2019 IL App (2d) 160721-U
No. 2-16-0721
Order filed May 7, 2019



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>GERALD NORRIS,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Du Page County.<br><br><br><br>No. 15-CF-2406<br><br>Honorable Brian F. Telander, Judge, Presiding. |

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court properly denied defendant's motion to quash and suppress: although the police searched his vehicle before arresting him, they already had probable cause and thus the search was valid as incident to the arrest.

¶ 2 After a bench trial on stipulated evidence, defendant, Gerald Norris, was convicted of aggravated robbery (720 ILCS 5/18-1(b)(1) (West 2014)) and sentenced to 13 years in prison. On appeal, he contends that the trial court erred in denying his motion to quash his arrest and suppress the evidence obtained through the warrantless search of his vehicle. We affirm.

¶ 3 Defendant's motion alleged as follows. At about 2:49 a.m. on December 5, 2015, someone entered the 7-Eleven store at 1663 North Route 59 in Naperville and demanded money from the clerk, Manubhai Patel. Patel complied, and the man walked out of the store. At about 2:53 a.m., Aurora police officers Steven Pacenti and Shepherd[1] positioned their squad car at the corner of Peppertree Lane and Gregory Street in Aurora, four to five miles southwest of the 7-Eleven. Pacenti observed a Cadillac traveling west on Raintree Road, and he stopped it. Pacenti told the driver, defendant, that he was being stopped for speeding and running a stop sign. He ordered defendant out of the car, handcuffed him, and removed him from the area of the car. The officers searched the Cadillac and took various items.

¶ 4 Defendant's motion alleged that Pacenti had lacked sufficient information to seize him for robbery, given that Patel's description of the robber did not match defendant and the stop occurred miles from the 7-Eleven. The motion also contended that the warrantless search of the car exceeded the scope of a permissible search incident to arrest.

¶ 5 The trial court held a hearing on defendant's motion. Defendant testified on direct examination that, at about 2:45 a.m. on December 5, 2015, he was driving on Raintree. He was obeying all traffic laws, and there was no warrant for his arrest. As he was about to park, the police pulled him over, searched his vehicle, and removed some of his property.

¶ 6 Defendant testified on cross-examination as follows. On December 5, 2015, he was on mandatory supervised release (MSR) for burglary. He had come from the 7-Eleven on Frontenac in Aurora, a quarter mile from Raintree and Gregory. It took him four or five minutes to get there. He drove about 10 miles per hour on Raintree. He was stopped as he crossed Gregory.

[1] The transcript does not disclose Shepherd's first name.

¶ 7 The State's first witness was Pacenti. On direct examination, he testified as follows. At about 2:53 a.m. on December 5, 2015, he and Shepherd were in a squad car in the area of New York Street and Eola Road in Aurora. There had been several recent armed robberies in Naperville and Aurora. A dispatch from Naperville police informed the officers of an armed robbery at the 7-Eleven on Route 59 in Naperville. The officers drove to Kirkwood Lane, because they knew that a person who lived nearby (not defendant) was a suspect in a string of armed robberies. Gregory runs north-south through Kirkwood. Pacenti positioned the squad car at the corner of Peppertree and Gregory, facing east, about 3½ miles from the 7-Eleven.

¶ 8 Pacenti testified that he then saw a white Cadillac traveling west on Raintree approaching Gregory. The car was going about 40 miles per hour; the speed limit was 25. There were two stop signs at the intersection, but the car did not slow down for either one. Eventually the Cadillac drove west to where Raintree Road became Raintree Court. Shepherd exited the squad car and approached Kirkwood to the southwest. Pacenti followed the Cadillac's route, going south on Gregory and west on Raintree. He saw the Cadillac, which had turned around and was now facing him.

¶ 9 The court admitted a video of what happened in front of the squad car. The State played the video and Pacenti described what it showed. At 1:56 in the video, defendant put his hands up. Pacenti had told him to do so because he had learned that the robber had displayed a firearm. Shortly afterward in the video, Shepherd crossed the street behind the Cadillac as Pacenti asked defendant preliminary questions. At 2:12 in the video, Shepherd was at the rear passenger side of the Cadillac. At 2:48 in the video, Pacenti and defendant were speaking. Pacenti testified that defendant "seemed nervous" and was "leaning forward kind of blocking [Pacenti's] view to the passenger side of the vehicle."

