

Police Prosecutor Update

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SEARCH AND SEIZURE SEARCH INCIDENT TO ARREST

On December 1, 2020, the Indiana Supreme Court issued its decision in Johnson v. State, ___ N.E.3d ___ (Ind. 2020) and overruled the decision in Johnson v. State, 137 N.E.3d 1038 (Ind. Ct. App. 2019), which was reported in the Police Prosecutor Update, Issue No. 331, January 2020. A casino patron reported to a security officer that an individual wearing a white hat had approached him in the casino and asked, “if he wanted to buy white girl,” which he interpreted to mean cocaine. A gaming agent was notified, and the agent reviewed security footage and identified Johnson. He located the Johnson and asked him to come to an interview room. The agent advised Johnson that he needed to pat him down. During the pat-down, the agent located and removed from Johnson’s pocket an object that “felt like a ball of drugs.” Johnson was charged with dealing in a look-alike substance. Johnson filed a motion to suppress the ball of white powder, which was denied. The trial court ruled that the search of Johnson’s pocket was incident to arrest. Johnson was found guilty as charged and appealed. The Court of Appeals reversed Johnson’s conviction, and the Indiana Supreme Court granted transfer.

The Court first found that the agent’s stop of Johnson was a justifiable Terry stop. An identified volunteer informant alleged criminal activity. Agents investigated further to corroborate the informant’s tip. Therefore, the agent had reasonable suspicion to make an investigative stop. The Court further found it was reasonable to frisk Johnson because the agent had a reasonable belief that Johnson could be armed. The agent suspected Johnson of trying to sell cocaine, and he was about to interview Johnson in the interview room. To support its conclusion that the frisk was reasonable, the Court cited a number of court precedents for the proposition that it is reasonable to believe that persons who are involved in dealing controlled substances are generally armed. The fact that this occurred in the early morning also contributed to the reasonableness of the frisk. The Court finally concluded that the agent could seize the baggie out of Johnson’s pocket when he was immediately able to identify the lump as contraband during the pat-down. According to the agent, based on his training and experience, the lump “felt like a ball of drugs.” Because he was able to make this conclusion without manipulating the lump, he was justified in retrieving it from the pocket. The Court affirmed Johnson’s conviction.

SEARCH WARRANT SUFFICIENCY OF THE AFFIDAVIT OF PROBABLE CAUSE

On December 18, 2020, the Indiana Court of Appeals issued its decision in Bunnell v. State, ___ N.E.3d ___ (Ind. Ct. App. 2020). Police officers checked on a domestic violence complaint. The responding deputy knocked on the front door of the house and received no answer. He went to other doors and attempted to reach someone in the house. At the last door he approached, he noticed two things: an exterior security camera, and the odor of raw marijuana. A second deputy arrived and smelled raw marijuana, as well. No one answered at the last door, so the deputy applied for a search warrant. He obtained a warrant for the house and deputies executed it, finding nine pounds of marijuana as well as

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marijuana plants. Bunnell was charged with felony dealing in marijuana, as well as other offenses. Bunnell filed a motion to suppress the fruits of the search warrant and alleged that the warrant was not supported by probable cause because there was no evidence the deputies had the requisite training or experience to identify marijuana by its odor. The trial court denied the motion and certified the question for interlocutory appeal.

Apparently, the affidavit of probable cause stated that the deputies recognized the odor of marijuana based upon their “training and experience.” However, it did not state what that training and experience was. To find probable cause to search for a drug based on its odor, the issuing magistrate must find that the officer has the requisite training and experience to identify a drug by its odor, and that the drug has a sufficiently distinctive odor to identify it. Courts have consistently found that a sufficiently trained officer’s identification of the odor of marijuana was sufficient to establish probable cause. What was lacking in this case was the establishment of the deputies’ credentials to detect marijuana by odor, and their identification was the sole basis for the judge’s finding of probable cause. There was no evidence in the affidavit of the deputies’ length of service, involvement in marijuana investigations or arrests, specialized training, or any other particular information from which a judge could conclude that they were qualified to “know the odor” of marijuana. The court, therefore, reversed the denial of the motion to suppress.