COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2016 CR 000067**
vs.	:	**Judge McBride**
SHELDON A. WHIPPLE	:	**DECISION/ENTRY**
Defendant	:	

Thomas W. Scovanner, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Daniel B. Startsman, III, assistant public defendant and counsel for Sheldon A. Whipple, 302 E. Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of the defendant Sheldon A. Whipple's motion to suppress which was filed on March 17, 2016. A hearing was held on the motion to suppress on April 7, 2016.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT

The defendant Sheldon A. Whipple was indicted on January 28, 2016 for one count of theft in violation of R.C. 2913.02(A)(1) and one count of aggravated possession of drugs in violation of R.C. 2925.11(A). These charges relate to events that occurred outside of a Meijer store on October 23, 2015.

Greg Johnson is a loss prevention specialist at the Meijer store in Miami Township, Clermont County. In his 31 years of experience in loss prevention, he has confronted more than one thousand shoplifters.

Between 11:30 and 11:45 am on October 23rd, Johnson was scanning the Meijer store for shoplifters on foot. While scanning the Men's Department, he saw the defendant select a belt from a rack, place it around his waist, and walk towards the exit without paying for it.

Johnson followed the defendant as he made his way through the store towards the exit, and he never lost sight of the defendant. As the defendant left the building, Johnson saw the defendant walk in the parking lot and stop to speak with another white male. As the defendant was leaving this area, Greg Johnson placed a call to dispatch.

Officer Matthew Davila is a patrol officer with the Miami Township Police Department. He was on duty on October 23rd and was driving near the Meijer parking lot at the time that Greg Johnson placed his call.

Officer Davila received a "theft in progress call" through dispatch. He then received an update that stated there was a white male with a green backpack who left Meijer and was stopped in the parking lot speaking to another male next to a cart corral.

Officer Davila spotted the defendant, who met the description provided in the dispatch, and he also saw Greg Johnson approach the defendant from about 20 feet away.

Officer Davila knew Greg Johnson, who had helped him with theft cases many times before. Officer Davila found Greg Johnson to be an extremely reliable source of information, based on his past experiences with him.

As Officer Davila approached the defendant, Greg Johnson physically pointed at the defendant. Officer Davila exited his cruiser and approached the defendant, who had a green backpack on his shoulder. Officer Davila then placed the defendant in handcuffs and read him his Miranda rights.

At that point, Greg Johnson was standing beside Officer Davila. Johnson stated that the defendant was the shoplifter described in the dispatch call that he still had a belt around his waist. Officer Davila lifted the defendant's shirt and saw the stolen belt from Meijer with the tags still on it. Officer Davila removed the belt from the defendant's waist and returned it to Johnson.

Officer Davila then searched the defendant's backpack, which was on the ground. In it he found a cigarette package that contained a substance that appeared to be a narcotic. It later tested positive for methamphetamine.

Subsequently, the defendant was charged with theft in violation of R.C. 2913.02(A)(1), a first degree misdemeanor, and aggravated possession of drugs in violation of R.C. 2925.11(A), a fifth degree felony.

STANDARD OF REVIEW

A motion to suppress is defined as "a device used to eliminate from a criminal trial evidence that has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation, etc.) of the United States Constitution."[1] When a defendant's motion to suppress is successful, the principal remedy for a constitutional violation is to exclude the evidence from the criminal trial.[2]

Pursuant to Crim.R. 12(C), before trial "any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." A motion to suppress evidence "on the ground that it [evidence] was illegally obtained" must be made prior to trial.[3]

A motion to suppress typically "presents mixed questions of law and fact."[4] In reviewing such a motion, "the court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses."[5]

LEGAL ANALYSIS

The Fourth Amendment to the United States Constitution protects people against "unreasonable searches and seizures."[6] Similarly, the Ohio Constitution provides: "The

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[1] *State v. Scruggs*, 12th Dist. Clinton No. CA2005-11-042, 2007-Ohio-6416, ¶ 4, citing *State v. French*, 72 Ohio St.3d 446, 449-50.
[2] *State v. Haines*, 12th Dist. Clermont No. CA2003-02-015, 2003-Ohio-6103, ¶ 8.
[3] Crim.R. 12(C).
[4] *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5373, 797 N.E.2d 71, ¶ 8.
[5] Id.
[6] Fourth Amendment to the United States Constitution.

right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated."[7] The United States Supreme Court has long observed that "'[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'"[8]

