**NONPRECEDENTIAL DISPOSITION**
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# United States Court of Appeals

**For the Seventh Circuit**
**Chicago, Illinois 60604**

Submitted February 26, 2024
Decided February 27, 2024

**Before**

DIANE S. SYKES, *Chief Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 22-2554

UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

*v*.

JULIUS JOHNSON,
*Defendant-Appellant*.

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

No. 1:19-cr-00214-TWP-TAB

Tanya Walton Pratt,
*Chief Judge*.

**O R D E R**

Julius Johnson pleaded guilty to trafficking fentanyl and unlawfully possessing a firearm. He reserved his right to appeal the denial of two motions to suppress evidence and a motion to compel the disclosure of a confidential source's identity; otherwise, he waived his appellate rights. The district judge sentenced him to 120 months' imprisonment and 4 years of supervised release.

Johnson appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738, 744 (1967). Johnson

responded to the motion, proposing issues to raise on appeal. CIR. R. 51(b). Counsel's brief explains the nature of the case and addresses the issues that we would expect an appeal like this to involve. Because counsel's analysis appears thorough, we limit our review to the subjects that counsel and Johnson discuss. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

In 2018, a task force composed of agents with the federal Drug Enforcement Administration and officers from the Indianapolis Metropolitan Police Department began investigating Johnson for suspected distribution of fentanyl. A cooperating source (CS-1) confirmed that Johnson was trafficking fentanyl and then worked with task force officers to conduct two controlled buys of fentanyl from Johnson. Shortly thereafter, CS-1 lost contact with Johnson, and the investigation stalled. In early 2019, another cooperating source (CS-2) informed officers that the source and Johnson had recently visited a storage facility together, and Johnson unlocked a unit labeled "Unit #212." Agent Clinton Jones investigated the storage facility and learned that Johnson had accessed Unit 212 almost 50 times in the span of 3 months.

On June 6, 2019, Agent Jones visited the storage facility and received consent from the manager for a K-9 unit to conduct a sniff of the area around Unit 212. The dog examined roughly six storage units and indicated the presence of narcotics outside of Unit 212. The next day, Jones obtained a federal search warrant for that unit. In support of the warrant application, Jones submitted an affidavit that described the two controlled buys executed by CS-1 in addition to CS-2's visit to Unit 212 with Johnson, Johnson's frequent access of the unit, and the canine indication for narcotics outside the unit. Jones also attested that CS-1 and CS-2 had provided reliable information that he independently corroborated. After the search warrant was issued, Jones called the manager of the storage facility and asked her to temporarily disable access to the unit.

Later that day, Johnson arrived at the storage facility accompanied by a tow truck, driven by Johnson's acquaintance, that was transporting his Oldsmobile to the unit. When Johnson could not access Unit 212, he drove the Oldsmobile to the office to speak with the manager, who tipped off Agent Jones. Officers then arrived at the scene, and a local officer, Matthew McDonald, arrested Johnson without a warrant, believing (incorrectly) that there were pending state charges against Johnson associated with the controlled buys in 2018. McDonald patted Johnson down, removing cash and two cell phones from his pockets.

The officers took Johnson to Unit 212. They read him his *Miranda* rights and explained the search warrant before opening the unit. A Buick Wildcat was parked

inside. The trunk of the Wildcat was locked, and so Agent Jones asked Johnson for the keys to avoid forced entry. Johnson responded that the keys were in the Oldsmobile and consented to the officers retrieving the keys. Inside the Oldsmobile, McDonald found a set of keys partially under an armrest, lifted the armrest to retrieve the keys, and observed a firearm protruding from the fabric of the armrest. The K-9 unit then conducted an open-air sniff and identified the presence of controlled substances on the driver and passenger sides of the Oldsmobile. Officers fully searched the Oldsmobile and retrieved the handgun from the armrest of the vehicle. The officers did not find drugs in the Oldsmobile, Unit 212, or the Wildcat.

