Police Prosecutor Update

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SUFFICIENCY OF THE EVIDENCE
SUBSTANTIAL STEP IN ATTEMPTED CRIME

On October 11, 2018, the Indiana Supreme Court issued its decision in BTE v. State, ___ N.E.3d ___ (Ind. 2018). BTE had a crush on G.M., who apparently did not feel the same way and preferred J.R. In the 2015-16 school year, he began planning an attack on the school that all of them attended, to occur on April 20, 2018, the anniversary of Columbine. A school resource officer learned the BTE had "liked" a Facebook page called "Columbine High School Massacre," and the local police investigated. The police interviewed BTE and he acknowledged plotting with his friend M.V., but he claimed their scheme was a long-running joke. BTE was charged. During the juvenile court hearing the judge admitted statements BTE made to M.V. and other juveniles via Facebook chat, wherein he expressed his wish to torture or kill J.R. and occasionally mentioned killing G.M. and described the weapons he might use. He claimed he knew how to make pipe bombs. He also solicited M.V. and D.H. to help with violent acts. He sent D.H., who did not attend school there, a picture of J.R. About the date, he said, "four twenty eighteen. Some people will find out what the state of nothingness is like." The court also admitted into evidence a diagram BTE made of one of the classrooms, marking the exits and indicating with an "x" where one of his victims sat. The trial court admitted BTE's death note to be read after he died carrying out his plan. The juvenile court adjudicated BTE delinquent for having committed attempted aggravated battery and conspiracy to commit aggravated battery.

The Court of Appeal reversed the attempted aggravated battery adjudication because "the conduct . . . did not go beyond mere preparation and was not strongly corroborative of his stated intent" and therefore did not amount to sufficient evidence that BTE completed a substantial step toward the completion of the crime. The Supreme Court granted transfer.

Whether an act constitutes a substantial step toward the commission of a crime is a fact question based on the totality of the circumstances. "A guilty mind, by itself, does subject the actor to criminal liability." The act must go "beyond mere preparation" but does not have to foreclose "preventive action by police and courts to stop the criminal effort." The court found that BTE's solicitations, drawings, diagrams and death note strongly corroborated his criminal intent. The solicitations subjected BTE to risk of being reported to the authorities. The court found that the severity of the offense – a school shooting – justified "drawing a fairly early line to identify and sanction behavior as an attempt." The court found that the lack of proximity to the planned offense (some two years in the future) was not dispositive. BTE's conduct in the aggregate "shows a young man with a clear intention to commit violence at his school, along with affirmative acts that strongly corroborate that intent." The trial court's judgment was affirmed.

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SEARCH AND SEIZURE
PIRTLE WARNINGS BEFORE DRUG RECOGNITION EVALUATION

On October 3, 2018, the Indiana Supreme Court issued its decision in Dycus v. State, ___ N.E.3d ___ (Ind. 2018), overruling the opinion of the Court of Appeals in Dycus v. State, 90 N.E.3rd 1215 (Ind. Ct. App. 2018), which was briefed in Issue 305, January edition, of the Police Prosecutor Update. Police encountered Monica Dycus with one foot out of her open car door, and the other on the brake, yelling at the car in front of her. The officer on the scene noticed a strong odor of marijuana on Dycus, and called for backup. The backup officer was a drug recognition expert, who performed the SFSTs. Dycus showed no clues on the HGN, which is consistent with marijuana use, and failed the walk and turn and one leg stand. Defendant agreed to take a chemical test, and after a breath test of .00, the officer noticed a green streak on her tongue and asked for consent to perform a DRE Evaluation. Dycus agreed, and after performing the evaluation, the DRE determined Dycus was under the influence of THC. A blood draw was performed, which returned positive for THC.

The Defendant alleged on appeal that the Defendant should have been read *Pirtle* warnings prior to consenting to the DRE evaluation. The court of appeals found that the Defendant should have been advised of her *Pirtle* warnings prior to consenting to the DRE evaluation. The courts had previously ruled that *Pirtle* was not required when performing the SFSTs or administering a chemical test. The court distinguished these decisions, in part, on the fact that these searches were narrow in scope, designed only to detect impairment, as opposed to the general search considered in *Pirtle*. The court also looked at the intrusiveness of the tests, finding the SFSTs only took a 'small amount of time' and that chemical tests were done quickly. The Supreme Court granted transfer.

