Police Prosecutor Update

Issue No. 231
June 2011

NEW LEGISLATION

During the 2011 legislative session, the Indiana General Assembly passed a number of bills relating to criminal offenses. Some of these new laws, which are of interest to law enforcement officers, are summarized in this Police Prosecutor Update. These new laws become effective on July 1, 2011.

SALVIA, SYNTHETIC CANNABINOIDS & BATH SALTS
HB 1102
SB 0057

SALVIA

Salvia is a plant in the mint family. One species of the plant contains Salvinorin A, which is the active ingredient in the plant that causes a high that some have compared to LSD.

Salvia has been sold online and in stores across Indiana as a "meditational herb." Some of the brand names of salvia include "Sally D," "Magic Mint" and "Diviner's Sage." The drug is generally smoked like marijuana.

Hundreds of people have posted videos on YouTube of themselves smoking salvia and then sharing their experience with the world. Perhaps the most notable such video was that of 18 year old Miley Cyrus smoking the drug from a bong.

The new Indiana law defines salvia in I.C. 35-41-1-24.2.

SYNTHETIC CANNABINOIDS

Synthetic cannabinoids are various chemical compounds that are applied to a plant material or sold in powder form. Since 2004, synthetic cannabinoids have been marketed under the brand names such as "Spice" or "K-2." The material is generally smoked and because these designer drugs affect the cannabinoid receptors in the brain, the drug produces a high similar to marijuana.

The new Indiana law defines synthetic cannabinoids in I.C. 35-41-1-26.3.

BATH SALTS

"Bath salts" are another form of new designer drugs that contain cathinone substances. This drug is usually a white or crystalline powder and is intended to be snorted or injected. The drug produces effects similar to MDMA, cocaine and methcathinone. Bath salts are being marketed on the internet and in stores with brand names including "Ivory Wave," "White Lightning" and "Hurricane Charlie."

Several compounds of bath salts are now defined under the new Indiana law as synthetic cannabinoids, as defined in I.C. 35-41-1-26.3. However, these bath salts are not, technically, synthetic cannabinoids, but have been so designated and treated under the new Indiana statute.

The bath salts made illegal by the 2011 legislation are very dangerous. Last week alone, hospital emergency rooms in the United States reported 240 overdose admissions from these bath salts.

Salvia and synthetic cannabinoids (including bath salts) have now been placed in Schedule I of the Indiana Uniform Controlled Substances Act and the sale or possession of such controlled substances are treated the same as the sale or possession of hash oil and hashish. See, I.C. 35-48-4-10 and I.C. 35-48-4-11.

Dealing in salvia or synthetic cannabinoids is a Class A misdemeanor. However, the offense is a Class D felony if:

1. The recipient or intended recipient is under 18 years of age;
2. The amount of the drug involved is more than 2 grams, but less than 300 grams; or
3. The person has a prior conviction for an offense involving marijuana, hash oil, hashish, salvia or synthetic cannabinoids.

The dealing offense is a Class C felony if:

1. The amount of the drug involved is more than 300 grams; or
2. The person delivered or financed the delivery of the salvia or synthetic cannabinoids on a school bus or within 1,000 feet of school property, a public park, a family housing complex, or a youth program center.

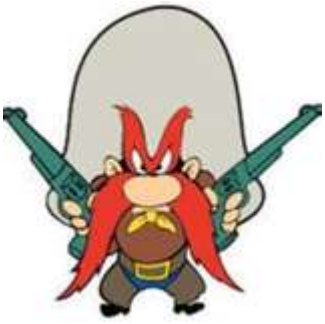
Possession of salvia or synthetic cannabinoids is also a Class A misdemeanor. However, the possession offense is a Class D felony if:

1. The amount of the drug involved is more than 2 grams;
2. The person has a prior conviction for an offense involving marijuana, hash oil, hashish, salvia or synthetic cannabinoids.

