

DISPOSAL OF EVIDENCE
IN
CRIMINAL CASES
2013 IPAC
SUMMER CONFERENCE

David Powell
Executive Director
Indiana Prosecuting Attorneys Council

SITUATION: UNSOLVED BURGLARY

Large flat screen TV found day after burglary near a tree with blood on it. 18 months later blood/DNA match with a suspect – suspect charged. Prosecution during trial preparation checks with LEA about the TV and discovers TV no longer in evidence – but in the Police Chief’s living room. TRUE STORY

I.C. 35-43-4-4(b)

- A LEA that is holding evidence over which a person is alleged to have exerted unauthorized control or to have obtained unlawfully, may return the property to the owner if:
 - 1) Property is photographed in a manner that will serve the purpose of demonstrating the nature of the property, and if these photographs are filed with or retained by the LEA in place of the property;

I.C. 35-43-4-4(b)

- 2) A receipt for the property is obtained from the owner upon delivery by the LEA
- 3) *The prosecuting attorney who is prosecuting the case that involves the property has not requested the LEA to decline requests to return the property to its owner; and*
- 4) the property may be lawfully possessed by the owner.

Subject: Disposal of Evidence
 TO: Law Enforcement Agency (LEA) Heads and Evidence Custodians

1. **Property/Contraband other than firearms or animals.** Property seized as a result of an arrest, search warrant, or warrantless search must be securely held by the LEA as provided by Indiana Code 35-33-5-5.
 - a. As a general rule property unlawfully obtained may be returned to the lawful owner, without a court order, so long as it is photographed in a manner that demonstrates the nature of the property and the photographs are retained by the LEA.
 - b. The LEA must obtain a written receipt from the owner when the property is released.
 - c. Contraband must be destroyed or disposed as provided in Indiana Code 35-33-5-5(c).
2. **Firearms.** Firearms seized in a criminal investigation must be disposed of pursuant to Indiana Code 35-47-9-2.
 - a. As a general rule firearms can be released without a court order to the rightful and lawful owner of the firearm if no criminal investigation or case is pending or after final disposition of a criminal cause.
 - b. In the event the lawful owner cannot be identified or located, then the firearms should not be sold, transferred, or destroyed except as authorized by order of the court.
3. **Animals.** Wild animals seized as a part of a criminal investigation should be turned over to a Conservation Officer with the Department of Natural Resources and disposed of as provided by Indiana Code 14-22-39-6. Domestic farm animals or pets seized as part of a criminal investigation should be impounded and disposed of with the assistance of the Indiana Board of Animal Health and the County Veterinarian as provided by Indiana Code 36-46-3-6.
4. **Verification of Ownership.** As a policy, no item of evidence should be released to a person claiming lawful ownership unless a verified written receipt attesting to ownership is obtained.
5. **Forfeiture.** If a LEA has seized property that may be subject to forfeiture as provided by Indiana Code 34-24-3-2, then Prosecutor's office should be immediately notified. No action may be taken by a LEA regarding property subject to forfeiture without approval of the Prosecutor.
6. **Abandoned Property.** The LEA should contact the county/municipal attorney for advice regarding proper disposal of abandoned property not subject to a criminal investigation.
7. **Prosecutor Consent.** Do not release or retain any property from your custody involving a criminal matter to a person claiming ownership without first obtaining the consent of the Prosecuting Attorney (Indiana Code 35-43-4-4 (b)(3)).
8. Your evidence custodian should become familiar with the above referenced statutes and contact this office if they have questions regarding evidence disposal.

Sincerely,
 Prosecuting Attorney

State v. McCord

- 4 apartments (fourplex) 3 broken into 7.3.12
 - A. Barker (@work) Marijuana pipe, baggie of marijuana, 2 handguns & \$400.00 in cash
 - B. Linda Kasabian – awoken by intruder, nothing taken – He had tattoos
 - C. Sturgis (Owner of Apartments) – not broken into
 - D. Charles Watson/Susan Atkins (@ work) Flat Screen TV, Laptop computer and 2 necklaces missing.

State v. McCord

- Paid probation fees of \$330.00 on 7.5.12
- On 8.25.12 picked up on body attachment failed to appear in child support hearing on 8.24.12 (owes \$15K). \$2,662.00 in his pocket.
- SW on 8.25.12 -Property seized: hammer, crowbar, 2 screwdrivers, 16 necklaces, 3 jars of coins.
- State v. McCord resolved by NPA – LEA calls and asks what to do with evidence in Case.

STATE OF INDIANA)
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JAMES MCCORD)
W/M DOB 10-31-64)

STATE OF INDIANA'S MOTION FOR DESTRUCTION AND/OR DISPOSAL OF EVIDENCE

Comes now, the State of Indiana, by and through the undersigned counsel, and hereby petitions this Court for an order mandating the disposal of any all evidence currently possessed by the Metropolitan Police Department under the following Cause #: 99 C011 1299 FB 106 and/or the following Agency #: XX10186398. In support of this motion, the State of Indiana avers as follows:

1. This instant matter was disposed of via guilty plea agreement on 06-6-2013 in the RED County Superior Court – Criminal Division 20.
2. The following items were seized by a law enforcement agency as a result of an arrest, search warrant, or warrantless search and were collected as evidence in this case: (list and describe all property to be disposed of)
 - Tarus, .380 Cal, Handgun, Serial #333767
 - Iver Johnson, .22 Cal, Handgun, Serial # 44329H
 - 15 inch Laptop Computer, Dell, Serial # 4297X
 - 42 inch Panasonic Television, Serial # 323232
 - \$2,662.00 in U.S. Currency
 - 1 hammer
 - 2 screwdrivers
 - 1 crowbar
 - 16 gold/silver necklaces
 - 3 glass jars containing U.S. currency coins, \$362.13

Barker-Apt. A

- Iver Johnson, .22 cal handgun (grandpa)
- Tarus, .380 handgun (street purchase)
- \$400.00 in U.S. currency (rent \$)
- Marijuana pipe and baggie of marijuana

Barker – Apt. A

- I.C. 35-47-3-2 governs disposal of firearms
- (b) firearms shall be returned to the rightful owner at once following final disposition of the cause.
- Return of the Iver Johnson .22 cal can be returned to Barker – Verified receipt
- Return of the Tarus, .38- cal is more difficult, Barker can attest to ownership but what if it turns up stolen?

