ORIGINAL

In the

Supreme Court of the United States

VENTURA E. YBARRA,

APPELIANT,

V.

PEOPLE OF THE STATE OF ILLINOIS,

APPELLEE.

No. 78-5937

Washington, D. C.
October 9, 1979

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

VENTURA E. YBARRA, Appellant,	:	
v.	:	No. 78-5937
PEOPLE OF THE STATE OF ILLINOIS, Appellee.	:	

Washington, D. C.

Tuesday, October 9, 1979

The above-entitled matter came on for argument at 11:27 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ALAN D. GOLDBERG, ESQ., Assistant Appellate Defender, Office of the State Appellate Defender, First Judicial District, 130 North Wells, Suite 2200, Chicago, Illinois 60606; on behalf of the Appellant.

MELBOURNE A. NOEL, JR., ESQ., Assistant Attorney General, State of Illinois, 188 W. Randolph St. (Suite 2200) Chicago, Illinois 60601; on behalf of the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-5937, Ventura E. Ybarra against Illinois.

Mr. Goldberg, you may proceed.

ORAL ARGUMENT OF ALAN D. GOLDBERG, ESQ.

ON BEHALF OF THE APPELLANT

MR. GOLDBERG: Mr. Chief Justice, and may it please the Court:

This case concerns the validity of a search which occurred at a public tavern in Aurora, Illinois. On March 1, 1976, at about 4:10 in the afternoon, a group of at least eight or nine police officers and Illinois Bureau of Investigation agents entered a public establishment by the name of the Aurora Tavern. Their purpose was to execute a warrant for the tavern, the premises of the tavern, and the bartender, a man by the name of Greg.

Agent Jerome Johnson announced the officers' purpose and authority, and he immediately told everyone in the tavern to stand for a search for weapons. Present in the tavern at the time were a group of approximately between nine and thirteen patrons, including my client, Ventura Ybarra.

The lighting was sufficient, according to Agent Johnson, for all of these patrons to be seen. And he described the tavern as one large room, with one entrance and one exit. Johnson testified he had never seen any of the patrons before, and despite never having seen any of them before, he then

proceeded to pat all of them down. And he did this even though he testified he had no knowledge that any had committed an offense, had no indication that Mr. Ybarra had a gun or was hostile or was hiding anything. Mr. Ybarra's hands were visible to him at all times. He had no knowledge that Ybarra owned or worked at the premises, which he did not. He was merely a patron.

In patting down Mr. Ybarra, he testified that he felt no weapon at all during that patdown. He felt a cigarette pack with objects in it. That was his testimony. He did not see the object immediately. He completed the patdown of the remaining patrons, a task which took several minutes. He then returned to Ybarra and he searched Ybarra again. And he searched Ybarra again, even though he testified that he had no knowledge at that time that Ybarra had any contraband or any of the items they were looking for.

Ybarra hadn't moved between the two searches, and at all times his hands had been on the bar, between the two searches. During the second search of Ybarra, the officer found six tinfoil packets containing heroin.

At the conclusion of the evidence at the hearing on the motion to suppress in Cook County, Illinois, the Prosecutor conceded that there was no probable cause for the search. Instead, he relied on a statute, and that is Illinois Revised Statute, Chapter 38, Section 108-9, which says that in executing a

warrant a police officer may reasonably detain to search anyone present at the time of the execution, in order to a) protect himself from attack, or b) prevent the disposal or concealment of any of the instruments, articles or things named in the warrant.

QUESTION: Independent of the statute, Mr. Goldberg, if the officer observed factors which would have warranted a patdown search under a Terry, what would you say then?

MR. GOLDBERG: If he had observed factors which would have warranted patdown in Terry, he could have performed it without the authority of the statute. There is little question about that.

QUESTION: Mr. Goldberg, does your argument depend at all on a question of degree? I notice the Supreme Court of Illinois said,"Obviously, this warrant to search a department store would not authorize the search of everybody in a department store." Conversely, suppose that a search warrant had issued for explosives stored in a privately owned cabin. And police executing a search warrant -- say, the cabin dimensions were 10 by 12 -- at night. In it, they found two people. Do you think they would have had the authority to make a patdown search of those two people?

MR. GOLDBERG: Well, the answer to that, I think, is that the premises are smaller and more private, and the number of people there are, less than the reasonable suspicion,goes

greater that they are involved in the criminal activity, necessarily. I think this particular set of facts was a public place and nine to thirteen patrons in a place where there is no reason to suspect an involvement is far beyond any line that t might be drawn.

QUESTION: But it is a line-drawing process?

MR. GOLDBERG: Necessarily a line would have to be drawn somewhere, but that line, I think, is provided in Terry v. Ohio. If the circumstances are such that the officers could reasonably suspect or in the case of -- not a weapon search but a search for contraband, and if they had probable cause, under the circumstances, to believe that the persons were involved in criminal activity, then they could search them.

QUESTION: If they had probable cause, there is no doubt they could search them. What if they had reasonable suspicion under Terry?

MR. GOLDBERG: Well, in your exposes hypothetical, of course, that would be a question of probability of danger to the officers. And Terry, of course, is the weapons situation, and reasonable suspicion would be sufficient under those circumstances.

Now, if they walk into a place and they have only a hunch that a person might be involved, that wouldn't be enough. And, traditionally, of course, when you are talking about searching someone for contraband, as opposed to a weapon, the Court

has always spoken in terms of probable cause. But the distinction which the State seeks to draw, saying that, "Well, you should only require reasonable suspicion here," I don't think that's one that really has any relevance here, because they had nothing. They had no reasonable suspicion or probable cause here. Whether you consider it a weapons search or a search for contraband, there was no sort of suspicion at all. So those differing degrees in which there are smaller premises, more reason to believe a person is involved, obviously all present closer questions. But this particular set of facts, since there was nothing at all, there is absolutely no suspicion of any kind.

QUESTION: If you were representing the bartender, would you be making the same argument?

MR. GOLDBERG: Well, the bartender was named in the warrant, Greg, and so I would be able to make this argument.

