

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v  
THANH MANH NGUYEN,  
Defendant-Appellant.

FOR PUBLICATION  
June 24, 2014  
9:15 a.m.  
No. 312319  
Oakland Circuit Court  
LC No. 2012-241303-FH

Before: O'CONNELL, P.J., and WILDER and METER, JJ.

WILDER, J.

Defendant appeals by leave granted<sup>1</sup> the guilty plea convictions of possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(iii), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession of ecstasy, MCL 333.7403(2)(b)(i), manufacturing 5 to 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii), felon in possession of a firearm, MCL 750.224f, possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), possession of less than 25 grams of oxycodone, MCL 333.7403(2)(a)(v), fraudulent use of a public utility over \$500, MCL 750.282, possession of dihydrocodeine, MCL 333.7403(2)(b)(ii), possession of psilocin, MCL 333.7403(2)(c), and seven counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 11 to 30 years' imprisonment for the possession with intent to deliver 50 to 449 grams of cocaine, possession with intent to deliver less than 50 grams of cocaine, possession of ecstasy, manufacturing 5 to 45 kilograms of marijuana, and felon in possession of a firearm convictions, 11 to 15 years' imprisonment for the possession with intent to deliver marijuana, possession of less than 25 grams of oxycodone, fraudulent use of a public utility over \$500, and possession of dihydrocodeine convictions, 2 days' imprisonment for possession of psilocin, and two years' imprisonment for each of the seven counts of felony-firearm. We affirm.

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<sup>1</sup> *People v Nguyen*, unpublished order of the Court of Appeals, entered November 21, 2012 (Docket No. 312319).

## I

This appeal arises from a traffic stop of defendant's vehicle on September 7, 2010, in the city of Troy. The record establishes that a confidential informant (CI), who was working with Immigration Custom Enforcement (ICE), had agreed to purchase a large quantity of cocaine from defendant in the city of Troy. With prior knowledge of the CI's agreement, the Troy police stopped defendant's vehicle, asked defendant to exit the vehicle, and thereafter performed a pat-down search for weapons and a consensual vehicle search. Officer Neil Piltz searched the driver's compartment, underneath the seat, the top of the seats, and behind the driver's seat. Officer Piltz then talked to defendant while another officer conducted a canine search. No drugs were located in the vehicle during this initial search.

Throughout his conversation with Officer Piltz, defendant had his hands in his pants pockets. Officer Piltz testified at the preliminary examination that when defendant removed his hands from his pockets, he noticed a bulge in defendant's right pants pocket —bigger than a golf ball—where it had been smooth during the initial pat-down. Officer Piltz felt the bulge and asked defendant what it was while he began to check inside defendant's pocket. Defendant then put his hands together in front of his body and told the officer that he should arrest him. Officer Piltz asked defendant why, to which defendant responded, "for what you're going to find in my pocket." Officer Piltz pulled out a felt bag and before he could look inside, defendant stated that it was cocaine. Officer Piltz then arrested defendant.

Approximately 20 minutes lapsed from the time defendant was pulled over to the time Officer Piltz found the cocaine and arrested defendant. Later and contemporaneous with his arrest, defendant waived his *Miranda*<sup>2</sup> rights and admitted to the operation of an illegal marijuana grow operation in his home and the possession of firearms and other illicit controlled substances. The Troy police relied on defendant's statements and the cocaine found at the time of the arrest to obtain a search warrant for his home. When the search warrant was executed at defendant's home, various illegal drugs, firearms, and other contraband were recovered.

