

Police Prosecutor Update

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SEARCH AND SEIZURE ANONYMOUS INFORMANT

On July 31, 2017, the Indiana Court of Appeals issued its decision in McGrath v. State, ___ N.E.3d ___, (Ind. Ct. App. 2017). An anonymous Crime Stoppers caller stated the following: an indoor marijuana grow was occurring at a specific street address. The color of the house and the first names of the occupants were identified. An odor of marijuana often emanated from the house, and bright light was visible from a window nightly. A police detective then conducted surveillance. He verified the address and the color of the house. He noted that the home had both a central air conditioning unit and individual air conditioners in both upstairs windows. Further, he noted that several of the windows had dark covering, consistent with a marijuana grow operation. At night he observed a light of an “apparent



difference” emanating from an upstairs window, consistent with the artificial light of an indoor grow. He also confirmed that the occupants of the house were Brandon McGrath and Kelsey Bigelow. The detective never detected the odor of marijuana.

The detective applied for a search warrant to use a forward looking infrared or “FLIR”, a thermal imaging detection system mounted to an aircraft. The search warrant was granted and executed, and the detective was informed that a heat signature recognized as consistent with a marijuana grow operation was observed from the upstairs of the house. The detective applied for a second search warrant, which was granted. Execution of this search warrant yielded 67.5 lbs. of marijuana plants and over 5 lbs. of marijuana leaves, along with plant fertilizers, heat lamps, dehydrators, drying racks, and deodorizing machines.

Prior to trial, McGrath requested a Franks hearing and filed a motion to suppress. It was denied and McGrath was found guilty of Dealing Marijuana. On appeal, McGrath argued that there was insufficient evidence to corroborate the anonymous tip. The court of appeals agreed: all of the facts of the tip that had been verified by the detective could easily have innocent explanations. The only fact in the tip that was not verified – the odor of marijuana – would have been crucial to a finding of probable cause that illegal activity was afoot. Although the court recognized the detective’s training and experience in the investigation of illegal drug operations, it found that it did not matter. “However impeccable the training and experience of law enforcement officer in such matters, that training and experience cannot provide a portion of the basis for, or the missing piece needed to establish, probable cause for the issuance of the warrant authorizing the use of a thermal imaging device.” (This statement leads one to wonder what evidence is sufficient to authorize use of a thermal imaging device.)

The opinion drew one dissent, on the grounds that the good faith exception to the exclusionary rule should save this search and seizure.

This is a publication of the Prosecutor’s Office which will cover various topics of interest to law enforcement officers. Please direct any questions or suggestions you may have for future issues to the Prosecutor’s Office.

SEARCH AND SEIZURE TERRY STOP

On July 31, 2017, the Indiana Court of Appeals issued its decision in Bell v. State, __ N.E.3d ___, (Ind. Ct. App. 2017). A patrol officer observed riding his bicycle at night without the required rear and front lights. When Bell rode within 20 feet of the officer, the officer asked Bell, “Hey, do you mind if I talk to you for a minute?” Bell approached, was looking around and was sweating. The officer asked Bell for his name and ran it for warrants. There were none. The officer asked Bell if he possessed anything illegal, and Bell said he was not. The officer observed a suspicious bulge in Bell’s front pocket. In response to this question, Bell looked away, started looking around and did not answer. The officer then patted Bell for weapons and recovered a gun. Bell did not have a permit. After he placed Bell under arrest, the officer searched Bell incident to arrest and found cocaine, heroin and marijuana. Bell was convicted of unlawful possession of a firearm by a serious violent felon, possession of a narcotic drug, possession of cocaine and possession of marijuana. Prior to trial Bell filed a motion to suppress the evidence because his rights under both federal and state constitutions had been violated. The trial court denied his motion.

On appeal, the court found that the initial stop was lawful and that the pat-down for weapons did not violate the Fourth Amendment. The encounter occurred after 1:00 a.m. in a high crime area. Bell had a suspicious bulge in his pocket and evaded the officer’s question about the bulge. Also, Bell was looking around and sweating heavily. It was reasonable for the office to be concerned for his safety and the safety of the public. It also found the pat-down did not violate Article I, Section 11 of the Indiana Constitution. The degree of suspicion was high because Bell was looking around, sweating heavily and evading the officer’s questions about the observed bulge. The intrusion into Bell’s privacy was minimal because it was confined to a pat-down of his outer clothing. Law enforcement needs were high given the circumstances leading up to the pat-down. The totality of the circumstances justified the pat-down.