QUESTION: Well, would you say that if it was found by a State court that there was reasonable suspicion that people in that particular bar might well be armed, could the patrons be patted down just for weapons, while they made the search -- before they made the search of the premises?

MR. GOLDBERG: If there was reasonable suspicion regarding the first patdown, you can be patted down, and there simply wasn't here.

QUESTION: For a weapon?

MR. GOLDBERG: For a weapon.

QUESTION: And then if a weapon were found, and assuming the possession of that weapon concealed on the person, was a violation of Illinois law, then there could be a general search. Only if a weapon were found.

MR. GOLDBERG: Right.

Now, the particular portion of this Illinois statute that was relied on was not a weapons section. It was not a) to protect themselves from danger. It was b) to prevent the disposal or concealment of any instruments, articles or things named in the warrant.

And it is simply our contention that neither of these searches were performed -- neither the first nor the second -- with reasonable suspicion or probable cause. There was no articulable standard in that at all.

The only reason for the search, apparently, was the mere presence of the patrons in the place where the search warrant was being executed. And that is a rationale for search that this Court has consistently rejected.

QUESTION: Isn't it a little bit broader than that? I am not saying it is valid. There is talk here of open and notorious narcotics transactions in this small place. So, it is something more than you just said. If that is valid.

MR. GOLDBERG: Yes, Your Honor. The first talk of this narcotics dealing being open and notorious is in the Attorney General's brief in this Court. That contention had

never been made before, and the reason it has never been made before is that it is simply untrue. There was no indication that someone who walked into this bar would have been aware that narcotics dealing was going on. The officer testified himself that he had no suspicions that --

QUESTION: Isn't that often true of any bar, though. One gets off a plane and there is a bar and he walks in. So I don't see the significance of your comment.

MR. GOLDBERG: Well, I think the State's assertion is that when in walking into the bar the patrons gave up their expectation of privacy: they walked into a bar where they should have known narcotics going on. And my assertion is they could not have known narcotics dealing was going on, because it wasn't open. If, by open, they mean that the bartender was standing behind the bar and selling narcotics as openly as he was selling alcohol, that's simply not true.

QUESTION: But you don't challenge the validity of the warrant for the search of the premises?

MR. GOLDBERG: No, there was no need for it.

QUESTION: Well -- Which said that their reason for searching it was that it was an open and notorious place for exchanging narcotics.

MR. GOLDBERG: No. The complaint for search warrant indicated only this. It indicated that an informant had been in the bar the previous day, and had seen tinfoil packages the

previous day behind the bar, and on the person of Greg the bartender. And he knew the tinfoil packets were a method of packaging heroin, and he had been told that heroin would be for sale on that day, March 1, 1976, the day on which the warrant was executed.

There is nothing in the complaint for search warrant contrary to the State's contention.

QUESTION: Well, what do you say that the searching officer could have searched, if he could not have searched the people in the bar?

MR. GOLDBERG: He could have searched the premises, that is --

QUESTION: Whereabouts on the premises?

MR. GOLDBERG: He could have searched behind the bar, he could have searched objects on the premises, and he could have searched the bartender, Greg.

QUESTION: Why not the people?

MR. GOLDBERG: Because the people, by virtue of being there, did not become part of the premises. If that were so, if the people simply by virtue of being there were like -- became like the bar or any of the objects in the bar, then the warrant would be a general warrant.

QUESTION: What if someone had a market basket they were wheeling out of the bar?

MR. GOLDBERG: If that were his personal possession, it

is not part of the premises. It is his. He has an expectation of privacy in it.

QUESTION: So, you say it has to be almost a fixture in the real property sense of the word?

MR. GOLDBERG: Well, it has to be something which the officers could reasonably believe could contain the contraband. And certainly, for example, a case in which beer, a case of beer which clearly would belong to the bar, although not a fixture, would be amenable for search for the contraband. But an individual walking into the bar, where the police, as here, don't have any reason to suspect him of involvement in any way, he is not amenable to search, simply because there is a search warrant being executed on the premises. In other words, a person is not part of the premises.

QUESTION: This warrant authorized the search of the premises and the bartender. Supposing the search warrant had authorized a search of everybody in the premises? Then, I suppose, it would be perfectly all right, wouldn't it?

MR. GOLDBERG: No, I think in that instance, it would be a general warrant. There has to be some reason to authorize a search of people in a search warrant.

QUESTION: Supposing, unlike the complaint here, this complaint had said that there was open notorious dealing and that persons in the premises regularly go in and acquire some drugs, and so forth and so on. And the warrant had said, "All

such persons may be searched as well as the bartender and the premises."

MR. GOLDBERG: If it said, for example, that the patrons, among them Ventura Ybarra, were involved in the criminal activity, I would have no argument. But if it said that some patrons are involved, or indicated some patrons were involved and implied that some were not, then I think there would be a similar, although not as obvious problem. At least in that instance, there would be some suspicion regarding the group of patrons, but here there is no suspicion regarding anybody. I think that would be a little more difficult problem, where some are suspected and some are not.

QUESTION: Nobody except the bartender.

MR. GOLDBERG: The only person suspected is the bartender, and it appears from the record that the bartender wasn't even there when the warrant was executed.

I would like to go back to the complaint for search warrant for just a second, because there is some dispute as to what inferences can be drawn from the complaint. The complaint only indicates that Greg is involved, and that tinfoil packets are on the bar, behind the bar, I should say. And there is no indication that they are in view of the customers, no indication that the informant saw this as a general patron of the tavern. Presumably, he was behind the bar when he saw it.

Nothing in the circumstances when the officers entered

indicate that narcotics dealing at that point was open and notorious. They had no indication that there was narcotics dealing going on when they walked in, from their position at the doorway. And again --

QUESTION: What about paragraph 4, of the application for the search warrant?

MR. GOLDBERG: Yes, "that the informant advised me that over the weekend of 28-29 February he had a conversation with Greg, and was advised that Greg would have heroin for sale on Monday, March 1, 1976."

