

SEARCH AND SEIZURE CANINE SNIFF

On August 20, 2015, the Indiana Court of Appeals issued its second opinion in the case of Washington v. State, ___ N.E.3^d ___ (Ind. Ct. App. 2015). In its first decision, the Court affirmed Washington's conviction of Dealing in Cocaine. Washington petitioned the Court for rehearing after the United States Supreme Court issued its decision in Rodriguez v. State, 135 S. Ct. 1609.

In this case, an officer stopped Washington for a traffic offense. A video began recording 30 to 40 seconds after the vehicles stopped and showed a time stamp of 4:17:44. The officer asked Washington questions and returned to his vehicle less than 3 minutes after the video started. At 4:25:30, dispatch informed the officer that Washington had a valid driver's license. A canine officer deployed his dog at 4:27:33. At this point the traffic officer had not completed the e-ticket. The dog indicated the odor of narcotics at 4:28:02. The delay in writing the ticket was due to the officer's computer's not functioning properly, resulting in the officer's having to contact dispatch for information about Washington.

The Rodriguez opinion held that a seizure justified only by a police-observed traffic violation becomes unlawful if it is prolonged beyond the time reasonably required to complete the process of issuing a ticket. The Court found that its previous decision, affirming Washington's conviction, did not conflict with Rodriguez and affirmed its previous decision.

RIGHT TO REMAIN SILENT PUBLIC SAFETY EXCEPTION

On August 11, 2015, the Court of Appeals issued its decision in Gavin v. State, ___ N.E.3^d ___, (Ind. Ct. App. 2015). In a domestic dispute Gavin fired several shots with his .40 caliber semi-automatic handgun out of his front door. Two of his shots hit the victim and shattered Gavin's car window. Gavin then ran inside his apartment, retrieved his 3-year-old stepdaughter and fled in his car with the shattered window. Several officers spotted Gavin's car, pulled him over, and with guns drawn, ordered him out of the car. Gavin jumped out of the car and told police there was a baby in the car. During the pat down, an officer found a box of ammunition in Gavin's front sweatshirt pocket. He then asked Gavin where the gun was. Gavin answered that it was in the car. Officers got the child out of the car and found the gun under the front passenger seat.



Gavin appealed his conviction on the grounds that it was error to admit his statement about the gun because he had not been advised of his rights under Miranda prior to making the statement. Miranda warnings are not required when police officers ask questions reasonably prompted by a concern for the public safety. In Gavin's case, officers were responding to a report of shots fired. They had been told a

child was in the vehicle and reasonably believed a child to be in the vehicle. During the pat down, they found a box of ammunition. At that point, the officer asked the defendant about the gun. The officer's question about the location of the gun was reasonably prompted by a concern for the safety of the child. This question falls within the public safety exception to Miranda; therefore, the Court affirmed Gavin's conviction.

SUFFICIENCY OF THE EVIDENCE IDENTITY OF THE CONTROLLED SUBSTANCE

On August 4, 2015, the Court of Appeals issued its decision in Smart v. State, ___ N.E.3d ___, (Ind.Ct.App. 2015). Smart and two friends were driving around and injecting methamphetamine. A police officer initiated a traffic stop of their vehicle, and a canine alerted to the presence of drugs in the vehicle. Smart was exhibiting behaviors consistent with methamphetamine use. Officers found a spoon on the front passenger floorboard, and 2 capped syringes containing a brown fluid. Smart had fresh track marks on his wrist and admitted that he used "speed" by injecting it. A field test for the fluid in one of the syringes gave a positive indication for methamphetamine. A chemist for the ISP laboratory testified that she was unable to analyze the substances in the syringes because the fluid was contaminated with blood or bodily fluids. She further stated that the field test was not confirmatory. The officer who conducted the field test was allowed, over defense objection, to testify as to the result of the field test.



At the trial, Smart testified that one of his passengers had offered him some speed that was already loaded in a syringe, that she had helped him inject it and had kept the needle. Another of his passengers testified similarly. Smart was found guilty of Possession of Methamphetamine and Unlawful Possession of a Syringe.

On appeal Smart argued that the field test results should not have been admitted because it lacked a sufficient foundation for scientific reliability. The court declined to address that argument because there was substantial evidence other than the field test result that the syringes contained methamphetamine. Any error in the admission of the field test was harmless. However, the Court found the evidence was not sufficient to sustain the charge of Unlawful Possession of a Syringe. The State was only able to prove that the syringes contained methamphetamine, which is not a legend drug; it was not able to prove the substance to be methamphetamine hydrochloride, which is a legend drug. (Note: the legislature amended the definition of Unlawful Possession of a Syringe; for offenses after July 1, 2015, possession of a syringe is unlawful if the syringe is used or intended to be used to ingest a legend drug *or a controlled substance*.)

SUFFICIENCY OF THE EVIDENCE INVASION OF PRIVACY

On August 7, 2015, the Court of Appeals issued its decision in McElfresh v. State, ___ N.E.3d ___, (Ind.Ct.App. 2015). McElfresh was charged with child molesting. Pending trial, he had been ordered to have no contact with T.W. and had signed acknowledgment of that order. After entering a guilty plea, but before the court had accepted the plea and entered judgment of conviction, McElfresh wrote a long letter to A.W., T.W.'s mother. In that letter he asked A.W. to talk to T.W. for him, to find out the truth. He wanted T.W. to admit she was coached. He outlined the kind of trouble T.W. would be

in if she lied: prosecution on charges of false informing and conspiracy, with possible sentence including probation. At the end of the letter, he asked A.W. not to speak to the prosecutor about his letter.

A.W. contacted the prosecutor and police, and McElfresh was charged with and, in a bench trial, convicted of attempted obstruction of justice and invasion of privacy. McElfresh appealed on the grounds that evidence was insufficient.

Because McElfresh told T.W.'s mother that if T.W. intended to lie under oath, she would face legal consequences, he did not commit the crime of attempted obstruction of justice. It is not a crime to make a true statement even if the subject matter of the true statement involves the future testimony of a witness in a criminal proceeding. The conviction on that count was reversed.

Likewise, the Court reversed the Invasion of Privacy conviction. McElfresh did not contact T.W. directly; he contacted her mother. He would have contacted her indirectly in violation of the no contract order if A.W. had talked to T.W. on his behalf as he requested. However, the letter clearly indicates that he intended to contact T.W. indirectly. Sending the letter with the request that its contents be communicated to T.W. is a substantial step towards committing the crime of Invasion of Privacy. Therefore, McElfresh committed the crime of attempted invasion of privacy. The Court remanded the count to the trial court with instructions to enter judgment of conviction for attempted invasion of privacy.