Police Prosecutor Update

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SEARCH AND SEIZURE
CONSENT

On March 2, 2015, the Indiana Supreme Court issued its opinion in *State v. Cunningham,* __ N.E.3d __ (Ind. 2014), reversing the decision of the Court of Appeals in *State v. Cunningham*, 4 N.E.3d 800 (Ind. Ct. App. 2014). Around midnight on May 17, 2013, police pulled Cunningham over because one of his taillights was broken. Cunningham asked the officer if he could exit the vehicle to look at the broken taillight. The officer told him, "that was fine, but I would pat him down for any weapons just for officer safety . . .." Cunningham got out of the vehicle and submitted to a pat-down. The officer felt a pill bottle and asked what was in it. The defendant admitted it contained marijuana and took the bottle out of his pocket. The officer asked him if he had anything else on his person; Cunningham admitted he had a pipe in his truck and offered to get it. After reading defendant his Miranda warnings, officer asked defendant to retrieve the pipe. Defendant was charged with Possession of Marijuana and Possession of Paraphernalia.

Defendant moved to suppress the pill bottle and the pipe. The trial court granted the motion on its interpretation that the statute did not require a taillight to emit only red light. On appeal, the Court of Appeals reversed the trial court on the issue of the taillight. However the Court upheld the trial court's suppression of all the evidence on the grounds that the defendant's consent to the pat-down "was invalid because it was merely acquiescence to police actions and directions."

An officer is permitted to stop and detain a motorist if the officer reasonably suspects that the motorist is engaged in, or about to be engaged in, illegal activity including a traffic violation. An officer, therefore, needs no particularized suspicion to order a motorist to stay in the car, or to deny him permission to exit. The Court found no coercion in the choice between remaining in the car, or being patted down as a condition of getting out of the car. The defendant's choice to step-out of the car, as he requested, and submit to a pat-down was free and voluntary. Officer's question about the contents of the pill bottle he felt during the pat-down did not coerce the Defendant into expanding the scope of his initial consent.

SEARCH AND SEIZURE
ANONYMOUS TIP

On February 27, 2015, the Court of Appeals issued its opinion in *Shelton v. State,* __ N.E.3d ___(Ind. Ct. App. 2015) affirming the defendant's convictions for Possession of Marijuana, Cocaine and a Schedule I Controlled Substance. Following his conviction of Class A felony possession of cocaine, defendant entered Community Corrections instead of the Department of Correction, and entered a contract wherein he consented "to allow [Community Corrections] staff and/or law enforcement officers to enter [his] residence at any time, without prior notice or warrant, to make reasonable inquiry into the activities of the residents of the home or assist in investigations of rule violations." He also agreed to "submit to

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searches of person, residence, vehicle, or personal property at any time by staff or law enforcement officers."

A few months after defendant entered community corrections, the local narcotics unit received an anonymous tip on its hotline that "Shelton was talking about having some marijuana in his house," that he was on house arrest, and that the marijuana had been stolen from a police car. Marijuana had, in fact, been stolen from a police car. This information had not been publicized, and only a few officers were aware of it. An officer confirmed with a case manager Defendant's participation in community corrections. The case manager, the officer and his canine partner went to Defendant's house. They searched the house and the garage with the assistance of the canine and discovered and seized 428 grams of marijuana, over 4 grams of cocaine, and 3 Ecstasy tablets. Defendant's fingerprints were recovered from the marijuana bags. After the trial court denied his motion to suppress, Shelton was found guilty as charged.

The Court of Appeals found that in the case of an offender on home detention, a degree of proof less than probable cause is required to satisfy the Fourth Amendment. That standard is "reasonable suspicion." Reasonable suspicion may be established if significant aspects of an anonymous tip are corroborated by the police. The anonymous tip "must also demonstrate intimate familiarity with the suspect's affairs and be able to predict future behavior." The informant's reliability was bolstered by the fact that he provided accurate information that had not been publicly disclosed. He identified Shelton by name and specified he was on house arrest. These facts were confirmed by the investigating officer. The tip exhibited indicia of reliability sufficient to create reasonable suspicion to search Shelton's house in accordance with his agreement with Community Corrections.

