

Police Prosecutor Update

Issue No. 243
October 2012

SEARCH AND SEIZURE WARRANTLESS SEARCH

On September 12, 2012, the Indiana Court of Appeals issued a decision in *Gaines v. State*, _____ N.E.2d _____ (Ind. App. 2012), affirming the defendant's convictions for drug offenses.

During a missing person investigation, police stopped a vehicle containing the defendant. The defendant was a back seat passenger in the car. The officer noticed that he had something in his mouth and that he was chewing. The defendant was ordered out of the car and placed in cuffs. The officers smelled a strong odor of marijuana coming from the car. One officer did a pat down of the defendant and found a baggie of marijuana in his pocket. The officer did not remove the baggie but instead placed his tazer in the small of the defendant's back and ordered him to spit out the object in his mouth or he would be tazed. The defendant complied and spit out a baggie with cocaine in it. Both officers testified that they believed the defendant was attempting to swallow some type of narcotic or other contraband. Based on all of the circumstances, the Court concluded that a reasonably prudent person could believe that the defendant was attempting to destroy contraband. Therefore, probable cause existed for the defendant's warrantless search.



The Court then went on to analyze the reasonableness of the means used to compel compliance. The Court used the three-part balancing test which requires the reasonableness of force used during a body search procedure to be measured against (1) the extent to which the procedure used may threaten the safety or health of the individual, (2) the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity, and (3) the community's interest in fairly and accurately determining guilt or innocence. The Court has previously held that a choke hold is dangerous, with a risk of serious injury and therefore amounted to unreasonable force. In this case, the Court held that the officer did not use unreasonable force by ordering the defendant to spit out the contraband under threat of using a tazer. The Court went on to say that no physical force was used and there was no risk to the defendant's physical safety. There was no intrusion on the defendant's bodily integrity by uttering a threat so the force was not unreasonable.

SEARCH AND SEIZURE WARRANTLESS SEARCH

On September 24, 2012, the Indiana Court of Appeals issued a decision in *Kirk v. State*, _____ N.E.2d _____ (Ind. App. 2012), affirming in part and reversing in part the convictions.

Officers were responding to a 911 call about two persons with a gun threatening someone. When they arrived, the officers very quickly tracked down the suspects. Officers patted down the suspects, a father and son, for weapons and found a loaded 380 on the 16 year old son. He was arrested and advised of his rights. A search incident to arrest revealed cocaine, cash and pills. The dad/defendant was arrested for public intoxication, neglect of a dependent and advised of his rights. During a search incident to the

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.

arrest of the dad, officers found a cell phone. One detective immediately pressed the text button on the cell phone and looked at six to eight text messages that were related to drug dealing. Detectives later got a search warrant for the defendant's home and found more drugs and cash. The defendant sought to suppress several things but for purposes of this PPU we will discuss only the motion to suppress the text messages.



The Court of Appeals has held that officers must first obtain a search warrant to search a cell phone absent an exception to the warrant requirement. In this case, the State did not make clear the reason for the search of the cell phone without a warrant. The defendant was not seen talking on his phone or even holding his phone prior to his arrest. The crimes he was arrested for did not implicate use of a cell phone. Although the officer was within his rights to confiscate the phone, there was no real law enforcement need to open the phone, press a button and read six to eight text messages. The State argued that the cell phone could have been remotely cleansed and the evidence therefore destroyed. However, the State failed to prove that this was a concern as they failed to act promptly to secure the contents of the text messages. The Court concluded that under these facts and circumstances, the warrantless search of the cell phone was unreasonable under the Indiana Constitution and the text messages should not have been admitted. The Court went on to hold that the introduction of the text messages was harmless as to three of the convictions but was not harmless as to the defendant's conviction for conspiracy to commit dealing in a controlled substance and reversed that conviction.

SEARCH AND SEIZURE ABANDONED PROPERTY

On September 25, 2012, the Indiana Court of Appeals issued a decision in *Hall v. State*, _____ N.E.2d _____ (Ind. App. 2012), affirming in part and reversing in part the convictions.

As part of an investigation of suspicious purchases of pseudoephedrine, an officer attempted to make a traffic stop of the defendant's car. The officer knew the defendant had outstanding warrants and that his license had been suspended as a habitual traffic offender. When the officer turned on his lights and siren to initiate the traffic stop, the defendant initially slowed down, but then took off at a high rate of



car.

speed reaching over 100 mph, crossing the center line and causing another car to leave the roadway. After several miles, the officer lost sight of the car. The officer eventually found the car in a field and the defendant was nowhere in sight. The officers prepared the car to be towed and when they started an inventory search of the car discovered a one-pot meth lab inside. The defendant challenged the warrantless search of his



Generally, abandoned property is not subject to protection under the Fourth Amendment. The question of abandonment is primarily a question of intent which can be inferred from words, acts and other objective facts. It depends on whether the defendant has so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search. The Court held that the evidence of abandonment was strong in this case. The defendant drove his car off the road and into a field, where he left it with a flat tire. He also left an active one-pot meth lab untended in his car. The evidence raises an inference that the defendant not only was attempting to disassociate himself with

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.

the car, but also that he did not reasonably expect the car to remain intact. Therefore, the defendant abandoned the car and his Fourth Amendment rights were not violated.