD ROKITA
Indiana Government Center South
302 W. Washington Street, Fifth Floor
Indianapolis, Indiana 46204-2770
Tel: (317) 233-3059
robert.yoke@atg.in.gov