VIDEO EXHIBITS
SILENT WITNESS

On February 13, 2015, the Court of Appeals issued its opinion in *Wise v. State,* __ N.E.__, (Ind.Ct.App. 2015), affirming defendant's convictions for Rape and Criminal Deviate Conduct. Wise and MB were married. Sometime in 2006, Wise was slipping Xanax into MB's drinks without her knowledge. About two years later, MB discovered videos on Wise's telephone. The videos depicted sexual intercourse and acts of criminal deviate conduct between Wise and MB. MB had no memory of these incidents. With a handheld camcorder, MB recorded the videos from Wise's phone. She changed the filenames on the cell phone's date stamp, but did not change the dates. She informed Wise she had found the videos. Wise acknowledged drugging MB for sex. In 2011, MB reported Wise to the police, and after an investigation Wise was arrested and charged. At trial he objected to admission of the videos, and his objection was over-ruled. The jury found him guilty. On appeal Wise challenged admission of the video on grounds that the videos were not properly authenticated.

Photographs may be admitted into evidence as "silent witness[es]," rather than merely demonstrative evidence, so long as the photographic evidence is relevant. The silent witness theory has been extended to the use of video recordings, and applies to videos that are recorded automatically without a human operator. Where there is no one who can testify to the recording's accuracy and authenticity and the recording must speak for itself and cannot be cross-examined, a strong showing of authenticity and competency is required. Factors authenticating a silent witness can include how and when the camera was loaded, how frequently the camera was activated, when the video was taken, and the processing and chain of custody of the recording, after it was made. In this case, MB testified that the

phone belonged to Wise. A photo of their daughter was the screensaver. MB described in detail how she recorded the videos as they played on the phone. Her testimony established a chain of custody for the videotape she made, as well as for the DVD onto which her neighbor copied the contents of the tape. While she altered the names of the videos, she had not altered the date and time stamps. She testified that the videos played at trial were the same ones she had recorded and were in the same condition that she had found them in 2008. MB identified herself and Wise as the people depicted in the videos.

As to the recordings on the cell phone, Wise acknowledged to MB that he had made them. The originals had been destroyed when Wise replaced his phone. He could not now complain that the recordings MB had made of the original video were not the best evidence of the offense. The Court found that a proper foundation had been made for the admission of the video.

BURGLARY

On February 19, 2015, the Court of Appeals issued its opinion in *Keller v. State*, __ N.E.3d __ (Ind. Ct. App. 2015), remanding defendant's conviction for Burglary, Class B felony, to the trial court to enter conviction to Burglary as a Class C felony, and to re-sentence the Defendant.

Property owner inherited from his great-grandparents a farmhouse, which remained vacant for several years until 2012. In 2012, property owner and his family moved into a relative's house and began renovating the farmhouse to live in. They received mail at the farmhouse, and some food and most of their belongings were stored there. However, no one slept there as the farmhouse was in rough condition. Property owner began remodeling the house on his own in 2013, a few hours each day. He also visited the house daily to feed livestock. As of the date of the trial, eight months after the crime, the property owner's family had still not moved into the house.

Through police investigation, Keller was identified as the burglar and arrested. A jury found Keller guilty of two counts of Class B felony burglary, one count of Class C felony burglary, three counts of Class D felony theft, and two counts of Class D felony receiving stolen property.

The Court found that this evidence was insufficient to support the conclusion that the farmhouse was a dwelling for purposes of a Class B felony. When an occupant is moving into a house, it is not necessary that he sleep in the house at the time of the burglary in order for the house to be a dwelling; it is sufficient that the occupant intend to reside permanently in the house *in the near future.* The State did not prove that the family intended to move into the house "in the near future." The Court ordered the two Class B felony counts of burglary remanded so that the trial court could enter judgments of conviction to Burglary as a Class C felony.

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