In my mind, the only thing that one can logically infer to that is that this informant, or anybody who knew that Greg had heroin for sale, could go up to Greg and purchase heroin, but that a lawful patron who walked in to buy a beer would have no way of knowing that narcotics dealing was going on.

I think this would be true that any time there is some illegal activity going on in a public place, normally, the patrons of that public place are not going to be privy to the information that there is unlawful activity going on there. And unless the police can somehow particularize the reason to believe that a particular individual is involved in the unlawful activity, then they cannot search him merely because they have a warrant for the premises.

The State has offered a new rule to justify the search in this case. Their rule is that a patdown is, per se,

permissible at the scene of a search warrant, where officers do not have reason to believe that a person has no connection to the premises or the criminal activity. That is set out in their brief.

This rule has, I think, several infirmities. First, it violates all the general principles we have been talking about this morning, the rule that mere presence at the scene of suspected criminal activity doesn't lead to an inference that one is involved.

Second, again, it would make every warrant into a general warrant. And it would also apparently put the burden on the person to be searched to avoid being searched. He would have to demonstrate to the officers that he was not involved in the criminal activity, that he was not connected with the premises in order to avoid search, instead of requiring the officers to articulate the reasons why they are searching. As a result, it could subject virtually anyone to a search, on the basis not of specific knowledge on the part of police, but because they had no knowledge, just because they had no knowledge about that person. Under the State's test, they could search him.

Even if this initial patdown, this first intrusion in the case had been permissible, it wasn't the end of it. There was a second search here. Even though the officer testified he hadn't found a weapon, even though all he had felt was what he described as a cigarette pack with objects in it, there was a

second search. He explicitly testified that he believed, after the first search and before the second search, that he had no knowledge that Ventura Ybarra had any contraband. That was his very testimony. He didn't have any knowledge that Ventura Ybarra had any contraband. And despite that he went ahead and searched him again a second time.

I think the reason why Officer Johnson honestly admitted he had no knowledge is because the feeling through a pat-down of a cigarette pack with objects in it can't logically give one any reasonable suspicion of probable cause.

QUESTION: What is this about Greg? You said he wasn't there.

MR. GOLDBERG: The record does not indicate that he was there, and there was no testimony that he was present. And in the closing argument in the supression hearing, the argument proceeded on the assumption that he was not present at the time the warrant was executed.

QUESTION: You mean there was a bar without a bartender?

MR. GOLDBERG: Well, apparently, there was another bartender there by the name of Peggy Miller who -- on whom the warrant was served, but Greg apparently was not there, the person who was dealing narcotics.

Now, this second search on the basis of no suspicion or probable cause was improper because the feeling of the cigarette package with the object in it could not logically lead one

to conclude anything about the person. The officer didn't feel what the objects were. They could have been a lighter or a book of matches or any other innocent object, and that's why he honestly testified that he didn't have any knowledge that there was any contraband on Ventura Ybarra at that point.

Now, the State also offers an alternative argument in their brief, and that is that the pat down of all people on the premises when the officers entered was permissible not as a search for weapons but as a search for contraband, based on reasonable suspicion. And, at some length, they discussed whether reasonable suspicion or probable cause should apply in a situation like this. While the decisions of this Court would indicate that probable cause is the relevant standard when the search is for contraband, in this case the search would have been impermissible under any standard, because there is no suspicion of any kind. The only suspicion offered by the State, again, is their assertion that the narcotics dealing was open and notorious, and, as I said earlier, the officer's testimony, the circumstances which confronted the officer, the complaint for search warrant, all indicate that there was nothing about the criminal activity on these premises that was open and notorious. There was no reason to believe that a lawful patron would know of the criminal activity.

QUESTION: In your submission, the search would -- had the search revealed the heroin the first time around it would

be just as unlawful as you contend with respect to the second?

MR. GOLDBERG: Well, if the officer, in patting someone down, had found heroin,and, of course, in patting someone down it would be extremely difficult to find heroin, since you are limited to the outer garments, but if the officer had found heroin on the initial pat down, it would have been equally illegal because that initial patdown was illegal.

So, it would be our argument that both the initial intrusion was illegal, because there was no reasonable suspicion to justify, and that the second patdown was -- or the second search was impermissible because there was neither reasonable suspicion or probable cause.

QUESTION: In the Illinois Appellate Division opinion on page 80 of the Appendix, it says, "In the first patdown of the defendant at the bar, a cigarette package with objects in it was felt by the officer. Within a few minutes the officer again searched the person of the defendant and found six tinfoil packs of heroin."

Now, let's pretermit for a moment your argument about the first patdown being illegal, and assume that it was legal. Would you say that the second patdown was not legal under those circumstances?

MR. GOLDBERG: I would say so, because the feeling of a cigarette pack with objects in it cannot logically give rise to any suspicion that a person has some contraband on his person.

QUESTION: In spite of the search warrant saying this is a place where heroin is frequently bought and sold, and that this is a normal way of carrying heroin?

MR. GOLDBERG: Well, the search warrant doesn't allege that a cigarette pack is a normal way of carrying heroin. I imagine there are a myriad number of containers in which heroin can be carried. But even though the officers knew or had probable cause to believe that there was heroin on the premises, feeling a cigarette package doesn't give one probable cause to believe that person has heroin. Maybe half of the patrons would have a cigarette package, in those circumstances. If that were true, that the patron on whom -- that the officers patted down on whom they felt the cigarette package --.

QUESTION: But it doesn't say that they patted down and felt a cigarette package with cigarettes in it. It says with objects in it. And these objects later turned out to be six tinfoil packs of heroin. Now, it doesn't say they were shaped like cigarettes.

MR. GOLDBERG: No, but the officer didn't feel those six tinfoil packets of heroin in the initial patdown. The only thing he could say was that he felt the cigarette package with objects in it. And then he further said that even after feeling that cigarette packet with objects in it he didn't have any knowledge that Ybarra had contraband. So he attached no significance to the feeling of the cigarette package with objects

in it. As far as he knew --

QUESTION: He didn't even know it was a cigarette package.

