

No. 03-1419

25th DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA,

Plaintiff

vs.

\_\_\_\_\_,  
Defendant

From \_\_\_\_\_ County

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**DEFENDANT APPELLANT’S BRIEF**

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**TABLE OF CONTENTS**

Table of Contents . . . . . ii

Table of Cases and Authorities . . . . . iii

Question Presented . . . . . 1

Statement of the Case . . . . . 2

Statement of the Facts . . . . . 2

Argument . . . . . 3

There was nothing beyond Defendant’s mere presence at \_\_\_\_\_ Billiards, seven minutes after closing time, before the doors were locked and in the company of 25 other patrons to connect him with alleged drug activity at the pool hall .....3

I.A warrant to search a premises does not authorize officers to search everyone present ..... 4

II.Since the pool hall doors were unlocked and it was only seven minutes past normal closing time, the hall was not closed to the public . . . . . 6

III.There was no particularized probable cause to search Defendant ..... 9

Conclusion . . . . . 11

Certificate of Service . . . . . 12

Appendix . . . . . 13

-iii-

**TABLE OF CASES AND AUTHORITIES**

**Cases**

*State v. Brooks*, 51 N.C. App. 90, 275 S.E.2d 202 (1981).....8, 10

*State v. Cutshall*, 136 N.C. App. 756,  
526 S.E.2d 187 (2000).....8  
*State v. Watlington*, 30 N.C. App. 101,  
226 S.E.2d 186 (1976)..... 10  
*Ybarra v. Illinois*, 444 U.S. 85(1979)  
.....passim

**Statutes**

N.C. Gen. Stat. §15A-226.....7

**QUESTION PRESENTED**

Was Defendant’s right to be free from unreasonable searches and seizures violated when police searched his person under a warrant authorizing a search of a pool hall?

**STATEMENT OF THE CASE**

Defendant pled guilty to felony possession of cocaine reserving the right to appeal the denial of his motion to suppress during the June 23, 2003 Criminal Session of \_\_\_\_\_ County. The Hon. Donald Bridges sentenced \_\_\_\_\_ to 6-8 months imprisonment, suspended and placed him on probation for 18 months.(R. 27-28). Notice of appeal was given on June 26, 2003. (R. 29-30).

**STATEMENT OF THE FACTS**

Defendant was at \_\_\_\_\_ Billiards on August 10, 2002 when \_\_\_\_\_ Police arrived and began to search the pool hall under a warrant issued earlier that day. (Tr. 18-22). The warrant allowed the search of (Street Address) among other things, the warrant a search of “vehicles and persons present at the time of the execution of the search warrant.” (R. 10). The object of the search was evidence of controlled substance violations. (R. 7-17). The search warrant affidavit stated that rack boys and managers at the pool hall had been seen using drugs and exchanging money with patrons. (R. 16). Sgt. \_\_\_\_\_, a \_\_\_\_\_ Police officer who helped with the search, said he first saw Defendant at one of the pool tables inside the pool hall. (Tr. 22). Although the officers stated that the pool hall closed at 2 a.m., the door was still unlocked when they entered at 2:07 a.m. (Tr. 26, 51-52). The Officer testified that about 25 people were playing pool when police arrived. (Tr. 26). Officers went inside the building, had everyone put their hands on the pool tables, and began full searches of each person in the pool room. (Tr. 30). Each person was ordered to empty their pockets onto the pool table. (Tr.30). The search of the building and the persons present happened simultaneously. (Tr. 32). At the time the search warrant was issued the officer said that he had no evidence showing that Perry had any involvement in drug activities at \_\_\_\_\_ Billiards. (Tr. 29). Sgt. \_\_\_\_\_ approached Defendant and searched him after checking his ID. (Tr. 35). Sgt. \_\_\_\_\_ found small plastic bags of crack and marijuana. (Tr. 37).

**ARGUMENT**

**There was nothing beyond Defendant’s mere presence at \_\_\_\_\_ Billiards, seven minutes after closing time, before the doors were locked and in the company of 25 other patrons to connect him with alleged drug activity at the pool hall.**

## ASSIGNMENT OF ERROR NO. 1.

(R. 33).

