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**Police Prosecutor Update**

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**Constructive Possession Supports Conviction**

***Field v. State 23A-CR-1094* (Ind. Ct. App. 4/24/2024)**

Clay County Deputy Sheriff James Switzer was investigating Field’s involvement with methamphetamine for dealing methamphetamine out of the apartment. (Id.) While conducting surveillance, Deputy Switzer saw Field at the Leavitt Street property. While conducting surveillance, Deputy Switzer saw Field at the Leavitt Street Property, and observed “several vehicles” would stop by the Leavitt Street property, “park in front of or even at times on South Leavitt Street, visit for a few moments and then leave the apartment.” This activity happened multiple times during Deputy Switzer’s surveillance.

On June 5, 2020, Deputy Switzer discovered Field had an outstanding arrest warrant. Deputy Switzer observed Field driving and initiated a traffic stop. Deputy Switzer arrested Field on the outstanding warrant, transported him to the Clay County Jail, and impounded his vehicle.

During an inventory search, Switzer located a cell phone that was “continually resonat[ing] sounds, notifications, it kept dinging and making all kinds of noises.” Under the driver’s seat, Deputy Switzer found a red sock with $9,060.00 in it. Deputy Switzer applied for and obtained a warrant to search the Leavitt Street Property for evidence related to methamphetamine dealing such as “documents, ledgers, more U.S. currency.”

Deputy Switzer then executed the search warrant of the Leavitt Street Property, which he described as a studio apartment. When walking into the apartment Deputy Switzer observed “a dresser, a bed . . . and a piece of furniture where the T.V. and DVR storage device was located.” In the dresser drawer he located several drug related items, but no money. He stopped the search and applied for and obtained a search warrant for drug related items.

Upon serving the second warrant, Deputy Switzer found clear plastic baggies and a blue glass smoking device commonly associated with the ingestion of methamphetamine. He also found multiple sets of scales and two cardboard boxes containing . . . a black zipper bag that contained clear plastic baggies. He observed another digital weighing scale. In a wooden box he found a clear plastic baggie containing 4.1 grams of methamphetamine.

Deputy Switzer also found a black leather duffle bag in the apartment. Inside, he found Field’s social security card, a vehicle registration for the truck that listed Field as the owner, and an envelope containing Field’s certificate of completion for a work training course.

Field told Deputy Switzer he wasn’t a big player in drug dealing but he sold drugs “here and there . . . [to] support [his] own habit, you know, maybe making [a] little bit of money back.”

After his conviction, Field appealed, claiming that the State did not prove he possessed the methamphetamine found at the Leavitt Street Property.

Convictions for possession of illegal items can be based on either actual or constructive possession. Actual possession occurs when a person has direct physical control over an item.

Constructive possession requires the individual to have both the intent and the capability to maintain dominion and control over the illegal substance. A person’s “mere presence where drugs are located or his association with persons who possess drugs is not alone sufficient to support a finding of constructive possession.” The intent to maintain dominion and control over an illegal substance can be inferred from “proof of a possessory interest in the premises on which illegal drugs are found” because “the law infers that the party in possession of the premises is capable of exercising dominion and control over all items on the premises.” However, when a defendant’s possession of premises was not exclusive, then the inference of intent to maintain dominion and control over the drugs ‘must be supported by additional circumstances pointing to the defendant’s knowledge of the nature of the controlled substances and their presence.’ The ‘additional circumstances’ have been shown by various means:

(1) incriminating statements made by the defendant,

(2) attempted flight or furtive gestures,

(3) location of substances like drugs in settings that suggest manufacturing,

(4) proximity of the contraband to the defendant,

(5) location of the contraband within the defendant’s plain view, and

(6) the mingling of the contraband with other items owned by the defendant.

In affirming the conviction, the Court of Appeals found that Deputy Switzer saw Field at the Leavitt Street Property multiple times. Field paid the owner of the property $160.00 in cash to be applied toward the rent for the Leavitt Street Property, which could suggest he lived there. Field’s social security card and vehicle registration were found in a black bag near the dresser where scales, small baggies, and methamphetamine were found. While Deputy Switzer could not remember the proximity of Field’s possessions to the dresser where the dealing-related items were found, the Leavitt Street Property was a small one room apartment. Thus, the black bag with Field’s possessions in it could not have been far from the dresser. Here, the apartment was a one room apartment with a bathroom, so the black bag holding Field’s personal items was in the same room as the items related to drug dealing.

The State presented evidence of “additional circumstances” to support Field’s conviction of dealing in methamphetamine. Field told Deputy Switzer that he sold drugs. While Field did not directly confess to dealing the 4.1 grams of methamphetamine found in the dresser at the Leavitt Street Property, Deputy Switzer testified that, based on his experience, 4.1 grams was not indicative of personal use and instead suggested dealing. The Court of Appeals found that the State proved Field constructively possessed the drugs and affirmed his conviction.

**K-9 Sniff and Subsequent Search Did Not Unreasonably Extend Traffic Stop**

**Plue v. State** **23A-CR-638(Ind. Ct. App. 4/2/2024)**

Richard Plue appeals his conviction and sentence for possession of methamphetamine, a Level 6 felony.