MR. GOLDBERG: Well, I think he indicated, at one point in his testimony, that he felt nothing, and then later on, in response to a question by the Prosecutor, he said he felt what he thought was a cigarette pack.

QUESTION: It might not have been.

MR. GOLDBERG: It might not have been a cigarette package.

QUESTION: Mr. Goldberg, you made emphasis on the difference between, what you call, the first search and the second search. How much time lapsed between the two?

MR. GOLDBERG: Variously it is described in the record as three minutes or ten minutes.

QUESTION: And I suppose the primary concern was for the presence of weapons, wasn't it? Are you faulting them because he may have finished his primary patdown of all the patrons and then came back to this one, or that he should have taken a chance on the presence of weapons, and Number 10 down the line?

MR. GOLDBERG: We are faulting him as to both. In other words, the officer had no reason and indicated in his testimony that he had no reason to suspect any of the patrons of criminal activity, and so there was no justification for

the initial intrusion, the intial patdown. And then beyond that, after feeling no weapons and feeling nothing which would give him probable cause to believe that Ventura Ybarra had contraband, he went and made a second search. So, on both points we believe the intrusions were improper.

QUESTION: No reason to suspect criminal activity, despite the contents of the application for the search warrant?

MR. GOLDBERG: No reason with respect to the first patdown to suspect that any of these patrons were involved, by his own admission, by his own testimony.

QUESTION: Are not violence and gunplay rather common in narcotics transactions?

MR. GOLDBERG: I imagine that in narcotics transactions violence and gunplay may be involved, but --

QUESTION: You imagine?

MR. GOLDBERG: I accept that it is, and I accept that under circumstances in which search warrants for narcotics are being executed there may be many circumstances in which the police find it necessary to pat down all the people there. This officer didn't think it was necessary. This officer didn't have any indication that there was any gunplay that was to be involved. There was nothing in the circumstances, by his own admission, that gave him any indication that there was any involvement on the part of the patrons in criminal activity. And he, himself, admitted he simply didn't think the patrons were

involved.

Maybe it is a unique situation, but I think there will be many search warrants for public places, and those search warrants by themselves cannot give the police authority to pat down everybody in a public place. If the police have some suspicion, if they have some reason to proceed in that manner, then we have no objection to it. But this officer admitted he didn't have any reason for proceeding in that manner. And for that reason we believe both the initial intrusion and the second search were improper.

QUESTION: Suppose the officer testified -- since we are getting into hypothetical situations -- Suppose he had testified that he felt a package with some objects in which he thought might be the little packages of heroin, but that he decided to make no issue of it on the first search to see whether the subject would try to pass the heroin on to somebody else and then get two customers,instead of one,on possession charges.

MR. GOLDBERG: That would obviously be a much stronger case for the State, if the officer suspected as a result of the patdown that the person possessed the narcotics named in the warrant. And of course that's not the situation that prevails here. But it seems to me -- And we don't rely alone on the waiting for the second see here,as the reason why it was improper, because there is the additional testimony of the officer that he didn't believe he had any contraband. But

certainly that would be a much stronger case.

QUESTION: Is the test reasonable suspicion or reasonable and actual suspicion?

MR. GOLDBERG: I think the test for a patdown is a reasonably articulable suspicion.

QUESTION: Supose the officer in this case was just dumb. And he had a reasonable and articulable suspicion, but didn't know it.

MR. GOLDBERG: It certainly is an objective test. There is no question about that. And if there was an indication in the record that the objective facts somehow were contrary to the officers' conclusions here, we simply wouldn't even be referring to the officers.

QUESTION: You are talking about a reasonable suspicion, or however you verbalize it, about a weapon, not about narcotics.

MR. GOLDBERG: About narcotics. We would think probable cause as a standard. But, in either event, it's an objective test. But here, obviously, the officer's own conclusions are extremely relevant.

QUESTION: The rationale of this case, as it comes to us -- the basis for the decision was on the statute, that if you got a warrant to search the premises you can search people on it; is that right?

MR. GOLDBERG: That was the conclusion that --

QUESTION: It wasn't the rationale that there was

reasonable suspicion of weapons.

MR. GOLDBERG: No. I believe that the Appellate Court and the trial court have held that on the basis of this statute, which they -- in the manner in which they applied it -- must have believed created a per se rule that everybody on the premises can be searched.

I reserve the remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Noel.

MELBOURNE A. NOEL, JR., ESQ.

ON BEHALF OF APPELLEE

MR. NOEL: Mr. Chief Justice, and may it please the Court:

My name is Melbourne Noel. I represent the State of Illinois, Appellee in this particular matter.

Illinois submits, Your Honors, that the officers went to the Aurora Tap with a valid search warrant for the premises on March 1st, properly followed the dictates of common police sense in their actions leading to a discovery of six tinfoil packets of heroin on Ventura Ybarra.

The State suggests that Appellant's criticism of police action here is contrary to common sense. Indeed, I think that perhaps the crucial dispute in this case, between both sides, is what amounts to a commonsense reading of, first of all, the complaint for the search warrant, and then the testimony of the police officer at the suppression hearing.

The two sides really do interpret those documents and testimony in very different fashions. We maintain that our interpretation, taking the inferences from the logical meaning of these documents, is the correct one.

Illinois suggests that if the complete position of the Appellant in this case is accepted by this Court that all drug enforcement officers will be less able to lawfully protect themselves from attack in similar situations, while they follow orders to execute search warrants that will, themselves, be rendered more ineffectual.

QUESTION: How could they be attacked after they patted them down?

MR. NOEL: One of the issues here, Your Honor --

QUESTION: How could they have been attacked after they patted them down?

MR. NOEL: They couldn't.

QUESTION: They could not?

MR. NOEL: No.

QUESTION: So, you don't have any justification for the second search at all, do you?

MR. NOEL: It is our argument -- and we are agreeing that they should have been patted down the first time. And then our argument is that the first patdown of Ventura Ybarra yielded probable cause to believe that he had on him the objects listed in the search warrant.