Defendant, along with the other patrons at \_\_\_\_\_ Billiards, was searched almost immediately after officers entered the building, even though the application for the search warrant contains no particularized information about Defendant. Although officers entered seven minutes after the usual closing time, the building was still unlocked and many customers were inside playing pool. Other than his presence at the pool hall police had nothing tying him to drug activity. Simple presence in a place that police are authorized to search does not give police the right to search anyone who happens to be there. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). In order to search a person present, the police must have probable cause specific to the individual they search. *Id.* The conclusion that the pool room was not open to the public at the time of the search (Tr. 70) and therefore probable cause existed to search each and every person present at the time the search was conducted was not supported by the evidence. The only evidence before the court was that the front door was unlocked and the approximately 25 people were inside playing pool. (Tr. 26, 51-52).

### **I. A warrant to search a premises does not authorize officers to search everyone present**

Although officers had probable cause to search \_\_\_\_\_ Billiards, they lacked probable cause to search Defendant at the time the warrant was issued. Since Defendant was searched almost immediately after officers arrived at the pool hall, there were no additional facts known to the officers justifying their search of his person. A person's legitimate expectation of privacy is not forfeited simply because he is on a premises where officers have probable cause to search. *Ybarra*, 444 U.S. at 92. In *Ybarra*, officers obtained a warrant to search a tavern based on an informant's tip that the bartender possessed heroin. *Ybarra*, 444 U.S. at 87. The informant also said that he spoke with the bartender in the tavern about purchasing heroin. *Id.* The warrant authorized a search for evidence of controlled substances. *Id.* at 88. Officers raided the tavern and patted down each of the customers in the tavern including Ybarra. *Id.* During the patdown the officer felt a cigarette pack with objects inside. *Id.* The officer did not remove the pack immediately, but several minutes later he took the pack from Ybarra's pocket and found heroin. *Id.* at 89. The Supreme Court noted in *Ybarra* that authorities had no reason to suppose that any person present in the tavern other than the bartender would be violating the law. *Id.* at 90. Later, when the police began their search there were still no reasons to believe Ybarra was violating the law. *Id.* In the search of \_\_\_\_\_ Billiards, police surveillance showed that rack boys/managers were seen using drugs and exchanging money with customers during normal working hours. (R 16). There was no indication from the months of surveillance that Defendant had been present at \_\_\_\_\_ Billiards or had any contact with rack boys/managers. Although the search began after the regular closing time, the door to the pool hall was not locked and there were 25 people inside playing pool. (Tr.26). Officers began full searches of each person present immediately upon entering the building without distinguishing between employees and customers. (Tr. 30-32). There was no probable cause to search Defendant at the time the warrant was issued, and

there were no additional facts, other than Defendant's presence at \_\_\_\_\_ Billiards, to support the search of his person once they arrived. Therefore the search of Defendant is indistinguishable from the one the Supreme Court ruled unconstitutional in *Ybarra*.

**II. Since the pool hall doors were unlocked and it was only seven minutes past normal closing time, the hall was not closed to the public**

The Defendant search was not authorized by N.C. Gen. Stat. §15-226, because the building was still open to the public at the time of the search and the patrons were searched before the search of the premises was complete. The statute reads: An officer executing a warrant directing a search of premises not generally open to the public or of a vehicle other than a common carrier may detain any person present for such time as is reasonably necessary to execute the warrant. If the search of such premises or vehicle and of any persons designated as objects of the search in the warrant fails to produce the items named in the warrant, the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find property particularly described in the warrant which may be concealed upon the person, N.C. Gen. Stat. §15A-226. The trial court should have found this statute inapplicable for two reasons: the pool hall was generally open to the public at the time of the search; and the officers searched Defendant and the other patrons well before the search of the pool hall was finished. Although officers testified that the pool hall was closed when they entered, that was not confirmed by anyone in actual control of the building at the time of the search. Also the door was open and there were 25 people inside at the time of the raid. (Tr. 26, 51-52). Any member of the public who wanted to play pool could reasonably assume that because the front door was unlocked and there were numerous customers inside playing pool that the establishment was still open. The statute specifically applies only to "premises not generally open to the public." Since the facts show that the public had general access to the pool hall at the time of the search, the statute does not permit the search.