¶ 10 Pacenti testified that there was no audio for the first 3:03 of the video, as he had missed the switch in the squad car and, after exiting, he wanted to keep his hands free in case he needed to reach for his gun. When Shepherd was positioned to cover for him, Pacenti turned on the microphone on his shoulder. By then, he had seen a black glove on defendant's right thigh; another black glove on the front passenger seat; a black bag on the front passenger-side floorboard; and a black jacket on the rear passenger-side floorboard. Pacenti identified photographs of these items.

¶ 11 Pacenti testified that he noticed that defendant was wearing "light colored stone[-]washed jeans with some type of designs on the front thigh area which were light, kind of silverish." These jeans struck Pacenti as unusual. He had heard from Shepherd that the Naperville police said that the suspect in the armed robbery wore silver pants. He believed that defendant's jeans matched the description. Pacenti identified photos of the jeans.

¶ 12 Pacenti testified further that he saw a brown plastic grocery bag on the front passenger seat. The bag was open, and Pacenti observed "a large amount of US currency, paper bills, just kind of randomly dropped in the bag. They were not organized at all." Pacenti identified a photo of the bag.

¶ 13 Pacenti testified that, at approximately 3:17 in the video, after he had made the foregoing observations, he ordered defendant to put his hands up. At 6:05 in the video, after defendant had been ordered out of the car and detained, Pacenti discovered a firearm between the driver's seat and the console. He moved it, saw that it was a BB gun, and replaced it. At some point after he detained defendant, he saw a black ski mask under a backpack on the front floorboard.

¶ 14 Pacenti testified that during their conversation defendant told him that he lived nearby. There was another car parked legally next to the passenger's side of defendant's car.

¶ 15 Pacenti testified that the Aurora police department had a policy allowing an inventory search of a vehicle that was going to be towed. The policy allowed the police to search the interior of the vehicle for any items to document on the tow sheet. The policy protected the police department in the event that any of the items were lost later on.

¶ 16 Pacenti testified on cross-examination as follows. The suspect in the previous armed robberies was Christopher Rounds, who had not been driving a white Cadillac. Defendant had not been named as a suspect and Pacenti had had no prior information on him. Pacenti and Shepherd positioned their squad car at Gregory and Peppertree because they had information suggesting that Rounds was the suspect in the robbery in Naperville.

¶ 17 Pacenti testified that, when he exited the squad car to approach defendant, he had received no further information from the owner of the 7-Eleven and had not seen any surveillance tape from the crime scene. Thus, he had no information on the suspect's height or weight or whether he had left in a vehicle. The dispatch had not mentioned black gloves. Pacenti saw nothing in the Cadillac that was related to a 7-Eleven store; the brown plastic bag appeared to be from Jewel. At some point, Naperville officers arrived to assist, as the crime had taken place in Naperville.

¶ 18 Pacenti testified that he did not call for the tow truck and did not recall which department made the request. When he searched the car, he had been under the impression that the Aurora police would be taking custody of it. Pacenti started filling out an inventory sheet, but he did not finish, because he was informed that Naperville police would take the car. He acknowledged that it is not within the Aurora police department's policy to inventory a vehicle if it does not take custody of it.

¶ 19 In the remainder of his testimony, Pacenti stated that defendant's vehicle had been blocking traffic. While performing the initial search, Pacenti had believed that the Aurora police department was going to arrange for the towing and that therefore he would be compiling the inventory. At some point, he learned that Naperville police would be arresting defendant.

¶ 20 Shepherd testified on direct examination as follows. On December 5, 2015, at about 2:40 a.m., he was with Pacenti on New York Street south of Eola Road. A few minutes later, he heard Officer Lippencott of the Naperville police department advise about the armed robbery near Routes 88 and 59. Pacenti and Shepherd drove to the area of Kirkwood Lane, where a suspect might be found. Pacenti parked facing east on Peppertree near Gregory. At 2:53 a.m., Shepherd heard a Naperville officer advise that the robber was "a male black or maybe it was a Hispanic *** wearing silver pants." He told Pacenti the information.

