

Police Prosecutor Update

Issue No. 185
April 2007

A recent case dealt with an illegal *Terry* search (although the stop itself was probably bad too). The relevant facts indicate that a police officer responded to a call at an apartment complex, which was a known high crime area. Upon his arrival, he observed an individual named Baker, whom the officer knew had various outstanding warrants for his arrest. According to the officer, Baker was walking toward a blue Impala in the parking lot. When Baker saw the officer, he fled behind the apartment buildings. The officer requested another officer to look for Baker or the car, while the officer pursued Baker on foot. The officer informed the second officer that the Impala needed to be stopped and barred from the apartment complex.

The second officer quickly spotted and stopped the car and advised the occupant to show his hands. The officer returned to assist the second officer and recognized the occupant of the car as the defendant, whom the officer had helped arrest on prior occasions. Both officers testified that the defendant failed to comply with their initial requests to show his hands and that he was “fidgeting around” in the car. The first officer testified that he continuously called for the defendant to “stop moving.” The officers approached the car together and asked the defendant to step out of the car. He did not comply until the first officer opened the driver-side door and directed him to step out. Once the defendant was out of the car, the officer conducted a pat-down search of the defendant’s person and found crack cocaine and marijuana.

The court of appeals stated that “assuming without deciding” that the initial stop of the defendant was reasonable, the officers were not permitted to order the defendant from the car and conduct a *Terry* pat-down search. The purpose of a *Terry* search is not to discover evidence of crime but to allow an officer to pursue his investigation without fear of violence. Prior to ordering the defendant from the car, the officer recognized that the driver was the defendant, not Baker. He could see the defendant’s hands and the interior of the car but did not testify that either raised officer safety concerns. Neither officer testified that, when the defendant exited the car, they feared for their safety or that they had any weapons drawn when they approached the defendant. The officer testified that he knew the defendant from prior drug arrests, but there was no evidence that the defendant was armed on those prior occasions, resisted arrest, or otherwise presented concerns for officer safety. But creating perhaps the most significant concern about the legality of the search was that the officer testified that he had previously told the defendant that he was going to search him every time he saw him. In conclusion, the circumstances presented did not warrant a pat-down search. Therefore, the seizure of the defendant’s person and his possessions was illegal.

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With regard to search (and arrest) warrants, IC 35-33-5-2(a) plainly states, “no warrant for search or arrest shall be issued *until there is filed* with the judge an affidavit. . . .” Many years ago, our supreme court stated that, “merely exhibiting an affidavit to the judge, or executing it before him, is not a ‘filing’ of the affidavit with the judge.” Filing of the affidavit is with the clerk of the court. The statute requires that the affidavit must be on file not only before a search warrant is executed but before it is issued. Some courts have found “substantial compliance” with the statute when the affidavit is filed a little late. But even these courts “urged law enforcement officers to comply with the requirements of IC 35-33-5-2(a).” Now a court of appeals case has said that the language of the statute could not be more clear. It held that failure to comply with the *timely* filing requirement means that the warrant was not supported by “oath or affirmation,” and any evidence seized under the warrant is subject to suppression.

This is a publication of the Monroe County Prosecutor’s Office which will cover various topics of interest to law enforcement officers. Please direct any suggestions you may have for future issues to Chris Gaal of the Monroe County Prosecutor’s Office.