Police Prosecutor Update

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SEARCH AND SEIZURE
STALE INFORMATION IN SEARCH WARRANT

On October 24, 2019, the Indiana Court of Appeals issued its decision in Byers v. State, ___ N.E.3d ___ (Ind. Ct. App. 2019). Byers' neighbor found a drone containing a computer drive had crashed in her yard. She plugged the drive into a device reader and found footage of a woman with a bag of white powder and a cut straw. She also identified Byers on the video. She turned the drone and the device over to the sheriff one or two days after she found the drone in her yard. Deputies used the footage to obtain a search warrant for Byers' home. The search was conducted on May 14, 2018; the video, according to the device, was last modified on May 10, 2018. During the search, officers found drugs, paraphernalia and a large amount of cash. Byers was charged with dealing in methamphetamine, maintaining a common nuisance, and possession of marijuana. Byers filed a motion to suppress the drug evidence because the probable cause was stale. After a hearing the trial court denied the motion, but allowed Byers to file an interlocutory appeal.

The general rule is that stale information cannot support a finding of probable cause. After reviewing several appellate decisions, some of which found that drug information 8 days old was stale, while 3-day old information was not stale, the court found that the four days between the activity and the issuance of the warrant did not make the video evidence of drug possession unconstitutionally stale. Therefore, the court found that the trial court did not err in denying the motion to suppress.

SEARCH AND SEIZURE
SEARCH OF PAROLEE'S PROPERTY

On October 30, 2019, the Indiana Court of Appeals issued its decision in Harper v. State, ___ N.E.3d ___ (Ind. Ct. App. 2019). Harper was placed on parole following his conviction for possession of a firearm by a serious violent felon. On release, he signed a parole agreement which stated, in part, that "my person and residence or property under my control may be subject to reasonable search by my supervising officer . . . if the officer . . . has reasonable cause to believe the parolee is violating or is in imminent danger of violating a condition" of parole. During a meeting with his parole officer, Harper tested positive for cocaine and admitted to travelling to New York without permission, both violations of his parole. Prior to the meeting, Harper's parole officer had received anonymous information that Harper was traveling to New York and dealing narcotics. Based on these events, the parole officer went to Harper's home and searched it. He located a receipt in Harper's name for a storage unit. He went to that storage unit and opened it. In plain view, he observed a handgun and a bag containing a block of white substance. He then stopped the search and informed a police officer who obtained a search warrant for the storage unit. The subsequent search yielded a large quantity of controlled substances. Harper was charged with dealing in cocaine and unlawful possession of a firearm by a serious violent felon.

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Harper moved to suppress the gun and the drugs arguing that the warrantless search of the storage unit was an investigative search, not a proper parole search. After the hearing the trial court ruled that the search of Harper's person and residence were lawfully conducted, but the initial search of the storage locker required a search warrant. The State appealed. The State contended that a warrant was not required for the initial search of the storage unit, but the search was permitted by a valid search condition in the parole agreement.

A probationer, and by analogy a parolee, is entitled to limited protection of his privacy interests. When a search is not conducted within the regulatory scheme of enforcing conditions, a probationer's privacy rights cannot be stripped from him. No more than reasonable suspicion is required to search a probationer's house. Based on the totality of the circumstances, the court found that the parole officer had reasonable suspicion to believe that Harper, who had actual knowledge of his parole conditions, was engaged in criminal activity. The trial court's grant of the motion to suppress was reversed.

FORFEITURE
8TH AMENDMENT UNREASONABLE FINE

On October 28, 2019, the Indiana Supreme Court issued its most recent decision in State v. Timbs, ___ N.E.3d ___ (Ind. 2019). Timbs twice sold heroin to a confidential informant. One of the buys took place in his Land Rover. A third buy was set up, but before it happened, Timbs was arrested in his Land Rover on his way to the buy. Timbs obtained heroin by driving his Land Rover 60 to 90 miles to meet his supplier, and these trips accounted for most of the 16,000 miles he drove in the 4 months he drove the vehicle. He had purchased the Land Rover with $42,000.00 from life insurance proceeds. Timbs pled guilty to a single count of dealing in a narcotic and conspiracy to commit theft and received a probated sentence. The State also filed a complaint to forfeit the Land Rover. The trial court found that the forfeiture of a roughly $40,000.00 vehicle violated the 8th Amendment's Excessive Fines Clause because it is grossly disproportional to the maximum $10,000.00 fine possible with the dealing offense. The Court of Appeals affirmed the trial court, but the Supreme Court reversed the trial court, ruling that the 8th Amendment Excessive Fines Clause had never been found to apply to the individual states. Timbs then petitioned to have the U.S. Supreme Court review his case. The U.S. Supreme Court reversed the Indiana Supreme Court and found that, indeed, the individual states are constrained to observe the 8th Amendment's prohibition against excessive fines. It then remanded the decision to Indiana Supreme Court.

The Indiana Supreme Court remanded the case to the trial court, but in doing so, it gave the trial court some guidelines for deciding whether a forfeiture violates the Excessive Fines Clause of the 8th Amendment. As the dissent points out, the balancing test devised by the majority leaves "litigants and lower courts uncertain about how a particular case with particular facts will be decided." However, the majority also appears to have rejected the statutorily mandated fine as the sole determinant in the calculation of excessiveness. This is essentially the test the court set up: First, the property must be the actual means by which an underlying offense was committed. Second, the harshness of the forfeiture penalty must not be grossly disproportional to the gravity of the offense and the owner's culpability for the property's misuse. In determining the harshness of the forfeiture, the court may assess the following: the extent to which the forfeiture would remedy the harm caused; the property's role in the underlying offenses; the property's use in other activities, criminal or lawful; the property's market value; other sanctions imposed on the owner; and the effects the forfeiture will have on the owner.

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Going forward, it is important to note that the excessive fines analysis does not apply when the forfeiture is of proceeds of criminal activity. To the extent the state can prove that the property is proceeds or traceable to proceeds of a criminal activity, the state should proceed under that theory. Only where the property is an instrumentality of the criminal activity does the excessive fines analysis apply. As to the actual means test, it appears the court would find it helpful if the state alleged all of the instances, whether charged or not, in which the property was used to facilitate criminal activity. More instances of the property's use would also help with the second prong – the gross disproportionality test. As to the gross disproportionality test, presenting evidence to show how integral the property was to the criminal enterprise – and not for lawful purposes – would mitigate the "harshness" of the forfeiture. For example, showing that the vehicle was driven for purposes of obtaining or selling drugs for the majority of the miles logged, or presenting skilled witness testimony that driving a prestige vehicle enhanced a drug dealer's ability to traffic in larger quantities, could potentially strengthen the state's position.

The federal government has had to face excessive fines challenges to forfeiture actions for over two decades, yet it still forfeits vehicles that are instrumentalities of crime. This decision will not make it impossible to forfeit automobiles as instrumentalities of criminal activity; it will require law enforcement to do more investigation. Ultimately, this decision should not deter law enforcement from seeking to forfeit the instrumentalities of crime, where appropriate.