QUESTION: Could you have patted down a man coming in the door? And I want to be fair with you, if you answer that that way I am going to ask you: Could you pat him down on the pavement? And you can't imagine where I am going from there.

MR. NOEL: There are circumstances on which a patdown for weapons, I think, could be justified by a person coming in the door. There would have to be more facts than simply an individual coming in the door. It depends who the person was. You know, was it a nun collecting for a charitable event, or was it a certain type of individual that had other particular factors about him? I say it is possible.

QUESTION: Mine did not include a nun. You can have my word for that.

MR. NOEL: But my point is, it would depend on the character of this individual coming in the door. I think there would be circumstances in which a patdown would be justified of a person coming in the door. Generally, I would say, there would be very few circumstances in which a patdown would be justified of a person coming in the door during a search, very few circumstances. But I think they could be imagined.

QUESTION: Certainly, if it were Greg coming in the door, a patdown would be indicated?

MR. NOEL: Yes, I think so, Your Honor.

QUESTION: Mr. Noel, I am puzzled by your saying very few circumstances, because any stranger walking in the door --

say he's just dressed in work clothes like the other people in the bar -- why would you treat him any differently than somone already in? He's just another customer.

MR. NOEL: Well, I think the first thing, Your Honor, is that in most situations the man probably would not be allowed to walk in the door. I would think probably there would be policemen at the door to explain to him --

QUESTION: Well, now you are changing -- But if the question is assumed someone is permitted to walk in, wouldn't he be fungible with the other customers, if he just wore the same kind of clothes and everything? I am kind of surprised you said it would be very rare that you could pat him down.

MR. NOEL: Well, perhaps not rare, but I think it would require an articulation of more than we would articulate of the people in the bar.

QUESTION: What do you have about a person in the bar, other than the fact that he previously walked in? That's really all you know about him.

MR. NOEL: Well, he is present around the bar, and he is on the location where the police officers are going to be forced to subject themselves to some risk in order to carry out the search warrant.

QUESTION: But so is the person walking in the door, as soon as he gets across the threshold.

MR. NOEL: That's true, Your Honor.

All I am trying to say -- Maybe I misspoke, Your Honor, in trying to quantify the number of circumstances in which this would have come about. What I am saying is, that I would hope that there would be more things that one could say about the person walking in the door than simply he walked in the door. Hopefully, there would be some additional factors about how was he dressed. Did he have on --

QUESTION: But you don't say any of those things about the people who previously walked through the door.

MR. NOEL: Yes, we do, Your Honor. Ventura Ybarra was wearing --

QUESTION: But before you made the initial patdown.

MR. NOEL: In the initial patdown, Ventura Ybarra was wearing heavy clothing which was capable of concealing a weapon. He was standing right next to the bar, where the search was going to take place.

MR. CHIEF JUSTICE BURGER: You can reflect on that until 1:00 o'clock.

Whereupon, at 12:00 noon, the Court recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Noel, you may continue.

MELBOURNE A. NOEL, JR., ESQ.

ON BEHALF OF APPELLEE (Resumed)

MR. NOEL: Thank you, Your Honor.

In further answer to Mr. Justice Marshall and Mr. Justice Stevens' question, this obviously is a difficult area, because three different courts in Illinois presented with this type of fact situation have come up with slightly different conclusions based on the facts of their particular case. Indeed, the same is true of courts in other states.

QUESTION: Are you defending the reasoning of the court below, which, as I take it, had nothing to do with whether there was a patdown or not? As far as I could see, the officer could just have come in and searched anybody, patdown or not, under the statute.

MR. NOEL: We do defend the reasoning of the court below, which did not rely on a frisk. They didn't deal with that, as Your Honor correctly points out. They relied on the second section of the statute, the reasonable belief that the people in the Aurora Tap were involved with the criminal activity and were likely to be concealing the objects of the search on their person.

QUESTION: And that would certainly distinguish the

people who were there from the people who arrived after the search began.

MR. NOEL: Up to that point, yes. But the other questions were related to the frisk. As to the search for the narcotics themselves on the persons of the patrons, we defend the decision below on that as an alternative argument. And in doing so, we ask this Court to apply the Camara-Terry balancing test to allow this type --

QUESTION: That's a lot of factual -- has some fact-finding in it, hasn't it? Has the fact-finding been done in the courts below?

MR. NOEL: I think that -- Does Your Honor refer to fact-finding with regard to the public interest need, and that sort of thing? I think that there are enough opinions written on the general subject. There is enough legislation written on the subject of drug control. And certainly this Court has written enough opinions on the subject of the sacredness of the warrant and the desirability of it, that I think those interests don't need to be developed any further, in order to justify the balancing test we are talking about.

And I think although the Appellate Court opinion specifically didn't invoke this, I think in other Illinois court opinions on the same statute there is reference, the most recent one being People v. Gloria Miller, which we -- It was so recent we had to include it in our brief as an appendix. It

wasn't published at that time. In that decision, the Illinois Appellate Court,First District, clearly employed the balancing test and refers to this Court's recent decision in Delaware v. Prouse and concludes that "a reasonable belief of the connection of the individual to the suspected criminal activity, and a reasonable belief that he is concealing the narcotics on him" is required before there can be a search under the Illinois statute.

QUESTION: Even if this Court hadn't decided the Terry case as it did, your position, I take it, is that under this statute all of these steps were appropriate? You draw your authority from the statute independent of Terry?

MR. NOEL: We don't rely so much on the statute for the frisk, Your Honor, because we don't feel that we have to. If the whole question of frisk goes out the window here and all we are left with is whether or not the search for narcotics on the individual person of Ybarra was proper, then we rely on our statute, and we rely on the second section of the statute.

QUESTION: I am not suggesting you can't rely on Terry in part, but primarily you are drawing on the statutory authority here?

MR. NOEL: Your Honor, we make two completely alternative arguments. And frankly the argument we prefer is the first one, the argument involving proper frisk of Ybarra, which yields probable cause to believe, then, that he has the objects of the

warrant on him. That's the argument we prefer.