Regarding seizures of an individual, there are three types of police encounters that individuals have with law enforcement. In the Fourth Amendment context there are: "(1) consensual encounters; (2) investigatory stops; and (3) seizures that equate to an arrest."[9]

If an individual has been detained without a warrant, the detention is constitutional as an investigatory stop when the police officer "reasonably suspected" the defendant of "wrongdoing."[10] The officer must have had "'specific and articulable facts' that the detention was reasonable."[11]

In determining reasonableness, the circumstances must be viewed "through the eyes of the reasonable and prudent officer at the scene who must react to events as they unfold."[12] In doing so, the court take's the officer's "experience and training" into

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[7] Ohio Constitution, Article I, Section 14.
[8] *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), citing *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891).
[9] *State v. McLemore*, 10 N.E.3d 1186, 2014-Ohio-2116, ¶ 9 (9th Dist.), citing *State v. Patterson*, 9th Dist. Summit No. 23136, 2006-Ohio-5424, ¶ 11.
[10] *U.S. v. Mendenhall*, 446 U.S. 544, 552, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). *See Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed. 332 (1993), at paragraph one of the syllabus ("*Terry* permits a brief stop of a person whose suspicious conduct leads an officer to conclude in light of his experience that criminal activity may be afoot * * *.").
[11] *State v. Chatton*, 11 Ohio St.3d 59, 60-61, 463 N.E.2d 1237, 11 O.B.R. 250 (1984).
[12] *State v. White*, 2d Dist. Montgomery No. 18731, 2002 WL 63294, *2 (Jan. 18, 2002), citing *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988), paragraph one of the syllabus.

consideration, "to understand how the situation would have been viewed by the officer * * *."[13]

Of note, the use of handcuffs does not automatically convert an investigatory stop into an arrest, particularly when they are used for safety concerns or to prevent flight.[14] An investigatory stop becomes an arrest when four elements are satisfied: "(1) An intent to arrest, (2) under a real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested."[15]

Generally, to arrest a person a police officer must have a warrant, unless the police officer has probable cause at the time of arrest.[16] An officer has probable cause to make a warrantless arrest when the officer has "sufficient information, derived from a reasonably trustworthy source, to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused."[17]

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[13] *White*, 2002 WL 63294 at *2.

[14] *State v. Hubbard*, 8th Dist. Cuyahoga No. 83385, 2004-Ohio-4498, ¶¶ 16-17. *See State v. Anderson*, 158 Ohio Misc.2d 34, 2010-Ohio-3989, 933 N.E.2d 850, ¶ 10 (C.P) (noting that handcuffing can be appropriate during a *Terry* stop as a means of preventing flight). *Cf. White*, 2002 WL 63294 at *6 (explaining that even if handcuffs should not have been used during an investigatory stop, if no evidence was seized as a result of the handcuffs, then no evidence should be suppressed).

[15] (Citation omitted.) *State v. Barker*, 53 Ohio St.2d 135, 139, 372 N.E.2d 1324, 7 O.O.3d 213 (1978). *See Terry*, 392 U.S. at 21 ("And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

[16] *State v. Timson*, 38 Ohio St.2d 122, 127, 311 N.E.2d 16, 67 O.O.2d 140 (1974). *See State v. Scruggs*, 12th Dist. Clinton No. CA2005-11-042, 2007-Ohio-6416, ¶ 6, citing *State v. Kerby*, Clark App. No. 03-CA55, 2007-Ohio-187, ¶ 31 ("Arresting officers must possess probable cause to believe that a suspect has committed a felony when making a warrantless arrest.").

[17] *Timson*, 38 Ohio St.2d at 127 citing *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). *See Scruggs*, 2007-Ohio-6416 at ¶ 6, citing *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223 (1964) ("Probable cause to arrest exists when the facts and circumstances within an officer's knowledge and of which he or she had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense.")

