

# Police Prosecutor Update

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## SEARCH AND SEIZURE CELL-SITE LOCATION INFORMATION

On May 4, 2017, the Indiana Supreme Court issued its decision in Zanders v. State, 73 N.E.3d 178, (Ind. 2017), which overrules the decision of the Court of Appeals in Zanders v. State, 58 N.E.3d 254 (Ind. Ct. App. 2017), reported in the September, 2016, issue no. 290, of the Police Prosecutor Update.

On January 31, 2015, Zanders robbed Whitey's Liquor Store and left with cash, Newport cigarettes and Patron tequila. On February 6, 2015, Zanders robbed J & J Liquor Store and made off with cash and 1800 Silver tequila. On both incidents, Zanders drove a red Pontiac. Prior to the robbery of the J & J, the clerk received a telephone call from an Ohio number; the caller asked about the store's closing time. Through that telephone number, police were able to identify Zanders as a suspect. Zanders was interviewed in Ohio, and denied ever visiting Indiana. During the interview, the detective made an emergency request to Zanders' cell phone provider to secure the records associated with his cell phone number. The provider gave the detective Zanders' call and cell-site location data for the previous 30 days. It was discovered that Zanders' phone was used to call Whitey's on the day of the robbery and that the phone was located in the same cell-site sector as Whitey's 9 minutes prior to the robbery. Likewise, just prior to the robbery of J & J, the cell-phone was located in the same cell-site sector as the liquor store. After each robbery, the phone returned to the same cell-site sector as Zanders' mother's home. Detectives secured a search warrant for Zanders' mother's house and his brother's house as well. In each, evidence linking Zanders to the robbery was found. Zanders was charged with 2 counts of robbery, Level 3; 2 counts of possession of a firearm by a serious violent felon; and the habitual offender enhancement. He was convicted of all counts and the enhancement.

Finding that the Fourth Amendment does not require police to obtain a search warrant to gather information an individual has voluntarily relinquished to a third party, the Court found Zanders had no reasonable expectation of privacy in cell-site location information (CSLI). Also, under Article 1, Section 11 of the Indiana Constitution, police may take minimally intrusive historical CSLI from a service provider to prevent an armed robbery suspect from striking again.

As the information police received in this case was "only historical, active, network-based CSLI," that did not reveal the content of Zanders' communications or any "high resolution location data," the police did not engage in a search. First, cell phones operate by transmitting signals, so that when users engage in communication, they are "voluntarily sending signals to their providers." Second, service providers keep track of those signals so that they know how much to bill.

The third party doctrine of the Fourth Amendment, however, has not been imported into state constitutional analysis under Article 1, Section 11. Turning to the 3-part Litchfield test, the Court found the level of suspicion was high, the level of intrusion – obtaining historical CSLI from the provider – was low, and law enforcement needs were urgent. The Court upheld Zanders' conviction. It is important to

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note that the Court specifically declined to pass judgment on the propriety of gathering other types of cell-phone data – “GPS, pinging, triangulation, passive, real-time and so on”—without a warrant.

## OPERATING WHILE INTOXICATED REFUSAL

On May 31, 2017, the Indiana Supreme Court issued its decision in Hurley v. State, \_\_ N.E.3d \_\_, (Ind. 2017), which overrules the decision of the Court of Appeals in Hurley v. State, 56 N.E.3d 127 (Ind. Ct. App. 2016), reported in the July, 2016, issue no. 288, of the Police Prosecutor Update.

Hurley was the subject of a traffic stop. She failed some field sobriety tests and consented to a chemical breath test. The state trooper explained to her and showed her how to blow into the tube as hard as she could. She blew into the instrument but failed to blow enough to get a sufficient sample. She repeated the process two more times, both times failing to provide a sufficient sample. Based on his interaction and observation of Hurley, the trooper concluded she was not cooperating and charged her with refusing the breath test. He subsequently obtained a warrant for a blood sample, and based on that Hurley was charged with operating a vehicle with an alcohol concentration equivalent to 0.15% or more. Hurley filed a petition for judicial review of the refusal determination. After a hearing, the trial court denied her petition. Hurley appealed. The Court of Appeals affirmed the trial court’s ruling.