Our secondary position is the Appellate Court position below, which relies on the statute. And we feel that we are entitled to make those arguments. As Appellee, I believe, that we can rely on any ground which would support the judgment below.

Indeed, this Court in the Sibron decision indicated that decisions on Fourth Amendment questions --

QUESTION: Excuse me. Was this particular ground presented to the court below?

MR. NOEL: It was not directly presented to the Appellate Court.

QUESTION: And was never decided?

MR. NOEL: It was never decided in so many words. The trial judge indicated -- Your Honor is talking about the first point?

QUESTION: The first point.

MR. NOEL: It was never decided specifically.

QUESTION: Was it presented? Was it ever raised in the state courts anywhere?

MR. NOEL: It was raised in the testimony and presentation of the agent witness at the suppression hearing and at the trial. It is there in his testimony. It was never argued by the State's Attorney, either in that court or in the Appellate Court.

QUESTION: Was it -- The State never defended on that ground?

MR. NOEL: The State never briefed that point, that's correct, Your Honor.

I would maintain that it is inherent in the testimony of the officer. At least four times, during the trial court proceeding, he mentioned that the first search of Ybarra was for the purpose for discovering weapons, to protect the police officers. So, regardless of whether the Illinois Court saw the issue and dealt with it, it was there.

And, as this Court held in Sibron, decisions of State Courts on Fourth Amendment areas, based on State law, are not binding on this Court. The Court said in Sibron that this Court, in looking at a situation, can determine independently whether or not there was probable cause, under the Fourth Amendment, or whatever standard is being used.

I would ask this Court to do that, and that's the reason we make the first argument.

QUESTION: It seems to me that when the Illinois Appellate Court relied on the second section, it implicitly rejected the first argument. The first section of the statute talks about justifying it, to protect themselves from attack. And that's the purpose of the frisk.

MR. NOEL: I don't think that's accurate, Your Honor, because they simply had never been briefed on the first point,

on the frisk point, and they simply didn't address it because it was not raised.

QUESTION: But the statute was called to their attention, including both sections of it.

MR. NOEL: That's correct, but the State's theory in the Appellate Court was simply on Subsection (b), Search for Narcotics. And the Appellate Court just doesn't usually address issues that are not briefed specifically before it.

QUESTION: But if your frisk theory is valid, you would also be entitled to rely on Subsection (a), I would think. If the purpose of a frisk is to protect the officer from attack, and Subsection (a) expressly says that is a permissible --

MR. NOEL: I would agree, Your Honor. Our only feeling is that that Subsection (a) is really superfluous in light of Terry. We don't need it. It wasn't invoked. We don't feel any point to arguing it. We rely on Terry and on this Court's probable cause decisions following that.

QUESTION: Isn't the predicate to relying on Terry some finding that the officer reasonably feared that the suspect was armed?

MR. NOEL: Yes, Your Honor, it is.

QUESTION: Is there any fact-finding like that in this record?

MR. NOEL: Yes, Your Honor, there is.

QUESTION: Why was it you never relied on Terry?

MR. NOEL: I don't know why they weren't presented, Your Honor. I wish they were.

QUESTION: Well, I know, but if it was never presented -- How could any court have addressed the predicate to Terry, if the Terry argument was never made?

MR. NOEL: Your Honor, the testimony of the agent is quite clear as to what he felt was the danger presented by the patrons in the bar and why he made the first patdown. The initial patdown of all the people in the bar is clearly undeniable only for one reason. It is a search for weapons. The reason why all the patrons were searched before Ybarra was searched the second time was strictly because security and protection was more important than anything that might have been raised during the first patdown of Ybarra, with regard to the objects in the warrant.

Then, on top of that, you have the background of the complaint for search warrant, specifically setting out -- and we disagree totally with opposing counsel's interpretation of it -- specifically setting out that over a period of days or weeks there was open and notorious drug traffic, not useage or possession, but traffic of drugs in this location. The informant went into the tavern, apparently as a patron, on at least -- he said at least ten other occasions he had been there and had observed tinfoil packets on and about the person of the bartender Greg, in a drawer behind the bar. And then on this particular

weekend, of February 28-29th, he had seen no fewer than 15 to 25 packets of tinfoil on or about the person of Greg.

Now, we submit to you there is no possible logical way to read this, other than that these packets, so many packets of tinfoil were there because heroin was being sold in this location. And we say that as a matter of judicial notice any court--based on the huge amount of jurisprudence on this subject and taking notice of the fact that where you have dealing in significant quantities of narcotics there is always a danger of violence. There is always the possibility, and indeed the likelihood of weapons being found on the individual dealers.

QUESTION: If analytically probable cause will justify a search either for weapons or for contraband, why won't reasonable suspicion justify a patdown, either for weapons or contraband--putting to one side the Terry case?

MR. NOEL: I would agree that our position would be that both are reasonable; both are good positions, but they would be for different reasons. The patdown for weapons is based on a different consideration. It is based on -- The balancing test there -- We are primarily concerned, of course, with the protection of the officers. The balancing test to allow a patdown to discover the narcotics, based on reasonable suspicion, would have a different cast of characters. In the balance there, you have the interest not being the protection of the police officers, but there you have the interest being

the great legislatively stated purpose in checking the debilitating use of narcotics in this country, and the judicial purpose in exalting and vindicating the effectiveness of search warrants.

So, I would say there is no reason why it couldn't be done for both purposes, but the balancing tests would have different features in each situation.

QUESTION: Mr. Noel, on the balancing test, no guns were found in this case?

MR. NOEL: That's correct, Your Honor.

QUESTION: No weapons of any kind?

MR. NOEL: That's correct.

QUESTION: So, you could be wrong?

MR. NOEL: What is required, Your Honor, is not a certainty. In fact, --

QUESTION: How many people did you find with dope in this place?

MR. NOEL: In this place, there were two separate bags of marijuana found, on different people, I believe.

QUESTION: You believe? Where is it in the record?

MR. NOEL: The only thing we have is the return from the search warrant, which lists the items. And we can presume that these came from different people, or they could have all come from the same person.

QUESTION: I can't presume things in criminal cases.

