



Police Prosecutor Update

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Unfortunately, there were not many appellate cases from the last month that dealt with law enforcement or suppression issues. But we'll discuss a few non-published cases¹ that could give guidance on some of your future investigations.

Roe vs State of Indiana, 20A-CR-2373 (July 14, 2021)

In November of 2019, Mr. Roe had an argument with a female that he was living with and it turned violent in Tippecanoe County. He grabbed her by the throat and slammed her to the floor. After initially getting away, he did it again in a different room and strangled her until her head was tingling, her face turned purple, and she was running out of air. He was charged with strangulation among other counts and a pre-trial no contact order was issued that ordered no contact "in person, by telephone or letter, through an intermediary, or any other way, directly or indirectly...while the case is pending." About two months later, Roe posted a message on Facebook: "Happy New Year to you everyone and to you too." The victim was 'tagged' in the post and she received a notification of it. She took a screenshot and called police. The State charged Mr. Roe with an additional count of Invasion of Privacy.

There was testimony from the victim about what 'tagging' meant and she clarified that the defendant did not actually post anything on the victim's page – only the tag to which she was notified about. The defendant admitted the post was his but denied tagging anyone and claimed Facebook must have automatically sent it to the victim. A jury found him guilty of Invasion of Privacy along with some of the other charges. On appeal by the defendant, the COA looked at the case to see if there was sufficient evidence to support the IOP conviction and found: yes, there was. The Court discussed what it means for someone to intentionally and knowingly engage in conduct and that circumstantial evidence can be used to prove either. "For example, intent can be inferred from a defendant's conduct and the natural and usual sequence to which such conduct logically and reasonably points." *Phipps v. State*, 90 N.E. 3d 1190, 1195 (Ind. 2018). The Court found that a Facebook 'tag' was enough to violate the clause of "no contact with the victim in any way, directly or indirectly." A trier of fact could reasonably infer the facts and circumstances in the record that Mr. Roe intended indirect contact with the victim from his FB post and therefore was in violation of the court's order. Conviction affirmed. As mentioned, it's an unpublished opinion, but for those that investigate domestic cases, it might give us a glimpse of the level of evidence needed to support an IOP conviction. In this case, a simple Facebook 'tag' was enough.

Jones vs State of Indiana, 20A-CR-2309 (July 28, 2021)

In *Jones*, the COA discussed the level of reasonable suspicion needed to detain someone. A State Trooper doing a commercial inspection on I-65 near Seymour noticed a motorcycle stopped along the highway and the driver appeared to be working on it. The driver did not request assistance, so the trooper went on down the highway when done with the inspections. Minutes later, a 911 call came in from area construction workers reporting a motorcycle on fire on I-65. On arrival, it was the same one the trooper had seen earlier. Troopers saw Jones walking away from the scene in a soybean field across a ditch. They went to the next exit and intercepted Jones as he came out of

¹ Cases that are not published, also known as Memorandum Decisions, apply only to that individual case. They cannot be used as precedent or cited in future cases.



the field – about ½ mile away. He told troopers he walked away because he was afraid it may explode. Not believing that story he was detained and handcuffed. They found he had an indefinite suspended license and a warrant for a syringe case. On a search incident to arrest, two syringes were in his shirt and \$1,653 along with a handgun was found in his backpack. Troopers noticed a crown royal bag near where they had been standing that looked out of place and found 114 grams of methamphetamine inside. Jones filed a motion to suppress because officers lacked reasonable suspicion to believe that Jones was engaged in criminal activity and therefore, detain him. The suppression was denied, and he was convicted of Level 2 Dealing Meth among other charges. The COA affirmed: “A law enforcement official may briefly detain a person for investigatory purposes without a warrant if based upon specific and articulable facts together with rational inferences from those facts, the official intrusion is reasonably warranted and the officer has a reasonable suspicion that criminal activity may be afoot.” *Ertel v State*, 928 N.E.2d 261, 264 (Ind. Ct. App. 2010). Not calling 911, walking ½ mile away, and not asking area construction workers for assistance were all facts the COA said supported reasonable suspicion to initially detain Mr. Jones. The further search of his person was also proper as a search incident to arrest and the Crown Royal bag was found to be abandoned, therefore he had no expectation of privacy in it.

Bishop vs State of Indiana, 21A-CR-350 (July 29, 2021)

Our last case discusses the five factors that a jury can consider in a constructive possession (not physically on the person) case and a reminder to LEOs to document well those related facts in a case you have involving a constructive possession arrest. The Bishop case arose from a traffic stop where the officer saw hand movements toward the floorboard while talking to the driver and subsequently a handgun was found under the driver’s seat where Mr. Bishop was sitting. After *Miranda*, Bishop acknowledged he knew about the gun and described it but then ended the interview. He was found guilty of possession of a handgun without a license. In another sufficiency of evidence review, the COA affirmed the conviction. For the State to prove constructive possession, it must show the defendant has “(i) the intent to maintain dominion and control and (ii) the capability to maintain dominion and control over the contraband.” *Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997). In a trial, the factors your prosecutor can use to help prove that required knowledge and dominion/control are: 1/incriminating statements made; 2/attempted flight or furtive movements; 3/the defendant’s proximity to the contraband; 4/is the contraband in plain view or the defendant’s view?; 5/the mingling of the contraband with other items the defendant owns. *Henderson v. State*, 715 N.E.2d 833 (Ind. 1999). The COA found that there was sufficient evidence in this case for a jury to find the defendant guilty and affirmed. I listed this case to remind you of the information your prosecutor will need in these type cases and to document well, take good photos, and do follow up investigation of those five factors when possible.

THIS MONTH’S AVOIDING SUPPRESSIONS TIPS

- ✓ Plain view/feel/smell doctrine:
- ✓ A warrant exception that allows officers to seize an object/evidence if:
 - they are lawfully in a position from which to view/feel the object,
 - its incriminating character is immediately apparent, and
 - if [police] have a lawful right of access to the object.
- ✓ All three prongs must be shown with facts.
- ✓ The criminal character must be “immediately apparent” based on your training and experience. If your testimony or PC is going to be that you “think it might be a meth pipe” in his or her pocket – that is not sufficient.

*Keep your
head on a
swivel
and be
safe...*