Barker – Apt. A

- I.C. 35-47-3-2(b) & (c) apply:
 - A reasonable attempt must be made to determine the rightful and lawful owner
 - Where no rightful owner :
 - Turnover to the Sheriff of the county in which the offense occurred or the city or town LEA if they seized the weapon and pop is > 2,500 and < 600,000.
 - Within 120 days of receipt LEA shall dispose of by public sale, sale to a licensed firearms dealer, sale or transfer to another LEA, release to ISP lab, or destroy.

Barker – Apt. A

- Marijuana pipe and baggie of marijuana
- I.C. 35-33-5-5 (e) provides for destruction without need of a court order:
 1. Essentially, keep enough for identification and testing
 2. Photograph the site and drugs to accurately depict the illegal activity
 3. Prepare and complete a chemical inventory
 (g) Destruction shall be witnessed by 2 persons

Watson/Aktins – Apt D

- Flat Screen TV and Laptop Computer.
- I.C. 35-33-5-5 governs disposal of stolen property:
 - Can photo and return to lawful owner prior to trial or following final disposition
 - Who is the lawful owner? They filed a claim per their renter insurance policy.
 - If insurer is owner and abandons?

Watson/Atkins – Apt D

- If insurance company abandons, then I.C. 35-33-5-5 (c) applies:
 - 1) LEA must make reasonable attempt to determine ownership
 - 2) After 90 days of notifying the insurance company or making reasonable effort to ascertain the owner
 - 3) Sell at public auction and deposit proceeds in county general fund

\$2,662.00 found on McCord

- What happens to the cash from McCord's pocket discover during booking 8.25.12?
- Is it really McCords? I would send written notice to McCord/Attorney to make a claim.
- Deal with the cash in the NPA
 - Restitution to Barker \$400.00
 - Repairs for broken windows
 - Child support arrears
 - Insurance deductibles, etc.

Search at Halfway House

8.25.12

- 1 Hammer
- 1 Crowbar
- 2 Screwdrivers
- 16 necklaces
- 3 clear glass jars containing coins.
- I.C. 35-33-5-5(a) seized by LEA via Search Warrant shall be securely held under the Order of the Court, except as provided in this section

Search at Halfway House

8.25.12

- Atkins not sure but 2 of the 16 necklaces look like hers. What do you do with this stuff now that the case is over.
- Follow the guidance in I.C. 35-33-5-5
- Notify the defense to provide proof of ownership – 90 day clock starts ticking
- LEA may hold onto the necklaces, and coins and put the public on notice (reasonable effort shall be made to ascertain ownership)

Search at Halfway House

8.25.12

- I.C. 35-33-5-5(c)(1) 90 days following reasonable effort to ascertain ownership (no time frame here) then may sell at public auction – proceeds go to county general fund
- (c)(2) any property whose possession is unlawful shall be destroyed by the LEA 60 days after final disposition of the cause.

State v. McCord

- Motion and Order
- What should yours look like.
- Gun policy?
- General Order vs. Specific detailed directions?
- Set down with the LEA that secure evidence and set your policy, especially for firearms.
- The law provides you with options.

Disposal of Evidence

- Animals
- Abandoned Property
- Dangerous persons
- Forfeitures
- Disposal Statutes and case law digests are provided in your materials
- Questions??

List of Disposal Statutes

Seizure of Animals and Equipment

I.C. §14-22-39-6 – Seizure of animals and equipment – Wild animals (DNR)

I.C. 35-46-3-6 – Impoundment of Animals – Pets/Domestic/Farm (BOAH- Title 15)

Forfeiture Statutes

I.C. § 34-24-1-1 – Seizure of vehicles or other property.

I.C. §34-24-1-2 – Procedure upon seizure.

I.C. §34-24-1-3 – Demand for Return – Recovery of law enforcement costs.

I.C. § 4-24-1-4 – Hearing; burden of proof; disposition of property.

I.C. §34-24-1-5 –Determination of secured interest and appraised value; disposition of property; payment.

I.C. §34-24-1-6 – Public sale of property; publication notice; proceeds.

I.C. §34-24-1-7 – Court order; filing; effect.

I.C. §34-24-1-8 – Retention of attorney to bring action.

I.C. §34-24-1-9 – Disposition of seized property; expenditures of money.

Property held As Evidence

I.C. §35-33-5-5 – Disposition of Property held as evidence; records

Return of Evidence from Theft or Conversion

I.C. §35-43-4-4(h) – Evidence from which theft or conversion may be presumed

Firearm Statutes

I.C. §35-47-3-1 – Disposal of Confiscated weapons.

I.C. §35-47-3-2 – Application of Section to firearms not require to be registered in National Firearms Registrations and Transfer Record; return of firearms to rightful owners; disposal procedure.

I.C. §35-47-3-3 – Application of section to firearms required to be registered in National Firearms Registration and Transfer Record; Return of firearms to rightful owners; unreturnable firearms, registry of firearms, disposal.

