

# Prosecutor Police Update

Issue No. 341  
November 2020

## SUFFICIENCY OF THE EVIDENCE MAINTAINING A COMMON NUISANCE

On October 23, 2020, the Indiana Court of Appeals issued its decision in Dowell v. State, \_\_\_ N.E.3d \_\_\_ (Ind. Ct. App. 2020). Dowell was observed driving left of center. After she was stopped, officers removed her and her two passengers from the car. During the course of the investigation for the ticket, one of the officers observed Dowell attempt to place a stainless steel vial in the back of her pants. Another officer observed a clear plastic bag containing several plastic baggies of what ultimately was found to be methamphetamine. The total weight of the bag was over 16 grams. Dowell was arrested and charged with dealing methamphetamine as a level 2 felony, possession of methamphetamine as a level 4 felony, and maintaining a common nuisance as a level 6 felony. Based on later conduct, she was also charged with obstruction of justice as a level 6 felony. After a jury trial she was found guilty as charged. The trial court merged the dealing and possession charges and sentence her to 20 years on the level 2 felony, and one and one-half years each for maintaining a common nuisance and obstruction of justice. The trial court ordered the sentences to be served consecutive to each other.

On appeal, Dowell asserted that the evidence was insufficient to convict her of maintaining a common nuisance, which “requires proof of a continuous or recurrent violation,” in this case to unlawfully keep, offer for sale, sell or deliver a controlled substance. Dowell argued the state had not proven that she used her vehicle more than one time to commit a crime involving methamphetamine. The state presented evidence from Dowell’s cell phone that she had several text messages about drug prices and details about meetings for drug deliveries. There was one mention of the car she was driving when she was stopped. However, it was not clear from the messages what car she was driving when she made her deliveries. The court found that the state proved only one use of the car, on the day police arrested her, for delivery of methamphetamine. Therefore, she could not be convicted of maintaining a common nuisance. The court reversed her conviction on that count.

## SUFFICIENCY OF THE EVIDENCE DISORDERLY CONDUCT

On October 21, 2020, the Indiana Court of Appeals issued its decision in McCoy v. State, \_\_\_ N.E.3d \_\_\_ (Ind. Ct. App. 2020). A police sergeant was dispatched to a domestic dispute at a residence. The sergeant asked the lessee of the residence to go next store to find out the name and contact information of the landlord. McCoy was the next-door neighbor. McCoy came out of her apartment and began advising her neighbor of “legal implications” and arguing with police. When the sergeant advised her that the situation did not involve her, she responded that she became involved when her neighbor came to her door asking for the landlord’s information. She went up to the sergeant to look at his name tag and began to walk away. The sergeant told her to “stay over there.” She turned around and yelled, “No, you don’t need to talk to me disrespectfully!” The sergeant replied, “Ma’am, you’ve got a disorderly conduct warning. Go to your residence.” She yelled back. The sergeant pointed to her

This is a publication of the Prosecutor’s Office which will cover various topics of interest to law enforcement officers. Please direct any questions or suggestions you may have for future issues to the Prosecutor’s Office.

residence and ordered, “Ma’am, go to your residence.” She screamed, “Get your hands off of me.” The sergeant began to issue another command, but she interrupted and screamed, “No! My right! Free speech!” At that point she was cuffed and arrested for disorderly conduct and resisting law enforcement. The trial court found her guilty of disorderly conduct and not guilty of resisting law enforcement. She appealed and alleged that the evidence was not sufficient to convict her.

Within a challenge to the sufficiency of the evidence to convict for disorderly conduct is a constitutional question: whether the action of the police violated Article I, Section 9 of the Indiana Constitution. That article includes the right to speak freely. Courts use a two-step inquiry to determine to determine whether application of the disorderly conduct statute violates the Constitution. Has state action “restricted a claimant’s expressive activity?” If so, did the restricted activity constitute “an ‘abuse’ of the right to speak?” Because McCoy was arrested after she yelled at the sergeant, the court found that “the State restricted her expressive activity.” Because McCoy’s speech commented on and criticized government action (the actions of the sergeant), the court deemed it to be political. The court found further that her speech did not disturb the peace and tranquility of the neighbors or cause discomfort to any nearby resident. Thus, McCoy’s speech was not an abuse of her constitutional right, and the evidence was “insufficient to support a conviction for disorderly conduct that would be consistent with Article I, Section 9 of the Indiana Constitution.” McCoy’s conviction was reversed.