For additional information regarding the identification and testing of these new controlled substances, please contact:

Hailey Newton
Forensic Scientist
Indiana State Police Laboratory
(317) 921-5300

CARRYING A HANDGUN WITHOUT A LICENSE
SEA 506



During the 2011 legislative session, the Indiana General Assembly passed an amendment to I.C. 35-47-2-1, expanding the places in which a person (except a serious violent felon or a person who has been convicted of Domestic Battery) may carry a handgun without a license to do so.

This new legislation added subsection (b) to I.C. 35-47-2-1. That new subsection of I.C. 35-47-2-1 states:

"(b) Except as provided in subsection (c), a person may carry a handgun without being licensed under this chapter to carry a handgun if:

(1) the person carries the handgun on or about the person's body in or on property that is owned, leased, rented, or otherwise legally controlled by the person;
(2) the person carries the handgun on or about the person's body while lawfully present in or on property that is owned, leased, rented or otherwise legally controlled by another person, if the person:
  (A) has the consent of the owner, renter, lessor, or person who legally controls the property to have a handgun on the premises;
  (B) is attending a firearms related event on the property, including a gun show, firearms expo, gun owner's club or convention, hunting club, shooting club, or training course; or
  (C) the person is on the property to receive firearms related services, including the repair, maintenance, or modification of a firearm;
(3) the person carries a handgun in a vehicle that is owned, leased, rented, or otherwise legally controlled by the person, if the handgun is:
  (A) unloaded;
  (B) not readily accessible; and
  (C) secured in a case;
(4) the person carries the handgun while lawfully present in a vehicle that is owned, leased, rented, or otherwise legally controlled by another person, if the handgun is:
  (A) unloaded;
  (B) not readily accessible; and
  (C) secured in a case; or
(5) the person carries the handgun:
  (A) at a shooting range (as defined in IC 14-22-31.5-3);
  (B) while attending a firearms instructional course; or
  (C) while engaged in a legal hunting activity."

The new exceptions to the statute prohibiting the carrying of a handgun without a license make the enforcement of this law much more difficult. When the police encounter an individual who is carrying a handgun without a license and who is on private property, the police officer will need to determine, first, whether that individual owns, leases, rents or otherwise "legally controls" that private property. It is not

clear how a police officer will be able to make that determination at the time that the police officer encounters the individual carrying a handgun without a license.

If the police encounter an individual who is carrying a handgun without a license and who is on private property owned by someone else, the police officer will need to determine if the individual carrying the handgun has the permission to have the handgun on the property by the person who owns, leases, rents or "legally controls" that private property. It is not clear how a police officer will be able to determine who owns, leases, rents or "legally controls" that private property. It is also not clear how a police officer will be able to determine whether the person who owns, leases, rents or "legally controls" that private property has given the individual carrying the firearm permission to do so on that property.

Even if the person who owns, leases, rents or otherwise "legally controls" the private property has not consented, the police officer will need to determine whether the person carrying the handgun without a license is attending a "firearms related event" on the property, or is on the property to receive "firearms related services," or is on the property to participate in a "firearms instructional course," or is on the property "while engaged in legal hunting activity." It is not clear how a police officer will be able to make that determination at the time that the police officer encounters the individual carrying a handgun without a license.

If the police encounter an individual carrying a handgun without a license in a vehicle, that individual may do so without a license, so long as the handgun is unloaded, the handgun is "not readily accessible," and the handgun is "secured in a case." It is not clear how a police will be able to determine whether or not the handgun is "readily accessible" nor is it clear how the police will be able to determine whether the handgun is "secured in a case" (as there is no definition of either the word "secured" or the word "case").