I.C. §35-47-3-4 – Unlawful Delivery of Confiscated firearm.

Dangerous Person Statutes

I.C. §35-47-14-1 – “Dangerous” defined.

I.C. §35-47-14-3 to I.C.35-47-14-9 (outlines process for the hearing that should be conducted to deterring if a person is deemed “dangerous). s

Seizure of animals and equipment

I.C. §14-22-39-6 – Seizure of animals and equipment.

- **State v. Souder, 444 N.E.2d 891,892-893 (Ind. Ct. App. 1983)**

The defendant was convicted for violating the Fish and Wildlife Act (Ind. Code §14-2-1-1 et. Seq.; now Ind. Code §14-22-39-1, et. seq.), which allows the State to keep any “hunting...appliances, apparatus, or devices”. This statute does not mention firearms, although it includes firearms generally. However, all firearms confiscated by the State, for whatever reason, will be disposed of according to I.C. §35-47-3-1 et. seq. (previously I.C. §35-23-4.1-16).

I.C 35-46-3-6 – Impoundment of animals .

- **Baxter v. State, 891 N.E.2d 110 (Ind. Ct. App. 2008)**

Trial Court denial of the defendant’s request to sell 9 horses seized by the humane society was not an abuse of discretion; statute required a defendant challenging the seizure of an animal to post a bond to cover the care of the animal and to request a hearing to challenge whether there was probable cause that the defendant neglected the animal, and defendant never post a bond or requested a hearing.

Forfeiture Statutes

I.C. §34-24-1-1 to I.C. §34-24-1-9

Reviews the procedure that law enforcement and prosecutors must follow when seizing evidence.

I.C. §34-24-1-2 – Seizure of vehicles and other property.

Details items that may be seized by law enforcement

I.C. §34-24-1-2 –Procedure upon seizure.

- **One 1968 Buick, 4 Door v. State, 638 N.E.2d 1313, 1317 (Ind. Ct. App. 1994).**

The State must prove its case by a preponderance of the evidence standard, under the forfeiture statute.

I.C. §34-24-1-3 – Demand for Return – Recovery of law enforcement costs.

- **\$100 v. State, 822 N.E.2d 1001, 1016-1017 (Ind. Ct. App. 2005)**

Defendant pled guilty to dealing in marijuana. The State filed two forfeiture complaints against the defendant for the black Cadillac that the defendant had been driving when she was arrested and \$100 found on her, while the second was for the \$998 that had been found in the defendant's home. The court allowed the State to keep the Cadillac but not the money. The court concluded:

Ellenstein's plea of guilty to dealing in marijuana as a Class A misdemeanor under Ind.Code § 35-48-4-10(a)(2)(C), based on her arrest for possessing one pound of marijuana in her Cadillac, was sufficient evidence by which the court could determine the Cadillac had been used to "transport" "a controlled substance" for the purpose of committing dealing in marijuana in violation of Ind.Code § 35-48-4-10. Ind.Code § 34-24-1-1(a)(1)(A)(viii).

The court noted that property is not forfeited automatically once a conviction is made, but the State must file a forfeiture complaint for the property. Under this statute, the State must prove that the seized property was used in that specific offense. When a defendant enters into a plea agreement, this does not result in an automatic forfeiture of property used during the course of the crime. Additionally the court ruled that the forfeiture statute was not a bill of attainder.

- **Hicks v. State, 635 N.E.2d 1151 (Ind. Ct. App. 1994).**

The defendant robbed several banks and a large sum of money was found in his home. The banks agreed to take a pro rata share of the money that had been recovered. The defendant brought suit to recover the fund and his first argument was that the court erred in distributing the funds. He claimed that the State did not comply with the correct proceeding for forfeiture under Ind. Code §34-4-30.1-3 (currently Ind. Code §34-24-1-3). However, the funds were not seized as forfeiture, which is aimed at crimes dealing with the drug trade. Forfeiting property that has been involved with illegal drug use or distribution was designed to be a deterrent to those involved. Additionally the property seized allows the State to recover any costs it incurred and then the remainder is given to the common school fund. In the defendant's case, the State made no claims on the funds and the funds were distributed back to the victims in the case under Ind. Code §35-33-5-5.

- **Sanders v. State, 823 N.E.2d 1214 (Ind. Ct. App. 2005)**

Defendant was convicted of dealing in cocaine, maintaining a common nuisance and possession of marijuana. When he was arrested, he had \$2,496 which the police had recovered. After the trial, the

State filed a motion to seize those funds, under Ind. Code §34-24-1-1, which the court granted. On appeal, the State's motion was reversed as being filed untimely. The State then filed a motion to be reimbursed for investigative costs that resulted from the defendant's arrest, which was granted and the defendant then appealed.

The court ruled that the State's motion to be reimbursed for investigative costs was essentially the same as the first motion for reimbursement of law enforcement costs as allowed under Ind. Code §34-24-1-1. This is improper because the State did not file the motion until 10 months after the property had been seized, while Ind. Code §34-24-1-1 requires an action to be filed within 180 days of the seizure. It was improper for the State to file the motion after the 180 day timeline and also improper to essentially file the exact same motion.