## II

Defendant was charged with 17 counts in total. Count I (possession with intent to deliver 50 to 449 grams of cocaine) was based on the recovery of cocaine from defendant's pocket at the time of the arrest, and Counts II through XVII related to the drugs, weapons, and contraband found in his home. The district court began a preliminary examination and heard testimony and argument on four separate hearing dates, May 10, 2011, July 12, 2011, August 16, 2011, and October 11, 2011. At the May 10, 2011 hearing, Officer Piltz and Sergeant Scott Salter of the Troy Police Department testified regarding the events that occurred leading up to the arrest. After both officers testified, defense counsel moved for the suppression of the cocaine found in defendant's pocket on the basis that the search was illegal. The district court ruled that the statements made by defendant to Officer Piltz, that he had cocaine in his pocket, were

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<sup>2</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

inadmissible because the officer violated defendant's *Miranda* rights. The district court also ruled that the police lacked probable cause for the arrest based on a lack of testimony regarding what they knew about the CI and whether the information was reliable. In connection with its probable cause ruling, the district court stated, "It seemed quite obvious to me from the tape that both officers believed that they had come up empty and that there was nothing to arrest the defendant for until he sees the bulge, goes in and takes it." Following this ruling, upon the prosecution's request, the district court set aside its finding that the police lacked probable cause, and permitted the prosecution to reopen proofs in order to present testimony from ICE agents whether the police had probable cause for the arrest.

At the July 12, 2011 hearing, ICE agents Brian Helmerson and Julia Harris testified regarding the information they received from the CI and the surveillance conducted on defendant. Agent Helmerson testified that the person who entered into the agreement to buy a large quantity of cocaine from defendant had been used previously as a CI in three ICE investigations. On the prior occasions, the CI had identified individuals involved in narcotics trafficking and then arranged meetings to conduct controlled substance transactions. According to Agent Helmerson, the CI's information resulted in the seizure of controlled substances, seven arrests, and five convictions.

Two weeks before defendant's arrest, Agent Helmerson contacted Sergeant Salter at the Troy Police Department, and informed him of the CI's agreement to buy cocaine from defendant in the city of Troy. Agent Helmerson informed Sergeant Salter that the information was from a reliable and credible source.

Throughout the day leading up to defendant's arrest, ICE agents heard the CI on the phone with defendant, who allegedly told the CI he was going to retrieve the cocaine after work and deliver it to the CI in the city of Troy. A surveillance team then observed defendant leave his work location and approach a house in a southwest Detroit location considered to be in a high intensity drug trafficking area. After defendant had arrived in Southwest Detroit, the CI received a communication from defendant that he was in possession of the cocaine. Defendant then drove in a direction consistent with his driving toward the specific Troy location at which defendant and the CI agreed to meet.

When defendant was observed driving toward the city of Troy, Agent Helmerson contacted Sergeant Salter to turn over surveillance of defendant to the Troy Police Department. Agent Helmerson gave Sergeant Salter a specific time defendant's vehicle would enter the city as well as a photograph of defendant. Sergeant Salter, observing a vehicle matching the description and license plate number of defendant's vehicle, which was also moving in the direction that Sergeant Salter was told defendant's vehicle would be traveling, relayed this information to Officer Piltz, who also saw defendant's vehicle traveling in that specific direction. Officer Piltz then conducted the traffic stop.<sup>3</sup>

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<sup>3</sup> Officer Piltz had previously testified during the May 10, 2011 hearing that he stopped defendant's vehicle and used the PA system to instruct defendant to turn onto the next side street.

At the conclusion of the July 12, 2011 hearing defendant filed a motion to suppress the cocaine found in his pocket, claiming it was the fruit of an unlawful search. Defendant also moved to suppress his statements made to the police after the arrest as fruits of an unlawful arrest. At the August 16, 2011 hearing on the motion to suppress, the district court found:

The defendant's stop was reasonable. His frisk was reasonable under Terry.<sup>4</sup> The search of his car was reasonable because I think at the moment he was stopped, based on the case law and the, the previous use of the informant and the informant having information that the defendant had the cocaine on his person.

At the moment of the stop I agree with the prosecution that they didn't need his consent to, to search the car. That they could have arrested him for probable cause for being in possession of narcotics with intent to distribute. And search the car and have searched him.