If a police officer makes an arrest of an individual for the offense of Carrying a Handgun Without a License, the prosecution of that individual may be even more difficult than determining whether or not to make the arrest. The statute defining the crime of Carrying a Handgun Without a License does not indicate whether the State or the defendant has the burden to prove that the many exceptions listed in the new subsection (b) do or do not apply. If this burden of proof is assigned to the State, it would appear that the prosecution will be required to prove, beyond a reasonable doubt, that the defendant does not fit into any one of the many exceptions now set forth in I.C. 35-47-2-1(b).

It seems likely that the 2011 amendment to I.C. 35-47-2-1 will cause significant problems for the law enforcement community relating to the arrest, prosecution and conviction of individuals who carry a handgun without a license.

VOYEURISM – UPSKIRT PHOTOGRAPHS
SEA 19

The voyeurism statute, I.C. 35-45-4-5 was amended during the 2011 legislative session to attempt to deal with the issue of individuals taking "upskirt" photographs of unsuspecting women. This amendment to the voyeurism statute was prompted by a case in Indianapolis where a creepy individual was taking "upskirt" photographs of women and girls, by using a camera planted in his shoe and getting his shoe in the proper position.

The 2011 legislation added subsection (d) to I.C. 35-45-4-5. Subsection (d) states:

> "(d) A person who:
> (1) without the consent of the individual; and
> (2) with the intent to peep at the private area of an individual;
> peeps at the private area of an individual and records an image by means of a camera commits public voyeurism, a Class A misdemeanor."

The voyeurism statute, as now amended, also defines "private area" as the naked or undergarment clad genitals, pubic area or buttocks of an individual. This would apply to both men and women as victims of this crime. Please note that the definition of "private area" does not include breasts, at least not until someone gets caught taking "down-blouse" pictures of unsuspecting women.

The amended voyeurism statute also provides that this "upskirt photograph" crime is a Class D felony if the person:

1. has a prior unrelated conviction for the offense;
2. publishes the image;
3. makes the image available on the internet; or
4. transmits or disseminates the image to another person.

TEXTING WHILE DRIVING
HEA 1129

During the 2011 legislative session, Indiana joined a number of other states by banning the dangerous practice of texting while driving.

A new section of the Indiana Code was created by the Indiana General Assembly, I.C. 9-21-8-59, which new section states:

> "(a) A person may not use a telecommunications device to:

(1) type a text message or an electronic mail message;
(2) transmit a text message or an electronic mail message; or
(3) read a text message or an electronic mail message;

while operating a moving motor vehicle unless the device is used in conjunction with hands free or voice generated technology, or unless the device is used to call 911 to report a bona fide emergency.

(b) A police officer may not confiscate a telecommunications device for the purpose of determining compliance with this section or confiscate a telecommunications device and retain it as evidence pending trial for a violation of this section."

The violation of this new statute has been designated as a Class C infraction. See, I.C. 9-21-8-49.

A person commits this infraction if the person is texting while operating a motor vehicle. The term motor vehicle is defined in I.C. 9-13-2-105 and does not include a farm tractor, motorized bicycle or an Amish buggy. A person commits this infraction only if the person is texting while operating a *moving* motor vehicle. However, the term "moving" is not defined in this new statute.

One unresolved question with this new statute is whether it would apply to a police officer typing, sending or reading a written message on the in-car computer. Hopefully, police will not be required to stop the police car, during a high speed pursuit, to read the electronic message on the in-car computer.

This new statute is going to be very difficult for a police officer to enforce. Specifically, it is going to be difficult for a police officer, on patrol, to observe an individual actually texting while driving. Obviously, an individual charged with this infraction may insist that he was not using his electronic device to text while driving, but was using the electronic device for another purpose, such as watching a movie (that's much safer).

Subsection (b) of this new statute creates another hurdle for a police officer attempting to enforce this statute by barring the police officer from confiscating a telecommunications device to determine compliance with the statute or as evidence pending trial. Since the telecommunications device of the suspected texting driver would provide proof positive regarding whether the driver was or was not texting, this section of the new statute eliminates the only certain proof regarding the violation of the statute.