- **Ziegler v. State, 780 N.E.2d 1169 (Ind. Ct. App. 2003)**

The Andy Ziegler's house was searched pursuant to a warrant and the police seized five quarter-ounce bags of marijuana and pills, a safe with \$2,716.02 and a handgun. The State did not file for forfeiture until 210 days after the items were seized from Ziegler's house. The State argued that they have the 180 days from seizure of the items or "(2) within the period that a prosecution may be commenced under I.C. 34-41-4-2 for the offense that is the basis for the seizure." Ind. Code §34-24-1-3. This second part refers to the statute of limitation for the prosecution to prosecute for the offense. If the owner of the property requests in writing for the property to be returned, then the State has 90 from receiving that notice to file for forfeiture. I.C. §34-24-1-3. However, the court clarified, stating that the statute of limitation deadline "will only occur when less than 180 days exist between the seizure and the limit to prosecute set forth in the Statute." Additionally, even though the original statute, Ind. Code §34-4-30.5-4 was repealed in 1998, the deadline for filing for forfeiture has not changed.

- **State v. Combs, 921 N.E.2d 846, 852 (Ind. Ct. App. 2010)**

A lengthy procedural history followed the seizure of the defendant's eight cars, which had been stored at a local shop. The State and the State Police were represented by the Madison County Prosecutor in the forfeiture proceeding against the defendant. Additionally "service on the Madison County Prosecutor's office was service on the State and the State Police in the civil action." Ultimately, the State Police were responsible for towing and storage fees incurred, as ordered by the court and the forfeiture proceeding was dismissed.

- **Caudill v. State, 613 N.E.2d 433 (Ind. Ct. App. 1993).**

Defendant was arrested for dealing in cocaine and at that time the police seized his 1984 Ford Bronco and \$355 that he was carrying. However, the cash the defendant had at the time of his arrest was not the same market bills that the informant had given the defendant for drugs. The State filed for forfeiture of the money and the Ford Bronco, which the court granted and the defendant appealed.

The defendant claims that the State has to prove “substantial connection” between the property that was seized and the crime that was committed and uses federal case law to support his reasoning. However, the court states “while there are similarities between the two forfeiture provisions, we need not resort to federal law to interpret our own forfeiture statute.” The court ruled that the defendant had four grams of cocaine in his possession, while he was driving the Ford Bronco, which was enough evidence to show that the defendant had used the Bronco to commit an offense under Ind. Code §34-24-1-1 (previously Ind. Code §34-4-30.1-1). The court also ruled that the money found in his possession, was still considered to be related to a drug transaction, despite the money not being the bills marked and given to the defendant by the informant. The money had been found on the defendant who was committing an offense under I.C. §34-24-1-1 (previously I.C. §34-4-30.1-1) and thus can be forfeited to the State.

The defendant claimed that the cash and drugs were seized from an illegal arrest and search under the Fourth Amendment and thus these two items cannot support the forfeiture order. The court said “that the exclusionary rule, although a rule of criminal procedure, applies also to forfeiture proceedings.” The court ultimately ruled that despite the fact the defendant was arrested, then taken to his house and was searched there, did not result in an illegal arrest or an illegal search under the Fourth Amendment.

This case was called into doubt by Katner v. State, 655 N.E.2d 345 (Ind. 1995) where the Court ruled “that the State bears the burden of demonstrating, by a preponderance of the evidence, this nexus: that the property sought in forfeiture was used ‘for the purpose of committing, attempting to commit, or conspiring to commit’ an enumerated offense under §34-4-30.1-1.” The Court also noted the forfeiture could occur, even if the defendant had not been convicted on the criminal activity and the prosecutor had to prove based on preponderance of the evidence that the property was the type allowed to be forfeited under I.C. §34-24-1-1 (previously I.C. §34-4-30.1-1). The Court gave the example that, “the State must show that the operator used (1) the vehicle to transport an illicit substance or item listed in the statute, (2) for the purpose of committing possession, attempting to commit possession, or conspiring to possess the substance or item.” The Court clarified Caudill could be interpreted that that “mere possession of an illegal substance and simultaneous use of a vehicle to support forfeiture...This is an incorrect statement of the law.”

I.C. §34-24-1-4 – Hearing; burden of proof; disposition of property

- **One 1968 Buick, 4 Door v. State, 638 N.E.2d 1313 (Ind. Ct. App. 1994).**

Property that has been seized may be transferred after it had been seized or while a forfeiture action is pending, but it may not be transferred before it has been seized under Ind. Code § 34-24-1-1 et. seq. (previously Ind. Code §34-4-30.1-1 et. seq.). Here, the State had filed for forfeiture against Armstrong’s truck on November 19, 1992 alleging that it had been seized on September 17, because Armstrong had used the car to transport drugs on February 25 and 28 and again on March 25 and

subsequently convicted of dealing and possessing marijuana. But Armstrong later sold the Buick to his brother on September 14, 1992. The trial court ruled in favor of the State, allowing the truck to be seized by the State.

I.C. § 34-24-1-4 (previously I.C. §34-4-30.1-4) protects good faith purchasers for value by requiring the prosecution to prove that the person who owns the vehicle knew or had reason to know that the car had been used in commission of an offense under I.C. § 34-24-1-1.

- **Op. Att. Gen. Opinion No. 1 (May 12, 2010)**

Article 8, Section 2 of the Indiana Constitution does not apply to forfeiture proceedings under Ind. Code §34-24-1. Forfeiture under this law is civil in nature and only those fines and forfeiture from criminal proceedings will be required to be paid into the common school fund under Article 8, Section 2 of the Indiana Constitution.

- **Serrano v.State, 946 N.E.2d 1139 (Ind. 2011).**

Serrano had \$500 in quarters and \$51 in cash that was found in his truck, covered in a residue that was eventually determined to be cocaine. The State filed for forfeiture of the truck and the money. The trial court forfeited the truck to the State and the cash to Serrano, citing that “Serrano had used his truck to transport or facilitate the transportation of a controlled substance for the purposes of committing a drug related offense, specifically, possession of cocaine or a narcotic drug in violation of Indiana Code §35-48-4-6 (2008).” Serrano appealed the Indiana Supreme Court reversed the trial court. No evidence was presented that showed that presence of the drugs in the truck was anything more than “incidental or fortuitous.”