Further, the district court articulated that, because the police found no contraband after they frisked defendant and searched his vehicle, a reasonable person would not have concluded that the confidential informant was correct. The district court held:

[E]verything that occurred post this stop and before the moment of the second search, which in my opinion the search –the going into the pants was definitely a search. It was not Terry. It was without a warrant. And the probable cause had absolutely dissipated by the time he went into the pants before the second search.

The district court suppressed the cocaine found in defendant's pocket on the basis that the police had no probable cause for the arrest, and it dismissed Count I (possession with intent to deliver 50 to 449 grams of cocaine).

At the October 11, 2011 hearing, the district court heard testimony focused on the remaining counts in order to determine whether defendant's statements to the police after he was arrested were fruits of an unlawful arrest. At this hearing Officer Scott Lamilza testified that he used defendant's statements from the interview following his arrest to obtain the search warrant for defendant's home. Based on this testimony, the district court suppressed defendant's statements as fruits of an unlawful arrest. The district court concluded that, absent evidence of the cocaine recovered from defendant's pocket and his statements, the search warrant for defendant's home was lacking in probable cause. Accordingly, the district court dismissed the remaining Counts II through XVII.

The prosecution appealed the ruling to the circuit court. The circuit court concluded that, based on the totality of the circumstances, "the information provided by the informant was sufficiently corroborated and supplemented by ICE Agents' and Troy Officers' investigation to Defendant did not stop at the next roadway, as instructed, but continued driving for about 500 feet and, at the same time, moved in the driver's seat as if he was "hiding something or moving something within the car."

<sup>4</sup> *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) (footnote added).

warrant a finding of probable cause or a ‘fair probability that contraband or evidence of a crime will be found in a particular place.’” The circuit court further found that probable cause did not dissipate as a result of Officer Piltz’s failure to find cocaine during the pat-down and vehicle search, and the police officer’s failure to find the cocaine during the pat-down and vehicle search were not contrary facts supporting the dissipation of probable cause, but rather, these facts are supportive of the notion that cocaine must be on defendant’s person. The circuit court also concluded that it did not matter whether the police searched defendant before or after the lawful arrest. The circuit court reversed the district court’s suppression of the cocaine and dismissal of Count I. Further, the circuit court ruled that, because defendant’s arrest was legal, the fruit of the poisonous tree doctrine did not apply to defendant’s statements made to the police while in custody, and remanded to the district court for further proceedings.

On July 12, 2012, defendant tendered a conditional plea of guilty to all 17 counts. Defendant preserved his right to challenge the circuit court’s ruling.

### III

On appeal, defendant contends that the circuit court erred by ruling that probable cause to arrest him existed at the time of the search, and even if probable cause did exist, it dissipated after the unsuccessful pat-down and vehicle search. Further, defendant contends that because he was not arrested before the search and the police only arrested him after unlawfully recovering cocaine from his person, the search does not fall within the search incident to arrest exception. We disagree.

#### A

This Court reviews a trial court’s factual findings in a suppression hearing for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005), but “the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court’s ultimate ruling on the motion to suppress.” *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

#### B

Both the United States and Michigan Constitutions protect persons against unreasonable searches and seizures. US Const, Am VI; Const 1963, art 1, § 11; *People v Bolduc*, 263 Mich App 430, 437; 688 NW2d 316 (2004). “The lawfulness of a search or seizure depends on its reasonableness.” *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). A custodial arrest based upon probable cause is not an unreasonable intrusion under the Fourth Amendment. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). An arresting officer, or collectively the officers involved in an investigation (“the police team” approach), must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant has committed it. MCL 764.15; see *People v Dixon*, 392 Mich 691, 696-698; 222 NW2d 749 (1974), abrogated in part on other grounds *People v Hawkins*, 468 Mich

488; 668 NW2d 602 (2003); *People v Mackey*, 121 Mich App 748, 753-754; 329 NW2d 476 (1982); *United States v Perkins*, 994 F2d 1184 (CA 6, 1993).<sup>5</sup> In reviewing a claim that police lacked probable cause to arrest, this Court must determine “whether facts available . . . at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony.” *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983). “Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity.” *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124, 129 (1998). “Circumstantial evidence, coupled with those inferences arising therefrom, is sufficient to establish probable cause.” *People v Northey*, 231 Mich App 568, 575; 591 NW2d 227 (1998).

