Police Prosecutor Update

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Pirtle warnings reminder

McCoy v. State, No 225-CR-294 (Ind. 8/29/22)

This case is an emphatic reminder that *Pirtle* advisements need to be given to anyone who might be considered in custody and is giving consent to search anywhere. An officer went to James McCoy's house on a tip that he had been robbed. McCoy also had an outstanding arrest warrant for unpaid fines. After getting to the house officers put McCoy in handcuffs because of the warrant. After some talk about the suspected robbery and its possible connection to drug use, the officer asked McCoy "if he would escort him inside the house to document any other missing items." McCoy agreed. After walking in, the officer smelled marijuana coming from upstairs. The officer also saw several plastic baggies strewn on McCoy's bedroom floor. The officer then obtained a search warrant for the house, and, as a result of that search, meth, THC vape oil, and various items of paraphernalia were found. McCoy ultimately was convicted of possession of meth and paraphernalia.

The Supreme Court reversed McCoy's convictions, holding that the warrantless entry and partial search of his home before the warrant was obtained violated his rights under *Pirtle v. State*, 323 N.E.2d 634 (Ind. 1975). The Court held there was a "clear-cut" *Pirtle* violation because the officer obtained McCoy's consent to search his house while in custody and without advising of his right to consult with an attorney before consenting. Whether McCoy was a crime victim, or a crime suspect, at the time of the search was not relevant. "In so holding, we emphasize that our decision should not be viewed as an extension of the *Pirtle* doctrine to cases where an officer asks the victim of a crime for permission to enter the home for investigative purposes, so long as that victim has not been detained."

Confirmatory testing of marijuana needed at trial

Rojo v. State, No 22A-CR-652 (Ind. Ct. App. 9/19/22)

This is an UNpublished case but has been getting a lot of traction with defense attorneys around the state, so I wanted to mention it. It is a piggyback to the *Fedij* case from earlier this year discussed in a previous edition of PPU.

Plainfield PD Officers were dispatched on a possible accident and after arriving observed that a single vehicle had apparently slid off the road into the grassy median. The car had three flat tires, and Toledo Rojo was sitting outside the vehicle looking disoriented. Officers noted he had "glossy eyes," "poor balance," and "slurred speech." He told the officers that he had a couple drinks and smoked marijuana a couple hours before driving. The officers observed something bulging out of a sock and they recovered a little bag from the sock that contained a substance they believed to be marijuana due to smell and sight. The substance was never tested. The officers did not perform any field sobriety tests on Rojo and

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instead transported him for a blood draw where the blood draw revealed that his blood contained THC and had an alcohol concentration equivalent of 0.132 gram per 100 milliliters of blood. Along with OVWI, he was also charged and convicted of possession of marijuana, which was overturned by the COA.

On appeal, among other things, Rojo asserted (correctly) that the State presented no chemical analysis evidence that the substance seized from his sock was actually marijuana, i.e., that it had a concentration of delta-9-THC that was more than 0.3%. Rather, the only evidence presented regarding the identity of the substance was the extremely limited testimony of one of the police officers simply indicating that he knew the substance was marijuana "through [his] training experience" due to "markers regarding sight and smell." The State asserted that this opinion testimony was sufficient to prove beyond a reasonable doubt that the substance possessed was marijuana. Relying on the Indiana Supreme Court's recent opinion in *Fedij v. State*, 186 N.E.3d 696 (Ind. Ct. App. 2022), the COA vacated the marijuana conviction. "…the State cannot premise a conviction 'upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility.'" *Id. at 708.*

Put simply, *Fedij* and *Rojo* makes it clear that that if you're going to trial on a marijuana charge – the substance must be tested. And note that even it if it ultimately tests below .03%, smokeable hemp is also illegal to possess in Indiana. (IC 35-48-4-10.1 and 35-48-1-26.6) ***ISP Labs CAN and WILL test plant material that appears to be marijuana.** As a result of these two cases, some think they cannot because I frequently get that question. They do what's called a 'semi-quant' test which will tell if you the plant substance contains above or below 1% THC. They cannot, however, quantify test on other THC products like vapes, wax, liquids, etc.