The search was also illegal because it occurred well before the search of the premises was complete. Sec. 15A-226 permits a search of persons present only when items sought by the warrant could not be found. *State v. Cutshall*, 136 N.C. App. 756, 526 S.E.2d 187 (2000). The trial court characterized this as a statutory requirement, rather than a constitutional one, but that reasoning overlooks the constitutional requirement the Supreme Court announced in *Ybarra*: that a warrant authorizing search of a premises does not justify the search of individuals based only on their presence. 444 U.S. at 91. It is only after a search of the premises fails to find the object of a search that there can be probable cause to search persons present. Interpreting the statute in a way that disregards the requirement that the premises be searched without success first would cause the statute to run afoul of *Ybarra*. *State v. Brooks*, 51 N.C. App. 90, 275 S.E.2d 202 (1981) (holding that once officers have searched a premises without success there is a particularized suspicion to search persons present) *Cutshall*, 136 N.C. App. at 760, 526 S.E.2d at 190 (if requirement that "the search warrant fails to uncover evidence" were eliminated, the statute would be unconstitutional in light of *Ybarra*). In *Cutshall*, officers made a controlled purchase of drugs from a trailer and obtained a warrant to search the premises, including outbuildings. *Id.* at 758, 526 S.E.2d at 188. Police raided the trailer and found 6-7 people inside. Police searched

Cutshall immediately, finding drugs and paraphernalia. The police also searched the trailer and outbuildings finding more drugs and paraphernalia. The court held that because there was no individualized suspicion of Cutshall, searching him before the premises was searched violated the constitutional principle applied in *Ybarra*. Id. at 758-59, 526 S.E.2d at 188-89. The fact that Defendant was searched well before the pool hall search was complete means that there was no probable cause to search him and therefore the search should have been suppressed.

### **III. There was no particularized probable cause to search Defendant**

Despite months of surveillance there was no information that Defendant had any connection to drug activity at \_\_\_\_\_ Billiards. According to the search warrant affidavit, officers had video cameras filming the outside of the pool hall around the clock from June 28 - August 5, 2002. (R. 16). Although the warrant identified several individuals identified with drug sales -- Defendant was not mentioned as a target. According to Sgt. \_\_\_\_\_, at the time he sought the warrant there was no evidence linking Defendant to illegal activity at \_\_\_\_\_ Billiards. Whether the search of a person present on the premises is reasonable and therefore constitutional, depends on whether a search of the premises came up empty. The fruitless search allows an inference that a person present at the scene is concealing contraband. See *State v. Watlington*, 30 N.C. App. 101, 103, 226 S.E.2d 186, 188 (1976) (upholding search under §15A-226 because search of vehicle was completed and unsuccessful before passenger was searched); *State v. Brooks*, 51 N.C. App. 90, 95, 275 S.E.2d 202, 205 (1981) (upholding §15A-226 search because officers had searched and failed to find "ready to sell" heroin before searching person present). In the Defendant search, after the warrant was issued officers discovered no additional information linking Defendant to any crime before they searched him. The search occurred before the officers had completed the search of the building so any inference that Defendant was concealing contraband that was the target of the search was premature. Therefore because there were no facts leading to a particularized suspicion of Defendant, the results of the search of his person should have been excluded.

### **CONCLUSION**

The Court of Appeals should reverse the order of the trial court permitting the use of the items taken from Defendant.

Respectfully submitted, this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Attorney for the Defendant

### **CERTIFICATE OF SERVICE**

I certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ a copy of the attached document was served on The State Of North Carolina by first class mail postage paid, to: Douglas A. Johnston

Spec. Dep. Atty. Gen.

PO Box 629

Raleigh, NC 27602

### **APPENDIX**

Transcript pages 65-74, Trial court order denying motion to suppress.