Our Supreme Court, in *People v Levine*, 461 Mich 172, 183; 600 NW2d 622 (1999), recognized that Michigan case law is consistent with federal precedent regarding the existence of probable cause on the basis of informant tips. The existence of probable cause is determined by the totality of the circumstances. *Id.* at 184, citing *Illinois v Gates*, 462 US 213, 230-231; 103 S Ct 2317; 76 L Ed 2d 527 (1983). In making a warrantless arrest, an officer “may rely upon information received through an informant, rather than upon his direct observations, so long as the informant’s statement is reasonably corroborated by other matters within the officer’s knowledge.” *Gates*, 462 US at 242, quoting *Jones v United States*, 362 US 257, 269; 80 S Ct 725; 4 L Ed 2d 697 (1960), overruled on other grounds *United States v Salvucci*, 448 US 83; 100 S Ct 2547; 65 L Ed 2d 619 (1980); see also *Levine*, 461 Mich at 182 (recognizing that an officer making an arrest without a warrant may rely on a tip, rather than direct observations, as long as the tip is reasonably corroborated by other matters within the officer’s knowledge). An informant’s “veracity,” “reliability,” and “basis of knowledge” are all highly relevant in determining the value of his report, and they can be used to determine whether probable cause exists. *Levine*, 461 Mich at 180, citing *Gates*, 462 US at 230.

## C

In the instant case, the testimony at the preliminary examination showed that the CI was credible and reliable. The CI had provided narcotics trafficking information and arranged controlled substances transactions in the past, resulting in seven arrests and five convictions. Accordingly, the information the CI provided about the arrangement to purchase cocaine from defendant was highly relevant to establishing probable cause that defendant possessed a large quantity of cocaine. *Levine*, 461 Mich at 180, citing *Gates*, 462 US at 230. Furthermore, not only was the information provided by the CI credible and reliable in the past, the information the CI provided about defendant was also reasonably corroborated by the observations of defendant made by both the ICE agents and the Troy police officers. As defendant allegedly reported to the CI by phone that he was going to retrieve the cocaine after work and deliver it to the CI in Troy, the surveillance team observed defendant drive from work, stop in a high intensity drug

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<sup>5</sup> Although judicial decisions from foreign jurisdictions are not binding, we find this Sixth Circuit opinion persuasive. *Hiner v Mojica*, 271 Mich App 604, 611-612; 722 NW2d 914 (2006).

trafficking neighborhood, and then drive toward the specific location defendant and the CI agreed to meet. In addition, the CI reported that defendant had confirmed possession of the cocaine before he began driving toward Troy. Given that the ICE agents and the Troy police officers reasonably corroborated the information provided by the CI, the police properly relied upon this information in making a warrantless arrest. *Gates*, 462 US at 242; see also *Levine*, 461 Mich at 182.

