Police Prosecutor Update

Issue No. 274
April 2015

BATTERY ON A POLICE OFFICER
"CASTLE DOCTRINE"

On March 11, 2015, the Court of Appeals issued its decision in *Cupello v. State*, __ N.E.3d __, (Ind. Ct. App. 2015), reversing the defendant's conviction for Battery on a Law Enforcement Officer. An employee of the apartment complex where the defendant resided reported to the off-duty constable, also employed by the apartment complex, that the defendant had been "verbally intimidating." The constable went to the defendant's apartment to investigate reports of intimidation. When the constable knocked, the defendant opened the door, and the constable intentionally placed his foot just inside the threshold of the door. There the constable questioned the defendant about the incidents, and the defendant asserted that he was being harassed by a staff member. When the constable told defendant that he could not press charges against the staff member, defendant became upset, stopped talking and slammed the door to the apartment, striking the constable's foot, shoulder and head. He slammed the door two more times on the constable and managed to close it on the third attempt.

The constable called for back-up, and when another officer arrived, they entered the defendant's apartment without a warrant and arrested him. Defendant was charged only with battery on a law enforcement officer, Class A misdemeanor, and was convicted at a bench trial.

I.C. 35-41-3-2(i) provides that "A person is justified in using reasonable force against a public servant if the person reasonably believes the force is necessary to . . . prevent or terminate the public servant's unlawful entry of or attack on the person's dwelling, curtilage or occupied motor vehicle[.]" The Court first found that the constable unlawfully entered the defendant's dwelling by placing his foot within the threshold of apartment door without lawful justification. Therefore, as a matter of law, the defendant was entitled to use reasonable force to terminate the constable's unlawful entry and prevent further entry. It was reasonable for the defendant to forcibly close the door and to keep trying to close the door on the constable because the constable had inserted his foot inside it. The Court found the facts legally did not support a conviction of battery on a law enforcement officer.

PATRONIZING A PROSTITUTE
ENTRAPMENT

On March 5, 2015, the Indiana Supreme Court issued its decision in *Griesemer v. State*, __ N.E.3d __, (Ind. 2015), affirming the defendant's conviction for Patronizing a Prostitute. On March 30, 2015, the Court of Appeals issued its decision in *Mobley v. State*, __ N.E.3d __, (Ind. Ct. App. 2015), likewise affirming a conviction for Patronizing a Prostitute. In *Griesemer*, a police detective was posing as a prostitute on a street corner when she noticed Griesemer drive past and stare at her. Griesemer looped around the block and stopped his car near her. Through his car window, he asked if she needed a ride. The detective declined, saying she was trying to make some money. Griesemer nodded his head toward the passenger seat two times; detective asked him how much money he had. Griesemer told her $20.00.

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The detective said she could "do head"; Griesemer nodded yes and nodded toward the passenger seat a third time. Detective told Griesemer to pick him up just down the street. Griesemer drove down the street where other officers arrested him. At a bench trial, Griesemer was found guilty as charged. Griesemer appealed, and the Indiana Court of Appeals reversed the conviction. *Griesemer v. State,* 10 N.E.3d 1015 (Ind. Ct. App. 2014).

In *Mobley,* the same detective was again posing on a street. Mobley drove past her slowly, staring at her, and stopped his car in the middle of the next street. The detective walked up to him and asked, "What's up?" In response, Mobley asked, "How much?" Detective responded "twenty for some head." Mobley nodded yes and then nodded toward his passenger seat. Detective told Mobley to pick her up in the nearby alley. When another officer wearing a "POLICE" vest showed up, Mobley turned to the detective and said, "Never mind." Mobley was convicted after a bench trial.

On appeal, both defendants argued that the State at trial failed to rebut their respective entrapment defenses. For entrapment to be a defense, the person's criminal conduct must be the product of a law enforcement officer using persuasion or other means likely to cause a person to commit the crime, and the person must not be pre-disposed to commit the crime. Conduct affording a person the opportunity to commit an offense is not entrapment. There is no entrapment if the State shows either that there was no police inducement or the defendant was predisposed to commit the crime. In both cases, the court found that the police had not induced defendant's conduct.

In *Griesemer*, defendant stared at the detective, stopped his car near her to initiate conversation and twice nodded his head in invitation *before* she mentioned the opportunity to exchange money for sex. Her stating, "I could do head," was an assertion rather than an order or directive. She merely afforded the defendant an opportunity to commit the offense. In *Mobley*, defendant drove slowly past the detective, staring at her, stopped his car in the middle of the street and asked "How much?" before detective mentioned the opportunity to exchange money for sex. Likewise, the detective merely afforded him the opportunity to commit the offense.

OPERATING WHILE INTOXICATED
CONSENSUAL ENCOUNTER

On March 19, 2015, the Indiana Court of Appeals issued its decision in *Rutledge v. State*, __ N.E.3d __, (Ind. Ct. App. 2015), affirming the defendant's conviction for Operating a Vehicle While Intoxicated, Class D felony, and Habitual Substance Offender. Two Wabash County Sheriff's Deputies encountered a minivan in the early hours of the morning and observed the driver to approach the edge of the roadway and "jerk back" on multiple occasions. They followed the minivan until it pulled into a residential driveway. They drove by the minivan, recorded the license plate number and checked it with the in-car computer. The address for the license plate did not correspond to the address where the minivan parked. The minivan then pulled back onto the road, and the deputies followed. The minivan pulled into another driveway. Deputies drove past, turned around and returned to the minivan. This took less than half a minute, during which deputies observed no door to open or dome light to illuminate in the minivan. The deputies pulled their car perpendicular to the minivan and did not activate their red and blue lights. They observed Rutledge in the driver's seat lying across the center console with his head resting on the

passenger seat. One detective tapped on the driver's side window, Rutledge sat up, and ultimately Rutledge got out of the van. Rutledge said he had been asleep and did not know what was going on. Rutledge had red and glassy eyes, slurred speech and the odor of alcoholic beverage about his person. The car keys were located on the passenger side floor. Rutledge got part way through the gaze nystagmus field test before refusing to do any more. He also said that he had not been operating the vehicle, but that a friend had driven him there and left. Deputies obtained a search warrant for his blood, which tested 0.19.

On appeal Rutledge argued that the encounter between deputies and himself was an unlawful seizure under the Fourth Amendment and was unreasonable under Article I, Section 11 of the Indiana Constitution, requiring that evidence of his intoxication be suppressed. First, the Court found that the initial encounter between deputies and Rutledge was consensual because Rutledge had parked the van on his own, the keys were on the floor, the deputies did not block the van or activate the red and blue lights, and Rutledge was lying down in the van until he sat up when a deputy tapped on the window. Therefore, it was not an investigatory stop or seizure under the Fourth Amendment. Even if the encounter were not consensual, the Court found the encounter was justified because the encounter took place in the early morning hours, Rutledge was having a hard time keeping the van on the road, Rutledge twice pulled into a driveway that was not his address, and deputies observed Rutledge lying with his head in the passenger seat. Therefore, they had reasonable suspicion that criminal activity may be afoot. The Court also found under the totality of these circumstances, the trial court did not abuse its discretion under the Constitution to allow the jury to hear the evidence of Rutledge's intoxication.