

Police Prosecutor Update

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SEARCH AND SEIZURE WEAPONS PAT-DOWN

On December 4, 2018, the Indiana Court of Appeals issued its decision in Durstock v. State, ___ N.E.3d ___ (Ind. Ct. App. 2018). A police officer and EMTs arrived at an apartment pursuant to an emergency dispatch and find the tenant Gaylord giving chest compressions to a victim, who the officer immediately suspected had overdosed on opiates. As the EMTs assisted the victim, the officer heard water running in the bathroom. Durstock left the bathroom and sat on the couch. Gaylord gave the officer permission to search the bathroom, and the officer located a brown backpack which both Gaylord and Durstock denied ownership of. Gaylord, who is female, gave officers permission to search it, and they found a loaded handgun wrapped in a wet bandana, digital scales, men's clothing, and men's deodorant. (Durstock is male, the victim was female.) Durstock was "nervous and shaking and sweaty." Another officer performed a pat-down of Durstock for officer safety. He asked Durstock if he "had anything that we needed to be concerned about," and Durstock removed some personal items from his pockets, but put his hand in one of his pockets and withdrew it without removing anything. During the pat-down this officer felt a "tubular object" that he testified was consistent with a syringe, which it turned out to be. Durstock was placed in handcuffs and was searched incident to arrest, during which officers found 3 bullets, \$331 in cash, rolling papers, and plastic bag containing 6.06 grams of fentanyl.

At the jury trial, Durstock presented an "oral motion to suppress," which the trial court denied after a hearing outside the presence of the jury. Durstock was ultimately convicted and sentenced. On appeal Durstock argued the pat-down was improper because the officers did not have reasonable suspicion he was armed and dangerous. Durstock made no argument under Article I, Section 11 of the Indiana Constitution. The Court of Appeals concluded that the pat-down did not violate the 4th Amendment. The officers were aware that a loaded gun had been found in a backpack where Durstock had been and which contained men's belongings. Durstock was the only male, and it was reasonable for officers to be concerned that the weapon belonged to Durstock and that their safety was in jeopardy.

Durstock also argued that the removal of the syringe from his pocket was improper. The Court found that the officer's testimony that he felt a tubular object consistent with a syringe satisfied the requirement that the identity of the contraband be immediately apparent to the officer doing the pat-down. Once the syringe was found and Durstock was arrested, subsequent searches were incident to arrest and permissible under the 4th Amendment. Durstock's conviction was affirmed.

SEARCH AND SEIZURE WEAPONS PAT-DOWN

On December 11, 2018, the Indiana Court of Appeals issued its decision in Negash v. State, ___ N.E.3d ___ (Ind. Ct. App. 2018). Police responded to a shots-fired dispatch and upon discovering that a vehicle was involved and parked in what the Court characterized as a public place, officers went to that

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vehicle to talk to the three occupants. Negash was in the driver's seat, and one occupant was the front passenger; the other occupant was in the back seat. The officers asked whether they "had heard anything and whether there were any weapons in the vehicle." All passengers said, "No." The front seat passenger was "moving around, reaching for the glovebox, going for his wristband, and pulling his shirt up." The back seat passenger did not say anything to officers, but pointed to Negash and made "the outline of a gun with his index finger and this thumb." Officers then asked Negash to step out of the vehicle. As he did so, the officer observed a bulge protruding from his right pocket. The officer conducted a pat-down of Negash and felt "a baggie of narcotics." He could see straight into the pocket and recognized that the baggie contained synthetic marijuana. He then arrested Negash and seized the baggie. They then searched the car and found a loaded handgun with the hammer cocked in the glovebox.

At trial, the defendant objected to the admission of the synthetic marijuana; the court overruled the objection. Negash was found guilty of possession of the gun and possession of a synthetic drug. On appeal, Negash argued that the search that produced the synthetic marijuana violated the 4th Amendment and Article 1, Section 11 of the Indiana Constitution. The Court found that the officers' approach to Negash's car did not implicate the 4th Amendment; therefore, they did not need reasonable suspicion of wrong-doing in order to approach it to ask Negash their purpose for being in the area. Because of the front passenger's conduct, and the back passenger's indication of a gun, the court found that the officer had reason to believe that he was dealing with an individual who was likely armed and dangerous. Upon seeing the bulge, he could conduct a pat-down for weapons, and the open pocket meant that its contents, the synthetic marijuana, was in plain view. The officers' actions did not violate the 4th Amendment

Applying the 3-part Litchfield test, the Court found that the officers had a high degree of suspicion that a violation of the law had occurred because they were in the process of investigating a report of shots fired with an alleged suspect still at large; the front passenger was acting suspiciously; and the back passenger pointed an accusation at Negash. The degree of intrusion was slight because officers did not display a weapon, show any force or place hands on Negash until they had reason to believe Negash was armed and dangerous. The Court finally found that law enforcement needs were high because police were investigating a shooting where the suspect was still at large, and there was an indication that Negash had a gun. Therefore, the officers did not violate Article 1, Section 11. The Court also found that Negash had waived the Article 1, Section 11 argument by not raising it to the trial court. The conviction was affirmed.

SUFFICIENCY OF THE EVIDENCE FALSE INFORMING

On December 20, 2018, the Indiana Court of Appeals issued its decision in Cannon v. State, ___ N.E.3d ___ (Ind. Ct. App. 2018). Police were looking for a pit bull who had attacked other animals. Cannon did not reveal to officers that the pit bull was in his garage. A child told the police where the pit bull was, and they charged Cannon with false informing, I.C. 35-44.1-203(d). Cannon was convicted. In reversing his conviction, the Court found that Cannon did not give the officer "any information, let alone false information." Therefore, he could not have committed the offense of false informing.