Police Prosecutor Update

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SEARCH AND SEIZURE
ITEMS EXPOSED TO PUBLIC VIEW

On December 6, 2011, the Indiana Court of Appeals issued a decision in *Dora v. State*, 957 N.E.2d 1049 (Ind. App. 2011), affirming the trial court's denial of the defendant's motion to suppress evidence.

On May 26, 2009, a party was held on the property of the defendant. The defendant's property was, essentially, a clearing in the woods, with a house, barn, mobile home and RV located on a concrete pad and gravel. Michael Shearer lived in the house on the property and the defendant lived, part-time, in the RV.

During the party, an intoxicated Holly Parker arrived and caused a disturbance. During that disturbance, Parker's cell phone somehow dialed the number of her daughter. The daughter did not speak to her mother on the cell phone, but could hear screaming and yelling and assumed that her mother was being held against her will. So, the daughter called the police. She told police that her mother was at the defendant's property and was in trouble. She also told police that there was "definitely" marijuana located on the defendant's property.

Police went to the defendant's property to investigate. When they arrived at the defendant's property, they spoke with the defendant and Shearer. The defendant and Shearer advised the police about the rampaging Parker and also advised that Parker had left. Police asked the defendant if they could inspect the damage to the RV caused by Parker and the defendant agreed. As the officers were examining the damage to the RV, an Officer shined his flashlight on a flower bed next to the RV and saw growing marijuana plants. It turned out that there were 59 marijuana plants growing next to the defendant's RV. The police officers placed the defendant under arrest and then got the defendant's consent to search the RV. Inside the RV, police officers discovered and seized two more marijuana plants.

After a hearing, the trial court granted the defendant's motion to suppress with respect to the items seized from inside the defendant's RV (a *Pirtle* violation). However, the trial court denied the defendant's motion to suppress evidence with respect to the 59 marijuana plants growing near the defendant's RV. The defendant then pursued an interlocutory appeal. On appeal, the Indiana Court of Appeals noted that the land immediately surrounding and associated with a home (the curtilage) is subject to the same 4th Amendment protections as the home. NOTE: It is not clear how much land around a RV would be designated as the curtilage. The Court also noted that when the police have a legitimate investigatory purpose for being on someone's property and limit their presence to places where other visitors would be expected to go, such as walkways, driveways and porches, their observations do not violate the 4th Amendment. The 4th Amendment does not protect activities or items that, even if within the curtilage, are knowingly exposed to public view. The Court held that the defendant specifically authorized the police officers to inspect the

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damage to his RV. At that point, obviously, the police were not required to avert their eyes from the marijuana plants growing near the RV.

SEARCH AND SEIZURE
OPENING A PILL BOTTLE DURING PAT DOWN

On December 16, 2011, the Indiana Court of Appeals issued a decision in *Corwin v. State*, _____ N.E.2d _____ (Ind. App. 2011), REVERSING the previous order of the trial court, denying the defendant's motion to suppress evidence.

In June of 2009, police received information that Balser, who had an active arrest warrant, was staying at a particular apartment. An officer went to the address and saw the defendant Corwin walk out of the apartment building. The defendant fit the general description for the wanted man, Balser. As the officer approached, the defendant got into a van. The officer went to that van and asked the defendant for his name. The defendant did not respond and, instead, put his hands in his pockets. The officer asked the defendant to get out of the van, but the defendant did not comply.

Eventually, the defendant got out of the van and sat down on the sidewalk. As the officer got near the defendant, he could smell burnt marijuana on the defendant's clothing. He then did a pat-down of the defendant for weapons. During the pat-down of the defendant, the officer found a folding knife in the defendant's pocket and also found a wallet on the defendant. The officer opened the wallet and found identification inside that identified the defendant as Corwin and not Balser, the wanted man.

The officer continued the pat-down of the defendant and felt a circular object in the defendant's pocket that he thought might be a weapon. He removed this object and discovered that it was a prescription pill bottle with part of the label ripped off. He opened the pill bottle and found 21 small pills inside, later determined to be alprazolam (Xanax). The State charged Corwin, with Possession of a Controlled Substance, a Class C felony.

Prior to trial, the defendant filed a motion to suppress evidence, alleging the officer improperly conducted a pat-down of the defendant and improperly seized the pills from the defendant. The trial court denied the defendant's motion to suppress evidence and the defendant pursued interlocutory appeal.

On appeal, the defendant conceded that the officer was permitted to stop him briefly to determine if he was the person wanted by the police and also that based upon his behavior, the officer was justified in performing a pat-down of the defendant for weapons. The Indiana Court of Appeals held that even after determining that the defendant was not the person wanted on warrant, the officer continued to have reasonable suspicion that the defendant was armed, due to the defendant's prior foolish behavior. The Court also noted that, during a pat-down for weapons, if a police officer feels something that feels like a weapon, the officer may reach into the suspect's clothing to check and see if the object is a weapon. The officer testified that he was concerned that the round pill bottle might be a weapon. When he asked the defendant what the object was, the defendant refused to explain. Therefore, the Court held that the officer was justified in taking the pill bottle out of the defendant's pocket to determine whether it was a weapon. However, the Court ruled that when the officer opened the defendant's pill bottle to determine its contents, that search exceeded the permissible scope of a pat-down for weapons and ruled that the pills should have been suppressed. See, e.g., *Granados v. State*, 749 N.E.2d 1210 (Ind. App. 2001), where the