¶ 21 Shepherd testified that at 2:59 a.m., he saw a white or silver Cadillac going west on Raintree. The Cadillac did not slow down at the stop sign on either side of the intersection. Shepherd concluded that it was going well over the speed limit. He exited and saw that the Cadillac had stopped and was facing east, toward the squad car. Shepherd saw Pacenti exit the squad car and approach the Cadillac.

¶ 22 Shepherd testified that he saw defendant alone in the Cadillac. Shepherd approached and heard Pacenti tell defendant that he had stopped him for running the stop signs and order defendant to keep his hands on the steering wheel. As Pacenti and defendant kept talking, Shepherd ran the Cadillac's registration, returned to the passenger side, and shined his flashlight into the interior. The first thing he noticed was defendant's pants. He found them "unusual" because there were white stone-wash spots; he did not often see people wearing "stone[-]wash

jeans like this, *** especially on midnight shift." Shepherd identified the photos that Pacenti had identified earlier.

¶ 23 Shepherd testified that he also saw a plastic bag with a black glove lying on top of it. At that point, Shepherd signaled to Pacenti to start recording his conversation with defendant. Shepherd continued to stand at the passenger-side door. Pacenti told him that there was cash inside the bag. Shepherd then saw the cash in the bag. Pacenti ordered defendant out, handcuffed him, and placed him into the squad car. Shepherd advised dispatch of the evidence in the car, including the bag full of cash, the glove on top of the bag, and some other items.

¶ 24 Shepherd testified on cross-examination as follows. The suspect in the previous robberies was Rounds; in briefings, defendant's name had not been mentioned to Shepherd. He had no information that a white Cadillac had been involved. While the squad car was positioned at Peppertree and Kirkwood, he knew that the robber had been described as male and "Hispanic, brown" and "wearing silver pants." By calling the silver pants "unusual," he had meant that they were suspicious, as the dispatch had mentioned them. The dispatch had not mentioned black gloves. To remove defendant from the Cadillac, Pacenti handcuffed him; he then moved him across the street.

¶ 25 The court admitted the Naperville and Aurora 911 and police dispatch audios. In the 911 call, Patel stated in part that the robber had brown skin and wore a black jacket. Much of the tape was garbled. In the Naperville police dispatch, the dispatcher repeated this description and added that the robber wore silver pants, a black jacket, and a black sweatshirt. Later (how much later is unclear), the dispatcher stated that defendant, to whom the white Cadillac was registered, had numerous prior offenses and was on parole.

¶ 26 In argument, defendant contended as follows. First, the traffic stop was invalid, because there had been no violation. The officers' testimony was not credible and the video showed two speed bumps in the area.

¶ 27 Second, defendant contended, even were the stop valid, it did not support the handcuffing, arrest, and warrantless search. First in this regard, defendant argued, there was no valid search incident to arrest. He had already been handcuffed and removed from the car, and there was no reason to believe that evidence of his traffic offenses could be found inside the car. Second, the officers had lacked a reasonable suspicion that he had committed the armed robbery. The dispatch description of the robber was generic and the robbery took place several miles from the area of the stop; the grocery bag was not evidence of a crime and neither were the gloves; the pants were just jeans and not distinctive; and other evidence had been discovered only after the arrest. Third, defendant's MSR status at the time did not support the search, as there had been no testimony that the officers had known that he was on MSR. Finally, the search was not a proper inventory search; it was performed to find evidence of a crime. Also, there was no proof that the search was done in accordance with a standardized procedure.

¶ 28 The State argued as follows. First, the stop was valid. The officers had had a clear view of the intersection and reasonably suspected that defendant had exceeded the speed limit and run two stop signs. Also, defendant's car was blocking traffic and he did not offer to move it.

¶ 29 Second, the search was valid under several theories. The officers had the right to arrest defendant for the traffic violations and thus to detain him for the remaining events. Also, defendant's car was blocking traffic, which gave the officers the right to impound the vehicle and conduct an inventory search. Pacenti had testified to the Aurora police department's policy, and

he had conducted the search in good faith, believing until told otherwise that the Aurora police department would be impounding the car.