Do non-mirandized statements also suppress the stuff found as a result?

State v. Jones, 21A-CR-2254 (Ind. Ct. App. 6/27/22)

A rare case of first impression out of Wayne County. Officers stopped Tala Jones for driving, knowing from several previous encounters, she was suspended. After confirming that Jones's license was still suspended, officers informed Jones that her car was going to be towed and asked her if she had anything in the vehicle. Jones admitted there was marijuana, which was eventually located on top of the center console before handcuffing Jones. Jones apparently then volunteered that she had a gun on her person, and officers also recovered it. After being asked if there was anything else in the car, Jones admitted having heroin and cocaine on her person. Officers removed these items and then informed Jones of her *Miranda* rights. The State charged Jones with F3 dealing in a narcotic, F3 dealing in cocaine, AM carrying a handgun without a license, and AM dealing in marijuana. At a later suppression hearing, the trial court granted a partial suppression of evidence. The trial court suppressed Jones's admission that she had heroin and cocaine on her person, and the heroin and cocaine itself, but not the marijuana or the gun. Both parties appealed.

On appeal, the State admitted that Jones's statements about the heroin and cocaine were properly suppressed, because Jones should have been Mirandized before she made them in response to the officer's questioning but challenged whether the U.S. or Indiana Constitutions required suppression of physical evidence obtained through a *Miranda* violation. Following the Supreme Court's decision in

United States v. Patane, 542 U.S. 630 (2004), the Court of Appeals held the Fifth Amendment did not require the suppression of physical evidence gained from *Miranda* violations, only the unwarned statements themselves, so long as the statements leading to the evidence were voluntary. The COA found no evidence that Jones's statements had been procured through threats, coercion, or other improper influences, so they were deemed voluntary.

The COA also held that under the Indiana Constitution, Article 1, Section 14's provision that "[n]o person, in any criminal prosecution, shall be compelled to testify against himself" was unambiguous with nothing to suggest a definition of testify as anything other than testimonial evidence at trial. Indiana precedent also did not suggest that Indiana's Self-Incrimination Clause was designed to prevent the admission of nontestimonial evidence. Jones's argument that Indiana's exclusionary rule was founded on Article 1, Section 14 was also denied. Thus, the COA reversed the trial court's suppression of the cocaine and heroin because it was nontestimonial evidence obtained only by Jones's voluntary statements.

But wait, there's more: on cross-appeal, Jones raised the issue of whether the search of her vehicle after admitting there was marijuana in it was unconstitutional. The COA concluded that the warrantless search of the vehicle was permitted under the Fourth Amendment based on probable cause and the automobile search warrant exception following Jones's admission that there was marijuana in the car. The COA also found the search reasonable, based on the totality of the circumstances, under Article 1, Section 11 of the Indiana Constitution. Officers were reasonably certain there was marijuana in the car after Jones admitted it, the degree of additional intrusion from the search was minimal, and the car was in a public place and subject to the automobile exception. Ultimately the COA upheld the trial court's denial of Jones's motion to suppress the marijuana.

More Miranda – needed after committing a new crime?

***Theobald v. State**, No. 21A-CR-2746 (Ind. Ct. App. 6/30/22)*

As Dylan Theobald was driving his motorcycle past Detective De'Joure Mercer's undercover car, he struck and broke the car's mirror with his fist. Theobald drove away at a high rate of speed, reaching 100 mph, and eventually was pulled over by other officers with Detective Mercer arriving soon thereafter. After being handcuffed, Detective Mercer repeatedly pressed Theobald to admit he had hit the mirror, and then Detective Mercer would simply complete an accident report, or otherwise Theobald would go to jail. Theobald refused to admit to anything. After about 45 minutes, Theobald apparently said, "I'd give you a hundred dollars in my pocket right now." Theobald then answered questions from Detective Mercer about where he was coming from. At no time was Theobald Mirandized. The State charged Theobald with F5 bribery (for offering Detective Mercer $100), along with some other charges. Theobald moved to suppress his statements to Detective Mercer, which the trial court denied.

