Police Prosecutor Update

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SEARCH AND SEIZURE
PASSENGER IN A VEHICLE

On August 22, 2017, the Indiana Supreme Court issued its decision in Thomas v. State, ___ N.E.3d ___, (Ind. 2017), overruling the decision in 65 N.E.3d 1096 (Ind. Ct. App. 2016), which was briefed in the January, 2017, edition of the Police Prosecutor Update. Drug Task Force officers received a tip from a credible confidential informant that two men from Chicago were travelling to Grant County to sell drugs. The tip provided specific information about the van they were driving, and where they would be staying. A detective located and began surveillance of the van and observed Thomas and Christmas enter it and drive away. Following the van, the detective observe it to illegally change lanes without signaling. The detective radioed a motor patrol officer who initiated a traffic stop. A narcotics detection canine arrived within a minute or two.

The detective and the motor patrol officer approached the van and spoke with Thomas and Christmas. Both told officers they were visiting family, but neither could identify where in Indiana family resided. Christmas, the driver, did not have identification and claimed he left it in Chicago. Other officers ran the K-9 around the van, and it alerted to the presence of narcotics. Officers got Christmas and Thomas out of the vehicle and patted them down. No drugs or weapons were found. Christmas gave officers consent to search the van. The K-9 was brought inside the van, but it did not alert to the odor of narcotics inside the van.

Christmas and Thomas were each asked whether they would consent to a strip search at the police station. Christmas agreed, and officers found $750.00. Thomas was taken to the police station while officers applied for a search warrant. They placed him in an interview room with video capability. Officers left him alone, but monitored him on the video. They observed Thomas remove something from his jacket pocket and place it in his mouth. They re-entered the room and retrieved from Thomas' mouth a plastic baggy containing 8.5 grams of heroin.

The Court of appeals reversed Thomas' conviction, finding that police violated Thomas' rights when they detained and transported him to the police station to await a search warrant. Thomas argued that a positive canine alert, while giving police probable cause to search a vehicle, does not create probable cause to search its occupants or to detain them. Because Thomas was not actually searched at the police station, but the police observed the contraband when Thomas removed it from his jacket, the Supreme Court restated the question as whether at any point the police had probable cause to detain Thomas and transport him to the police station.

First, the Court found that Thomas was in custody because he was given two choices: either consent to a strip search or be detained at the police station until a judge decided on a search warrant. There was no third choice in which he freely could walk away. Turning to probable cause the Court found the dog sniff alone might not have been enough to establish probable cause to arrest Thomas.

However, combined with the following facts, there was sufficient probable cause: A reliable confidential had provided specific information about illegal activity and a detailed description of the vehicle involved, which the detectives confirmed. When officers pulled the vehicle over, Thomas was nervous. Thomas and Christmas gave inconsistent answers about their travel to the county; neither could identify where their family lived. Christmas was driving across state lines without his identification. Finally, after the K-9 indicated on the vehicle and the occupants were removed, the K-9 did not indicate on the inside of the van. At that point it was reasonable to believe that at least one of the two occupants took the drugs with him. The Court affirmed the detention, the seizure of the evidence and the conviction.

SUFFICIENCY OF THE EVIDENCE
DRUG FREE ZONES

On August 14, 2017, the Indiana Supreme Court issued its decision in McAlpin v. State, ___ N.E.3d ___, (Ind. 2017), which overruled the decision of the Court of Appeals in 72 N.E.3d 940, and which was briefed in the March/April edition of the Police Prosecutor Update. McAlpin was manufacturing methamphetamine in his home which was within 500 feet of Bicentennial Park. He was charged with Dealing with Methamphetamine enhanced to a Level 4 felony because of the park.

Bicentennial Park is surrounded by residential neighborhoods and has an outdoor amphitheater, but no playground equipment, benches or shade trees. It also had bathrooms and green space. The methamphetamine lab was found at approximately 10:00 a.m. on a school day in August. It is an enhancing circumstance if a drug offense took place within 500 feet of a park "while a person under 18 years of age was reasonably expected to be present." During closing argument, defense counsel argued that it was not reasonable to expect that children would be present in this park at 10:00 a.m. on a school day. On appeal McAlpin alleged the evidence was insufficient to prove the enhancing circumstance.

The Court of Appeals concluded that the state failed to prove that children were likely to be present in a park with such limited facilities at 10:00 a.m. on a school day and remanded the case to the trial court to enter conviction to a Level 5 felony. Granting transfer the Supreme Court noted that in the 2014 criminal code reform, the legislature added a requirement that a minor's presence at a park be "reasonably expected." This standard "asks what the ordinary reasonable person would expect under the circumstances." The best judge of that standard is the trier of fact, in this case, the jury. Although the park had no playground, no benches for resting, and no shade trees to block the August sun, the jury was instructed to weigh these facts using its "common sense." "With that in mind, we decline McAlpin's invitation to invade the jury's province and thus reject his sufficiency claim." It affirmed the McAlpin's conviction.

SEARCH AND SEIZURE
SCOPE OF SEARCH INCIDENT TO ARREST

On August 22, 2017, the Indiana Court of Appeals issued its decision in Porter v. State, __ N.E.3d ___, (Ind. Ct. App. 2017). Defendant was a passenger in a vehicle that was pulled over for an equipment violation. During the stop, the office could smell the odor of marijuana coming from the car and from Porter. Porter was asked to get out of the car. The officer search Porter by checking her pockets, around

the waist band of her jeans and down her legs, but did not find anything. A search of the vehicle did not result in any marijuana. So the officer returned to Porter, who still smelled like marijuana. She searched Porter again, but this time put her hands down Porter's jeans, but outside her underwear. There she felt something she believed to be a marijuana blunt. She then reached inside the underwear and retrieved the blunt. Porter was arrested for possession of marijuana.

The Court found this search to be unreasonable under the Fourth Amendment. "While there was probable cause to search Porter incident to arrest and to conduct the initial search of Porter's person, when [the officer] went several steps further by inserting her hand into Porter's pants and then under her underwear, in a public place, with no voiced concerns about officer safety or destruction of evidence, the search became unreasonable."

The Court also found the search to be unreasonable under Article I., Section 11. It applied the 3-part Litchfield test. The officer validly suspected that Porter was committing the Class B misdemeanor of possession of marijuana, but she did not suspect Porter of a more serious crime. Thus the degree of suspicion was not high. It found that the degree of intrusion was significant in that it involved an intrusion into her most private areas at the side of a public road with no effort to protect Porter from visibility or unsanitary events. The Court found the needs of law enforcement were low because there was no evidence of a need to search Porter on the side of the road rather than taking her to a more private area. The judgment of the trial court was reversed.