Police Prosecutor Update

Issue No. 278
August 2015

SEARCH AND SEIZURE
FLASH BANGS

On July 31, 2015, the Seventh Circuit Court of Appeals issued its decision in the case of Louise Milan v. Billy Bolin, *et al*. In June, 2012, the police department became aware of Internet postings that made threats against the police. A typical post said, "New Indiana law. You have the right to shoot cops." The posts came from the internet protocol (IP) address at the home of Milan and her granddaughters. The police obtained a search warrant for Milan's address, and an 11-man SWAT team rushed to the front door of the house and broke open the front door and nearby window and tossed two "flash bang" grenades into the house. The police then searched the house, handcuffed Milan and her granddaughter and led them out of the house for questioning. After questioning they were released. Milan sued the City and several police officers, contending that the police had used excessive force in the search of her home. The City and the police moved for summary judgment and argued that qualified immunity insulated them from liability.

Milan's IP address was unsecured, meaning anyone within a short distance could use it to post on the internet without a password. Shortly before the search police spotted a man known for making threats to the police on the porch two doors from Milan's house. (This man was found ultimately to have posted these threats.) Police officers thought several male individuals with Milan's last name could also be responsible for the posts, but one of them was not related to Milan or even known by her, and police observed no males entering or leaving the house during their investigation. They did, however, observe a small in stature female, age 18, whose age they estimated as 13 to 15.

The Court had previously ruled, "[T]he use of a flash bang grenade is reasonable only when there is a dangerous suspect and a dangerous entry point for the police, when the police have checked to see if innocent individuals are around before deploying the device, when the police have visually inspected the area where the device will be used and when the police carry a fire extinguisher." In this case the use of the flash bang combined with the failure to check whether the IP address was unsecured, the failure to conduct a more extensive investigation before deciding to use the flash bang, the neglect in investigating the suspected perpetrator, and handcuffing the 18-year-old female justified the district court's denial of summary judgment. "[W]hile the defendants are correct to point out that a reasonable mistake committed by police in the execution of a search is shielded from liability by the doctrine of qualified immunity, . . . [the police] committed too many mistakes to pass the test of reasonableness."

SEARCH AND SEIZURE
SEARCH WARRANTS

On July 24, 2015, the Court of Appeals issued its decision in Buford v. State, ___ N.E.3d ___, (Ind.Ct.App. 2015). Police received an "intelligence form" from the prosecutor's office indicating there might be drug activity at the residence of Buford and that Johnny Stewart, who had an open arrest warrant, was involved. No source for this information was identified. The police went to the residence,

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.

and officers could smell the odor of burnt marijuana and see Buford and through the screen door. When they knocked, Buford and Stewart ran away. Police continued to knock, and both ultimately came to the door. Both had warrants and were arrested inside the house, where police smelled the stronger odor of burnt marijuana and observed "shake" on the dining room table.

One of the officers left and obtained a search warrant. They discovered a gun, bullets, marijuana roaches, a scale with cocaine residue, plastic baggies with cut-out corners, and cocaine. After losing a motion to suppress, Buford was convicted of Dealing in Cocaine, Possession of a Firearm by a Serious Violent Felon, and Maintaining a Common Nuisance. He appealed the conviction alleging the evidence seized pursuant to the warrant should have been suppressed.

The Court of Appeals, in reversing the conviction, focused on an assertion in the affidavit evidence of *the offenses of Dealing Marijuana and other illegal substances* existed. "The affidavit asserting police would find evidence of "dealing" at Buford's residence contained no information to satisfy [the requirement that independent evidence corroborates the anonymous hearsay statement], nor did the totality of the circumstances corroborate the hearsay statement there was 'dealing' at the residence. After the reference to the 'tip' that Stewart was 'selling drugs out of the residence,' the affidavit asserts the police saw Buford and Stewart at the residence; police smelled burnt marijuana when they approached the residence; and when Buford opened the door and they entered the house they saw marijuana on the table. As none of those circumstances corroborate a statement there was dealing at the house, the affidavit did not provide probable cause for the issuance of a search warrant." The Court did not discuss whether the officers had probable cause for any other crime or whether the officers, having obtained a warrant, acted in good faith.

SEARCH AND SEIZURE
GPS DEVICE

On July 7, 2015, the Court of Appeals issued its decision in Wertz v. State, ___ N.E.3d ___, (Ind.Ct.App. 2015). The defendant was driving when he lost control of his vehicle and crashed into a utility pole and was severely injured. His passenger was killed. Police officers found a Garmin GPS devise belonging to the defendant near the wrecked vehicle. Officers went to the hospital and obtained written consent from the defendant to examine the contents of the GPS unit. However, it needed a PIN code to access the device, which the police obtained by contacting the manufacturer. Based on information obtained from the device, the defendant was charged with Reckless Homicide.

The defendant moved to suppress the evidence from the device. The trial court ruled that the defendant's consent was invalid because he was on pain medication at the time. However, the trial court ruled the defendant had no reasonable expectation of privacy with respect to the information stored in the GPS unit and denied the motion. The defendant pursued an interlocutory appeal.

The Court of Appeals found no real difference between a cellular telephone and a GPS unit, which it found would record and store information in which citizens would have a reasonable expectation of privacy. Therefore, absent consent, a search warrant is required to obtain information from a GPS device.

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.