Agent Jones instructed Officer McDonald to search Johnson more thoroughly before he was transported to jail. While frisking Johnson's upper thighs, McDonald felt a foreign object in Johnson's crotch area. McDonald moved Johnson inside Unit 212, pulled down his pants, and reached into the flap of Johnson's underwear, where he found a clear plastic bag of a rock-like substance. McDonald had to briefly manipulate Johnson's genitals to retrieve the bag, which contained a substance later confirmed to be fentanyl. Other officers were present in Unit 212 during the search. Additionally, the tow-truck driver briefly approached the unit; the Wildcat largely obstructed his view, but he saw the upper part of Johnson's buttocks.

Johnson was charged with possession with the intent to distribute fentanyl, 21 U.S.C. § 841(a)(1), (b)(1)(B); carrying a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1); and possession of a firearm as a felon, 18 U.S.C. § 922(g)(1). He pleaded not guilty and filed a motion to compel the identity of CS-1. He argued that he could not raise an effective Fourth Amendment challenge to his warrantless arrest and the resulting search of his person without being able to argue that CS-1 did not have credible information establishing probable cause.

The district judge denied the motion to compel. She concluded that the identity of CS-1 was not essential to Johnson's defense because the offenses charged were not based on Johnson's sales to CS-1 but were instead based on contraband found in his car and on his person months later. Further, the probable cause supporting the federal search warrant and Johnson's arrest included the controlled buys but did not depend on information that came from CS-1.

Johnson next filed a motion to suppress the firearm and fentanyl, arguing that the searches of the Oldsmobile and of his person were unlawful. He conceded that he had given officers consent to search the Oldsmobile but contended that his consent was invalid because he was unlawfully under arrest at the time. In denying this suppression

motion, the judge explained that Johnson's warrantless arrest was lawful because, irrespective of anything that occurred at the storage facility, probable cause to arrest already existed based on the controlled buys. The judge also concluded that Johnson gave valid consent for the officers to obtain keys from the Oldsmobile, where they lawfully recovered a gun in plain view. Even if the consent was invalid, suppression was unwarranted because the doctrines of inevitable discovery or good faith applied.

As the case progressed, Johnson filed a second motion to suppress (with the assistance of new counsel). He contended that (1) the search warrant was impermissibly based on stale and unreliable information; (2) the search of the Oldsmobile was unlawful because the officers manipulated the armrest to discover the gun (exceeding the scope of consent), and the canine sniff of the Oldsmobile exceeded the scope of an open-air search; and (3) video surveillance showed that the search of his person was excessive and invasive. The district judge allowed the second motion, held an evidentiary hearing, and heard testimony from Jones, McDonald, the officer paired with the canine, the tow-truck driver, and staff from the storage facility.

After the hearing, the judge denied the second motion to suppress. First, the judge concluded that the federal search warrant was supported by probable cause based on the information about the controlled buys (which was not stale), Johnson's frequent access to the storage unit, and the canine sniff outside the unit. And officers had independently verified the information provided by CS-1 and CS-2, so their reliability was not at issue. Next, the judge concluded that the search of the Oldsmobile was lawful because Johnson granted the officers permission to retrieve keys from the Oldsmobile—a fact he had conceded in his first motion—and there was no evidence of force, threat, or coercion. Therefore, the handgun seen in plain view inside the car did not need to be suppressed. Last, the judge determined that the partial strip search of Johnson was reasonable after the officers perceived a concealed foreign object during a lawful search.

Shortly before his trial date, Johnson pleaded guilty to all charges. In the written plea agreement, the parties agreed that Johnson could appeal the rulings on the motion to compel and motions to suppress, but Johnson explicitly waived his right to appeal his conviction and sentence on any other grounds.