The Supreme Court found that none of the components of the DRE, either individually or cumulatively, have a strong likelihood of uncovering evidence of a crime other than what caused the officers to conduct the DRE in the first place. By conducting the DRE, officers were going to find only evidence of Dycus' intoxication; therefore, it is specific enough to eliminate the risk of involuntary consent, and no additional advisement is needed. Dycus' conviction was affirmed.

RIGHT TO REMAIN SILENT
MIRANDA WARNINGS IN DUI STOP

On October 31, 2018, the Indiana Court of Appeals issued its decision in Corbin v. State, ___ N.E.3d ___ (Ind. Ct. App. 2018). At 11:36 p.m., two sheriff deputies were dispatched to a disabled vehicle on the interstate. They observed it on the right hand shoulder; Corbin was in the driver's seat and Alexander was in the front passenger seat. Deputy 1 asked Corbin where she was coming from. Corbin stated that she was returning to Indianapolis from a wedding. Deputy 1 noticed red, glassy eyes and slowed, slurred speech. He asked if she had drunk alcohol, and Corbin admitted that she had. Corbin and Alexander were then ordered to exit the car. Deputy 1 observed Corbin to be uneasy on her feet and to hold onto Alexander for support. Then he and Alexander attempted to start the car. Deputy 2 summoned Corbin and detected "an overwhelming odor of alcohol in addition to indicia previously observed by Deputy 1. He asked her how much alcohol she'd had to drink. She indicated a glass or two of wine and stated, "you can check me if you want. I don't care." He then informed Corbin that he would administer some tests. After the horizontal gaze nystagmus was administered, he asked Corbin, "have you only had two glasses?" Corbin responded, ". . . it feels like three maybe . . . I haven't had many." After administering a breathalyzer, Deputy 2 read Corbin the Implied Consent Law and offered her a chemical

test, to which she consented. On the way to the test Corbin cried a lot. She tested at 0.152 grams of alcohol per 210 liters of breath. Corbin was ultimately convicted in a bench trial of operating a vehicle with an ACE of 0.15 or more, Class A misdemeanor.

Corbin argued that the trial court should not have admitted her statements made to deputies because she was in custody when she made the statements and had not been advised of her *Miranda* rights. When Deputy 1 first questioned Corbin whether she had consumed any alcohol, she was not physically constrained in any way and had not been told she was a suspect in a crime. The encounter became a traffic stop; "persons detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." After she left her car, she became a suspect. At that point Deputy 2 asked further questions about her alcohol consumption. The Court found these questions to be cumulative because she had already admitted alcohol consumption. Moreover, officers can ask questions and request sobriety tests of motorists whom they pull over.

Corbin also argued that the trial court erroneously admitted the results of the chemical test for intoxication because her copious tears on the way to her chemical test for intoxication got in her mouth, and therefore, the officer could not show that she had no foreign substance in her mouth within 15 minutes before the breath sample was taken. The Court found no evidence that Corbin's tears entered her mouth within 15 minutes of the test, and Corbin failed to present any scientific evidence to support her claim that her tears were foreign objects or that tears could invalidate the results of the chemical test.

Her conviction was affirmed.

SUFFICIENCY OF THE EVIDENCE
POSSESSION OF PARAPHERNALIA

On October 31, 2018, the Indiana Court of Appeals issued its decision in Granger v. State, ___ N.E.3d ___ (Ind. Ct. App. 2018). Granger was stopped for a traffic offense, and the officer observed a grinder in the handle area of the door. Upon further examination, he found a substance he believed to be marijuana inside the grinder. A grinder can be used to grind marijuana into finer pieces for easier consumption. The trial court found Granger guilty of possession of paraphernalia.

The state alleged in its information that Granger possessed a device that he intended to use for "introducing into [his] body a controlled substance." The court found there is a difference between preparing a controlled substance for easier consumption and actually introducing it into one's body. The evidence was, therefore, insufficient to support the conviction. Granger's conviction was reversed.

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