

Police Prosecutor Update

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SEARCH AND SEIZURE BLOOD DRAW WARRANT

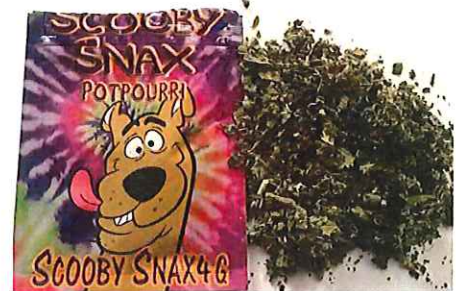
On October 14, 2015, the Indiana Court of Appeals issued its opinion in the case of Herron v. State, ___ N.E.3^d ___ (Ind. Ct. App. 2015). A police officer stopped Herron to investigate whether she was operating while intoxicated. He informed her of the implied consent law and asked her if she would submit to a chemical test for intoxication. She refused, and the officer filled out a pre-printed probable cause affidavit for a blood draw. The affidavit included blank spaces that required the officer to fill in information required to complete the affidavit. The officer filled in the blank for evidence of intoxication as follows: slurred speech, glassy and bloodshot eyes, unsteady balance, and a breathalyzer reading of 0.19%. However, the officer did not fill in the blank that was to be used to describe erratic or unlawful motor vehicle operation, or the blank that described why he believed Herron to be in operation of the vehicle. Nevertheless, when the officer presented the affidavit to the judge, the judge issued the warrant. A sample of Herron's blood tested over 0.15%, and she was charged with Operating a Vehicle while Intoxicated. She moved to exclude the evidence obtained by the blood draw, and when the trial court denied her motion, she appealed.

Noting that the use of boilerplate language does not invalidate a warrant so long as the affidavit contains sufficient facts specific to the search at issue to establish probable cause, the Court found that the affidavit did not contain facts sufficient to establish that Herron, though intoxicated, had operated a vehicle. Focusing on the individualized information contained within the affidavit, the only facts were that Herron on a particular date and time and at a particular location exhibited signs of intoxication and refused a chemical test. The warrant was, therefore, invalid. Fill-in-the-blank affidavit forms are adequate and efficient as long as the officer fills in the blanks with probative information.

VOID FOR VAGUENESS SYNTHETIC DRUG LAW

On October 7, 2015, the Indiana Supreme Court issued its decisions in Tiplick v. State, ___ N.E.3^d ___, (Ind. 2015) and Ashfaque v. State, ___ N.E.3^d ___, (Ind. 2015) and overruled the previous decisions of the Court of Appeals in Tiplick v. State, 25 N.E.3^d 190 (Ind.Ct.App. 2015) and Ashfaque v. State, N.E.3^d 183 (Ind.Ct.App. 2015).

Defendants were charged with several counts of dealing in and possession of a synthetic drug, XLR11. At the time they were charged, XLR11 was classified as a synthetic by the Indiana Board of Pharmacy in Emergency Rule 12-493(E) in the Indiana Register. Pursuant to I.C. 35-31.5-2-321, synthetic drugs include over 7 dozen enumerated compounds as well as "any compound determined to be a synthetic drug by rule adopted under I.C. 25-26-13-4.1 [emergency rule]." At the trial level, Tiplick and Ashfaque moved to dismiss the charges alleging, among other complaints, that the statutory definition of synthetic drug was void for vagueness.



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 trial court denied their motions. The defendants appealed, and the Court of Appeals reversed and dismissed the synthetic drug charges. The majority of the Court of Appeals found the provision allowing for the creation of the Emergency Rule rendered the statute unconstitutionally vague because it created a “Where’s Waldo” approach to determining which substances were classified as synthetic drugs. A person of ordinary intelligence could not be expected to determine which drugs were illegal.

The Supreme Court found that “an ordinary Hoosier, armed with the chemical formula for XLR11 (which is given in the emergency rule) could determine through appropriate testing whether he was attempting to sell any products containing it.” The Court also found that three discrete statutes gave clear guidance as to how to find everything falling within the definition of synthetic drug. Therefore, the statute was not unconstitutionally vague.

The defendants at the trial level had also argued that the charging information was defective because it failed to name the specific synthetic drug, and it did not reference the Emergency Rule that identified XLR11. The Court found that XLR11 was named as the substance in the affidavit of probable cause. However, the Court agreed that the charging information should reference the emergency rule. The XLR11 counts were ordered dismissed, but the State is free to re-file them.

OPINION EVIDENCE ULTIMATE ISSUE

On October 26, 2015, the Indiana Supreme Court issued its decision in Williams v. State, ___ N.E.3d ___, (Ind. 2015). Drug task force officers and a CI set up a controlled purchase of cocaine from Williams. Three detectives observed CI and Williams make a hand-to-hand exchange, after which CI gave the undercover detective 0.98 grams of cocaine. These facts and observations were part of the trial testimony and evidence. At trial, in response to the prosecutor’s question, the undercover detective testified, “[T]here’s zero doubt in my mind that that was a transaction for cocaine.” Defendant was convicted and appealed his conviction. The Court of Appeals, Williams v. State, 29 N.E. 3d 144 (Ind.Ct.App. 2015), affirmed and held that the detective’s opinion testimony led only to an inference of guilt and was not an opinion of guilt itself. On transfer, the Supreme Court affirmed the guilty verdict but overruled the opinion of the Court of Appeals. The detective’s statement was an opinion of Williams’ guilt and thus inadmissible.

A witness may testify to his opinion of the facts and circumstances, even if “it embraces an ultimate issue.” For example, a witness may testify that a person was intoxicated, or that he can identify a person depicted in a video. These may be elements of a crime, but to fully resolve the charge, evidence must be presented to prove the other elements. A witness may not give an opinion as to the “ultimate issue.” The detective was not permitted to *expressly state* the ultimate legal conclusion that Williams performed a “transaction for cocaine.” That statement did not imply guilt; it was equivalent to the detective’s stating, “Williams is guilty.” The Court found, however, that the detectives’ inadmissible statement was harmless error, as there was plenty of other probative evidence, including a second controlled buy, from which the jury could conclude guilt.