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Indiana Court of Appeals held that a police officer could not unroll a dollar bill removed from the defendant's sock, and *Fentress v. State*, 863 N.E.2d 420 (Ind. App. 2007), where the Indiana Court of Appeals held that a police officer could not unwrap a foil ball removed from the defendant's pocket, and *Harris v. State*, 878 N.E.2d 534 (Ind. App. 2007), where the Indiana Court of Appeals held that *Terry* does not justify a search inside a closed pill bottle, and *Barfield v. State*, 776 N.E.2d 404 (Ind. App. 2002), where the Indiana Court of Appeals held that a search inside a cigarette box violated the scope of a permissible pat-down for weapons.

SEARCH AND SEIZURE
TERRY STOP

On January 6, 2012, the Indiana Court of Appeals issued a decision in *Woodson v. State*, _____ N.E.2d _____ (Ind. App. 2012), REVERSING the defendant's convictions for two counts of Fraud, as a Class D felony.

In February, 2011, an officer had parked his police car across the street from a gas station and fast food restaurant in Indianapolis. This area had been designated by the police as a "hot zone" for illegal drug activity. The officer saw a car in the parking lot of the gas station with two individuals inside. He could not see what the individuals inside the car were doing. A bicycle was parked next to the car.

The defendant got out of the car, put on a backpack, and began to ride the bicycle around the gas station parking lot. The officer drove into the parking lot and approached the defendant. He asked the defendant what he was doing. The defendant responded by being "loud" and "belligerent." Because of this, the officer handcuffed the defendant for safety reasons. After confirming the defendant's identity, the officer asked the defendant if he could search the defendant's backpack. The defendant agreed. During the search of the backpack, the officer discovered and seized 34 pirated movie DVDs.

The State charged the defendant with two counts of Fraud, as a Class D felony. Prior to trial, the defense filed a motion to suppress evidence, seeking to suppress the pirated DVDs seized from the defendant's backpack. The trial court denied the defendant's motion to suppress evidence. The case proceeded to bench trial and the trial court found the defendant guilty as charged. The defendant appealed.

The Indiana Court of Appeals examined the facts and circumstances of this case and determined that the officer had, in fact, conducted a *Terry* stop for investigation upon the defendant. In that regard, the Court pointed to the testimony of the officer that when he first approached the defendant, he stated that he would have pursued the defendant if the defendant had fled instead of complying with the request for information. Moreover, the Court noted that the officer handcuffed the defendant because the defendant was loud and belligerent, in the absence of any apparent threat to officers.

The Court went on to conclude that the officer lacked the reasonable suspicion necessary to justify a *Terry* stop. The Court of Appeals stated that, although the incident took place in a designated "hot zone," there was nothing that the police observed prior to the *Terry* stop that would have given the officer any kind of suspicion that drug-related or other criminal activity might be afoot. As a result of the above

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holdings, the Indiana Court of Appeals ruled that the DVDs seized by the police from the defendant's backpack should have been suppressed. The defendant's convictions for Fraud were overturned.

SEARCH AND SEIZURE
REASONABLE SUSPICION TO STOP

On December 29, 2011, the Indiana Supreme Court issued a decision in *State v. Renzulli*, 958 N.E.2d 1143 (Ind. 2011), finding that an officer DID have reasonable suspicion to stop a possibly intoxicated driver based on a concerned citizen's tip. The trial court granted the defendant's motion to suppress the evidence of the stop based on a lack of reasonable suspicion. The State appealed to the Indiana Court of Appeals where the ruling was affirmed. The State sought transfer to the Indiana Supreme Court.

In April of 2009 at 1:00 a.m., a 911 call was made by a motorist who identified himself and gave his phone number. The caller stated that he had been following a blue Volkswagen who had been driving erratically and was going to "kill somebody." The caller also told 911 that the car just pulled into a specific BP Gas Station. Within 90 seconds the police arrived at the BP, observed a blue Volkswagen and began an investigation.

An investigatory stop of a citizen by a police officer does not violate that citizen's constitutional rights if the officer has a reasonable articulable suspicion of criminal activity. When making a reasonable suspicion determination, reviewing courts examine the "totality of the circumstances." The Court went on to distinguish between professional or criminal informants and cooperative citizen tips. The Court analogized this case to cases involving an "anonymous tip." The Court went on to say that in this case the tip was enough to permit a brief *Terry* stop. The caller provided independent indicia of reliability. He provided the color and make of the vehicle, at the location the police arrived, at a time of night with minimal vehicular traffic, and importantly, the police officer arrived almost immediately after the 911 dispatch.

The Court also found there was enough corroboration of the tip by the police to determine they had reasonable suspicion for an investigatory stop. Even though the officer did not observe the driver commit any traffic violations, he did corroborate the tip by observing the blue Volkswagen at the specifically identified BP Gas Station at 1 a.m., within 90 seconds of the call, made by the tipster who gave his name and telephone number.

Note of caution: This area of the law is very fact specific and this case does not create any bright line rules for what creates reasonable suspicion based on a 911 call.

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