¶ 30 Next, the State argued, the officers had had probable cause to arrest defendant for robbery. Although the relationship between the timing of the various dispatches and the events of the video was not clear, several facts could be inferred as to what the officers knew and when they knew it. First, they knew that the robber was a male wearing silver pants and a black jacket; that he got cash from the register; and that he headed south (toward where the officers found defendant). Second, defendant was wearing pants that could be called silver and a black jacket, and there were black gloves in the car. Third, defendant appeared nervous and to be sitting so as to block Pacenti's view of the front passenger seat. Fourth, there was a grocery bag full of cash on the front passenger seat. At that point, if not earlier, the officers' observation of so many suspicious matters in plain view gave them "probable cause to arrest [defendant], probable cause to believe the vehicle had fruits of a robbery in it, and evidence would be found inside." This validated the search even though the removal and handcuffing of defendant did not yet transform the stop into an arrest.

¶ 31 The State argued next that the dispatches and the video showed that, about 5 minutes and 18 seconds into the stop, the officers knew that defendant was on MSR. Defendant admitted in his testimony that he had been on MSR at the time. Thus, per statute (see 730 ILCS 5/3-3-7(a)(10) (West 2014)), he had to consent to the search. The State argued that whether the officers had known that he was on MSR should not be a factor in deciding whether they had infringed on any reasonable expectation of privacy that defendant actually had.

¶ 32 Defendant replied as follows. The officers had received little specific information from dispatch and had essentially acted on a hunch. The State had presented no evidence of any inventory policy of the Naperville police, who had ended up towing defendant's car.

¶ 33 The trial court denied defendant's motion, explaining as follows. The officers testified credibly that they saw defendant exceed the speed limit and run the stop signs. Thus, the initial stop was valid. Although the stop took place three or four miles from the robbery, that was consistent with the lapse of time between the robbery and the stop. Once Pacenti approached defendant, they started talking about the traffic violations, which were still the subject of the conversation when the sound was activated for the video. Defendant appeared nervous. Also, from the video, it was clear that his car was illegally parked and was blocking traffic.

¶ 34 The court continued as follows. The dispatch had at various times described the robber as brown, Hispanic, or black. It had also described him as wearing silver pants and some black clothing, including a black jacket, and having taken a large amount of cash. Pacenti's testimony, corroborated by the video, was that defendant was wearing black. The pants were silver and had "some kind of strange either distress or design in big patches, but *** they [could] easily be characterized *** as silver because of the way they [were] faded out or washed out." Further, there was a black glove on defendant's thigh and another sitting on or by the brown Jewel bag. The video showed that, as soon as Pacenti saw the bag with cash on the seat next to defendant, he ordered him out of the car. The court continued:

> "When the officer sees the money in the car, thrown in there, I believe at that particular time, not only does the officer have a reasonable suspicion, but he has probable cause.

> If you take the Defendant's demeanor, the way the Defendant's acting, people don't walk around or carry around money just thrown in a baggie in a disheveled manner[;] that would certainly lead a reasonable officer to believe that crime had been committed.
>
> He's just heard that it was a black, brown, or Hispanic man, with silver pants, and [he] took a large amount of money.
>
> Common sense tells me that armed robbers throw money into a bag as quickly as possible, and it was sitting on the seat."

¶ 35 The court continued as follows. Because the car was impeding traffic, the officers had the right to remove it. Although Naperville police eventually took the car, Pacenti began an inventory search in accordance with his department's policy, which required that a car impeding traffic or threatening public safety be searched. At that point, the police recovered the gun.

¶ 36 The court stated that there were "multiple grounds on which the officers had a right to search" defendant's car. Aside from the MSR and inventory-search bases, these included that the officers had "probable cause to arrest defendant." The court continued:

> "[U]nder [*Arizona v. Gant*, 556 U.S. 332 (2009)], although clearly the Defendant is cuffed and no longer able to be a threat for reaching for weapons, I believe under Gant ***, the second prong of Gant ***, that it was reasonable to believe that there was evidence relevant to the crime of the arrest that was found in the vehicle.
>
> The cases that say the officers can't search are basically traffic cases, where there will be no expectation that an officer could find something that was evidence of a crime that he was arrested for in the vehicle, because there's DUIs, there's traffic offenses, and there's no chance.

