Police Prosecutor Update

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SEARCH AND SEIZURE
CELL-PHONE LOCATION RECORDS

On August 4, 2016, the Indiana Court of Appeals issued its decision in Zanders v. State, ___ N.E.3d ___, (Ind. Ct. App. 2016). On January 31, 2015, Zanders robbed Whitey's Liquor Store and left with cash, Newport cigarettes and Patron tequila. On February 6, 2015, Zanders robbed J & J Liquor Store and made off with cash and 1800 Silver tequila. On both incidents, Zanders drove a red Pontiac. Prior to the robbery of the J & J, the clerk received a telephone call from an Ohio number; the caller asked about the store's closing time. Through that telephone number, police were able to identify Zanders as a suspect. Zanders was interviewed in Ohio, and denied ever visiting Indiana. During the interview, the detective made an emergency request to Zanders' cell phone provider to secure the records associated with his cell phone number. The provider gave the detective Zanders' call and cell-site location data for the previous 30 days. It was discovered that Zanders' phone was used to call Whitey's on the day of the robbery and that the phone was located in the same cell-site sector as Whitey's 9 minutes prior to the robbery. Likewise, just prior to the robbery of J & J, the cell-phone was located in the same cell-site sector as the liquor store. After each robbery, the phone returned to the same cell-site sector as Zanders' mother's home. Detectives secured a search warrant for Zanders' mother's house and his brother's house as well. In each, evidence linking Zanders to the robbery was found. Zanders was charged with 2 counts of robbery, Level 3; 2 counts of possession of a firearm by a serious violent felon; and the habitual offender enhancement. He was convicted of all counts and the enhancement.

Zanders contended that the warrantless search of his cell-phone's historical location data as compiled by the provider violated the 4th Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution. The Court held that Zanders had a reasonable expectation of privacy in the historical data generated by his cell phone but collected by the provider. Therefore, the detectives should have obtained a search warrant before obtaining the cell-site location records. Zanders convictions were ordered vacated. A petition for transfer has been filed.

SUFFICIENCY OF THE EVIDENCE
FAILURE TO IDENTIFY

On August 4, 2016, the Indiana Supreme Court issued its opinion in the case of Weaver v. State, ___ N.E.3d ___ (S. Ct. Ind. 2016), overruling the appellate decision in Weaver v. State, 53 N.E.2d 1225 (Ind. Ct. App. 2016) which was briefed in the April, 2016, edition of the Police Prosecutor Update. 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

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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. The Court of Appeals reversed Weaver's conviction for failure to identify.

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 was sufficient to support Weaver's conviction and affirmed the judgment of the trial court.

SUFFICIENCY OF THE EVIDENCE
DISORDERLY CONDUCT

On August 29, 2016, the Indiana Supreme Court issued its opinion in the case of Day v. State, ___ N.E.3d ___ (S. Ct .Ind. 2016), vacating the Court's opinion in Day v. State, 48 N.E.3d 921 (Ind. Ct. App. 2016), which was briefed in the April, 2016, edition of the Police Prosecutor Update. 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. Because a public disturbance requirement was not among the elements of the crime, and because a previous version of the disorderly conduct statute had a public disturbance requirement, the Court concluded that the legislature specifically excluded a requirement that a person disrupt the public. Therefore, the state did not need to prove that Day's conduct disrupted the public.

Day next contended that term fighting in the statute included only physical altercations and not verbal altercations. The Court agreed with Day's contention; however, it found that Day's "intentional, point-blank spitting on M.D." was sufficient evidence of a physical altercation or fighting. Day's conviction for disorderly conduct was affirmed.

IMPLIED CONSENT
REFUSAL

On August 23, 2016, the Indiana Supreme Court issued its decision in Burnell v. State, ___ N.E.3d ___, (S. Ct. Ind.2016), vacating the opinion in Burnell v. State, 44 N.E.3d 771 (Ind. Ct. App. 2016), which

was briefed in the October, 2015, issue of the Police Prosecutor Update . Officers stopped Burnell for moving violations. Burnell smelled of the odor of alcoholic beverages and failed all of the field sobriety tests. An officer read her the refusal information and warning and asked Burnell if she would submit to the chemical test for intoxication. Burnell replied, "I don't know. I – I – I would really prefer if you would call my uncle." Pressed by the officer for a yes-or-no answer, Burnell made the following statements to the officer: "Yeah, yeah but – I'm an adult, but I, I . . . I can't get [sic] have another one . . . I got in trouble like two years ago. . . It was in Palm Beach. . . . Bruce is my uncle, and he's my best friend." Finally, the officer asked, "Are you willing to take the test or not? Okay?" Burnell ultimately replied, "Well if I refuse, I'm going to jail either way. So yeah, I guess I gotta take it." She then began to walk away from the officer, and he grabbed her arm to stop her. She told him not to touch her and began moving away from him again. The officer deemed her behavior a refusal and placed her under arrest.

Prior to trial, Burnell filed a petition for judicial review of the suspension of her driver's license for refusing the chemical test. At the hearing, both parties agreed there was probable cause to offer the test, but disputed whether she had refused the test. The trial court did not terminate her suspension. "I believe that the officer was appropriate in determining her behavior to constitute a refusal." The Court of Appeals upheld the trial court. The Supreme Court disagreed, however, with the lower court's holding, "that anything short of an unqualified, unequivocal assent to a properly offered chemical test constitutes a refusal." Instead, the Supreme Court held that "a refusal to submit to a chemical test occurs when the conduct of the motorist is such that a reasonable person in the officer's position would be justified in believing the motorist was capable of refusal and manifested an unwillingness to submit to the test." The Court found that Burnell clearly heard and understood the officer's offer of a chemical test and was capable of refusing. Although at first declaring her assent, she stepped away from the officer twice, justifying a reasonable person in the officer's place to believe that she was unwilling to submit to the test. Therefore, the trial court's conclusion was justified, and its judgment was affirmed.