Police Prosecutor Update

Issue No. 232
July/August 2011

PUBLIC INTOXICATION
PASSENGER IN A VEHICLE

On June 28, 2011, the Indiana Supreme Court issued a decision in *Moore v. State*, 949 N.E.2d 343 (Ind. 2011), affirming the defendant's conviction for public intoxication, where the defendant was a passenger in a car.

This case started on December 5, 2008 when the defendant, Brenda Moore, was drinking at her sister's house. Lynn Roberts stopped by the house and asked Brenda Moore if he could borrow her car to go to the hospital to check on a friend. Brenda Moore agreed and decided to tag along.

On the way to the hospital, the police stopped the car driven by Lynn Roberts because a license plate light was not working. During the traffic stop, it was discovered that the driver, Lynn Roberts, did not have a valid driver's license. At that time, Brenda Moore was sloppy drunk and passed out in the passenger seat of her car. Brenda Moore was arrested for Public Intoxication and the car was towed.

Brenda Moore was found guilty of Public Intoxication at bench trial and appealed. The Indiana Court of Appeals reversed the defendant's conviction for Public Intoxication. *Moore v. State*, 935 N.E.2d 301 (Ind. App. 2010). In doing so, the Court of Appeals ruled that the public intoxication statute requires that the intoxicated person either threatens public safety or bothers other people in public. Since, the defendant, Brenda Moore, was merely passed out in her car, the Court of Appeals held that she was not violating the public intoxication statute.

The Indiana Supreme Court reversed the Indiana Court of Appeals and reinstated the defendant's conviction for Public Intoxication. The Supreme Court held that the public intoxication statute simply prohibits an individual from being in any public place in a state of intoxication. The Supreme Court ruled that the public intoxication statute does NOT require proof that the person intoxicated in public be a threat to public safety or bother other people in public.

It seems likely that in 2012 the Indiana General Assembly will look at this issue. One concern raised is that there should be public policy in place to discourage drinking and driving and to encourage the use of a designated driver. On the other hand, if being intoxicated as a passenger in a vehicle is not public intoxication, it is not clear what a police officer should do with Brenda Moore and others in similar situations. Certainly, it would have been improper for the police in this case to dump Brenda Moore out on the side of the road and wish her luck.

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MOPEDS – MOTORIZED BICYCLES

On June 17, 2009, the defendant, Michael Lock, was operating his 2009 Yamaha Zuma motor scooter on U.S. 24 in Huntington County. A state trooper pulled the defendant over for speeding and discovered that the defendant's driver's license was suspended because the defendant was a habitual traffic offender. The defendant was arrested and charged with the offense of Driving After Being Adjudged an Habitual Traffic Offender, a Class D felony. The case proceeded to bench trial and the defendant was convicted. The defendant then appealed.

On appeal, the Indiana Court of Appeals reversed the defendant's conviction. *Lock v. State*, _____ N.E.2d _____ (Ind. App. 2011). The Court of Appeals held that the State failed to prove, at trial, that the defendant's motor scooter was not a "motorized bicycle," as defined by I.C. 9-13-2-109.

Currently, I.C. 9-13-2-105 defines a "motor vehicle" as, essentially, a vehicle that is self-propelled. However, the statutue provides several exceptions, including an exception for a "motorized bicycle." I.C. 9-13-2-109 defines the term "motorized bicycle" as follows:

> "Motorized bicycle" means a two (2) or three (3) wheeled vehicle that is propelled by an internal combustion engine or a battery powered motor, and if powered by an internal combustion engine, has the following:
> (1) An engine rating of not more than two (2) horsepower and a cylinder capacity not exceeding fifty (50) cubic centimeters;
> (2) An automatic transmission;
> (3) A maximum design speed of not more than twenty-five (25) miles per hour on a flat surface.
> The term does not include an electric personal assistive mobility device."

The Indiana Court of Appeals reviewed the statutory definition of "motorized bicycle" and held that the State failed to prove at trial that the motor scooter that the defendant was driving had a design speed of greater than twenty-five (25) miles per hour on a flat surface.

It is not clear why the Indiana General Assembly chose to exclude a "motorized bicycle" from the definition of a "motor vehicle." This exclusion has allowed the habitual traffic offenders to ride these "motorized bicycles" on Indiana roads and highways without a driver's license. The motor scooters are very popular with the habitual traffic offenders and are certainly creating traffic safety headaches in many areas.