"Probable cause deals with 'probabilities – the factual and practical nontechnical considerations of everyday life on which reasonable and prudent men act – and is a fluid concept, to be based on the totality of the circumstances, and not reduced to a neat set of legal rules."[18] If there is probable cause, then the "arresting officer is not required to obtain a warrant in order to apprehend a suspected felon in a public place."[19]

An informant's tip may support an officer's probable cause determination to arrest an individual.[20] When probable cause for an arrest is largely based on an informant's tip, courts focus on "probable cause as it relates to information and tips received from informants."[21]

An informant's tip is generally considered "reliable and trustworthy when evidence uncovered by independent police work corroborates the information supplied by the informer."[22] To determine whether an informant's tip supports probable cause, the trial court examines the "'totality of the circumstances' surrounding the informant's tip."[23] Factors considered include "an informant's veracity, reliability, and basis of knowledge."[24] These facts "illuminate the common sense practical question of whether probable cause exists."[25]

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[18] *State v. Crittendon*, 12th Dist. Clermont No. CA2001-03-04-045, 2001 WL 1462784, *2 (Nov. 19, 2001), quoting *State v. Ingram*, 20 Ohio App.3d 55, 61 (12th Dist. 1984).
[19] *Inram*, 20 Ohio App.3d at 57, citing *Steagold v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed. 38 (1981).
[20] *Crittendon*, 2001 WL 1462784 at *2, citing *Ingram*, 20 Ohio App.3d at 61.
[21] *Ingram*, 20 Ohio App. at 58.
[22] *Crittendon*, 2001 WL 1462784 at * 2, citing *State v. Heston*, 29 Ohio St.2d 152 (1979), paragraph one of the syllabus.
[23] *Crittendon*, 2001 WL 1462784 at * 2, citing *Illinois v. Gates*, 462 U.S. 213, 233, 103 S.Ct. 2317 (1983).
[24] *Crittendon*, 2001 WL 1462784 at * 2, citing *Gates* at 462 U.S. at 233.
[25] *Crittendon*, 2001 WL 1462784 at * 2, quoting *Ingram*, 20 Ohio App.3d at 58.

Loss prevention specialists sometimes act as informants to provide probable cause in instances of shoplifting, as in the case of *State v. Garrison*, 6th Dist. Lucas No. L-97-1309, 1998 WL 484132 (Aug. 14, 1998).[26] In *Garrison*, the defendant filed a motion to suppress based on the argument that there was no probable cause to arrest him for shoplifting.[27]

As part of their job, two loss prevention specialists who worked for the victimized store followed the defendant and his wife around the store.[28] The loss prevention specialists witnessed the defendant place several items in the wife's purse.[29] The loss prevention specialists called the police and an officer came to the store and conferred with the specialists.[30] The officer testified that he based the arrest on the loss prevention specialists' statements.[31] The appellate court accordingly held that the police officer had probable cause to arrest the defendant for a theft offense.[32]

A search is reasonable under the Fourth Amendment when it is based upon probable cause and executed under a warrant.[33] Indeed, a warrantless search is "'*per se unreasonable*,' 'subject to only a few specifically established and well-delineated

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[26] *See State v. Calliens*, 8th Dist. Cuyahoga No. 97034, 2012-Ohio-703 (finding an officer had probable cause to arrest a shoplifter when the defendant matched the description of a shoplifter that was broadcast on a radio by store employees, and when the officer arrived he confirmed with a store security guard and employee that the defendant was the woman they witnessed shoplifting in the store).
[27] *State v. Garrison*, 6th Dist. Lucas No. L-97-1309, 1998 WL 484132, *1 (Aug. 14, 1998).
[28] Id.
[29] Id. at *2.
[30] Id.
[31] Id.
[32] Id. at *3.
[33] *State v. Moore*, 90 Ohio St.3d 47, 49, 734 N.E.2d 804, 123 A.L.R. 5th 661 (2000), citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1976).

exceptions.'"[34] "Once a warrantless search is established, the burden of persuasion is on the state to show the validity of the search."[35]

One such exception to the warrant requirement is a search incident to a lawful arrest, which applies "only to the 'area from which [the arrestee] might gain possession of a weapon or destructible evidence.'"[36] A search incident to arrest must "be justified by either the interest in officer safety or the interest in preserving the evidence * * *."[37]

Accordingly, a police officer may only search space within the arrestee's "'immediate control,' meaning 'the area from within which he might gain possession of a weapon or destructible evidence.'"[38] "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply."[39]

A search "may also extend to the personal effects of the arrestee," so long as those personal effects are within the arrestee's immediate control.[40] Moreover, an item may still be within an arrestee's immediate control even though it is "momentarily" out of

