

Police Prosecutor Update

Issue No. 272
February 2015

Criminal Gang Activity

On January 28, 2015, the Indiana Court of Appeals issued its decision in *Dimmitt v. State*, ___ N.E. 3d ___ (Ind. Ct. App. 2015), affirming in part and reversing in part the defendant's conviction and sentence. This note will deal specifically with the Court's opinion affirming the conviction for Criminal Gang Activity, a Class D felony.



Troy Kelly, Raymond Depew, and David Widner went to a bar with several friends. After they were seated, a man in a blue hooded sweatshirt (blue hoodie guy) confronted Depew because he did not like the way Depew looked at him. Blue hoodie guy left and returned with the defendant and Robert Niles. During the confrontation, the defendant lifted his shirt, showed his tattoos, including a swastika and an emblem bearing the words "rebel cause" and "pres," and stated he was the president of a gang called Rebel Cause. Niles was also a member of Rebel Cause, and other people in the bar sported the Rebel Cause tattoo. After members of Depew's group said they did not want any trouble, the defendant shook hands with two people in the group and left.

At about 2:30 a.m., Depew's group attempted to leave. The defendant's group followed them outside. Blue hoodie guy punched Depew in the back of the head. A fight ensued. The defendant and blue hoodie guy grabbed Kelly while another guy punched him in the face. The defendant held Kelly against a car and punched him in the face. Kelly suffered cuts and abrasions and torn rotator cuff. The defendant punched Widner, knocked him unconscious and then kicked Widner in the head. Widner suffered a skull fracture and permanent brain damage.

The state charged the defendant with aggravated battery, Class C felony battery, Class A misdemeanor battery, Class B misdemeanor battery, Class D felony criminal gang activity and habitual offender. The State introduced evidence from several gang specialists that Rebel Cause was a white supremacist prison gang that had expanded outside prison and that was known to engage in criminal activity including violent crime. To be admitted to the gang, members must commit a physical assault against another person. To leave the gang, a member is physically assaulted by other members. The jury found Dimmitt guilty of battery causing serious bodily injury, Class A misdemeanor battery, felony gang activity and habitual offender.

Dimmitt argued that there was insufficient evidence to support his conviction for criminal gang activity because there was not substantial evidence of a nexus between his gang affiliation and the offenses he committed. The court disagreed. It found that Dimmitt openly announced his affiliation with Rebel Cause at the outset of the confrontation and used that affiliation as a means of intimidation. Dimmitt committed the underlying offenses together with other members of Rebel Cause, and battery is commonly used by members to further its criminal goals.

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Expectation of Privacy
Strip Search

On January 16, 2015, the Indiana Court of Appeals issued its decision in *White v. State*, ___ N.E. 3d ___ (Ind. Ct. App. 2015), affirming the defendant's conviction for possession of cocaine and possession of marijuana, enhanced by his adjudication as an habitual substance offender.

Officer Goode was driving home in her personal vehicle when she observed the defendant's car hit a red car and drive away without stopping. Goode reported what she had seen on her radio and followed the defendant's car. She ultimately lost sight of the car. Officers Mengerink and Keedy responded to Officer Goode's report and stopped the car. Goode arrived shortly thereafter. All three officers noticed front-end damage to the car and fresh red paint marks on the front bumper. Officers smelled the odor of raw marijuana on the defendant's person and the odor of burnt marijuana inside the car. They arrested White for leaving the scene of an accident and searched the defendant and his car, but found no marijuana.

The defendant was taken to jail. Because of the strong smell of marijuana coming from the defendant, the defendant was subjected to a strip search, in private, with two sheriff's deputies present. Deputies discovered 2 baggies inside defendant's underpants, containing raw marijuana and 3.1992 grams of cocaine. After his motion to suppress was denied and he was convicted, defendant appealed.

The defendant alleged that officers did not have probable cause to arrest him. Officer Goode observed the accident and followed the vehicle. She reported her observations to other officers who stopped the vehicle. They observed fresh red paint transfer on his front bumper that was consistent with the area of the vehicle that she previously saw strike the red car. The Court found this evidence to be sufficient for probable cause to make an arrest.

The defendant next contended that the strip search at the jail violated his Fourth Amendment rights. A police officer may conduct a warrantless search of a person incident to lawful arrest. The search and arrest must be substantially contemporaneous and confined to the immediate vicinity of the arrest. Searches that do not occur until the arrestee arrives at a law enforcement facility are justified as long as the items searched are found on the person of the arrestee or are immediately associated with this person. However, there are limits on searches incident to arrest. Such a search may involve a relatively extensive exploration of the person, but it is unreasonable if it is "extremely or patently abusive." Routine strip searches pursuant to lawful misdemeanor arrests are not reasonable. The circumstances surrounding the arrest, rather than the offense itself, may give rise to reasonable suspicion, and if so, the search may be reasonable.

In this case, officers noticed the odor of raw marijuana on the defendant's person and burnt marijuana in his vehicle. The odor of raw marijuana was still present at the jail. Although the underlying arrest was for a misdemeanor, the Court concluded the strip search incident to arrest at the jail was justified because officers reasonably suspected that the defendant might be in possession of marijuana.

Expectation of Privacy
Back Seat of the Police Car

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On January 15, 2015, the Seventh Circuit decided *U.S. v. Webster*, ___ F.3d ___ (7th Cir. 2015) and affirmed the defendant's conviction.

Webster had a burgeoning career as a coke and pot dealer in South Bend, and as many career-minded dope dealers, he also kept guns in his house, despite being a convicted felon. When police arrived at his home for a knock and talk, they quickly developed probable cause. Webster was placed in the back of a patrol car, and a police officer sat with him for 2 ½ hours while a search warrant was obtained and served. At one point, the officer got out of the car, and Webster and a codefendant talked and Webster placed a phone call, all of which was captured by the in car video camera. At trial, Webster moved to suppress these recordings in which Webster complained that the police were “trying to kill my mother fucking career.”

The Seventh Circuit noted that Webster needed to establish that he had a reasonable expectation of privacy in his communications while in the back of a police car. The Court found that society did not confer an objectively reasonable expectation of privacy in a conversation that occurs in a squad car.



The Court did note that not all police vehicles would result in the same outcome. In this case, the police car had an open cage and was full of electronics visible and obviously capable of recording or transmitting conversations. However, there would not be an objective expectation of privacy in the back of a paddy wagon where prisoners were separated from the officers by thick plexiglass and no electronics were visible.