MR. NOEL: Your Honor, we can take reasonable inferences from the facts. But, regardless of what was found --

QUESTION: Your reasonable inference is that a person in a bar has a gun. That's what you said a minute ago, and you didn't find any guns, did you?

MR. NOEL: But that does not determine whether or not the officer was capable of having a reasonable belief under Terry before he made the search. We will admit that --

QUESTION: You keep pointing at Terry. What is there in Terry to give you the right to search for dope?

MR. NOEL: Nothing. And we maintain --

QUESTION: And this man was arrested for dope, not a weapon.

MR. NOEL: But the first search of him, Your Honor, was for weapons.

QUESTION: Wouldn't it be an extension of Terry to apply it to dope?

MR. NOEL: No, Your Honor, we feel that, rather than being an extension or change of Terry, all that we are asking here is an explanation of the Terry principle and an application to it -- of it, rather -- to narcotics search warrant situations, recognizing that general background information --

QUESTION: There was nothing in Terry about dope.

MR. NOEL: That's right, Your Honor.

QUESTION: This man was casing the joint to rob it.

MR. NOEL: But Terry has been applied to many other situations than armed robbery. In fact, the most recent example which we feel is even less strong than our own case is Pennsylvania v. Mimms. In that situation, all you had was a stop for an individual having an expired license plate. And he is ordered out of the car and a bulge appears under his --

QUESTION: But this man didn't have an unexpired license or anything. He was lawfully in a place of business.

MR. NOEL: That's correct, Your Honor, a place of business in which there was open and notorious narcotics traffic.

QUESTION: Had it been raided? Had it been padlocked? Had it been closed? Had anything been done to tell anybody that this is a bad place to be in?

MR. NOEL: Your Honor, that was the purpose of this particular search.

QUESTION: Well, he knows now. He knows now. He is in jail. He knows now.

MR. NOEL: I think, Your Honor, what we find after the frisk is made has no bearing on whether or not there was reasonable suspicion before the frisk was made.

QUESTION: May I also take recognition of the fact that you found dope didn't justify the search?

MR. NOEL: First search, no, Your Honor.

QUESTION: Didn't justify either search, in and of itself. The finding of dope didn't justify it, did it?

MR. NOEL: No, but the --

QUESTION: Did it?

MR. NOEL: Of course not, Your Honor.

QUESTION: You are not trying for that, are you?

MR. NOEL: No. We are not trying to go backwards from the finding of dope to justify either one of the searches.

So, our position then on the frisk simply is, what we are asking the Court to do is to recognize not only, as Terry did, that certain observed activities on the part of the suspect can lead to reasonable suspicion that he is armed and dangerous. We are asking the Court to interpret Terry to allow general knowledge of narcotics traffic, and general background knowledge contained in the complaint for search warrant to provide the same kind of basis for a frisk that there was in Terry.

As I was pointing out in Pennsylvania v. Mimms, the only indication that the police officer had in going under the coat of the driver of the automobile, once he got him out on the side of the road, was that there was a bulge under there. This individual had been engaged in no felonious activity whatsoever. There was no information about him personally at all. Yet the simple fact that he had been pulled over for -- an expired license, and had a bulge under his coat, this Court found summarily was sufficient basis to justify the frisk.

And we would submit that in a much more dangerous situation of police officers executing a judicially ordered search

of a place where there had been open and notorious drug traffic, that in that situation they must be allowed, under these circumstances, to at least frisk -- they must be allowed to frisk at least the people on the premises to determine whether or not there is any threat to their safety, before they go ahead with the search. And that's exactly what we have here. There is no possibility here of a ploy, in order to discover dope, Justice Marshall.

It is clear from the testimony of the police officer, Agent Johnson, that he -- the initial patdown was only for the purpose of discovering weapons.

QUESTION: And then when they didn't find any, that was the end of it, wasn't it, under Terry? And they didn't find any, as you have just told my Brother Marshall, and that was the end of it.

MR. NOEL: It wasn't the end of it in Ybarra, because in the course of the patdown they felt -- Agent Johnson felt the cigarette pack with --

QUESTION: No weapon, nothing that he could possibly think was a weapon; is that correct?

MR. NOEL: But under the lower court decisions which have dealt with this problem, it is held that if they obtain, in the course of a frisk, reasonable cause -- if they feel something which gives them probable cause, rather, to believe that the objects of a warrant are in a pocket, rather than a

weapon, they are allowed to operate on this. They are not required, under the decisions, to simply ignore the feeling of the cigarette pack with objects in it, and say, "Well, it is not a weapon, so we can't touch it." That would be requiring them to give up their own intelligent commonsense assessment, which yields probable cause of what was in the pocket of the individual.

QUESTION: That's true about many provisions of the Constitution, isn't it, including the Fifth Amendment guarantee against compulsory self-incrimination? The most logical commonsense thing to do is to ask the suspect about -- "Did you do it?" And he has an absolute Constitutional right to say, "I won't answer." That's not very logical or commonsensical, but it is required by the Constitution.

MR. NOEL: I would say, Your Honor, that it is an entirely different quality of right that's been treated entirely differently by the courts. I don't think that it reflects on the decisions. For example, Guzman v. Estelle, in a decision in the Fifth Circuit, dealt with this problem. And also a recent decision of U.S. Court of Appeals for the District of Columbia, United States v. Branch, dealt with this problem, in footnotes. Both came to the conclusion that when in the course of a proper frisk an officer feels something which gives him probable cause to believe the object of the warrant is there, he is not, should not and cannot be required

to simply ignore it.

So, this is the position we take on the first argument. We maintain that the justification for the frisk here is as strong as in any of this Court's decisions on the subject. And we maintain that under this Court's decision on probable cause that once the officer -- in light of all the background facts -- Remember, there was an awful lot of information available to him from the complaint for the search warrant. Once he had felt this object --

QUESTION: Mr. Noel, I don't mean to keep going over the same point, but your case really depends almost entirely on paragraph 3 of the complaint for a search warrant. That's the entire basis of your claim, that there was open and notorious drug dealing in this particular location. If I read it correctly --

MR. NOEL: Well, in paragraph 4, also, Your Honor, excuse me, in which it is mentioned to the informant that there is going to be offered for sale at the tavern on March 1st --

QUESTION: That he would have it for sale, presumably to the informant.