Elwood Police stopped Plue's vehicle for failing to stop at a stop sign and having an opaque license plate. Officer Shoppell immediately requested a K9 officer before leaving his vehicle to speak to Plue. Although the request for a K9 Officer was prompted by Officer Shoppell's familiarity with Plue, calling for a K9 officer as backup was commonplace for Elwood police.

Officer Shoppell requested Plue's license. Plue handed Officer Shoppell paperwork showing that he had "specialized driving privileges."  Officer Shoppell returned to his police cruiser with the documents to review them and to check Plue's license status.

Less than five minutes later, the K9 officer and his dog arrived. Officer Shoppell was still in his vehicle reviewing the documents and had not yet drafted a warning or citation. By that point, about eight minutes had elapsed since the start of the traffic stop. The K9 officer requested Plue and his passenger get out of the vehicle. After they complied, the K9 officer circled Plue's vehicle with the dog, who alerted to drugs in the vehicle. The officers' subsequent search of the vehicle revealed methamphetamine in the center console.

Fourth Amendment Analysis

A dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's prohibition.

But a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, become[s] unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation.

In assessing whether a detention is too long in duration, courts examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.  The burden is on the State to show the traffic stop was not extended due to the dog sniff.

Shoppell's body camera showed that he was still reviewing the paperwork retrieved from Plue and his passenger when the police dog arrived. He had not begun to draft any warning or citation for the infractions or returned the documents to Plue and his passenger. In short, the body cam footage does not reflect any unreasonable delay by Officer Shoppell.

Officer Shoppell's approximate five-minute review of the documents resembled normal verification procedures during a traffic stop. There was no evidence suggesting that Officer Shoppell did not diligently pursue a means of investigation likely to confirm or dispel quickly his suspicions that Plue had committed two infractions.

**Degree of Concern, Suspicion, or Knowledge**

When determining whether a search violates Article 1, Section 11, we evaluate the "reasonableness of the police conduct under the totality of the circumstances." *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). Reasonableness "turn[s] on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." *Id.* at 361.

We have already determined that the dog sniff did not extend the traffic stop. We therefore conclude the degree of concern, suspicion, or knowledge of Plue's criminal conduct was high. *See Harbaugh v. State*, 96 N.E.3d 102, 107 (Ind.Ct.App. 2018) (finding positive dog sniff generated degree of concern, suspicion, or knowledge of criminal activity that contributed to finding that vehicle search did not violate Article 1, Section 11).

**Degree of Intrusion**

Given that the dog sniff was not a search and occurred shortly after the start of the traffic stop, it was only a "minimal intrusion" on Plue's ordinary activities. *See McKinney*, 212 N.E.3d at 707. But Plue's detention and the search of his vehicle were moderately intrusive because they impacted both his "physical movements" and his "privacy." *Hardin*, 148 N.E.3d at 944-46.

**Extent of Law Enforcement Needs**

"The needs of law enforcement to find evidence of drug activity is obviously high." *McKinney,* 212 N.E.3d at 708. "[N]o simpler method exists for detection of hidden drugs than a dog sniff." *State v. Gibson*, 886 N.E.2d 639, 643 (Ind.Ct.App. 2008). And absent the search of his vehicle, Plue would have been able to quickly leave the scene in his vehicle with the suspected drugs.

**Totality of the Circumstances**

The totality of the circumstances leads us to conclude that the vehicle search was reasonable under Article 1, Section 11. The intrusive nature of the vehicle search is offset by the high degree of concern and suspicion of criminal conduct and a similarly high degree of law enforcement needs. *See Harbaugh*, 96 N.E.3d at 107 (finding vehicle search after dog sniff during traffic stop did not violate state constitution).

**NEW DRUG LAW EFFECTIVE 7/1/2024**

On March 1, 2024, Governor Holcomb signed into law HEA 1203, making it illegal for a person to knowingly or intentionally possess xylazine. It is also a crime to knowingly or intentionally manufacture; finance the manufacture of; deliver; or finance the delivery of xylazine, or to possess with intent to manufacture; finance the manufacture of; deliver; or finance the delivery of xylazine. Subsection (c) of this law also defines persons to whom the law DOES NOT apply to. This law goes into effect on July 1, 2024. Full text of the law is below:

**35-48-4-18. Possession of xylazine; Class A misdemeanor but may be a Level 6 felony under certain circumstances. [Effective July 1, 2024]**

**(a)** A person who knowingly or intentionally possesses **xylazine** commits possession of **xylazine**, a Class A misdemeanor. However, the offense is a Level 6 felony if the person has a prior unrelated conviction under this section.

**(b)** A person who:

**(1)** knowingly or intentionally:

**(A)** manufactures;

**(B)** finances the manufacture of;

**(C)** delivers; or

**(D)** finances the delivery of;

**xylazine**; or

**(2)** possesses, with intent to:

**(A)** manufacture;

**(B)** finance the manufacture of;

**(C)** deliver; or

**(D)** finance the delivery of;

**xylazine**;

commits dealing in **xylazine**, a Level 5 felony. However, the offense is a Level 4 felony if the person has a prior unrelated conviction under this section.