Based on the testimony provided by the ICE agents and the Troy police officers, probable cause to arrest defendant existed at the time defendant's vehicle was initially stopped by Officer Piltz. The collective information known by the ICE agents and the Troy police officers prior to defendant's arrest justified the belief by a fair-minded person of average intelligence that defendant had possession of a substantial amount of cocaine. At the time of defendant's arrest, the ICE agents and Troy police were aware that defendant and the CI had engaged in communications and negotiations culminating in the CI's agreement to purchase a large quantity of cocaine from defendant at a specific location in Troy. The ICE agents corroborated that defendant would leave his place of business and obtain the cocaine when they observed defendant leave his work and go to a high drug trafficking area in southwest Detroit. The ICE agents further corroborated that defendant was going to drive to Troy to sell the cocaine he had obtained, when defendant communicated with the CI that he had the cocaine in his possession, and they observed defendant driving toward Troy. This information was relayed to the Troy police who had a photograph of defendant, a description of his vehicle and license plate number, and the direction in which defendant would be heading. The Troy police observed the vehicle that matched the description and license plate number heading in the direction indicated by the ICE agent. Furthermore, when Officer Piltz activated his emergency lights to initiate the traffic stop, defendant failed to follow the officer's instructions to pull off on to the next side road. Instead, he continued traveling for another 500 feet and Officer Piltz observed defendant moving around in the vehicle as though he was attempting to move or hide something. Because we recognize the collective knowledge approach allowing numerous law enforcement agents to possess different information that, in its totality, constitutes probable cause, the information possessed collectively by the ICE agents and the Troy police officers was sufficient for a fair-minded person of average intelligence to believe that defendant had committed or was committing a crime. *Dixon*, 392 Mich at 696-698; *Mackey*, 121 Mich App at 753-754; *Perkins*, 994 F2d 1184. Therefore, the police had probable cause to lawfully arrest defendant.

## D

Alternatively, defendant contends that, even if probable cause existed, it dissipated after the police performed a pat-down search for weapons and found no cocaine after searching his vehicle. Again, the district court's ruling that probable cause dissipated and the circuit court's holding that it did not are subject to de novo review. *Williams*, 472 Mich at 313. The district court relied upon our Supreme Court's decision in *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992). In *Russo*, the Court held:

Once established, probable cause to arrest, which is concerned with historical facts, is likely to continue indefinitely, absent the discovery of contrary facts. By contrast, it cannot be assumed that evidence of a crime will remain indefinitely in a given place. Thus, "staleness" is not a separate doctrine in probable cause to

search analysis. It is merely an aspect of the Fourth Amendment inquiry. [Id. at 605.]

Although the district court viewed the failure to find the cocaine during the initial pat-down for weapons and vehicle search as facts supporting the dissipation of probable cause, the circuit court held that these facts demonstrated it was more probable that the cocaine was on defendant's person. The evidence supports the circuit court's conclusion that probable cause did not dissipate. The ICE agents and police received information that defendant possessed a substantial amount of cocaine from a reliable and credible informant. Defendant failed to stop his vehicle as ordered by Officer Piltz, and while he continued to drive, defendant made evasive movements indicating he was moving or hiding something. The fact that cocaine was not found either during the pat-down search, which was geared toward searching for weapons, or the search of defendant's vehicle, did not lead to the dissipation of probable cause. Rather, given the credible and corroborated information from the CI that defendant possessed cocaine, that cocaine was not recovered during the pat-down search for weapons or the search of the vehicle, and that defendant may have disregarded the order to stop his vehicle to take time to hide the cocaine in his pocket, the circuit court did not err in finding that probable cause for the arrest continued to exist during the second search of defendant.

## E

Having found the arrest to be lawful, we hold that the search incident to that arrest, which revealed the cocaine in defendant's pocket, was also lawful. Generally, a search conducted without a warrant is unreasonable unless it was conducted pursuant to an established exception to the warrant requirement. *Beuschlein*, 245 Mich App at 749. A search incident to arrest is an exception to the warrant requirement, and may occur whenever there is probable cause to arrest. *People v LaBelle*, 478 Mich 891; 732 NW2d 114 (2007). There are two historical rationales for the "search incident to arrest" exception: "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles v Iowa*, 525 US 113, 116; 119 S Ct 484; 142 L Ed 2d 492 (1998).

