

# Police Prosecutor Update

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## SUFFICIENCY OF THE EVIDENCE MAINTAINING A COMMON NUISANCE AND POSSESSION OF PARAPHERNALIA

On May 9, 2018, the Indiana Court of Appeals issued its decision in Leatherman v. State, \_\_\_ N.E.3d \_\_\_ (Ind. Ct. App. 2018). Two law enforcement officers observed Leatherman driving a van. After the van parked, they approached it and observed Leatherman pass a small bag to Ditton, who shoved it in her pants. The bag, when removed, contained methamphetamine. During a pat-down of Leatherman, two syringes containing a liquid residue were removed from his pockets. Gray caps on the syringes indicated they were from the county's needle exchange program. Two other syringes were also found in the van. Leatherman was found guilty of maintaining a common nuisance, possession of methamphetamine, and possession of paraphernalia. He was also an habitual offender.

Leatherman challenged the sufficiency of the evidence to support his convictions for maintaining a common nuisance and possessing paraphernalia.

With regard to the possessing paraphernalia charge, intent to introduce a controlled substance into one's body can be inferred from circumstantial evidence. The court found that evidence of Leatherman's possession of methamphetamine and delivery to Ditton as well as the two used syringes was sufficient for the jury to find intent. However, Leatherman also alleged he had legal authority to possess syringes under the local needle exchange program. The court found the statute does not confer immunity from prosecution on needle exchange program participants. The statute provides that attending a needle exchange program may not be the basis for a stop, search, seizure, probable cause or reasonable suspicion. It does not "condone unlawful conduct that transpires after an individual has obtained a needle from an exchange program." Leatherman's conviction for possession of paraphernalia was affirmed.

With regard to maintaining a common nuisance, the court found that the state presented sufficient evidence that Leatherman used the van to facilitate delivery of a controlled substance. However, it found the state failed to prove that Leatherman used his van for that purpose more than one time. Under previous versions of the definition of common nuisance, the structure had to be used "one or more times" for the illegal activity. When the legislature re-codified the nuisance statutes into I.C. 35-45-1-5 in 2016, it removed that language. According to precedent prior to the "one or more times" language, the state must prove that a structure was used multiple times for the illegal activity. The conviction for maintaining a common nuisance was reversed.

In 2016, the legislature moved all of the various common nuisance crimes into I.C. 35-45-1-5. While the result in this case is not terribly controversial – requiring a car to be used more than once to deliver drugs, it is not apparent that the legislature intended to require the state to prove that an individual used a building more than one time to facilitate involuntary servitude, juvenile prostitution (I.C. 35-45-1-5(a)(4)), or human trafficking (I.C. 35-45-1-5(a)(5)). The 2016 re-codification is causing some unintended consequences.

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 CUSTODY AND PIRTLE ADVISEMENT

On May 10, 2018, the Indiana Court of Appeals issued its decision in State v. Janes, \_\_\_ N.E.3d \_\_\_ (Ind. Ct. App. 2018). Janes and a passenger drove past a reserve deputy sheriff in the early morning hours and failed to dim his headlights. When the deputy sheriff stopped Janes, Janes was nervous, would not make eye contact, and handed him a bank card instead of his driver's license. Suspecting Janes was impaired, the deputy asked for backup. Two other deputies arrived; one of them had information about Janes being involved with methamphetamine. The reserve deputy approached Janes on the driver's side of the car to deliver the warning; one of the other deputies approached on the passenger side. After giving Janes a verbal warning and his driver's license back, the deputy started toward his patrol car, then went back to the driver and asked for consent to search the car. Janes gave consent, and the deputy asked him and the passenger to exit the car and stand next to a patrol car while they searched. Janes and his passenger complied. Methamphetamine was found in the trunk, and a pipe and gun were found in the car. Janes was charged and filed a motion to suppress the evidence. At the hearing, Janes told the court that the officers did not tell him he was free to go, and he did not feel free to leave. The trial court found that Janes was in custody when he gave consent and that a Pirtle advisement was required for consent to be valid. As no Pirtle advisement was given, the evidence found in the car was suppressed. The State appealed.

As the State appealed a negative judgment, it had to show the trial court decision was contrary to law. An appellate court may not reweigh the evidence or judge witness credibility, and must consider only the evidence most favorable to the trial court's ruling. One factor in determining whether an encounter is custodial is whether a reasonable person would feel free to leave. However, a driver in a traffic stop is not free to leave, yet the traffic stop is not ordinarily considered custodial. Other factors must be present, such as the advisement of Miranda rights, the use of handcuffs, restraining the defendant, telling the defendant he is a suspect in a crime, vigorous interrogation, suggesting the defendant should cooperate, implying adverse consequences for not cooperating, the length of the detention, and suggesting the defendant is not free to go about his business.

The court found the following evidence supported the trial court ruling: Three uniformed officers in three separate cars with flashing lights stopped Janes on a rural highway in the middle of the night. (The court found the number of officers unusually high for a traffic stop). Two officers stood on either side of the car when one of them returned his driver's license to him. The deputy asked Janes, after the verbal warning, if he'd had anything to drink that night, whether anything illegal was in the car, and whether there were guns, knives, or other weapons. The court did not appear to give any weight to the fact that the deputy had returned Janes' driver's license. "We agree that, considering the totality of the circumstances, a reasonable person would not feel free to leave this scene." The judgment of the trial court was affirmed.

It is difficult to discern any guidance from this opinion as to when an ordinary traffic stop, as this one was, turns into custodial detention. The court appears to disregard the prior guidance of cases, such as Sellmer v. State, 842 N.E.2d 358 (Ind. 2006), and Jones v. State, 655 N.E.2d 49 (Ind. 1995), which define custody as "a reasonable person under the same circumstances would believe that she was under arrest or not free to resist the entreaties of the police." For now, it appears that the best course for an officer would be to advise the suspect of his Pirtle rights before obtaining consent to search if there is any doubt that he is in custody.

## SEARCH AND SEIZURE ANONYMOUS INFORMANT

On May 1, 2018, the Indiana Supreme Court issued its decision in McGrath v. State, \_\_ N.E.3<sup>d</sup> \_\_\_\_ (Ind. 2018), vacating McGrath v. State, 81 N.E.3<sup>d</sup> 655 (Ind. Ct. App. 2017), which was briefed in Issue No. 300 of the Police Prosecutor Update, August, 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. 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 implements.

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.”

The Supreme Court disagreed. Because the anonymous informant reported having observed criminal activity firsthand, the tip had “greater weight than might otherwise be the case.” The detective was able to corroborate all of the tipster’s information, except for the odor of marijuana. Although some of those facts were plainly evident, not all were, and no evidence of occupancy was in the public domain. While each of the facts, viewed discretely, were prone to innocent explanation, “this kind of divide-and-conquer approach is improper.” “When viewed collectively, and in the context of [the detective’s] training and experience, these facts are sufficiently indicative of a marijuana grow operation.” The trial court’s decision denying the motion to suppress was affirmed.