CASELAW

UPDATE

2014 IPAC
SUMMER CONFERENCE

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SEARCH & SEIZURE

TRAFFIC STOPS

State v. Keck, 4 N.E.3d 1180 (Ind. 2014)
Decided: March 25, 2014
Opinion Certified: May 7, 2014
Driving Left of Center – Pot Holes

On February 12, 2012, the defendant, Darrell Keck, was driving westbound on Highway 36 in Putnam County. A deputy with the Putnam County Sheriff's Department was following the defendant. The deputy observed that the defendant was driving slowly and almost came to a complete stop before turning onto County Road 100 East from Highway 36.

County Road 100 East in Putnam County is a typical rural county road in Indiana. The surface is "chip and seal" in parts and gravel in other parts. The road is probably 12 to 16 feet wide and has no centerline. In the late winter and spring, County Road 100 East is full of potholes.

The defendant drove in the center portion of County Road 100 East for one-quarter to three-quarters of a mile. There was no traffic approaching from the other direction. The defendant was not driving erratically, but was driving slower than the posted speed limit. The deputy sheriff conducted a traffic stop on the defendant for driving left of center. Things did not go well for the intoxicated defendant after the traffic stop and the defendant ended up being charged with Operating While Intoxicated and Operating With a .08 BAC.

Prior to trial, the defense filed a motion to suppress evidence, requesting that the trial court suppress all evidence gathered by the police after the traffic stop. The defense argued that there was no reasonable suspicion justifying the traffic stop.

The trial court GRANTED the defendant's motion to suppress evidence. The trial court judge took judicial notice of the poor conditions of the county roads in Putnam County. In a written ruling, the trial court stated:

> "Because of the poor road conditions, the court finds it wholly unreasonable to expect motorists in Putnam County to take a perfectly straight course, on the far right side of a roadway riddled with potholes in the absence of oncoming traffic, as in the case at Bar. Evasive action, including possible driving left-of-center has become a necessity with the current conditions of our County Roads."

The State appealed. On appeal, the defendant contended that he did not commit a traffic violation because he drove left of center on a county road, simply to avoid potholes. The State argued that this was a simple matter in that the deputy initiated a traffic stop on the defendant because the defendant drove left of center, in violation of IC 9-21-8-2.

IC 9-21-8-2 states:

> "(a) Upon all roadways of sufficient width, a vehicle shall be driven on the right half of the roadway except as follows:
>
> (1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing overtaking and passing.
>
> (2) When the right half of the roadway is closed to traffic under construction or repair.
>
> (3) Upon a roadway divided into three (3) marked lanes for traffic under the rules applicable to a roadway divided into three (3) marked lanes.
>
> (4) Upon a roadway designated and signposted for one-way traffic.
>
> (b) Upon all roadways, a vehicle proceeding at less than the normal speed of traffic at the time and place under conditions then existing shall be driven:
>
> (1) In the right-hand lane then available for traffic; or
>
> (2) As close as practicable to the right-hand curb or edge of the roadway;
>
> except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway."

The Indiana Court of Appeals affirmed the decision of the trial court suppressing the evidence gathered by the police after the traffic stop. See, *State v. Keck*, 986 N.E.2d 847 (Ind. App. 2013).

The Indiana Court of Appeals held that the trial court heard evidence that could support the conclusion that the defendant's compliance with IC 9-21-8-2 was not possible under the circumstances. The Indiana Court of Appeals summarized its ruling by stating:

> "As the trial court heard sufficient evidence to support the conclusion Keck was in compliance with IC 9-21-8-2(b) and could not have complied with subsection (a), we cannot say the trial court erred to the extent it found the stop improper. We therefore affirm." 986 N.E.2d at 852.

Thereafter, the Indiana Supreme Court granted transfer in this case and also affirmed the ruling of the trial court.

