Police Prosecutor Update

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OPERATING WHILE INTOXICATED
CHEMICAL TEST FOR INTOXICATION

On March 23, 2016, the Indiana Court of Appeals issued its opinion in the case of Mannix v. State, ___ N.E.3d ___ (Ind. Ct. App. 2016). After 2:00 a.m., Mannix was driving her car and struck her victim as he was walking home from an addictions treatment center. Mannix stopped her car for about 10-15 seconds, did not see what she had struck, and drove home and went to bed. Her victim was found dead at about 5:30 a.m. After her father saw the damage to the vehicle and retraced her route home, the police determined Mannix to be a suspect. Mannix consented to a blood test, and blood was drawn from her at 9:52 a.m. Her blood tested 0.10, and her blood-alcohol concentration was estimated to be between 0.17 and 0.28 at the time of the accident. She was charged with operating a vehicle while intoxicated causing death, class C felony. She was found guilty of that offense along with the class C felony of leaving the scene of an accident.

Mannix argued that her consent was not voluntary because the implied consent law requires chemical tests to be administered within 3 hours of the accident. If a person submits to a chemical test within 3 hours of an accident and has a blood alcohol concentration of at least 0.08%, there is a rebuttable presumption that the person's blood alcohol concentration at the time of the accident is at least 0.08%. The Court found that the fact that Mannix's blood was drawn more than 3 hours after the accident is relevant only to the rebuttable presumption, not to the admissibility of the test. Mannix having been duly advised and having signed a waiver to the blood draw, her consent to the chemical test was voluntary.

SEARCH AND SEIZURE
ANONYMOUS TIP

On March 8, 2016, the Indiana Court of Appeals issued its opinion in the case of Grayson v. State, ___ N.E.3d ___ (Ind. Ct. App. 2016). An anonymous caller reported a person in a silver or gray car was waiving a gun at an apartment building. When the officer arrived at the apartment building, he saw a silver car with its headlights off. That car subsequently moved into a parking space. The officer did not see any other gray or silver cars. The officer in full uniform and flashlight approached the driver's side and asked Grayson, the driver, if he lived at the apartment building. Grayson stated that he did not, but that his passenger did. The officer observed the butt of a firearm beneath Grayson's feet. The officer asked Grayson if there were any firearms in the car, and Grayson replied there were not. Ultimately, Grayson gave officers permission to search, and the firearm was removed. Grayson was charged with possession of a firearm by a serious violent felon. Grayson's passenger was released.

Grayson filed a motion to suppress the firearm alleging that the officer lacked reasonable suspicion to conduct a Terry stop and that Grayson had not been advised of his Pirtle rights before he consented to the search of his car. The trial court concluded that the officer had reasonable suspicion to believe criminal

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activity had occurred and that the Pirtle warnings were not necessary because the officer had probable cause to arrest once he had seen the gun between Grayson's feet. In addition, Grayson objected to the admission of the gun because the investigatory stop was based solely on an anonymous tip.

The Court of Appeals found that while an anonymous tip alone is not likely to constitute reasonable suspicion for a Terry stop, certain details provided by the tipster were corroborated by the officer. A report of an individual waiving a gun warrants an immediate response by police. Once the tip was corroborated by the officer's observations of the car, occupied and moving slowly into a parking space, the officer was justified in investigating this car and its occupants. The officer's observation of the gun and Grayson's lie about the firearm further justified the officer's actions. Grayson's conviction was affirmed.

SUFFICIENCY OF THE EVIDENCE
DISORDERLY CONDUCT

On March 15, 2016, the Indiana Court of Appeals issued its opinion in the case of Day v. State, ___ N.E.3d ___ (Ind. Ct. App. 2016). Day and his wife were getting a divorce and disagreed about selling the marital home. The wife received a phone call from Day, who stated, "You f***ing bitch; I ought to kill you." The wife hung up, made a snack for the children and went to bed. She awoke to Day shouting at the children. Day entered her bedroom screaming, "You f***ing bitch. You will sign these papers for the house." The wife begged him not yell in front of the children. At some point Day spit in her face. The wife called 911. Day continued screaming. When the police arrived they observed through the glass front door Day cornering his wife with his finger in her face. They could hear Day screaming. Day was charged with and subsequently convicted of disorderly conduct, engaging in fighting or tumultuous conduct.

On appeal, Day contended that the evidence was insufficient to support his conviction. First he alleged that the legislature intended to require that a person disrupt the public, which the state had not proven. Noting that the statute is similar to language in the Model Penal Code, the Court also noted that the legislature specifically omitted any reference to disrupting the public. Therefore, it applied the plain and ordinary meaning of the language in the statute to determine whether the evidence was sufficient. The common and ordinary meaning of fight refers to "a hostile encounter, either physical or verbal in nature." The Court found that Day's conduct was hostile and concluded he engaged in fighting within the meaning of the statute. The conviction was affirmed.