The presentence investigation report (PSR) calculated a base offense level of 24 for Count 1 (possession with intent to distribute), based on the amount of fentanyl recovered. U.S.S.G. § 2D1.1(c)(8). The PSR then calculated a base offense level of 20 for Count 3 (possession of a firearm as a felon), *id*. § 2K2.1(a)(4), before grouping Counts 1

and 3 for a combined offense level of 24. *Id.* § 3D1.4. After a two-level reduction for acceptance of responsibility, *id.* § 3E1.1, the total offense level was 22. Combined with a criminal history category of II, this yielded a guidelines range of 46 to 57 months' imprisonment, *id.* § 5A, raised to the statutory minimum of 60 months, 21 U.S.C. § 841(b)(1)(B). The statutory minimum and guidelines sentence for Count 2 (possession of a firearm in furtherance of drug trafficking) was 60 months of imprisonment, consecutive to any other sentence imposed. *See* 18 U.S.C. § 924(c)(1)(A)(i); U.S.S.G. § 2K2.4. At the sentencing hearing, the judge imposed the mandatory minimum prison sentence of 120 months, and Johnson appeals.

In support of the motion to withdraw, counsel begins by assessing whether there is a nonfrivolous basis to withdraw Johnson's guilty plea because the scope of Johnson's appeal depends on whether the waiver of almost all appellate issues is valid. We agree with counsel that any challenge to the plea would be frivolous. Johnson did not move to withdraw his plea in the district court, so our review would be for plain error. *United States v. Davenport*, 719 F.3d 616, 618 (7th Cir. 2013). And review of the plea colloquy shows that the judge substantially complied with Rule 11 of the Federal Rules of Criminal Procedure. The judge explained, and confirmed that Johnson understood, the nature of the charges and potential penalties, his right to plead not guilty and the consequences of pleading guilty, his trial rights, and the sentencing process. FED. R. CRIM. P. 11(b). Johnson confirmed that he was not coerced or promised anything in exchange for his plea, and these sworn statements are presumed true. *See United States v. Smith*, 989 F.3d 575, 582 (7th Cir. 2021). The judge also confirmed that an adequate factual basis existed to support the plea. Thus, counsel properly concludes that there is no error, plain or otherwise, justifying withdrawal of the guilty plea. *United States v. Neal*, 907 F.3d 511, 515 (7th Cir. 2018).

Accordingly, counsel is also correct to conclude that the waiver of Johnson's appeal rights is enforceable. An appellate waiver stands or falls with the plea agreement of which it is part. *See United States v. Nulf*, 978 F.3d 504, 506 (7th Cir. 2020). And no exception to the enforceability of the waiver applies because Johnson's 120-month sentence does not exceed the statutory maximums, 18 U.S.C. § 924(a)(8), (c); 21 U.S.C. § 841(b)(1)(B), and the judge did not consider any constitutionally impermissible factor at sentencing, *Nulf*, 978 F.3d at 506. Counsel thus rightly concludes that it would be frivolous to raise on appeal any argument not specifically carved out from the waiver. This includes all potential sentencing challenges.

With respect to the issues that fall outside the appeal waiver, counsel also concludes that Johnson has no nonfrivolous arguments to raise. We agree.

First, counsel properly determines that there is no basis on which to challenge the denial of Johnson's motion to compel the identity of CS-1. We would review the district judge's denial of the motion to compel for an abuse of discretion and would affirm so long as any reasonable person would agree that CS-1's identity was not "'relevant and helpful' to [Johnson's] defense or 'essential to a fair determination of a cause.'" *United States v. Jefferson*, 252 F.3d 937, 940–41 (7th Cir. 2001) (quoting *Roviaro v. United States*, 353 U.S. 53, 60–61 (1957)). As the district judge pointed out, Johnson's drug charge was based on the fentanyl hidden on his person when he was arrested, and so the credibility of CS-1's information at the beginning of the investigation would not be relevant to a defense. The judge reasonably decided to protect the flow of information to law enforcement. *See id.* at 941–42.