In a unanimous opinion authored by Justice Massa, the Indiana Supreme Court explained the limited role of a reviewing court when, in general, a trial court weighed evidence presented at a hearing. The Indiana Supreme Court stated:

> "[W]hen it comes to suppression issues, appellate courts are not in the business of reweighing evidence. And we reiterate that principle today; our trial judges are able to see and hear the witnesses and other evidence first-hand. But the appellate bench, in the far corner of the upper deck, doesn't provide such a clear view. Remote from the hearing, in time and frequency in distance, we review a cold paper record. Thus, unless the record leads us to conclude the trial judge made a

> clear error in his findings of fact, we will apply the law de novo to the facts as the trial court found them." 4 N.E.3d at 1185, 1186.

Using this model of judicial restraint, the Indiana Supreme Court held that the trial judge had found that the defendant was either authorized to drive in the manner that he did, pursuant to IC 9-21-8-2(b) or was excused from IC 9-21-8-2(a) due to the road conditions. Based upon these trial court findings, the Indiana Supreme Court ruled that the trial court did not err in its decision to suppress the evidence gathered by the police after the traffic stop.

Analysis

With all due respect to the nine (9) judges who reviewed this case, I believe that all nine (9) judges missed the issue.

If the issue was whether the defendant, Darrell Keck, in fact violated IC 9-21-8-2, then the Judges would be correct. There was evidence supporting a ruling that the defendant drove left of center but did not violate IC 9-21-8-2. The appellate courts examining a sufficiency issue should not, from the upper deck, reweigh the evidence.

However, the question before all nine (9) Judges was NOT whether the defendant had, in fact, violated IC 9-21-8-2. The question was whether the driving of the defendant (driving left of center) provided the law enforcement officer with reasonable suspicion to initiate a traffic stop. These are two entirely different questions, with different analysis, requiring different results.

In the case at bar, the defendant, Darrell Keck, was driving in the middle of County Road 100 East. He may or may not have been avoiding potholes. He was more likely driving in that manner because he was drunk. In any event, the deputy certainly had reasonable suspicion justifying a traffic stop, regardless of whether it was ultimately determined that the defendant did or did not violate IC 9-21-8-2.

It seems likely that this case will be used by the defense bar to argue that a traffic stop may be improper, even if the law enforcement officer observes a traffic violation.

Robinson v. State, 5 N.E.3d 362 (Ind. 2014)

Decided: March 25, 2014
Opinion certified: May 8, 2014
Driving on or across the fog line

On October 15, 2011, at approximately 1:00 a.m., a deputy with the Elkhart County Sheriff's Department began following a PT Cruiser on County Road 4. The PT Cruiser was being driven by the defendant, Joanna Robinson. The deputy made a video recording from his squad car of the defendant's driving and the traffic stop.

The deputy observed the defendant twice drive her vehicle across the fog line on the right side of the roadway and initiated a traffic stop for "unsafe lane movement." Once the defendant had been stopped, the deputy observed that the defendant had bloodshot eyes, slurred speech, and the odor of an alcoholic beverage on her breath. Although the defendant claimed that she

only drank one beer, she failed three field sobriety tests. The defendant also, without any prompting, admitted to the deputy that she had marijuana in her bra and shook the marijuana from her bra out onto the roadway. The defendant took a breath test, which indicated a blood alcohol content of .09.

The State charged the defendant, Joanna Robinson, with Operating While Intoxicated (a Class A misdemeanor), Possession of Marijuana (a Class A misdemeanor), Driving While Suspended (a Class A misdemeanor) and Operating With a .08 BAC (a Class C misdemeanor). The defense filed a motion to suppress evidence, seeking to suppress all evidence gathered by police after the traffic stop. In the motion to suppress evidence, the defendant alleged that the deputy lacked reasonable suspicion to initiate a traffic stop because the squad car video showed that the defendant stayed in her lane and only twice touched the fog line.

On July 6, 2012, a combined bench trial and hearing on the defendant's motion to suppress evidence was held. The trial court issued a written order denying the defendant's motion to suppress evidence. The trial court noted in its written order that it had viewed the squad car video several times and concluded that the defendant did twice drive onto the white fog line on the right side of the roadway, but the her vehicle never actually left the roadway.

The trial court convicted the defendant of Operating While Intoxicated (a Class A misdemeanor) and Possession of Marijuana (a Class A misdemeanor). The defendant appealed.

