

# Police Prosecutor Update

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## BATTERY “BODILY INJURY”

On November 5, 2012, the Indiana Supreme Court issued a decision in *Bailey v. State*, \_\_\_\_\_ N.E.2d \_\_\_\_\_ (Ind. 2012), affirming the defendant’s conviction. The defendant appealed his conviction for domestic battery. The Indiana Court of Appeals reversed the conviction in an unpublished decision. The Indiana Supreme Court granted transfer.

The defendant and his wife lived together in Indianapolis. The defendant came home one night from work and he and his wife began drinking beer. The defendant began to threaten his wife, calling her vulgar names and “put his hands on her”. The wife testified that he poked her repeatedly in the forehead with his finger, hard enough to push her head back. The police came but the defendant was gone. The defendant came back again and shoved the victim out of the way to get inside. Police were called a second time. The defendant was told to leave but came back as soon as the police were gone. The defendant began poking his wife in the head again. The victim testified that all of these things caused pain. The defendant was arrested the third time the police came to the home.

“Bodily injury” is defined by I.C. 35-31.5-2-29 as “any impairment of physical condition, including physical pain.” The Indiana Court of Appeals reversed the conviction holding that for the victim to have suffered “bodily injury”, her pain “must be sufficient to rise to a level of ‘impairment of physical condition.’” When the Court of Appeals weighed the victim’s pain against that suffered by other victims, they found it insufficient in comparison. The Indiana Supreme Court disagreed with this analysis and held that pain alone – regardless of severity or duration – is sufficient to constitute impairment of physical condition. The Court held that engaging in a case-by-case comparison to determine whether a victim’s pain is sufficiently significant is not required by the statute.

## SEARCH AND SEIZURE TERRY STOP – PAT DOWN

On November 15, 2012, the Indiana Court of Appeals issued a decision in *Clanton v. State*, 977 N.E.2d 1018 (Ind. Ct. App. 2012), reversing the defendant’s conviction for possession of cocaine, a class D felony.

Off duty officers were working part-time as security officers for an apartment complex, in part to enforce the strict no loitering policy. The officers were dressed in their full police uniforms, carried their police issued guns, tasers and police radios. At 11:15 p.m. while patrolling on foot, the officers saw three black men standing outside a resident’s doorway for five to fifteen seconds. Believing the men to be loitering, the officers approached them. The men turned their backs to the officers as they approached and when asked what they were doing, one fled and was chased by one officer. The other two, including the defendant, remained and followed the officer’s directions. Neither made any furtive movements or threatened the officer in any way. The officer withdrew his taser, told the men to place their hands on the wall and patted them down. The officer felt a sharp object in the defendant’s right front pocket. He

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couldn't tell what it was so he removed it. He then saw that it was a pen cap and inside the cap was a plastic baggie. The officer removed the plastic baggie and found that it contained what he believed to be cocaine.



The Court of Appeals held that the 4<sup>th</sup> Amendment applied to the actions of the officer because although he was off duty and on private property, he was acting as a law enforcement officer during the investigation. He was wearing his full police uniform, complete with his badge, gun, taser and radio.

The Court did NOT address the validity of the stop and subsequent pat down because they found that the search of the pen cap exceeded the scope of the pat down under *Terry*. An officer is permitted to remove non-weapon contraband during a *Terry* frisk if the contraband is detected during an initial pat down for weapons and if the incriminating nature of the contraband is immediately ascertained by the officer. Thus, if the officer determines that an item is not a weapon and the officer cannot immediately ascertain whether or not the item is contraband, the search of that item must stop.

Here, once the officer discovered that the sharp item in the defendant's pocket was a pen cap, he had dispelled his suspicion that the item was a weapon. The officer admitted that he could not tell what was inside the baggie when he first observed it hanging out of the pen cap. As a result, the discovery of the cocaine violated the defendant's rights under the 4<sup>th</sup> Amendment and the conviction was reversed.