Johnson responds that, had he known who CS-1 was, he could have discredited the information CS-1 provided and thus shown that there was no probable cause to support the search warrant. But the judge highlighted that the search warrant did not rely only on CS-1's information, explaining that probable cause was otherwise supplied by CS-2's trip to the storage unit with Johnson, the fact that Johnson accessed the unit almost 50 times in a short period, and the canine indication of controlled substances outside of the unit. Therefore, even without CS-1's involvement, there was probable cause to grant the search warrant, and the identity of CS-1 was inconsequential. *See United States v. Haynes*, 882 F.3d 662, 665 (7th Cir. 2018). Counsel thus rightly concludes that it would be frivolous to argue that denying Johnson's motion to disclose the identity of CS-1 was an abuse of discretion. *See Jefferson*, 252 F.3d at 941–42.

Counsel also properly determines that the judge did not err in denying Johnson's motions to suppress evidence, namely, the gun and the fentanyl. We would review the legal conclusions of the district judge de novo and her factual findings for clear error. *United States v. Fifer*, 863 F.3d 759, 764 (7th Cir. 2017). As counsel states, it would be futile to argue that Johnson's arrest was unlawful. A warrantless arrest is lawful if there is probable cause to believe a crime was committed. *United States v. Haldorson*, 941 F.3d 284, 290 (7th Cir. 2019). First, no matter what occurred at the storage facility, the prior investigation, including the controlled buys, had established probable cause to arrest Johnson. *See id.* at 291–92. Second, when officers encountered Johnson at the storage facility, they knew that Johnson was trying to access a unit he frequently visited, where a canine indicated the presence of narcotics the day before. Based on the totality of the

circumstances, it was reasonable for the officers to arrest Johnson on sight. *See United States v. Price*, 888 F.2d 1206, 1209 (7th Cir. 1989).

Johnson reiterates on appeal that the controlled buys could not provide probable cause because they occurred months before his arrest. But counsel correctly explains that that "staleness" of a controlled buy is rarely relevant to the legality of a warrantless arrest. *Haldorson*, 941 F.3d at 292. When, as here, there are no subsequent developments that disprove or discredit the initial controlled buys, and further investigation reveals more illegal conduct, we would not find the arrest unlawful. *Id.* at 292–93.

Counsel is also correct that there is no nonfrivolous argument that entering the Oldsmobile, where the gun was in plain view, violated Johnson's Fourth Amendment rights. Nothing suggests the judge clearly erred in finding that Johnson authorized an officer to obtain the keys to the Wildcat from his Oldsmobile. The finding is supported by testimony and Johnson's first suppression motion. Johnson responds that his initial attorney, without his authorization, wrongly conceded his consent, but Johnson is bound by the acts and statements of his lawyer. *See Lombardo v. United States*, 860 F.3d 547, 552 (7th Cir. 2017). Regardless, we would defer to the judge's determination that Officer McDonald's unrebutted testimony was credible. *See Haldorson*, 941 F.3d at 290.

Finally, counsel considers whether Johnson can argue that the search of his person violated his Fourth Amendment rights because it was too invasive. We agree with counsel that there is no nonfrivolous challenge to the constitutionality of his search. Officers have a "broad scope of authority" to search a person incident to arrest, including the authority to conduct a strip search when there is a reasonable suspicion that the arrestee is concealing contraband. *Campbell v. Miller*, 499 F.3d 711, 716–18 (7th Cir. 2007) (citing *United States v. Robinson*, 414 U.S. 218, 234–35 (1973)). Here, the judge rightly determined it was reasonable for the officers to believe Johnson was concealing contraband because, among other things, Johnson was the subject of a longstanding investigation for fentanyl distribution, and McDonald felt a foreign object while searching Johnson's waistband and crotch.

Johnson asserts that the strip search was nevertheless unreasonable because it was conducted in a "public" place with civilians and officers. But the judge credited McDonald's testimony, which described it as a partial strip search occurring in a "shielded location." Nothing in the record suggests that the judge's conclusions were clearly erroneous, and a partial strip search, based on reasonable suspicion of contraband and conducted with some privacy, does not violate the Fourth Amendment.

*See generally Kaniff v. United States*, 351 F.3d 780 (7th Cir. 2003). Counsel thus properly concludes that challenging the search as unreasonably invasive would be frivolous.

Therefore, we GRANT counsel's motion to withdraw and DISMISS the appeal.