On April 23, 2013, the Indiana Court of Appeals issued an opinion in this case, REVERSING the defendant's convictions and holding that the traffic stop was improper. *Robinson v. State*, 985 N.E.2d 1141 (Ind. App. 2013). The Court of Appeals explained the manner in which swerving within a lane or driving onto a fog line contributes to the determination of whether a traffic stop is proper. The Court of Appeals stated:

> "Thus, swerving within a lane or onto the fog line may or may not give rise to reasonable suspicion. Factors to be considered may include whether there is repeated swerving, whether there is swerving over an extended distance or period of time, whether the driver narrowly avoids hitting an object or causing an accident, whether road or weather conditions might explain the driver's conduct, and whether the driver overcorrects when returning to the proper lane of travel." 985 N.E.2d at 1147.

The Indiana Court of Appeals then applied this framework to the facts and circumstances in the case at bar and stated, in relevant part:

> "In this case, Robinson was driving late at night on a road with some curves. On two occasions, she briefly touched the fog line and then immediately returned to her lane. There was no indication that she swerved sharply or overcorrected….Given the fact that it was dark, the road had some curves, and that Robinson made only brief contact with the fog line, we conclude that the State failed to establish that the traffic stop was supported by reasonable suspicion that Robinson was impaired." 985 N.E.2d at 1148.

The State filed a Petition for Transfer, requesting that the Indiana Supreme Court consider the case. On July 11, 2013, the Indiana Supreme Court granted transfer, thereby vacating the decision of the Indiana Court of Appeals, pursuant to Indiana Appellate Rule 58(A).

The Indiana Supreme Court issued its opinion in this case on March 25, 2014, as a companion case to *State v. Keck*. The opinion was authored by Justice Massa, with Justice Rucker dissenting. The Indiana Supreme Court reversed the decision of the Indiana Court of Appeals and affirmed the trial court's denial of the defendant's motion to suppress evidence.

One of the interesting aspects of the *Robinson* case was the manner in which the three (3) courts viewed the testimony of the police officer who made the initial traffic stop in comparison to the dashboard video of the defendant's driving behavior. The officer who made the traffic stop testified that he observed the defendant "drive off the right side, which is the south side of the road, twice." The trial judge watched the dashboard video and indicated that he did not see, on that video, the defendant's vehicle actually leave the roadway, but did see that the defendant twice veered onto the white fog line.

The trial court, in denying the defendant's motion to suppress evidence, noted that it was "quite possible that the officer's actual visual observation of the defendant's vehicle was superior to the video camera in his car." The trial court also noted that "the act of weaving onto the fog line, while not itself an illegal act, did give a trained police officer justification to stop and inquire further as to the driver's condition."

The Indiana Court of Appeals was not impressed by the trial court's analysis of the evidence presented during the suppression hearing. The Court of Appeals appeared to focus on the dashboard video of the defendant's driving. The Court of Appeals noted that:

> "The trial court, which viewed the video several times, acknowledged that Robinson's driving was not inconsistent with a driver who was momentarily distracted." 985 N.E.2d at 1148.

The Indiana Supreme Court viewed the trial court's factual findings differently. The Supreme Court stated that the trial court had clearly found that, to the extent that the testimony of the officer conflicted with the video, the testimony of the officer was more reliable. The officer who made the traffic stop testified that, "both passenger side tires were over the fog line" and "completely off the roadway" "twice." The Indiana Supreme Court stated that it must accept such factual findings by the trial court and use such factual findings to determine if the traffic stop was constitutionally proper.

With respect to the propriety of the traffic stop, the Indiana Supreme Court noted that the 4th Amendment does not require police to grant drivers "one free swerve" before a traffic stop can lawfully be made. See, *Virginia v. Harris*, 558 U.S. 978, 130 S.Ct. 10, 175 L.Ed.2d 322 (2009). Moreover, the Indiana Supreme Court stated that the defendant swerved twice on a relatively straight, flat road and held:

> "Although such movement could have been attributable to driver distraction or some other innocuous cause, Terry does not require absolute certainty of illegal activity, but reasonable suspicion." 5 N.E.3d at 368.

The Indiana Supreme Court held that the traffic stop was proper under the 4th Amendment to the Constitution of the United States and under Article I, Section 11 of the Indiana Constitution.