I.C. §34-24-1-6– Determination of secured interest and appraised value; disposition of property; payment.

- **One 1968 Buick, 4 Door v. State, 638 N.E.2d 1313, 1317-18 (Ind. Ct. App. 1994).**

“Because [I.C. 34-4-30.1-5](#) provides protection for valid lienholders, mortgagees, security interest holders and innocent co-owners, it would be inconsistent for us to find that the statute provides no protection for good faith purchasers for value.”

I.C. §34-24-1-6 – Public sale of property; publication notice; proceeds.

- No notes of decision.

I.C. §34-24-1-7 – Court order; filing; effect.

- No notes of decision.

I.C. §34-24-1-8 – Retention of attorney to bring action.

- No notes of decision.

I.C. §34-24-1-9 – Disposition of seized property; expenditures of money.

- No notes of decision.

Property held as Evidence

I.C. §35-33-5-5 – Disposition of Property held as evidence; records

- **Campbell v. Chappelow, 95 F.3d 576, 579 (7th Cir. Ind. 1996).**

A formal complaint was filed against plaintiffs for cruelty to animals, specifically towards the plaintiff's cattle. At the probable cause hearing, the court issued a search and seizure warrant for the plaintiff's property. The court was informed that the local Humane Society would care for the cattle. Once the warrant was executed by the state trooper, the cattle were removed and taken to the Humane Society. More cattle were subsequently seized by another state trooper. The charges were later dismissed and the cattle were ordered to be returned to the plaintiff. But, those who had been taking care of the cattle had filed liens against the plaintiff for costs incurred in caring for the cattle. Then the cattle were sold and the money given to satisfy the liens. The Plaintiff was not notified of the sale and subsequently sued. Many people were sued, but at the time of this case, all parties had been dismissed based on agreements, except for the state troopers. The plaintiffs "argue that the district court erred in entering summary judgment on the state law bailment and conversion claims, and the district court's statute of limitation and §1983 rulings were in error." *Id.* at 578. The court affirmed the district's ruling.

"The plaintiffs present no authority supporting their argument that the concept of bailment applies in this situation. The best they can do is point to the Indiana statute which provides that "all items of property seized by any law enforcement agency as a result of a ... search warrant ... shall be securely held by the law enforcement agency under the order of the court trying the cause...." Ind. Code §35-33-5-5. The Campbells present no basis for substituting common law bailment duties for the statutory duties imposed by this section. In any event, this section governs actions by the "law enforcement agency" and does not make individual police officers who seize property pursuant to a warrant the personal bailee of the property." *Id.* at 579

- **Gore v. State, 456 N.E.2d 1030, 1033 (Ind. Ct. App. 1983).**

Cash that was recovered from the defendant, who was convicted of possession, should be returned to him in accordance with Ind. Code §35-33-5-5 (formerly Ind. Code §35-1-6-5.1). Money that appears to have come from the sale of drugs (but no evidence that is actually had), is not something that the legislature defined as unlawful to possess under this statute. Defendant was also only convicted of possession. The money should be returned to the defendant.

- **Williams v. State, 444 N.E.2d 888, 890-891 and nt. 3 (Ind. Ct. App. 1983).**

A car retained as part of investigation of vehicle thefts did not constitute a taking of property by the police. An undercover police officer acquired the vehicle by purchasing it from the thief and returned the car to its lawful owner, 5 months later after the investigation was complete. The officers had not notified the lawful owner that his car had been found, due to preventing the disclosure of the investigation. The owner of the care sued to recover rental value, depreciation and other damages and alleged the delay of returning the care resulting in a taking under Article 1, Section 1 of the Indiana Constitution. However, the car was not seized but “[r]ather it come into possession through a purchase of a thief.” Additionally, “the police came into possession through a lawful investigation and retained it only for the duration of the investigation.”

The car was not used as evidence, under I.C. §35-1-6-5.1 (now repealed, see I.C. §35-33-5-5 for current law), which allows “retention of evidence seized pursuant to an arrest, search warrant or warrantless search while a case or investigation is pending.” Rather the police were able to retain the vehicle based on the statute of I.C. §9-9-1.1-4(a) (previously I.C. § 9-9-1.6-7), which allows the police to keep the stolen vehicle and notify the bureau within 72 hours and then returned to its owner after the bureau has located him. The court held that based on the statute:

The retention of the vehicle beyond the seventy-two hours and the time necessary to search the records to identify the owner and then notify him constituted a breach of specific statutorily imposed duty or a tortious invasion of the plaintiff’s property rights. However, because Williams argued to the court that his theory was not in tort and he does not argue he stated a tort claim to us, we affirm the trial court’s dismissal.

- **Tracy v. State, 655 N.E.2d 1232, 1235-1236 (Ind. Ct. App. 1995).**

Money that the defendant used to buy marijuana from an undercover cop and was later taken by law enforcement was not a seizure of property as defined under I.C. §35-55-5-5. The defendant paid \$26,000 for the marijuana. An additional amount of money had been found in a compact disc case and was seized by the police. The court, discussing the \$26,000 stated:

[The court] cannot equate such a consensual exchange with a “seizure,” as contemplated by the [seizure of property] statute....[I.C. 35-33-5-5] does not require that all property seized as the result of a “criminal investigation” be returned. It requires that very specific property-that

seized “as a result of an arrest, search warrant, or warrantless search”-be returned. See I.C. 35-33-5-5(a).

