Police Prosecutor Update

Issue No. 345
April-May 2021

With very few trials and essentially no litigation over the past year or so, there have not been many appellate decisions lately regarding law enforcement. So, this edition is for April/May. With things slowly getting back to normal, we'll also get back to monthly editions of PPU soon.

PUBLIC INTOX: Speculative Danger vs Actual Danger

Estes v State of Indiana (20A-CR-1921) (March 29, 2021).

Kyle Estes was arrested in February 2020 in Hendricks County for Public Intoxication (IC 7.1-5-1-3(a)(1) – "it is a Class B Misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication caused by the person's use of alcohol or a controlled substance…if the person (1) endangers the person's life. Mr. Estes was seen at 2am walking along the "fog line" on a fairly busy road. The deputy had to swerve to avoid him. Circling back, the deputy then observed him in the middle of the road on the double yellow line. With blood shot eyes and staggering, he had to be helped off the road. Estes was convicted in a bench trial and appealed claiming he did not actually endanger his life. The COA compared to *Davis v State*, 13 N.E.3d 500 (Ind. Ct. App. 2014) where the defendant in that case was in a drunk in a grassy area of an apartment complex – but the state argued he was in danger of being struck by a car ***if*** he left the apartment complex. The COA found no danger: "While the statute does not require that actual harm or injury occur, some action by the defendant constituting endangerment of the life of the defendant…must be shown (*Davis*, 13 N.E. 3d at 503).

Similarly, in *Pulido v State*, 132 N.E.3d 475 (Ind. Ct. App. 2019), the defendant was staggering on a sidewalk next to a city street with no evidence of traffic along the street. COA: No dangerous situation. "The officer's testimony that she was attempting to protect Pulido from any future, potential harm of walking in the street and getting struck by a car was "merely speculate [and] not proof beyond a reasonable doubt that Pulido was a danger to himself. *Pulido*, 132 N.E.3d at 480.

Unlike those cases, however, Estes was on a highway and the officer had to swerve to miss him. He was then seen in the middle of the road. The Court found that all added up to being an actual danger within the meaning of I.C. 7.1-5-1-3(a)(1). "Estes conduct was not the sort of mere "speculative danger" contemplated in *Davis and Pulido*. Conviction affirmed.

***Wagner v State of Indiana* (20A-CR-2027). May 10, 2021**

Wagner found his way to the COA via an interlocutory appeal of a denied Motion to Suppress out of Vanderburgh County. It's an unpublished opinion - but is a good reminder of the various facts that can be used in totality for reasonable suspicion. And also a reminder to document well and testify to even the little things. The building bits of RS, that the Court ultimately uses to affirm, are italicized below.

Officers noticed a vehicle in the parking lot of an Econo Lodge, in a *high crime area* of Evansville at *2:00am.* Officers pulled behind the vehicle and it *sat through an entire traffic light cycle without moving*.

This is a publication of Indiana Prosecuting Attorneys Council which will cover caselaw and various topics of interest to law enforcement officers. Please direct any questions or suggestions you may have for future issues to Rick Frank, Drug Resource Prosecutor at IPAC – RickFrank@ipac.in.gov

Thinking the driver may be impaired, officers watched the car pull in a gas station and *sit at the pump for 4+ minutes without getting out.* After another deputy pulled into the gas station in a marked vehicle, the *vehicle finally pulled out which led the observing officer to believe he was avoiding the police*. Finally, officers *observed it cross below the fog line*. Believing the driver could be impaired – a traffic stop ensued. Total *observation time before stop was 10-15 minutes.* The stopping officer noticed two orange syringe caps in the cup holder and the driver was very nervous. Asked to exit the vehicle, a baggy with white substance was seen tucked in the door. He was charged with Dealing in Methamphetamine, as a Level 3 felony.

Under a 4th Amendment analysis, the Court pieced together whether reasonable suspicion existed by the officer "pointing to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant intrusion. *Atkinson v. State*, 992 N.E.2d 899, 901 (Ind. Ct. App. 2013). Reasonable suspicion is determined on a case-by-case basis by looking at the totality of the circumstances but is generally satisfied when the facts known to the officer at the moment of the stop, along with reasonable inferences arising from those facts, would cause an ordinary prudent person to believe that criminal activity has occurred or is about to occur. *Id.* at 901-902. The Court went thru a great analysis using each of the facts above to conclude that, based on the totality of the circumstances, the officer had reasonable suspicion to believe Wagner was impaired. "While each of these behaviors individually may appear harmless, taken together they constituted reasonable suspicion."

Under the Indiana Constitution, the Court also found that the stop was reasonable using the *Litchfield* factors. 1/The degree of concern or suspicion was high adding together all the suspicious behaviors. 2/ The degree of intrusion was not substantial because a *Terry* stop was relatively minor. And 3/ law enforcement needs were high because "there is a strong interest in preventing alcohol related accidents, and police should have every legitimate tool at their disposal to get drunk drivers off the road." *Robinson v State*, 5 N.E.3d 362, 368 (Ind. 2014).

So, as you put together investigations – remember details and documentation matter!

Keep your head on a swivel and be safe…

THIS MONTH's AVOIDING SUPPRESSIONs TIPs

Timing and training are the keys for a K-9 sniff of a vehicle during a routine traffic stop. It's not a search, so it can be done during any legal stop – without any additional reason. *Illinois v. Caballes,* 543 U.S. 405 (2005). However, the traffic stop cannot be extended due to the K-9 sniff any longer than it would normally take to complete the paperwork (ticket, warning, etc) for the original stop.

- ✓ The traffic stop and K-9 sniff generally should not be done by the same officer, since that extends the stop. *State v. Gray*, 997 N.E.2d 1147 (2013). See also: *Rodriguez v. United States*, 575 U.S. 348 (2015).
- ✓ If additional PC develops – the stop can be extended. Just make sure you document well.
- ✓ The K-9/handler needs to be up to date on their training and certification(s). *Florida v. Harris*, 568 U.S. 237 (2013)

This is a publication of Indiana Prosecuting Attorneys Council which will cover caselaw and various topics of interest to law enforcement officers. Please direct any questions or suggestions you may have for future issues to Rick Frank, Drug Resource Prosecutor at IPAC – RickFrank@ipac.in.gov