

Police Prosecutor Update

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SEARCH AND SEIZURE SEARCH OF A PERSON ON COMMUNITY SUPERVISION

On November 30, 2018, the Indiana Court of Appeals issued its decision in Jarman v. State, ___ N.E.3d ___ (Ind. Ct. App. 2018). Jarman was under the supervision of community corrections for a previous felony. Community Corrections officers had received an anonymous tip that Jarman's ex-wife was living in the residence, that Jarman had been drinking alcohol, and that Jarman had been abusing his Adderall medication. So the officers went to Jarman's house to investigate. Officers conducted a "safety sweep" and found Jarman's ex-wife in the attic (her presence in the home was apparently a violation). One of them handcuffed Jarman and patted him down and found a white powder that Jarman said was joint medication. The officer asked for the bottle, and Jarman gave the officer the key to the cabinet. When the officer opened it he found methamphetamine, a synthetic urine kit, handwritten ledgers, stamp baggies, a cut straw, a scale, and a glass smoking device.

At trial, Jarman moved to suppress all the evidence found after the warrantless search of Jarman. The State responded that Jarman had waived his 4th Amendment rights as a condition of his admission to community corrections. The waiver Jarman signed stated, ". . . I . . . waive my rights concerning searches and seizures under the Fourth and Fourteenth Amendment. . . . I hereby consent to allow employees of Community Corrections or law enforcement officers to search my person . . . without a warrant and without probable cause." The court denied Jarman's motion to suppress, and found him guilty of several of the charges.

In State v. Vanderkolk, 32 N.E.3d 775 (Ind. 2015), the Supreme Court held that suspicionless searches of a community corrections participant are permitted if the person has consented or has been informed that the conditions of community corrections unambiguously authorize such searches. Because the language of Jarman's community corrections waiver stated that he consented to searches "without a warrant and without probable cause," it did not authorize suspicionless searches. Since the search of Jarman took place without any suspicion that Jarman possessed contraband, the Court found that Jarman had not given up his constitutional right to that minimum level of protection from being searched. Therefore, the court found that the evidence should have been suppressed and reversed his conviction. The Court suggests language that could have cured the defect in the waiver: "without suspicion," "without reasonable suspicion," "without reasonable cause," or "without cause."

Interestingly, the state did not argue an alternative theory, namely, that the search of Jarman was justified as a search incident to arrest after he was found to be in violation of a condition of his community corrections participation (the ex-wife).

SUFFICIENCY OF THE EVIDENCE CONSTRUCTIVE POSSESSION

On November 29, 2018, the Indiana Court of Appeals issued its decision in Smith v. State, ___ N.E.3d ___ (Ind. Ct. App. 2018). A patrol officer observed Smith roll through a stop sign, fail to stop for another stop sign, and then “suddenly slow down [and] pull to the right,” such that the passenger side tires hit the curb. The officer initiated a traffic stop. When Smith’s car stopped, the officer observed him moving around in the car and “shift from the middle of the front seat back to the driver’s seat.” The car then pulled away from the curb and drove away, travelling from 11th Street to 13th Street and getting about halfway down 13th Street before stopping again. The officer ordered Smith out the car, and Smith complied. Smith did not have a driver’s license. The officer nevertheless released Smith and instructed him to have a licensed driver pick him and the car up. A second officer on scene checked the car for weapons, and finding none, also noticed that the front passenger window was in a lowered position. (The stop occurred in late May.)

After concluding the stop, the officers went back to the place where Smith’s car had hit the curb. There they saw a 9mm semi-automatic pistol laying in the recently mown grass about 15 feet from the curb. They then saw Smith drive his car backwards on 13th Street, stop in the intersection, and then turn and drive forward past their location. Smith was stopped and arrested; he had a prior conviction for a serious violent felony. The pistol had fresh scratch marks on the side that was laying in the grass. It did not appear to have been in the grass for a significant length of time. The property at the location was vacant. Smith was charged and found guilty by a jury of possession of a firearm by a serious violent felon.

Smith argued that the State failed to prove beyond a reasonable doubt that he “constructively possessed the handgun that police found abandoned on the front lawn of a vacant house.” The Court disagreed. Constructive possession occurs when a person has the intent and capability to maintain dominion and control over an object. The State must show that the defendant is able to reduce the object to his personal possession. The state must establish that the person knew of the presence of the object. His knowledge may be inferred by additional circumstances like incriminating statements, attempted flight or furtive gestures, a drug manufacturing setting, his proximity to the object, the object is in plain view, or is in close proximity to items own by the defendant. From the facts at trial, a reasonable jury could find that Smith had intent to maintain dominion and control over the gun and therefore possessed it. The conviction was affirmed.

RIGHT TO REMAIN SILENT INVESTIGATION OF OPERATING WHILE INTOXICATED

On November 16, 2018, the Indiana Court of Appeals issued its decision in Reid v. State, ___ N.E.3d ___ (Ind. Ct. App. 2018). A caller summoned police to his residence because he had heard a crash and observed his wife staggering in the driveway. When the officer arrived he saw the defendant and another woman along with a freshly damaged car with a shredded passenger-side tire. He immediately saw that Reid appeared intoxicated. After Reid identified herself, she identified the car as hers and answered that she had just arrived home. She denied having struck anything and told the officer the damage to the car was old. He then pointed the tire out to Reid and she indicated that she had in fact struck a curb that evening. When asked if she had consumed alcohol, she replied, “not since I’ve been home.” At that point he asked her to leave the driveway and stand in front of his patrol car where he

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administered field sobriety tests. After Reid failed and tested 0.168 on a portable breath test, he read the Indiana complied consent advisement to her. She refused to take a chemical test. He then placed her in handcuffs, took her to a hospital and obtained a search warrant for blood.

Reid filed a motion to suppress all statements or admissions made by her, as well as the blood test results. After a hearing the trial court denied the motion but granted permission to seek an interlocutory appeal. Reid argued that the officer detained her in violation of the Fourth Amendment and conducted a custodial interrogation of her at her residence without first advising her of her Miranda rights in violation of the Fifth Amendment. The Court first found that Reid's Fourth Amendment rights were not violated because the "facts known to [the officer] together with the reasonable inferences arising from such facts would cause an ordinarily prudent person to believe that criminal activity may be afoot." Turning to the Fifth Amendment, the Court found that based upon the totality of the circumstances and the fact that the questions to Reid were about her vehicle and did not indicate that she must remain at the scene, there was no formal arrest or restraint on Reid's freedom of movement of the degree associated with a formal arrest at the time she made her statements. Therefore, the Miranda advisement was not required. Finally, addressing Article I, Section 11, the court found the police degree of concern or suspicion to be high because while investigating a crash, the officer found a damaged vehicle and an intoxicated driver. The degree of intrusion was low, because responding to a call from the homeowner, he approached the driveway to encounter the damaged car and the driver. The extent of law enforcement needs was found to be high due to the devastation caused generally by alcohol-impaired driving. The denial of Reid's motion to suppress was affirmed.