In this case, the majority opinion of the Indiana Supreme Court contained some very interesting observations regarding drunk driving. The majority opinion stated:

> "And few Hoosiers would dispute the heartbreaking effects of drunk driving in our state. Since 2008, Indiana has seen a 10% annual increase in the number of victims of alcohol-impaired driving accidents. Samuel Nunn, Traffic Safety Facts: Alcohol, 2012, 13-C08 Ind. U. Center Crim. Just. Res. 1, 1 (June 2013), available at http://www.in.gov/cji/files/T-Alcohol.pdf. Last year, 158 Hoosiers lost their lives in crashes involving alcohol-impaired drivers. Id. Law enforcement has a strong interest in preventing these accidents, and "police should have every legitimate tool at their disposal for getting drunk drivers' off the road." Harris, 558 U.S. at 978 (Roberts, C.J., dissenting from denial of certiorari)." 5 N.E.3d 368.

Additional Note

For another good crossing the fog line traffic stop case, please see *Atkinson v. State*, 992 N.E.2d 899 (Ind. App. 2013).

State v. Cunningham, 4 N.E.3d 800 (Ind. App. 2014)

Decided: February 27, 2014
Petition for Transfer filed by the State: March 27, 2014
No decision on Petition for Transfer as of June 10, 2014
Oral Argument Scheduled: September 25, 2014, at 9:00 a.m.
Tail Light – Pat Down

On May 17, 2013, Huntingburg Police Department Officer Andrew Hammock pulled over a vehicle driven by the defendant, Michael Cunningham, because the red lens cover on one of the tail lights of the vehicle was missing and that tail light was emitting a white light instead of a red light.

When Officer Hammock advised the defendant of the reason for the traffic stop, the defendant expressed surprise and asked if he could get out of the vehicle and see for himself. Officer Hammock told the defendant that he could get out of his vehicle to check, but that if he did so, the officer would pat him down for officer safety. The defendant answered, "That was fine."

The defendant got out of this car and Officer Hammock conducted a pat-down. During the pat-down, Officer Hammock felt a pill bottle on the defendant and asked the defendant what was in the pill bottle. The cooperative defendant told Officer Hammock that the pill bottle contained marijuana and then took the pill bottle out of his pocket and gave it to Officer Hammock.

Officer Hammock then asked the defendant if there was anything else that the officer needed to know about. The defendant admitted that he had a marijuana pipe in this car and went and got the pipe out of the car for Officer Hammock.

NOTE: Although not set forth in the opinion of the Indiana Court of Appeals, it seems likely that the defendant also placed the marijuana and pipe into an evidence bag, handcuffed himself and, while being booked, took a "selfie" and prepared his own fingerprint card.

The State charged the defendant, Michael Cunningham, with Possession of Marijuana (as a Class D felony, due to a prior conviction) and Possession of Paraphernalia (as a Class D felony, due to a prior conviction).

Prior to trial, the uncooperative defense attorney filed a motion to suppress evidence, challenging the initial traffic stop and the pat-down of the defendant during the traffic stop. After a hearing on the motion to suppress evidence, the trial court granted that motion, holding that the initial traffic stop was improper. Specifically, the trial court relied upon IC 9-19-6-4(a)(2), which requires that vehicles be equipped with at least one (1) tail light which emits a red light plainly visible from a distance of 500 feet.

The State appealed. In a 2-1 decision, the Indiana Court of Appeals upheld the order of the trial court suppressing the marijuana and the pipe. However, the majority of the Indiana Court of Appeals did so for a reason other than the reason set forth by the trial court.

The majority of the Indiana Court of Appeals stated that it appeared that the trial court ruled that, pursuant to IC 9-19-6-4(a)(2), a vehicle needs to have only one (1) working tail light. The Court of Appeals held that this was not correct, as subsection (c) of that statute requires all vehicles, manufactured after 1956, to have two (2) properly working tail lights. See, *Freeman v. State*, 904 N.E.2d 340 (Ind. App. 2009).