> In this case, the officers knew and were told that a weapon was used.
>
> So, obviously, they're concerned not only about their safety, but more importantly, *** it was very likely and reasonable to believe that a search of the vehicle would evidence [*sic*] relevant evidence to the crime the Defendant was being arrested for, which was the armed robbery."

¶ 37 The court concluded that, although defendant had been handcuffed and removed from the car before the officers searched it, they could still do so incident to the arrest, because the offense of arrest was robbery and the officers had ample reason to believe that evidence of that crime would be found inside the car.

¶ 38 The cause proceeded to trial. The court found defendant guilty and sentenced him as noted. He timely appealed.

¶ 39 On appeal, defendant does not contest the trial court's finding that the initial stop was proper. He contends, however, that the court still erred in denying his motion to quash and suppress. We disagree. We hold that the court properly found that the police conducted a valid search incident to an arrest. Although the arrest followed the search, the police already had probable cause *before they began the search* to believe that defendant had committed the armed robbery of the 7-Eleven. As the arrest did not depend on the search for validation, both were permissible. We affirm on this ground and need not consider other possible justifications for the search.[2]

[2] In his reply brief, defendant contends that the State has forfeited any argument that the search was properly based on probable cause even absent a valid search incident to arrest. Defendant asserts that the State did not raise this justification in its argument on his motion to quash and suppress. Based on our reading of the record, including portions of the argument

¶ 40 In reviewing a ruling on a motion to quash and suppress, we accept the trial court's findings of fact unless they are manifestly erroneous, but we consider *de novo* whether the arrest and search were legal. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006).

¶ 41 The trial court concluded that, by the time Pacenti removed defendant from the car and detained him, there was probable cause to believe that he had committed armed robbery. The court noted that by then the officers had seen in plain view (1) defendant wearing a black jacket and silver pants, matching the dispatcher's description; (2) two black gloves near defendant, also matching the description; (3) a large amount of cash haphazardly stuffed into a plastic shopping bag within defendant's reach; and (4) defendant acting nervously and trying to obstruct Pacenti's view of the bag. Also, we note, the stop occurred at approximately 3 a.m., a low-traffic time, at a distance from the robbery consistent with defendant's involvement.

¶ 42 The existence of probable cause depends on the totality of the circumstances at the time of the arrest. *People v. Grant*, 2013 IL 112734, ¶ 11. "Whether probable cause exists is governed by commonsense considerations, and the calculation concerns the probability of criminal activity, rather than proof beyond a reasonable doubt." *Id.* Here, we agree with the trial court that the foregoing facts established probable cause to believe that defendant had committed armed robbery and thus to arrest him and search his car on this basis. We would characterize the evidence supporting probable cause as very strong. Indeed, defendant does not contend that the combined factors that we have noted did not suffice for probable cause.

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quoted earlier, we disagree with defendant's reading of the record. Moreover, it appears that the trial court considered and accepted this additional justification. In any event, because we fully resolve this appeal on the basis of search-incident-to-arrest, it is not important whether the State forfeited an additional basis to affirm.

¶ 43 Defendant maintains, nonetheless, that the search was not valid as incident to his arrest. He relies on timing. He contends that under *Gant* and *Smith v. Ohio*, 494 U.S. 541 (1990), the search was invalid because he was not arrested for armed robbery until after the search. We disagree. Although an arrest is not validated by the creation of probable cause as a result of a preceding search, the arrest is valid if probable cause existed before the search was initiated.

¶ 44 In *Smith*, a police officer followed the defendant and asked him what was in the grocery bag that he was carrying. The defendant did not respond, kept walking, and threw the bag onto the hood of his car. The officer approached, pushed the defendant's hand away, and opened the bag. He found drug paraphernalia inside the bag and arrested the defendant. The paraphernalia provided probable cause to arrest the defendant, which the officer then did. The Ohio Supreme Court upheld the search of the bag as incident to the arrest. *Smith*, 494 U.S. at 542-43.