Thus, the state police or the DEA would not have to hold onto the \$26,000 until the final disposition of the case under the statute. The excess money, from the compact disc case, that was taken from the defendant after his arrest, would be subject to the requirements in the I.C. §35-33-5-5. Even if the State held the money from the compact disc until final disposition, the claimant still must prove that he is the rightful owner of the property seized by the police under this statute, by preponderance of the evidence. The trial court’s decision may be overturned by the appellate court “if the decision cannot be sustained upon any theory the evidence supports.” There is some discrepancy over whether the money was the defendant’s or also his co-defendants. Thus the State was not required to return the funds to the defendant as the rightful owner has not been proven.

- **Williams v. State, 952 N.E.2d 317 (Ind. Ct. App. 2011).**

Defendant was convicted of carrying a handgun without a license, but filed a motion to suppress. The motion was granted and the case was subsequently dismissed. The defendant had been convicted of a felony and thus it was unlawful for him to own a gun. He transferred ownership of the gun to his counsel on the same day that the case was dismissed. The defendant subsequently filed a Petition for Release of Property to counsel in regards to the gun. The trial court denied this petition and the Court of Appeals overruled. The petition was not requesting that the gun be returned to the defendant, but to his counsel. The statute does not allow the return of property “to only the person who owned the property at the moment the case was disposed.” This would be reading more into the statute than what is actually there. Thus the court allowed the gun to be returned to the defendant’s counsel, as he was the rightful owner of the gun, following disposition of the case.

- **Merlington v. State, 839 N.E.2d 260 (Ind. Ct. App. 2005).**

Defendant had \$641 in his pocket when he was arrested for possession of drugs with intent to deliver. The police recovered the cash and it was indicated that the cash was admitted in the defendant’s trial as evidence (see note 6 for further explanation). Defendant did have lawful possession of the cash at the time of the arrest, but the court also looked at whether the cash may be lawfully possessed. There is nothing that suggests that the defendant’s possession of the cash was unlawful, i.e. that the cash came from the sale of drugs. The cash should be returned to the defendant under I.C. §35-33-5-5(c)(1) because possession of the cash was not unlawful and there was no evidence presented that indicated it was not the defendant’s money.

- **Seel v. State, 739 N.E.2d 170 (Ind. Ct. App. 2000).**

Defendant stored his handguns in a rented storage facility but this did not constitute a violation of carrying a handgun without a license. Once the criminal charge of possession of marijuana was dismissed, the defendant was entitled to have his handguns returned. Carrying a handgun without a license is not the same as possession of a handgun without a license. Under the statute, the defendant had the right to his guns, which were lawfully possessed.

- **Sinn v. State, 693 N.E.2d 78, (Ind. Ct. App. 1998).**

Defendant's personal property had not been returned to him after a plea agreement had been reached. When the defendant testifies that he is the owner of the property and the State provides no evidence against this, there is a presumption that the defendant is the proper owner. The defendant had received an order that the defendant's property be returned to him. If his property has not been returned, the defendant should seek enforcement of the order, rather than trying to appeal the judgment "unless he is in some manner aggrieved thereby." The defendant should file a motion for rule to show cause and a hearing can be held if needed so that it can enforce its order.

- **Hicks v. State, 635 N.E.2d 1151 (Ind. Ct. App. 1994). (Compare with above case, Tracy v. State).**

Funds that were recovered from bank robberies were disbursed to the banks from whom the defendant had stolen from, who had agreed to joint stipulation of a pro rata share of the money that was recovered from the defendant. The court stated that "This statute sustains the trial court's continuing jurisdiction over property seized in the course of a criminal investigation." The Court of Appeals held that money had been returned to its rightful owners under the statute.

- **State v. Poxon, 514 N.E.2d 652 (Ind. Ct. App. 1987).**

Arrestee was acquitted of Dealing in Cocaine. He then made an oral motion that his property that was taken during his arrest be returned to him, which the court granted. The State did not present any evidence that the arrestee had obtained the money in an unlawful way (i.e. from selling narcotics or other illegal transaction). Thus the money was returned to the arrestee.

- **Conn v. State, 496 N.E.2d 604 (Ind. Ct. App. 1986).**

Defendant was convicted of receiving stolen property. The police had seized many items from his property that were not listed in the warrant. Under the statute, if the items are not found to be stolen, the items should be returned to the defendant. If the items recovered were stolen, then the

property should be returned to its rightful owners. The State attempted to claim that since the defendant had failed to obtain a ruling on a motion for rule to show cause, that it resulted in no issue preserved for review. The court held that the court should conduct a hearing if needed to mandate that the defendant's property be returned to him.

Destruction of Property Seized

- **Anderson v. State, 468 N.E.2d 569 (Ind. Ct. App. 1984).**

Defendant had filed a sworn claim for possession of the property and the State filed an answer, denying that the defendant owned the property. When one has claimed ownership of property seized for purposes of prosecution, the court must have an evidentiary hearing on the merits. Here, the trial court had denied the defendant's motion without a hearing and thus was in error. If the property was destroyed because possession of the property would be unlawful, then the defendant would not have a claim to possession.

Jurisdiction

- **Martin v. Ind. State Police, 537 F. Supp. 2d 974 (S.D. Ind. 2008).**

Property that is seized under this statute must be held by the court that is trying the case under I.C. §35-33-5-5(a). Before the property can be transferred or initiate forfeiture proceedings, to another court or even to a federal agency, a motion from the prosecuting attorney and an order from the court, to transfer the property under I.C. §35-33-5-5(j) must be submitted and issued. In this case, the court never issued a transfer order and thus there had not been a valid transfer of jurisdiction to the United States Customs and Border Patrol.