The majority of the Indiana Court of Appeals also held that the traffic stop in question was not improper, as was the traffic stop in *Kroft v. State*, 992 N.E.2d 818 (Ind. App. 2013). In *Kroft*, the vehicle had a "dime-sized" hole in one of the tail light lenses. However, in this case, the entire red lens was missing from one of the tail lights.

Based upon this analysis, the majority of the Indiana Court of Appeals held that the trial court was incorrect and that the traffic stop by Officer Hammock was constitutionally proper.

The majority of the Indiana Court of Appeals then examined the propriety of the pat-down of the defendant by Officer Hammock. The majority began its analysis of this issue by stating that a pat-down during a traffic stop is not automatically justified. See, *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998); *Mitchell v. State*, 745 N.E.2d 775 (Ind. 2001). Even if a person gets out of a car during a traffic stop, without the officer's permission, a

pat-down is not justified, absent furtive or threatening movements. *Jett v. State*, 716 N.E.2d 69 (Ind. App. 1999). The majority of the Indiana Court of Appeals concluded that there was insufficient evidence justifying a pat-down of the defendant by Officer Hammock. The majority of the Indiana Court of Appeals stated:

> "If Officer Hammock believed that it was more dangerous for Cunningham to be outside of his vehicle than inside of it, he could have taken the less-intrusive step of ordering him to stay inside." 4 N.E.3d at 806.

In its analysis, the majority of the Indiana Court of Appeals then proceeded to an examination of the purported consent to the pat-down by the defendant. The Court of Appeals recognized that consent is a well-established exception to the requirements of the 4th Amendment. *Thayer v. State*, 904 N.E.2d 706 (Ind. App. 2009). However, mere acquiescence to a claim of lawful authority to search by the police is not a valid consent. See, *State v. Jorgensen*, 526 N.E.2d 1004 (Ind. App. 1988).

In this case, the majority of the Indiana Court of Appeals ruled that the consent given by the defendant to the pat-down was constitutionally invalid. The majority stated:

> "We conclude that Officer Hammock clearly did not ask Cunningham for permission to conduct a pat-down search. Instead, Officer Hammock's testimony demonstrates that he gave an ultimatum to Cunningham: if he decided to exit the vehicle to inspect the tail lamp, "I <u>would</u> pat him down for any weapons just for officer safety issue." Tr. p. 6 (emphasis added). Phrased that way, Cunningham had no choice but to submit to the pat-down when he exited the vehicle, despite the absence of reasonable suspicion that he was armed and dangerous. Cunningham's response to Officer Hammock, "That was fine," only represents Cunningham's acquiescence or submission of Officer Hammock's claimed right to conduct a pat-down, even when the officer had no such right." 4 N.E.3d at 806-807.

<u>The Dissent</u>

Judge Brown dissented, arguing that the consent by the defendant to the pat-down was valid. Judge Brown was of the opinion that the defendant was given a clear choice. That is, if the defendant wanted to get out of the vehicle to check his tail light, he could do so but would be subject to a pat-down.

It was the defendant's choice. The defendant chose poorly.

<u>Analysis</u>

I believe that it is likely that the Indiana Supreme Court will grant the State's Petition for Transfer and weigh-in on this case, from the far corner of the upper deck.

Veerkamp v. State, 7 N.E.3d 390 (Ind. App. 2014)

Decided: April 29, 2014
Defendant filed Petition for Rehearing: May 29, 2014
No ruling on Petition for Rehearing as of June 10, 2014
Smoke coming from exhaust

On March 2, 2013, at approximately 10:30 p.m., the defendant, Tyler Veerkamp, was driving a truck on Main Street in Greensburg, Indiana. Greensburg Police Department Officer Justin Wells was about one block behind the defendant.

As the defendant made the turn onto Main Street and accelerated, his truck belched out so much smoke that Officer Wells could not see the passenger side tail light on the defendant's truck. After the acceleration, the smoke cleared and Officer Wells could see again. At this point, Officer Wells stopped the defendant because he believed the excessive smoke coming from the defendant's vehicle constituted a traffic violation.

NOTE: The excessive smoke was not only a traffic violation, it was environmentally unsound and posed a danger to the iconic tree growing out of the Courthouse. The smoke also could have damaged the lungs of Decatur County resident Rocky Raccoon.