¶ 45 The Supreme Court reversed. The Court disapproved of reasoning " 'justify[ing] the arrest by the search and at the same time…the search by the arrest.' " *Id.* at 543 (quoting *Johnson v. United States*, 333 U.S. 10, 16-17 (1948)). It quoted its statement in *Sibron v. New York*, 392 U.S. 40, 63 (1968), that " 'an incident search may not precede an arrest *and* serve as part of its justification.' " (Emphasis added.) *Id.* Thus, the search-incident-to-arrest exception to the warrant requirement "does not permit the police to search any citizen without a warrant *or probable cause* as long as an arrest immediately follows." (Emphasis added.) *Id.*

¶ 46 In *Smith*, the search did not merely precede the arrest. It also lacked probable cause when it was undertaken. That both of these considerations were crucial can be seen in the language that we have quoted. The infirmity of the police activity in *Smith* was that the search " 'serve[d] as part of [the arrest's] justification' " (*id.* (quoting *Sibron*, 392 U.S. at 63)), which it did by supplying the probable cause that did *not* exist before the search.

¶ 47 *Smith* cited *Rawlings v. Kentucky*, 448 U.S. 98 (1980). See *Smith*, 494 U.S. at 453. In *Rawlings*, the defendant admitted to a police officer that he owned some illegal drugs that another person had taken out of her purse. The officer searched him and found $4500 in cash and a knife. He then placed the defendant under arrest. *Rawlings*, 448 U.S. at 101. The Supreme Court upheld the denial of the defendant's motion to suppress the cash and the knife. It explained that, once the defendant admitted owning the drugs, the police had probable cause to arrest him. As the arrest "followed quickly on the heels of the challenged search," it was "not *** particularly important that the search preceded the arrest rather than vice versa." *Id.* at 111.

¶ 48 *Smith* thus did not bar a search incident to a subsequent arrest if the search was *already* justified by the existence of probable cause. Illinois courts have recognized and followed this principle. In *People v. Kolichman*, 218 Ill. App. 3d 132 (1991), officers went to a store where the defendant and two companions were present. The defendant was leaning on the counter for support, had drool coming from his mouth, and could not answer questions intelligibly. One officer patted him down and found pills. He arrested the defendant, but not for disorderly conduct. The pills formed the basis of the defendant's later conviction of unlawfully possessing controlled substances. *Id.* at 134-35.

¶ 49 The appellate court held that the trial court properly denied the defendant's motion to suppress the pills. The court explained that the pat-down was a valid search incident to arrest even though the arrest followed the search. The crucial consideration was that the search was independently validated by probable cause to believe that the defendant had committed a criminal offense—there, disorderly conduct. *Id.* at 139-40. It was of no consequence that the defendant had not been arrested for that offense: the crucial consideration was that the search had been justified by probable cause. *Id.* at 140-41; see *People v. Rossi*, 102 Ill. App. 3d 1069, 1073

(1981). In *People v. Damian*, 374 Ill. App. 3d 941 (2007), the court held that a police officer's search of the defendant's vehicle was proper even though it preceded the arrest: the key was that the officer had had probable cause for the arrest even before he undertook the search. *Id.* at 947.

¶ 50 *Gant* did not overrule *Rawlings* or the Illinois authority that we have cited. *Gant* holds simply that an officer may search a vehicle "[1] when an arrestee is within reaching distance of the vehicle or [2] it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant*, 556 U.S. at 346. We note that in *Gant* only the first prong was at issue before the Court. Nothing in *Gant* casts doubt on *Rawlings* or any other authority holding that the arrest need not precede the search if the search is supported by probable cause.

¶ 51 Whether *Gant* casts any doubt on the validity of a search incident to arrest when the needed probable cause relates to an offense other than that of the arrest is a question we need not consider here. Defendant was arrested for armed robbery, and the officers had probable cause to believe that he had committed that offense and that evidence of the offense was inside his car.

¶ 52 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County. As part of our judgment, we grant the State's motion to award $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 53 Affirmed.