Other

- **State v. Willits, 773 N.E.2d 808 (Ind. 2002). (Abrogated on other grounds).**

The statute "codifies the common law rule that requires the return of such property to the rightful owner unless the property has been destroyed because possession would be unlawful."

Return of Evidence from Theft or Conversion

I.C. §35-43-4-4(h) – Evidence

- **Stanley v. State, 435 N.E.2d 54, 58-59 (Ind. Ct. App. 1982).**

Defense argues that photographs of the stolen items could only be used as evidence if the property was not available at trial and claimed that the stolen items could have been admitted instead of photos of the items. However, the court found that:

Prior to returning this property, it was properly photographed pursuant to IC 35-43-4-4(h)(1) and no request to retain the property was made by the prosecuting attorney pursuant to IC 35-43-3-3(h)(2). In regard to subsection (h)(3), we think it is clear that Waterfield and Cunningham were acting in their capacities as employees and agents of the Convenient Food Mart when they signed for receipt of the stolen property. Therefore, we find no reversible error based upon the statute's receipt provision.

- **Moore v. State, 504 N.E.2d 586, 587 (Ind. Ct. App. 1987).**

When there is no dispute over who is the owner of the stolen property, the law enforcement agency may return the property to such owner without an evidentiary hearing. In this case, when the victim claimed the money that was found on the defendant, via affidavit, the prosecutor returned the money to the victim. Nine months later, the defendant claimed that the money was his. The court stated, "The police were insulated from any responsibility for turning over the [money] to the wrong person because of their reasonable belief based upon [victim's] affidavit and the circumstances of [the defendant's] arrest." If the defendant wanted to recover the cash, he would have to file a civil action against the person whom the property had been returned to. The court held that "a defendant cannot demand the return of property which has been seized but neither used as evidence nor the subject of prosecution without alleging more. The fact that the property was not used as evidence or that [the defendant] was not charged with robbery of the cash is irrelevant to the issue of whether [the defendant] was the rightful owner."

Firearm Statutes

I.C. §35-47-3-1 – Disposal of confiscated weapons in accordance with chapter.

- **State v. Souder, 444 N.E.2d 891,892-893 (Ind. Ct. App. 1983).**

The defendant was convicted for violating the Fish and Wildlife Act (Ind. Code §14-2-1-1 et. seq.), which allows the State to keep any "hunting...appliances, apparatus, or devices." This statute does not mention firearms, although it includes firearms generally. However, all firearms confiscated by the State, for whatever reason, will be disposed of according to I.C. §35-47-3-1 et seq (previously I.C. §35-23-4.1-16).

I.C. §35-47-3-2 – Application of Section to firearms not required to be registered in National Firearms Registration and Transfer Record; return of firearms to rightful owners; disposal procedure

- **1978 Op. Atty. Gen. No. 29.**

Any firearm that was confiscated and whose owner could not be found must be delivered to the county sheriff in the county in which the firearm had been confiscated.

- **Indiana State Police v. Don's Guns & Galleries, 674 N.E.2d 565, 569-570 (Ind. Ct. App. 1996).**

Joellyn Lawrence reported her handgun as stolen. When the Marion County Sheriff's Department logged in the stolen handgun into their computer database, the crane number was mistakenly entered in the area for recording the gun's serial number. Don's Guns sold this same gun to Kevin Johnson and it filed a Report of Handgun sale with the MCSD. A couple of months later, Johnson was pulled over for speeding and the officer noticed the gun in Johnson's car. The officer then ran a background check on the gun and found out the gun had been reported stolen. Johnson was taken to the Indiana State Police and was soon released. He filed a lawsuit against Don's Guns on several theories, including misrepresentation. Don's Guns then filed a third-party complaint against the ISP and MCSD for indemnification and damages. Don's Guns argued that the ISP had violated Ind. Code §35-47-3-2 by not returning the stolen gun to the MCSD's office. However, the rightful owner was easily identifiable and the police did not owe a private duty to the handgun seller under the statute. Thus, the gun had been properly returned to its' owner, Joellyn Lawrence, under I.C. §35-47-3-2.

I.C. §35-47-3-3 – Application of section to firearms required to be registered in National Firearms Registration and Transfer Record; Return of firearms to rightful owners; unreturnable firearms, registry of firearms, disposal.

Firearms that must be registered in the National Registration and Transfer Record, under 26 U.S.C. 5845 include firearms, machine guns, rifles, shotgun, any other weapon, destructive devices, etc. See 26 U.S.C. 5845 for further definitions of each type of weapon. This section applies to military, police and automatic weapons that cannot be possessed by the public in general.

I.C. §35-47-3-4 – Unlawful Delivery of Confiscated firearm

- **Seel v. State, 739 N.E.2d 170 (Ind. Ct. App. 2000).**

Under the statute, a firearm cannot be returned or delivered to a person who is convicted of a felony involving a firearm, which caused the firearm to be confiscated. Defendant had charges for possession of marijuana dropped and the police should have returned the confiscated firearms that were found in the defendant's rental facility. That State did not introduce any evidence to prove that the defendant was as "drug abuser" under I.C. §35-47-1-4 and thus the firearms could be returned to the defendant.

Dangerous Person Statutes

I.C. §35-47-14-1 – "Dangerous" defined

*No notes of decisions

I.C. §35-47-14-3 to I.C. §35-47-14-9

*No notes of decisions. Outlines process for the hearing that should be conducted to determine if deemed "dangerous."