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SEARCH & SEIZURE
PLAIN SMELL

In July, the Indiana Court of Appeals issued two decisions authorizing searches based upon an officer's "plain smell" of marijuana

The first case was *Edmond v. State*, _____ N.E.2d _____ (Ind. App. 2011), which was issued by the Indiana Court of Appeals on July 14, 2011. This case started when an Indianapolis police officer stopped a vehicle for disregarding a stop sign. The driver and only occupant of the vehicle was the defendant, Shon Edmond.

During the traffic stop, the officer smelled the odor of burnt marijuana coming from the defendant's vehicle and coming from the defendant's breath. The officer patted-down the defendant and felt a bulge in the defendant's pocket that the officer thought might be a bag of marijuana. The officer then reached into the defendant's pants pocket and discovered and retrieved a bag of marijuana. The defendant was later convicted of Possession of Marijuana, a Class A misdemeanor.

On Appeal, the Indiana Court of Appeals did not analyze the actions of the police officer as a pat-down, with a plain feel of marijuana. Instead, the Court of Appeals held that when the officer smelled the odor of burnt marijuana coming from the defendant's breath, the officer had probable cause to arrest the defendant and conduct a full search of the defendant incident to that arrest. The Court of Appeals also held that it did not matter whether the police officer actually placed the defendant under arrest, so long as probable cause existed to make that arrest.

On July 15, 2011, the Indiana Court of Appeals issued a decision in *Meek v. State*, _____ N.E.2d _____ (Ind. App. 2011), affirming the trial court's denial of the defendant's motion to suppress evidence.

In this case, an Indianapolis police officer validly stopped a vehicle after observing some suspicious activity. The defendant, Charles Meek, was driving the vehicle. Another individual, Eric Moore, was a passenger in the vehicle and there was a child in the back seat.

During the traffic stop, the officer smelled the odor of raw marijuana coming from the car. The officer got both Charles Meek and Eric Moore out of the car and called for back-up.

The officers conducted a pat-down of the two adults in the car and found $1,900 cash on Eric Moore and found a handgun and a handgun permit on the defendant, Charles Meek. The officers then searched the vehicle, but found no marijuana. When the officers asked about the smell of marijuana coming from the car, the

defendant admitted that he had smoked marijuana in the vehicle earlier that day. The officers then conducted a more thorough search of the defendant, Charles Meek, and, not surprisingly, discovered that he was in possession of marijuana and some pills that contained hydrocodone.

The State charged the defendant, Charles Meek, with Possession of a Controlled Substance, a Class D felony. The defendant filed a motion to suppress evidence, requesting that the court suppress all of the evidence recovered from the defendant's person. After a hearing, the trial court denied the defendant's motion to suppress evidence. Thereafter, the defendant pursued an interlocutory appeal.

On appeal, the defendant argued that the plain smell of marijuana may have allowed the police to search the vehicle, but did not authorize the police to search the occupants of the vehicle. The Indiana Court of Appeals disagreed, ruling that the plain smell of raw marijuana, along with the other facts and circumstances, including the failure of police to locate any marijuana in the car, the defendant's admission that he had smoked marijuana in the car earlier in the day, and the fact that the defendant at first denied to the officer that he was in possession of a firearm, provided the police officers with the authority to conduct a more thorough search of the defendant, Charles Meek.

One note of caution. This case could be read to approve a search of both a vehicle and the occupants of a vehicle when an officer smells the odor of marijuana coming from a vehicle. However, the case may not be interpreted in later cases to be quite so broad and the search of the occupants of a vehicle may be approved only upon the plain smell of marijuana coming from the vehicle, along with other facts and circumstances that would support the search of the occupants of the vehicle for marijuana.

IMPROPER U-TURN

On July 26, 2011, the Indiana Court of Appeals issued a decision in *Gagne v. State*, _____ N.E.2d _____ (Ind. App. 2011), affirming the defendant's infraction conviction for making an improper U-turn on I-65.

On June 20, 2010, the defendant, Jay Gagne, was driving northbound on I-65 in Bartholomew County. An Indiana State trooper observed the defendant make a U-turn to the southbound lanes of I-65 by driving across a dirt and gravel storage space in the median. The trooper stopped the defendant and gave him a ticket for improper U-turn.

The defendant took the case to jury trial and lost. The defendant then appealed, arguing that he did not make an improper U-turn because INDOT had not posted a "No U-Turn" sign at the place where he made the U-turn.

The Indiana Court of Appeals rejected the defendant's argument, holding that I.C. 9-21-8-19 prohibits U-turns by any non-emergency or non-maintenance vehicles anywhere on freeways or interstate highways. The requirement of posting a "No U-Turn" sign applies only to special crossovers built for emergency and maintenance vehicles. INDOT is not required to post a "No U-Turn" sign at every spot that could conceivably be driven across to make a U-turn.