The Supreme Court held that Title 260, Section 2-4-2 of the Indiana Administrative Code requires an officer to administer a second test after the first returns an insufficient sample unless the driver “manifests an unwillingness to take the test.” “A refusal to submit to a chemical test occurs when the conduct of the motorist is such that a reasonable person in the officer’s position would be justified in believing the motorist was capable of refusal and manifested an unwillingness to submit to the test.” The Court found no testimony to indicate that Hurley in any way attempted to foil the breath test or failed to follow instructions. Moreover, the trooper testified Hurley was “completely cooperative.” Since there was no unwillingness to take the test and because the trooper did not offer a second breath test, she could not have been found to have refused. Therefore, the judgment of refusal was reversed.

## FORFEITURE SUFFICIENCY OF THE EVIDENCE

On May 19, 2017, the Indiana Court of Appeals issued its decision in Gonzalez v. State, \_\_ N.E.3d \_\_, (Ind. Ct. App. 2017). On January 25, 2016, a sheriff’s deputy stopped the car Gonzalez was in. The deputy smelled the odor of marijuana and asked the 4 occupants for vehicle registration and identification. When Gonzalez opened the glove box, the deputy observed a “marijuana dispensary container” and marijuana residue throughout the vehicle. The vehicle occupants were removed and searched. Two were in possession of cocaine. In a void beneath the center console, officers discovered heroin. Gonzalez possessed \$810.00. The driver (who was not Gonzalez) had rented the vehicle.

On February 1, 2016, a forfeiture action was filed against the \$810.00, alleging that it had been furnished or was intended to be furnished in exchange for a violation of a criminal statute, used to facilitate the violation of a criminal statute, or was traceable as proceeds of a crime. At some point, Gonzalez pled guilty to possession of marijuana as a class B misdemeanor. The other three pled guilty to felony narcotics possession charges. A bench trial was held, and on November 30, 2016, the trial court entered judgment of forfeiture.

IC 34-24-1-1(d) establishes a rebuttable presumption when money is found on or near a person who is committing one of several dealing crimes or possession of cocaine, a narcotic drug, or methamphetamine as a Level 3, 4, or 5 felony. Gonzalez' conviction to possession of marijuana did not qualify the state's forfeiture action for that presumption. It appeared to the Court the state tried to prove that Gonzalez conspired with others to deal in narcotics. It was not known how Gonzalez became a passenger in the vehicle, whether he had communicated with any of the other occupants about the heroin in the car or the drugs they possessed, whether he knew about the hidden compartment, or whether he knew where the vehicle was going. The State failed to establish a nexus between a crime and the currency. The Court reversed the forfeiture order.

## SEARCH AND SEIZURE REASONABLE SUSPICION

On May 30, 2017, the Indiana Court of Appeals issued its decision in Redfield v. State, \_\_ N.E.3d \_\_\_, (Ind. Ct. App. 2017). A police officer responded to a dispatch report, based on an anonymous tip, of a person with a firearm. The report described the person as a black male wearing a grey shirt and a hat. The officer observed a man matching that description when he arrived on scene. Bailey approached the man, Redfield, who was talking to another man, Welker. While waiting for backup officers to arrive, the officer made contact with Welker, patted Welker down, and spoke to Welker briefly. He told Welker he'd received a call about "somebody with a gun." At that point, Redfield stepped away, bladed his body away from the officer's line of sight, and at about 5 feet away from the officer, made a motion with his right hand that appeared to be that of "drawing for a gun." The officer then drew his sidearm and ordered Redfield to stop and "Let me see your hands." Redfield disregarded the commands and continued to walk away. The officer tased Redfield, who made a quick motion with his right hand and grabbed a firearm out of the side of his pants. The officer was able to seize the firearm. Redfield was arrested. The gun was loaded with a single hollow-point bullet along with regular ammunition. The officer also discovered cocaine on Redfield.

Redfield moved to suppress the gun and drugs, which motion was denied. At a jury trial, Redfield was convicted of unlawful possession of a firearm, possession of cocaine, pointing a firearm and resisting law enforcement. On appeal, Redfield argued that the officer had no reasonable suspicion that Redfield was engaged in criminal activity and therefore, had no grounds to seize Redfield.

Possession of a firearm, by itself, is not sufficient to establish reasonable suspicion of criminal activity. While the officer did not have reasonable suspicion at the time he approached the two men, Redfield's behavior subsequent to that approach gave rise to reasonable suspicion. Upon mention of the dispatch about a man with a gun, Redfield stepped away, bladed his body and made a hand motion consistent with drawing a firearm. He then failed to heed the officer's command to stop. Once he attempted to flee after the officer told him to stop, the officer had probable cause to seize and arrest Redfield. The search of Redfield, which resulted in the discovery of the gun and drugs, did not violate the Fourth Amendment. The judgment of the trial court was affirmed.