MR. NOEL: Yes.

QUESTION: But there isn't a single reference in here to anyone ever having observed heroin change hands in that tavern.

MR. NOEL: That is correct, Your Honor. But I think

the only logical inference to be drawn from the number of packets that are present and from the willingness of Greg on a short-term basis to have it for sale again -- to go from February 29th and have it for sale on March 1st, it is a reasonable inference to be drawn that this was done before.

QUESTION: Well, there is equally an inference that the informant could go in on March 1st and get a packet from the bartender.

MR. NOEL: I wouldn't agree, Your Honor. I don't think that the language here and the background information is that limited. I think that would be unreasonable reading of the --

QUESTION: The informant had been in the tavern on ten other occasions, but it doesn't say he observed tinfoil on each of those occasions.

MR. NOEL: Your Honor, this was not written by legal scholars, but it does say "has been in the tavern on at least ten other occasions and has observed the tinfoil packets on Greg and in a drawer behind the bar." The only reason for mentioning ten other occasions and then following it by the other clause would be to have the one reflect back on the other, as far as I can tell.

But admittedly, both in the search warrant complaint and in the testimony, everything is not spelled out word for word exactly as you would have liked to have seen it. It rarely is in search warrant situations.

QUESTION: The Court of Appeals in its opinion at page 80 of the Appendix says, "No objection is made to the warrant itself."

Now that leaves open all the questions we have been discussing, but I take it no one challenged the validity of the warrant as, far as it went?

MR. NOEL: That is correct, Your Honor.

QUESTION: But they did challenge the right of the warrant to search this man.

MR. NOEL: That is correct.

QUESTION: Is that the point that is before us?

MR. NOEL: That's one of the -- certainly the ruling of the Appellate Court below, and it is certainly one of the points that is before you, yes. That is not the point which we are arguing first. That is our secondary argument.

QUESTION: Mr. Noel, just a matter of curiosity, whatever happened to Greg?

MR. NOEL: I don't know, Your Honor.

QUESTION: He wasn't even present, was he?

MR. NOEL: We are not sure of that, but the indication is that he was not. But I am not sure of that either, at least at this point, when the lawsuit went into court.

Now, on our second alternative argument, based on what we are telling the Court -- what we are arguing -- is that if Johnson did lack a full traditional probable cause for the

second search, that search that turned up the tinfoil packets of heroin, he at least had a lesser Camara-type probable cause or a Terry reasonable belief, that the bar and/or his fellow patrons were connected with the illegal drug activity on the premises, and may have had the objects of the warrant concealed on their persons.

These are actually two different possible theories on which the Court could affirm the decision below, one of them argued primarily in our brief, the other mentioned in Footnote 10, ascribed to Professor LeFevre.

Really, regardless of which theory is used, they are both two parallel ways to describe the same basis for the search, the same information and reaching the same result. We believe that the lesser reasonable belief test is more appropriate in this case. That's what we are emphasizing, primarily because it is a matter of consistency with this Court's prior decisions, and also trying to create a level of certainty for police officers to operate under. We think either theory could justify the decision of the Appellate Court below. And, of course, both theories involve a balancing test which was used in Camara, Terry and other cases that we cite.

We feel that under a balancing test -- we feel that we have here such strong Governmental interest in the controlling of drug traffic, and very importantly, I think -- very importantly -- we are not dealing here with warantless search

automobile. Secondly, that case was really pre-Terry and pre-Camara, and therefore it never really considered the possibility of a balancing test being appropriate in some situations.

Our issue here, our specific issue, was never decided in that case. It was really only alluded to.

For the reasons, then, stated in our brief, we simply ask that the Court affirm the judgment below.

Thank you.

MR. CHIEF JUSTICE BURGER: You have two minutes left, Mr. Goldberg, I believe.

REBUTTAL ORAL ARGUMENT OF ALAN D. GOLDBERG, ESQ.

ON BEHALF OF THE APPELLANT

MR. GOLDBERG: Thank you.

All I really wish to say at this point is that although Counsel for the State constantly refers to the Terry opinion, nothing in Terry supports an automatic right to frisk in this situation. Terry sets forth a standard of reasonable suspicion, reasonable belief. And the State's position, in Part 1 of their brief, is that they can frisk automatically when they are executing a warrant without reasonable suspicion, and Terry simply doesn't support that position.

And the only other thing I would say is that, again, the State contends that somewhere in this record there is an indication that drug traffic was open and notorious. I have gone through the factors in the record that I think indicate

just the opposite, and indicate that the officer's belief was just the opposite. I could argue until I am blue in the face that it wasn't open and notorious, and the State is really saying nothing any more than contradicting me. They are not pointing to anything in the record --

QUESTION: How about the transcript at page 9, at the bottom of it,where it says, "What happened during the patdown, if anything?" And Officer Johnson responds, "During the patdown, I felt some objects that I felt to be heroin."

MR. GOLDBERG: That gets to the other point of whether there was probable cause or reason for suspicion for its second intrusion. And then at that point the trial attorney objects and the Court says, basically,"You can't tell us what you felt, you have to tell us what facts led you to reach that belief."

QUESTION: Yes, but that would at least establish a subjective belief on his part. Admittedly the test is a subjective one.

MR. GOLDBERG: Right. At that point -- this is the preliminary hearing -- it does seem to indicate a subjective belief. Everywhere else in the record he says he doesn't have a subjective belief. At this point, which is about a month before the suppression hearing, he seemed to think so. When he reconsidered his testimony later on, he didn't have that subjective belief. Perhaps, he had realized himself how illogical it was to feel a cigarette pack and think that it contains heroin.

That was just a hunch. And that also invalidates the second search.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Gentlemen. The case is submitted.

(Whereupon, at 1:27 o'clock, p.m., the case was submitted.)