STATE OF INDIANA)	IN THE RED SUPERIOR COURT
) SS:	CRIMINAL DIVISION, ROOM 20
COUNTY OF RED)	CAUSE NO: 99 C011 1209 FB 106
STATE OF INDIANA)	
)	
v)	
)	
JAMES MCCORD)	
W/M DOB 10-31-64)	

STATE OF INDIANA’S MOTION FOR DESTRUCTION AND/OR DISPOSAL OF EVIDENCE

Comes now, the State of Indiana, by and through the undersigned counsel, and hereby petitions this Court for an order mandating the disposal of any/all evidence currently possessed by the Metropolitan Police Department under the following Cause #: **99 C011 1209 FB 106** and/or the following Agency #: **XX10186398**. In support of this motion, the State of Indiana avers as follows:

1. This instant matter was disposed of via guilty plea agreement on 06/6/2013 in the RED County Superior Court – Criminal Division 20.

2. The following items were seized by a law enforcement agency as a result of an arrest, search warrant, or warrantless search and were collected as evidence in this case: (list and describe all property to be disposed of)
 - Tarus .380 Cal., Handgun, Serial #333767
 - Iver Johnson, .22 Cal., Handgun, Serial # 44329H
 - 15 inch Laptop Computer, Dell, Serial # 4297X
 - 42 inch Panasonic Television, Serial # 323232
 - \$2,662.00 in U.S. Currency
 - 1 hammer
 - 2 screwdrivers
 - 1 crowbar
 - 16 gold/silver necklaces
 - 3 glass jars containing U.S. currency coins, \$362.13

3. Accordingly, the State now petitions this Court for a judicial order to destroy or dispose of all evidence as permitted under I.C. 35-47-3-2 and I.C. 35-33-5-5.

WHEREFORE, the State of Indiana respectfully petitions this Court for the destruction or disposal of evidence presently being held by the Metropolitan Police Department under the above captioned cause number and/or the Agency number of: **XX10186398**.

Respectfully submitted,

Good Lawyer
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing was served upon the attorney for the Defendant, by either personal service, by placing said copy in the Public Defender's mailbox, or by depositing it prepaid in the United States First Class Mail on the same date of filing this motion.

Good Lawyer
Deputy Prosecuting Attorney

Red County Prosecutor's Office
333 E Brown Street
Hometown, IN

STATE OF INDIANA)
)
COUNTY OF RED)
)
)
STATE OF INDIANA)
)
 v)
)
JAMES MCCORD)
W/M DOB 10-31-64)

SS: IN THE RED SUPERIOR COURT
CRIMINAL DIVISION, Room G20

CAUSE NO.:
99 CO11 1209 FB106

ORDER

COMES NOW, the Court and hereby ORDERS the Metropolitan Police Department to destroy and/or dispose of all evidence in its possession under agency case number **XX10186398** and/or cause number 99CO11 1209 FB 106 pursuant to I.C. 35-47-3-2 and I.C. 35-33-5-5 and the Plea Agreement executed under this cause.

SO ORDERED THIS _____ DAY OF _____, 2013.

JUDGE,
RED SUPERIOR COURT, ROOM G20

Distribution:
(Defense Counsel)
Good Laywer (Red County Prosecutors Office)
Metropolitan Police Department – Property Division

Sample Prosecutor Letter to Law Enforcement – Disposal of Evidence

Subject: Disposal of Evidence

TO: Law Enforcement Agency (LEA) Heads and Evidence Custodians

1. **Property/Contraband other than firearms or animals.** Property seized as a result of an arrest, search warrant, or warrantless search must be securely held by the LEA as provided by Indiana Code 35-33-5-5.
 - a. As a general rule property unlawfully obtained may be returned to the lawful owner, without a court order, so long as it is photographed in a manner that demonstrates the nature of the property and the photographs are retained by the LEA.
 - b. The LEA must obtain a written receipt from the owner when the property is released.
 - c. Contraband must be destroyed or disposed as provided in Indiana Code 35-33-5-5(e).
2. **Firearms.** Firearms seized in a criminal investigation must be disposed of pursuant to Indiana Code 35-47-3-2.
 - a. As a general rule firearms can be released without a court order to the rightful and lawful owner of the firearm if **no** criminal investigation or case is pending or after final disposition of a criminal cause.
 - b. In the event the lawful owner cannot be identified or located, then the firearms should not be sold, transferred, or destroyed except as authorized by order of the court.
3. **Animals. Wild** animals seized as a part of a criminal investigation should be turned over to a Conservation Officer with the Department of Natural Resources and disposed of as provided by Indiana Code 14-22-39-6. **Domestic** farm animals or pets seized as part of a criminal investigation should be impounded and disposed of with the assistance of the Indiana Board of Animal Health and the County Veterinarian as provided by Indiana Code 35-46-3-6.
4. **Verification of Ownership.** As a policy, no item of evidence should be released to a person claiming lawful ownership unless a verified written receipt attesting to ownership is obtained.
5. **Forfeiture.** If a LEA has seized property that may be subject to forfeiture as provided by Indiana Code 34-24-1-2, then Prosecutor's office should be immediately notified. No action may be taken by a LEA regarding property subject to forfeiture without approval of the Prosecutor.
6. **Abandoned Property.** The LEA should contact the county/municipal attorney for advice regarding proper disposal of abandoned property not subject to a criminal investigation.
7. **Prosecutor Consent. Do not release or return any property from your custody involving a criminal matter to a person claiming ownership without first obtaining the consent of the Prosecuting Attorney (Indiana Code 35-43-4-4 (h)(3)).**
8. Your evidence custodian should become familiar with the above referenced statutes and contact this office if they have questions regarding evidence disposal.

Sincerely,

Prosecuting Attorney