**(c)** This section **does not apply** to one (1) or more of the following:

**(1)** A person who dispenses, prescribes, or administers a drug containing **xylazine** to a nonhuman species, if:

**(A)** the drug has been approved by the Secretary of Health and Human Services under section 512 of the federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 360b); or

**(B)** the dispensing, prescription, or administration of the drug is permissible under section 512(a)(4) of the federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 360b(a)(4)).

**(2)** A person who:

**(A)** manufactures, distributes, or uses **xylazine** as an active pharmaceutical ingredient for manufacturing an animal drug approved under section 512 of the federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 360b); or

**(B)** has been issued an investigation use exemption for **xylazine** under section 512(j) of the federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 360b(j)).

**(3)** A person who manufactures, distributes, or uses a **xylazine** bulk chemical for pharmaceutical compounding by a licensed pharmacist or veterinarian.

**(4)** A person who uses **xylazine** for another purpose approved or permitted under the federal Food, Drug, and Cosmetic Act.

**(5)** A person who:

**(A)** possesses **xylazine** for the purpose of engaging in an activity permitted under this section; or

**(B)** delivers or transports **xylazine** from a person described in subdivisions (1) through (5)(A) to another person described in subdivisions (1) through (5)(A).

**What is xylazine?**

**Common or street names: Tranq, Tranq dope, Sleep-cut, Philly dope, Zombie drug**

Xylazine is a medicine used in veterinary medicine. It is NOT an opioid. It is a tranquilizer, sedative and pain reliever that is FDA approved ONLY for use in animal medicine. It has no FDA-approved uses for humans.

In recent years, xylazine has been found as an adulterant in drugs of abuse often sold on the streets, such as in heroin or fentanyl. Although many of its effects are similar to opioids, chemically it is not an opioid; therefore, naloxone is not known to be effective in reversing the toxic effects of xylazine.

When combined with fentanyl or other synthetic opioids, xylazine can increase the potential for fatal overdoses, as the similarity in pharmacological effects can further reduce the already decreased respiratory function. Overdoses associated with xylazine may be more difficult to identify in clinical settings, as they often appear similar to opioid overdoses and may not be included in routine drug screening tests. The administration of naloxone can still address the effect of an opioid on breathing which may be sufficient to prevent death. Naloxone should be given in response to ***any*** suspected drug overdose to reverse any possible opioid effects. Naloxone will not reverse the effects of xylazine. However, because xylazine is often used with opioids like fentanyl, naloxone should still be given.

Repeated xylazine use is also associated with skin ulcers, abscesses, and related complications.

***What are symptoms and health risks of xylazine?***

When used in people, xylazine can cause:

* sedation
* difficulty breathing
* dangerously low blood pressure
* slowed heart rate
* wounds that can become infected
* severe withdrawal symptoms
* death

**How are people exposed to xylazine?**

Illegal drugs such as cocaine, heroin, and fentanyl can be mixed with xylazine, either to enhance drug effects or increase street value by increasing their weight. People who use illegal drugs may not be aware of the presence of xylazine. DEA has seized xylazine and fentanyl mixtures in 48 of 50 states, and the DEA laboratory system reported that approximately 23% of fentanyl powder and 7% of fentanyl pills seized by the DEA in 2022 contained xylazine.

Xylazine appears as a white crystalline solid and easily blends into powdered street drugs. People report using xylazine or xylazine-containing drugs by injecting, snorting, swallowing, or inhaling. Liquid xylazine is cooked down and made into a powder form, then mixed with other substances — such as heroin — or pressed into counterfeit pills (fake pills that look like prescription medications) including opioids (e.g., Norco, Percocet, Vicodin, etc.), sedatives (Xanax), or even stimulants (Adderall). People who are obtaining these drugs may not be aware that xylazine is present in what they are using, which can increase the risk of a fatal overdose. As such, xylazine can be swallowed, inhaled, smoked, snorted, or injected into muscles or veins.

Xylazine is a cheap “filler” for illicit opioids and other counterfeit pills since it increases the potency of various opioids. This effect of xylazine allows those who are creating and supplying drugs to maintain a very strong product. However, most people who are purchasing or being given illicit drugs are not seeking xylazine and likely do not know that xylazine may be cut into the drugs they are trying to obtain.

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**LEO Tips from the desk of the Prosecutor**

* **WRITING YOUR PC Affidavit:**
  + If it’s not in your report – it didn’t happen
  + Cases are very FACT-SPECIFIC-this could affect the outcome of your case
  + Describe everything that happened-details matter!
  + Who collected what and from where
  + The Judge was not there – so be careful not to assume they will know things not in the PC
  + Grammar and spelling – these are public record usually
  + Leave out or redact:

-Name of victims of sex crimes

-Names of child witnesses in sex crimes

-Full SSNs, DOBs, addresses of victims

**Don’t use ‘Cop Talk’ – it’s a car, not a commission.**

**--A good PC can help you avoid an unnecessary depo or suppression--**