SEARCH WARRANTS
SEARCH OF INDIVIDUAL WHO ENTERS PREMISES

On April 27, 2016, the Indiana Court of Appeals issued its opinion in the case of Shotts v. State, ___ N.E.3d ___ (Ind. Ct. App. 2016). Police officers executed a search warrant authorizing the search of a house and seizure of heroin if found within that house. The warrant also authorized the arrest of an individual named Summers. Officers detained seven people and questioned them and found heroin, cocaine, suboxone and drug paraphernalia. As the search was being conducted, Shotts pulled up in his car and approached the house. As he entered the enclosed front porch, an officer, wearing plain clothes and a black tactical vest that displayed the word "POLICE" told Shotts to stop right there. Shotts stated he was there to see his friend

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and continued inside. The officer observed Shotts had his right hand in his pocket and ordered him to remove it. Shotts refused and entered the front door. The officer drew his gun, placed Shotts in handcuffs and found a purple handgun in Shotts' pocket. Shotts was charged with and found guilty of unlawful possession of a firearm by a serious violent felon, Class B felony.

Shotts argued that the handgun should have been suppressed because he was seized in violation of the Fourth Amendment. A search warrant implicitly carries with it the limited authority to detain the occupants of the premises without any degree of individualized suspicion while a proper search is conducted. Summers argued that he was not an occupant of the premises because he did not reside at the house. The Court, however, read "occupant" to mean anyone who is in the immediate vicinity of the premises to be searched at the time the search is executed and found that Shotts became an occupant when he entered the house. Therefore, the seizure of Shotts and the search of his person was not unconstitutional. His conviction was affirmed.

SUFFICIENCY OF THE EVIDENCE
FAILURE TO IDENTIFY

On April 28, 2016, the Indiana Court of Appeals issued its opinion in the case of Weaver v. State, ___ N.E.3d ___ (Ind. Ct. App. 2016). Weaver had an inoperable plate light, and a deputy sheriff stopped him for it. The deputy asked Weaver if he had his license and registration. Weaver replied he did not know. Weaver looked but was unable to find registration. Weaver said that he had an Indiana license previously, but was not aware he was required to carry identification while driving. The deputy asked Weaver where he lived. Weaver replied, "Indianapolis." The deputy asked, "What's your actual physical mailing address?" Weaver asked if he was being charged with something. The deputy did not ask Weaver for his mailing address again. After about 8 minutes of questions and evasive responses by Weaver, the deputy arrested him until he could identify him. Sixteen minutes after the traffic stop began, Weaver gave the deputy his birthdate. From that the deputy confirmed Weaver's identity, determined Weaver's license was suspended, and impounded the car. He allowed Weaver to leave; Weaver was later charged with and convicted of driving while suspended and failure to identify, both misdemeanors.

On appeal, Weaver challenged the sufficiency of the evidence for the charge of failure to identify. To prove failure to identify under I.C. 34-28-5-3.5, the state must prove that a person knowingly refused to provide his name, address, and date of birth. The Court found that the evidence did not show that Weaver refused to give his address when asked. Instead, he asked a question about being charged for something. That response was not a denial of information, and the officer did not ask the question again to give Weaver the opportunity to provide his address or refuse to do so. As reprehensible as Weaver's behavior was, his question in response to the deputy's question was not a refusal to give his address. The failure to identify conviction was reversed.

SUFFICIENCY OF THE EVIDENCE
INTIMIDATION

On April 21, 2016, the Indiana Court of Appeals issued its opinion in the case of Roar v. State, ___ N.E.3d ___ (Ind. Ct. App. 2016). Roar was near his sister's apartment when he saw Olive, his sister's landlord, serve an eviction notice by placing it in the door to the apartment. Roar considered Olive a slumlord and thought Olive had an attitude. He immediately removed the notice from the door and yelled at Olive. "He called me a

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bitch and then told me that if I came back on the property[] he'd kill me." Roar was charged with intimidation, a class D felony. The allegation of intimidation was that Roar communicated a threat with the intent to place Olive in fear of retaliation for a prior lawful act. After a bench trial, the court found him guilty of the class A misdemeanor. Roar challenged the sufficiency of the evidence on appeal.

Roar argued that because he conditioned his threat on "if [she] came back on the property," evidence concerning whether he intended to place Olive in fear of retaliation for a prior lawful act is irrelevant. The Court found that mere use of conditional language in the course of communicating a threat does not vitiate the statute's application when the factual predicate was the victim's prior lawful act. The Court declined to reweigh the evidence, finding that the trial court was capable of discerning whether intimidation occurred where there is a clear nexus between the prior lawful act and the threat. Roar communicated a threat to Olive, and he did so with the intent to place her in fear of retaliation for serving the eviction notice. Roar's conviction of the charge of intimidation was affirmed.

The Court in this case specifically declined to follow the appellate court ruling in C.L. v. State, 2 N.E.2d 798 (Ind. Ct. App. 2014) (conditional threats cannot demonstrate an intent to place a victim in fear of retaliation for a prior lawful act); and it distinguished Causey v. State, 45 N.E.2d 1239 (Ind. Ct. App. 2015). Because of the split in opinions, caution should be exercised in charging intimidation, and prosecutors should consider charging intimidation in the alternative where the facts warrant it.

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