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[34] *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), at paragraph (a) of the syllabus, quoting *Katz*, 389 U.S. at 357.
[35] *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d 949, 62 A.L.R. 6th 677, ¶ 25, quoting *Xenia v. Wallace*, 37 Ohio St.3d 216, 218, 524 N.E.2d 889 (1988).
[36] *Gant*, 556 U.S. at paragraph (a) of the syllabus, quoting *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).
[37] *Gant*, 556 U.S. at the syllabus. *See Smith*, 2009-Ohio-6426 at ¶ 12, citing *United States v. Chadwick*, 433 U.S. 1, 15, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) ("But when the interests in officer safety and evidence preservation are minimized, the court has held that this exception no longer applies.").
[38] *Gant*, 556 U.S. at 335, quoting *Chimel*, 395 U.S. at 763.
[39] *Gant*, 556 U.S. at 339, citing *Preston v. United States*, 376 U.S. 364, 367-68, 84 S.Ct. 881, 11 Led.2d 777 (1964).
[40] *Smith*, 2009-Ohio-6426 at ¶ 13.

reach.[41] The Ohio Supreme Court has advised that "[a]s long as the arrestee has the item within his immediate control at the time of the arrest, the item can be searched."[42]

(I) THE SEARCH OF THE DEFENDANT'S PERSON

The defendant moved to suppress evidence of the belt because Officer Davila did not have a reasonable suspicion of criminal activity or probable cause to conduct the search.

The state counters that Greg Johnson's statements to Officer Davila constituted probable cause for an arrest, and thus the defendant was searched incident to an arrest. The state argues that the defendant was initially detained for investigative purposes and placed in handcuffs. When Greg Johnson informed Officer Davila that the defendant was still wearing the stolen belt, Officer Davila had probable cause to

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[41] *State v. Henderson*, 12th Dist. Warren Nos. CA2002-08-075, CA2002-08-076, 2003-Ohio-1617, ¶ 16.

[42] *State v. Frazee*, 2d Dist. Montgomery No. 26699, 2015-Ohio-4786, ¶ 11, quoting *State v. Adams*, 155 Ohio St.3d, 2015-Ohio-3954, 45 N.E. 127, ¶ 183. *See Henderson*, 2003-Ohio-1617 at ¶ 15 (the focus is on whether the item was "within the immediate control of the suspect at the beginning of the encounter with law enforcement officials and whether any delay in searching" the item is reasonable); *Frazee*, 2015-Ohio-4786 at ¶ 20 (finding that a jacket that the defendant removed as he was arrested was within his immediate control because the arrestee was wearing the jacket when he was arrested); *State v. Sharpe*, 7th Dist. Harrison No. 99 CA 510, 2000 WL 875342, *5 (June 30, 2000) (finding that, although a backpack was searched away from the arrestee after he had been handcuffed, the backpack was still within the arrestee's immediate control because it had been on his shoulder at the time he was arrested). *Cf. State v. Robinson*, 131 Ohio App.3d 356, 357, 722 N.E.2d 573 (1st Dist. 1998) (holding that an arrestee's purse was not in her immediate control when she was arrested outside a bar and the purse was retrieved from inside by police, and then it was searched while she was secured in the officer's cruiser); *State v. Myers*, 119 Ohio App.3d 376, 381, 695 N.E.2d 327 (2d Dist. 1997) (concluding that the warrantless search of an arrestee's purse, which had been resting on a table, was unconstitutional because the arrestee was already under arrest and under the officer's control with her hands handcuffed).

arrest the defendant for theft. Therefore, under the state's view, Officer Davila's action of lifting the defendant's shirt and removing the belt was a search incident to arrest.

Officer Davila's initial stop of the defendant was an investigatory stop because he reasonably suspected the defendant of criminal wrongdoing.[43] He received a call that a theft was in progress, and then he received an update that the thief was a white male standing in the Meijer parking lot next to a cart corral, wearing a green backpack, and talking to another male.

Officer Davila turned his vehicle and immediately spotted the defendant, who met that description. He also saw Greg Johnson approaching the defendant from 20 feet away and pointing towards the defendant. Viewing these circumstances from Officer Davila's perspective, he had reasonable suspicion sufficient to stop the defendant to investigate wrongdoing. Officer Davila placed the defendant in handcuffs, which can be permissible during an investigatory stop for officer protection and to prevent flight.[44]

Next, Greg Johnson told Officer Davila that the defendant was the person in the theft and that he still had the stolen belt on his waist. The state argues, and the court agrees, that at this point Officer Davila had probable cause to place the defendant under arrest.

