

# Police Prosecutor Update

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## SEARCH AND SEIZURE STOP AND FRISK

On March 30, 2020, the Indiana Court of Appeals issued its decision in Bell v. State, \_\_\_ N.E.3d \_\_\_ (Ind. Ct. App. 2020). The Indianapolis Motor Speedway has a “no weapons” policy on its parking area where thousands of Indianapolis 500 attendees gather and socialize during the race weekend. Every attendee is advised of the policy. Two on-duty uniformed sheriff deputies were approached by two people who told them Bell was on the lot with a handgun in his back pocket. They described him and told the deputies where they could find them. The deputies drove to the area in their unmarked Kubota utility vehicle and located Bell. They got his attention and asked him to come to them, which he did reluctantly. He stopped his approach at a distance where he was out of their reach. They told Bell they had a report of a possible weapon in the area and reminded him of the no weapons policy. They told him that if he had a firearm, they would “run it” and if there were no issues with it, Bell would be allowed to stow it in his vehicle off the premises. Bell denied having a weapon, then became irate, began shaking nervously, cursed at the deputies, and stated they needed a warrant to speak to him. He took a few steps backward; the deputies told him to calm down and “stand still, stop.” Bell did not calm down and continued moving away, changing his direction as the deputies changed theirs. Another deputy arrived and placed himself behind Bell. Bell assumed a fighting stance; when he did so the second deputy observed the butt of a handgun poking out of his back pocket. He saw Bell’s hand coming down and grabbed Bell’s arm. Bell was then secured and ultimately arrested for carrying a handgun without a license, a Level 5 felony due to a prior conviction.

At his bench trial Bell moved to suppress the gun. He argued that the deputies did not have reasonable suspicion to stop him when they asked to speak to him. The trial court denied the motion. Bell was convicted as charged. On appeal he alleged the stop violated the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution. First, the court of appeals concluded the initial encounter was consensual because only two deputies approached Bell in unmarked vehicle, did not draw or display a weapon, did not touch Bell, and did not yell at him. Second, the court found a seizure did not occur when the officers told Bell to “stand still, stop.” They did not touch Bell, draw their weapons or use an aggressive tone of voice. Further, even if their directions amounted to a seizure, it was supported by reasonable suspicion. After they explained to Bell that they would run the firearm and then return it to him if there were no issues with it, he became aggressive, cursed the deputies, began shaking nervously, and took a few backwards steps before they directed him to stop. The totality of the circumstances gave rise to a reasonable suspicion that Bell possessed a firearm and that his possession was not legal. Third, the frisk of Bell was justified. After Bell assumed a fighting stance, the backup deputy observed his gun and Bell’s hand coming down, which the court inferred was a movement toward the gun.

Finally, the court found that the stop and frisk did not violate Article 1, Section 11 of the Indiana Constitution. Initially, the deputies had a low degree of concern that a violation had occurred. However, Bell’s conduct provided a moderate degree of suspicion that he illegally possessed a firearm. After

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attempting to evade deputies, assuming a fighting stance and reaching for the gun, police had a high degree of suspicion. The degree of intrusion, from Bell's point of view, became high after the deputies grabbed his arm and restrained him. The court then concluded that the extent of the needs of law enforcement tipped the balance in favor of reasonableness. "Protecting the public from gun violence is a legitimate and paramount concern of law enforcement, and the State is legitimately concerned with deterring gun violence by unlicensed individuals." Grayson v. State, 52 N.E.3d 24, 28 (Ind. Ct. App. 2016). The conviction was affirmed.

## SUFFICIENCY OF THE EVIDENCE THC VAPES

On March 26, 2020, the Indiana Court of Appeals issued its decision in Dearman v. State, \_\_\_ N.E.3d \_\_\_ (Ind. Ct. App. 2020). The state charged Dearman with possession of controlled substance and possession of marijuana. The information for count I alleged that Dearman possessed "Tetrahydrocannabinols . . . listed in Schedule I." At his bench trial, the parties stipulated that "Dearman possessed vape cartridges containing hash oil." The trial court found Dearman guilty as charged and entered judgment of conviction for count I.

On appeal, the State agreed that the conviction to count I should be vacated. Marijuana is defined in I.C. 35-48-1-19(a) as "including hashish and hash oil." Marijuana is excluded from the controlled substances to which the penalties in I.C. 35-48-4-7 apply. Thus, possession of hash oil is not a violation of I.C. 35-48-4-7.

Whether THC vapes are hash oil in every case has not been established. This is an unregulated product. If an analyst is not able to identify the contents of THC vape cartridges as hash oil, there appears to be a good argument that they contain, in fact, a Schedule I controlled substance.