Defendant contends that this was not a proper search incident to arrest because it occurred prior to the arrest. A search incident to arrest may still be valid if the arrest has not been made at the time the search is conducted, *LaBelle*, 478 Mich at 891, and follows "quickly on the heels" of the search, *Rawlings v Kentucky*, 448 US 98, 111; 100 S Ct 2556; 65 L Ed 2d 633 (1980). The search may occur immediately before the arrest, at the place of arrest, or at the place of detention, and may occur before the defendant is advised of his right to post bail. *Champion*, 452 Mich at 115-116; *People v Crawford*, 202 Mich App 537, 538-539; 509 NW2d 519 (1993). In the instant case, after defendant was pulled over, Officer Piltz performed a pat-down search for weapons and defendant consented to a vehicle search. After the police searched the vehicle, they searched defendant's person again and found cocaine in his pocket. Because a search incident to an arrest may occur whenever there is probable cause to arrest, even if the arrest has not been made at the time the search is conducted, the police were not required to arrest defendant prior to conducting the search incident to arrest. *LaBelle*, 478 Mich at 891. Given that the police had probable cause to arrest defendant, the fact that defendant was searched immediately prior to his arrest does not make the search incident to arrest invalid. Additionally,

because probable cause existed to arrest defendant, the need to preserve evidence for later use at trial still exists even though the search was conducted prior to the arrest.

## F

Defendant further asserts that no arrest was going to occur until after the police searched him the second time, and as a result, the search incident to arrest principles do not apply. In support of this argument, defendant asserts that the district court made factual findings that the officers did not believe they had probable cause to arrest defendant at the time of the search. At the May 10, 2011 hearing, before the district court reopened proofs for evidence from the ICE agents, the district court stated, “It seemed quite obvious to me from the tape that both officers believed that they had come up empty and that there was nothing to arrest the defendant for until he sees the bulge, goes in and takes it.” Regardless of the subjective beliefs of the police at the traffic stop, our Supreme Court has instructed that the probable cause inquiry is “objective.” *People v Cipriano*, 431 Mich 315, 342; 429 NW2d 781 (1988). The Court held:

An arresting officer’s subjective characterization of the circumstances surrounding an arrest does not determine its legality. Rather, probable cause to justify an arrest has always been examined under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved. [Id.]

Because the surrounding facts and circumstances were sufficient to warrant a prudent individual to believe that defendant committed an offense, the district court’s conclusion about the subjective belief of the police with regard to whether probable cause existed is not outcome-determinative here.

Defendant also contends that the stop was an investigatory stop, and the initial pat-down was a justified *Terry* pat-down; however, after the officers conducted a consensual search of his vehicle, the second pat-down was no longer justified under *Terry*, thus making it an illegal search. Despite defendant’s contention, this case does not rest upon “reasonable suspicion,” as is the case in *Terry v Ohio*, 392 US 1, 26-27; 88 S Ct 1868; 20 L Ed 2d 889 (1968) (holding that when the officer has reasonable suspicion that the individual stopped for questioning is armed and thus poses a danger to the officer, the officer may perform a limited pat-down search for weapon). While it is true that a police officer may perform a limited pat-down search for weapons if the officer has reasonable suspicion that the individual is armed, the police, in the present case, had probable cause to arrest defendant when they initiated the stop. *Id.* at 27. A *Terry* frisk must be justified by reasonable suspicion, while a search incident to arrest needs no justification, so long as the underlying arrest is supported by probable cause. *People v Eaton*, 241 Mich App 459, 463; 617 NW2d 363 (2000), citing *United States v Robinson*, 414 US 218, 235; 94 S Ct 467; 38 L Ed 2d 427 (1973). Because the police had probable cause to arrest defendant, the police did not need any additional justification to conduct the search incident to the arrest. The intervening pat-down search for weapons and consensual search of the vehicle did not negate the facts that probable cause existed at the time of the initial stop and the police could have arrested defendant at any point.

#### IV

For the foregoing reasons, we conclude that the circuit court did not err by reversing the district court's suppression of the cocaine. The police had probable cause to arrest defendant and the search incident to the lawful arrest was valid.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Peter D. O'Connell  
/s/ Patrick M. Meter