Here, Greg Johnson's information is considered "reliable and trustworthy" given that he witnessed the entire theft and provided information that proved accurate (e.g. the description of the defendant, the fact he had a stolen belt on his waist, etc.).[45] Furthermore, Officer Davila testified that he had reliably used information from Greg

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[43] *Mendenhall*, 446 U.S. at 552.
[44] *Hubbard*, 2004-Ohio-4498 at ¶¶ 16-17; *Anderson*, 2010-Ohio-3989 at ¶ 10.
[45] *Crittendon*, 2001 WL 1462784 at * 2, citing *Heston*, 29 Ohio St.2d at paragraph one of the syllabus.

Johnson many times in the past to lead to successful theft arrests. Accordingly, the court finds that Officer Davila had probable cause to arrest the defendant once Greg Johnson identified the defendant as the person who had stolen the belt from Meijer.

Therefore, as an incident to arrest Officer Davila lawfully searched the defendant's person and removed the stolen belt from his waist. A search incident to arrest is justifiable to preserve evidence, which is precisely what Officer Davila did by finding and removing the belt.[46] Because the belt was on the defendant's person, it was also within his immediate control. As such, the court finds that Officer Davila's search of the defendant's person did not violate the Fourth Amendment's prohibition against unreasonable searches. Accordingly, the defendant's motion to suppress the belt from evidence at trial is not well-taken and is denied.

(II) THE SEARCH OF THE DEFENDANT'S BACKPACK

The defendant moves to suppress the methamphetamine that was discovered in his backpack during Officer Davila's search. The defendant argues that the backpack was outside of his immediate control because he was handcuffed during the search, and the bag was at least a few feet away from him. Thus, the defendant posits that it was illegal for Officer Davila to have searched his backpack as incident to his arrest.

The state counters that the backpack was searched pursuant to the exception for searches incident to arrest. Under the state's view, an officer may search a backpack or purse that the defendant had on his or her person at the time of arrest, even if the defendant is handcuffed by the time of the search.

[46] *Gant*, 556 U.S. at 335 quoting *Chimel*, 395 U.S. at 763.

As discussed, "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply."[47] Courts have distinguished between searching items that are in the defendant's immediate control at the time of arrest, and items that were not within the defendant's immediate control at the time of arrest.[48]

When the defendant was initially spotted by Officer Davila in his police cruiser, he was wearing the green backpack. Before the defendant was arrested, however, his backpack was removed and he was handcuffed. He remained handcuffed while Greg Johnson identified him as the thief.

Per the state's argument, it was only after the identification that the defendant was placed under arrest. Therefore, the backpack was searched once the defendant no longer had it under his immediate control. Because the backpack was not under the defendant's immediate control during the search, the search cannot be justified by a concern that the defendant would have been able to reach into his backpack for a weapon.

Moreover, Greg Johnson testified that he never saw the defendant place any stolen good in his backpack, nor did he ever inform Officer Davila that the defendant had any stolen items in the backpack. Officer Davila also admitted that he did not know or have reason to believe there were any stolen Meijer goods in the backpack when he searched it. Rather, he searched it pursuant to office policy, after he had already

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[47] *Gant*, 556 U.S. at 339 citing *Preston*, 376 U.S. at 367-68.
[48] *Frazee*, 2015-Ohio-4786 at ¶ 11, quoting *Adams*, 2015-Ohio-3954 at ¶ 183. *See Henderson*, 2003-Ohio-1617 at ¶ 15; *Sharpe*, 2000 WL 875342 at *5; *Robinson*, 131 Ohio App.3d at 357, *Myers*, 119 Ohio App.3d at 381.

retrieved the stolen belt. Hence, Officer Davila did not search the backpack out of concern that evidence of the theft might be lost or destroyed.

Neither of the justifications for the search incident-to-arrest exception apply in the case at bar. Given that the defendant was not wearing his backpack when he was arrested, the court finds that the state has not met its burden to show the validity of its warrantless search of the backpack. Therefore, the defendant's motion to suppress the backpack, including the methamphetamine found within, is well-taken and granted.

CONCLUSION

For the foregoing reasons, the defendant's motion to suppress shall be granted in part and shall be denied in part. Specifically, the court denies the defendant's motion to suppress evidence of the belt he stole from Meijer. However, the court grant's the defendant's motion to suppress evidence collected from the illegal search of the defendant's backpack, including the methamphetamine.

IT IS SO ORDERED.

DATED: 6-1-2016

Judge Jerry R. McBride