Police Prosecutor Update

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SEARCH AND SEIZURE
TERRY STOPS AND CONSENSUAL ENCOUNTERS

Two panels of the Court of Appeals each decided a case in which Terry stops and consensual encounters were in issue. On May 25, 2016, the Indiana Court of Appeals issued its opinion in the case of Mullen v. State, ___ N.E.3d ___ (Ind. Ct. App. 2016). An apartment complex that had been the site of frequent drug activity and gun violence posted "no loitering" signs over all building entrances because management believed loitering was related to drug activity and violence. It had also requested that police enforce its loitering policy and stop and identify individuals on apartment property to determine whether they were legally on the property. A detective was observing the southern entrance of Building 2 and could see a large group of males in the hallway. He observed one or two lean out of the entrance, look both ways and then lean back in. Having investigated narcotics, vice, and gangs, he recognized this activity as consistent with open air drug sales. He asked a second detective to enter the other doorway of Building 2; the second detective did so and radioed the exact time of his entrance. Within a second the first detective saw two males hurriedly exit, walk very close to the side of the building so fast that it was "between a walk and a run," and look over their right shoulders. Two pairs of detectives engaged the men. One man stopped; the first detective and his partner engaged Mullen, the other man.

The detective asked Mullen where he lived, and Mullen pointed to a building but could not give the address. Mullen turned his body at an angle, which the detective considered a fighting stance either to prepare to fight or to conceal a weapon. Mullen began backing away with his eyes darting left to right, which the detective considered as preparing to flee. He asked Mullen if he had any weapons. Mullen told him he could not search him. Mullen finally stated he had a knife and reached down to his pocket. The detective and other officers then grabbed Mullen. There was a struggle; one officer came to assist and observed the outline of a gun handle through Mullen's shirt. Police found a .45 caliber handgun in Mullen's waistband where Mullen had been reaching. Mullen was not legally authorized to live in the government-subsidized apartment complex. He was charged with possession of a firearm by an SVF and resisting law enforcement. The trial court denied his motion to suppress the gun.

The State argued that the initial encounter with Mullen was consensual, and that a seizure did not occur until officers grabbed Mullen's wrists. Not every encounter between police and a citizen is a seizure requiring objective justification. The test is whether the officer's words and actions would have conveyed to a reasonable person that he was not free to leave. Here the record revealed no evidence that the detective ordered Mullen to stop. Mullen stopped to show the detective his id. without being ordered to stop. Two officers walked toward Mullen and his companion, and a second set of officers approached the men from a different direction, with one of them shining his flashlight and identifying himself as a police officer. The Court, however, declined to decide whether those facts amounted to a consensual encounter and assumed that police actions were a seizure, requiring reasonable suspicion.

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Mullen had argued that Terry did not apply to private property. A simple bright-line distinction between public and private property alone does not dictate whether and investigatory stop based on reasonable suspicion satisfies the 4th Amendment. Noting that behavior that supports a reasonable suspicion that an individual is on another's property without the owner's permission justifies a Terry stop, the Court rejected Mullen's contention. The Court went on to find that the large group of men loitering, with some appearing to be acting as lookouts and two men quickly exiting upon the appearance of a police officer, gave rise to a reasonable inference that the two men either were engaged in drug dealing or had no right to be on the property. The detective was, therefore, justified in stopping Mullen to ask for id. and his address. The failure to specifically answer questions, adoption of a fighting stance, telling police he had a knife, and reaching toward his pocket permitted police to secure Mullen and do a pat-down.

In the second case, Scisney v. State, ___ N.E.3d ___ (Ind. Ct. App. 2016), police received a dispatch of "shots fired" by a white male wearing a blue shirt near a high crime area. While searching, the officer saw a white male wearing a blue shirt walking with Scisney. The officer activated her emergency lights and approached the white male and conducted a pat down. A second officer who had been following the first approached Scisney, who put his head down and continued walking at a faster pace. The second officer saw Scisney touch the right side of his waist, so he parked his police vehicle close to Scisney without activating his lights, and stepped out. He asked Scisney if he had any weapons, and Scisney did not respond. He patted Scisney down and felt the grip of a pistol on Scisney's waist. Scisney ran and the pistol fell to the ground. Scisney was charged with possession of a firearm by an SVF and resisting law enforcement. The trial court denied Scisney's motion to suppress and found him guilty of both counts.

Scisney argued that his encounter with the officer was not consensual and that the officer lacked reasonable suspicion to conduct a Terry stop and pat down. The Court found that the consensual nature of Scisney's encounter ended when the officer asked to speak with him. At that point a reasonable person in Scisney's situation would not feel free to walk away because two officers were present in marked vehicles, emergency lights were activated in one vehicle, and the officers were in full uniform with their firearms readily visible. The Court then found that the officer had reasonable suspicion to stop Scisney. They had received a report of gunshots; Scisney was walking with a man who matched the description of the perpetrator; and when officers approached the suspect, Scisney walked faster and bowed his head to avoid eye contact. Scisney also touched the right side of his waist line, and did not respond when asked about weapons. The officer reasonably believed Scisney had participated in criminal activity and that he was armed and possibly dangerous.

SEARCH AND SEIZURE
CONDITION OF PROBATION

On May 18, 2016, the Indiana Court of Appeals issued its opinion in the case of Hodges v. State, ___ N.E.3d ___ (Ind. Ct. App. 2016). Hodges was placed on probation and signed an acknowledgement of the conditions of probation that stated, "You waive your right against search and seizure, and shall permit a Probation Officer, or any law enforcement officer acting on a probation officer's behalf, to search your person, residence, motor vehicle, or any location where your personal property may be found. . . ." After Hodges was placed on probation, an Indiana State Police Trooper was investigating Hodges for manufacturing methamphetamine. He discovered Hodges was on probation and spoke to his probation officer about the results of his investigation. The probation officer decided she wanted to visit Hodges at his home to check compliance with conditions and asked the trooper to accompany her. They

accompanied Hodges to his address and discovered his residence had burned down, but the garage was still standing. Hodges was living at his in-laws' home nearby. They searched the garage and found evidence to charge Hodges with possession of chemical reagents or precursors and possession of methamphetamine. The trial court denied Hodges' motion to suppress.

Hodges asserted the warrantless search was defective because the officers did not have reasonable suspicion he had violated his probation and because the search condition in his probation rules was invalid. Hodges asserted the search violated Article 1, Section 11 of the Indiana constitution. As to the reasonable suspicion argument, the Court held, "in light of 'Vanderkolk's expansive endorsement of warrantless and suspicionless searches under the Fourth Amendment' we conclude that a separate Litchfield [i.e. the three-prong balancing test] is not required here." Because of the waiver provision he signed in his probation rules, his probation officer is not required to have reasonable suspicion of a probation violation or a new crime to initiate a search. Turning to the validity of the search condition, the Court found that by signing the probation rules, he was "unambiguously" aware of the waiver against search and seizure. Further, it concluded that the language was sufficient to constitute a clearly expressed search condition. It would make little sense to require boilerplate reference to the federal and state constitutions in order for the search conditions to be considered valid. The denial of the motion to suppress was affirmed.