On interloc appeal, the COA agreed that Theobald clearly was in custody and interrogated when he made the challenged statements and should have been Mirandized. However, the COA adopted the "new crime exception" to *Miranda*'s exclusionary rule, which has been utilized by federal appellate

courts. Under this exception, a statement made by a person who is subject to custodial interrogation but not given *Miranda* warnings is still admissible if the statement itself is evidence of a new crime. Bribery would be one such example, as would be threatening statements. Therefore, Theobald's offer to pay $100 to Detective Mercer was admissible in a bribery prosecution, although the COA declined to say whether the statement would be sufficient proof of bribery. The other statements Theobald made about his driving would be suppressed, however.

Voluntary consent at a knock and talk

Casillas v. State, No 21A-CR-2182 (Ind. Ct. App. 7/11/22)

Last case in this long PPU edition. It highlights the delicate nature of knock and talks and the importance of good documentation of exactly what happened. Two detectives, members of a DEA Task Force, went to Leon Casillas's house to conduct a knock-and-talk after receiving a tip that Casillas was dealing heroin. The detectives were in plain clothes but wearing vests identifying them as law enforcement officers. There were three other officers on or near the front porch too. At first, none of the officers were using body cameras.

According to the detectives, after they asked Casillas if they could come inside, Casillas initially was reluctant but never said no, and eventually did let the detectives inside. The detectives also testified there was never a threat or any display of weapons. Casillas had a different version of events, namely that officers essentially pushed their way inside when he started to go back inside and close the door. Once inside, the detectives saw in plain view marijuana, a digital scale, and what appeared to be packages of drugs. During subsequent questioning Casillas admitted that there was heroin in the house. Officers then obtained a search warrant based on what they had seen, and Casillas statements. They eventually found heroin, meth, syringes, ledgers, and other dealing paraphernalia. Casillas moved to suppress, which was denied. He was convicted of F2 dealing in a narcotic and F6 possession of meth.

The Court of Appeals affirmed. Noting its standard of review prohibited it from second-guessing the trial court's credibility determinations, the COA held that the detectives' testimony established that Casillas voluntarily consented to their entry into his home, leading to the viewing of the contraband and Casillas's admission. The COA also did not believe the number of officers on the scene or their failure to tell Casillas that he could refuse them entry rendered his consent involuntary.

The COA did write a footnote expressing dismay that there was no bodycam footage surrounding the detectives' entry into the house. It noted that there was bodycam footage from **after** they entered, including of Casillas's questioning, despite the detectives' testimony that DEA policy forbid the use of bodycams. The COA also noted that current DEA policy apparently has no such prohibition. It said that the "gap in footage is unfortunate because when critical portions of law enforcement interactions go unrecorded, public confidence in police action diminishes."

You may recall a COA case regarding forfeitures from back in December of 2021 (*Olympic Financial Group Inc v State*, No. 21A-CR-1017 (Ind. Ct. App. 9/17/21). It clarified the need for a clear nexus to criminal activity when a forfeiture is made. As a result of that case, federal prosecutors in the Southern and Northern District of Indiana have put out a new memorandum regarding their adoption of forfeiture cases. At their request, that memo is attached to the email carrying this edition of PPU.

UPCOMING TRAININGS/CLES:

Winter Conference: December 4-8.
Drug Summit – Dealing Resulting in Death: Thurs Feb 23, 2023 – Carmel. For officers and prosecutors. https://www.in.gov/ipac/ipac-training/

Keep your head on a swivel and be safe…

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