

# Police Prosecutor Update

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## SMOKEABLE HEMP INJUNCTION REVERSED

On July 8, 2020, the Seventh Circuit Court of Appeals issued its decision in C.Y. Wholesale v Holcomb, 965 F.3d 541 (7<sup>th</sup> Cir. 2020). In 2019, the Indiana legislature enacted I.C. 35-48-4-10.1, which made it a class A misdemeanor to manufacture, deliver or possess smokeable hemp. C.Y. Wholesale and other plaintiffs filed suit in the Southern District of Indiana to enjoin enforcement of I.C.35-48-4-10.1. The district court issued a preliminary injunction barring the enforcement of Indiana's criminalization of smokeable hemp, and Indiana appealed.

The district court had ruled that I.C. 35-48-4-10.1 had been expressly preempted by the 2018 federal Farm Bill which prevented states from prohibiting the transportation or shipment of hemp in accordance with federal regulations and which authorized states to regulate the production of hemp even if those regulations were more stringent than federal regulations. The court of appeals found that with respect to transportation and shipment, the district court's injunction could stand. However, the court found, "The Farm Law authorizes the states to continue to regulate the production of hemp, and its express preemption clause places no limitations on a state's right to prohibit the cultivation or production of industrial hemp. Thus, the part of Act 516 prohibiting the manufacture of smokeable hemp does not fall within the ambit of the Farm Law's express preemption clause. We are also unconvinced that the express preemption clause, standing alone, precludes a state from prohibiting the possession and sale of industrial hemp within the state."

The district court had also ruled that "the Farm Law showed a clear intent on the part of Congress to legalize all forms of low-THC hemp and that the hemp sellers had shown at least some likelihood of succeeding in their claim that Act 516 frustrated Congress's purpose." The court of appeals found, "nothing in the 2018 Farm Law that supports the inference that Congress was demanding that states legalize industrial hemp, apart from the specific provisions of the express preemption clause." As of August 14, 2020, the preliminary injunction on enforcing I.C. 35-48-4-10.1 has been officially vacated. Law enforcement officers may now enforce the prohibition on the manufacture, delivery and possession of smokeable hemp.

## SEARCH AND SEIZURE OPEN VIEW, PLAIN VIEW AND INVENTORY

On July 9, 2020, the Indiana Court of Appeals issued its decision in Combs v. State, \_\_\_ N.E.3d \_\_\_ (Ind. Ct. App. 2020). Combs drove his van into an electrical box. Witnesses observed him look for something under the driver's seat, rummage around, and then leave the scene. The first investigating officer arrived and ultimately tracked the van to Combs' driveway, where he observed a fluid trail, a flat tire and damage to the van. Combs stepped out of the driver's seat of the van. As Combs retrieved the registration, the officer observed a knife between the front seats. Combs denied consent to search the van.

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Combs exhibited indications that he was under the influence of a controlled substance; he failed field sobriety tests, but was negative for alcohol. He agreed to submit to a chemical test. Combs consented to the officer looking under the front seat of the van, but refused consent to look inside the black bag the officer observed. Combs was then transported from the scene. Another investigating officer called for the van to be towed and conducted an inventory, during which various controlled substances were found. The van was returned to Combs' wife two days later.

Combs was charged with several offenses including possession of controlled substances and leaving the scene of a property damage accident. He filed a motion to suppress the evidence obtained from the van. At the suppression hearing, the officer who authorized the tow testified that he was "towing the van as evidence because it was involved" in a property damage accident from which the driver left the scene. The trial court denied the motion to suppress because it found that there was probable cause to believe the van was connected to a criminal act; therefore, it could be seized without a warrant. On motion to reconsider, the court found that the officer was in fresh pursuit; exigent circumstances allowed the officer to enter the defendant's property; there was probable cause to believe the defendant had committed leaving the scene of a property damage accident and to arrest the defendant; and the obvious nature of the van as evidence of the crime of leaving the scene allowed its seizure pursuant to the plain view doctrine. Combs was found guilty of all three counts (in addition to other counts) of drug possession at his trial.

On appeal, the court of appeals first distinguished between open view and plain view. Open view is when a law enforcement officer sees contraband from an area that is not constitutionally protected. A warrant is not needed to observe the contraband evidence, but a warrant may be needed to seize it. In plain view, an officer has a legal right to be in the place where evidence can be observed; the criminal nature of the evidence is "immediately apparent;" and the officer has a lawful right of access to the incriminating object. The court found that neither open view nor plain view applied to the facts of this case. It found that the impound of the van, based on the testimony of the officers, was a pretextual means to search it for evidence. The van did not provide any additional evidence of leaving the scene of an accident as officers had already taken photographs of the damage to its exterior. The van was parked in Combs' driveway, and officers had time to procure a warrant. Therefore, Combs' convictions of three counts of drug possession were reversed.