Once Officer Wells stopped the defendant, it was clear that the defendant was drunk. The State charged the defendant with Operating While Intoxicated, a Class D felony.

Prior to trial, the defense filed a motion to suppress evidence, requesting that all evidence gathered by the police after the traffic stop be suppressed. The defense claimed that the traffic stop was unconstitutionally improper.

A hearing was held on the defendant's motion to suppress evidence. At the conclusion of that hearing, the trial court denied the defendant's motion to suppress evidence. The trial court ruled that the defendant's vehicle had, in fact, emitted excessive smoke, in violation of IC 9-18-8-5 and, therefore, the traffic stop by Officer Wells was proper.

The defendant pursued an interlocutory appeal.

On appeal, the Indiana Court of Appeals examined IC 9-19-8-5, which was the statute allegedly violated by the defendant. That statute states:

> "The engine and power mechanism of a motor vehicle must be equipped and adjusted so as to prevent the escape of excessive fumes or smoke."

The defendant contended that the trial court erred in its determination that the defendant's vehicle spewed-out excessive smoke. The Court of Appeals noted that the term "excessive" was not defined in Title 9. The Court of Appeals turned to the Merriam-Webster Online Dictionary that defined excessive as "exceeding what is usual, proper, necessary or normal."

NOTE: For those Prosecutors not in rural jurisdictions, the Urban Dictionary defines excessive as "too much, over the top, extra."

Based upon the Merriam-Webster definition of excessive, the Indiana Court of Appeals held that the trial court did not err in determining that the smoke that was yacked-out by the defendant's truck was excessive. The Court of Appeals noted that Officer Wells testified that he could not see through the smoke and that, at one point, the smoke covered the passenger side tail light of the defendant's vehicle.

Because Officer Wells had reasonable suspicion that the defendant, Tyler Veerkamp, had violated IC 9-19-8-5, the Indiana Court of Appeals ruled that the traffic stop by Officer Wells was constitutionally proper and affirmed the trial court's order denying the defendant's motion to suppress evidence.

Navarette v. California, _____ U.S. _____ (2014)

Decided: April 22, 2014

Traffic Stop – 911 Call

On April 23, 2008, at 3:42 p.m., a person called the 911 dispatch in Humboldt County, California. The caller indicated that she had been run off the road on Highway 1 by a silver Ford F-150 pick-up truck, with license plate number 8D94925 and that the pick-up truck was continuing to travel south on Highway 1.

NOTE: The 911 caller had identified herself by name during the 911 call. However, the prosecutor did not introduce the recording into evidence during the suppression hearing. Therefore, the call was treated, by the United States Supreme Court, as an anonymous 911 call.

The 911 dispatcher in Humboldt County relayed the information to neighboring Mendocino County. The information was broadcast to California Highway Patrol Officers at 3:47 p.m.

At 4:00 p.m., a California Highway Patrol Officer on Highway 1 spotted a pick-up truck that matched the description of the truck in the 911 broadcast. A traffic stop was initiated at 4:05 p.m. The pick-up truck that was pulled-over was being driven by Lorenzo Prado Navarette. The passenger in the pick-up truck was Jose Prada Navarette.

As the police approached the pick-up truck, they could smell marijuana. It turned out that there was 30 pounds of marijuana in the pick-up truck. The marijuana was seized by the police.

The State of California charged the defendants, Lorenzo Prado Navarette and Jose Prada Navarette, with transporting marijuana. Prior to trial, the defendants filed a motion to suppress evidence, claiming that the police lacked reasonable suspicion of criminal activity to conduct a traffic stop. The trial court denied the defendants' motion to suppress evidence.

The defendants entered pleas of guilty to the charge while maintaining, under California law, their right to appeal the suppression issue. The defendants were sentenced to 90 days to serve and probation for 3 years.

On appeal, the California Court of Appeals affirmed the judgment of the trial court, holding that the police had reasonable suspicion to conduct a traffic stop. The California Supreme Court refused further appeal. Thereafter, the United States Supreme Court granted certiorari.

In a 5-4 decision, the United States Supreme Court upheld the California trial court and ruled that, based upon the anonymous 911 call, the police had sufficient reasonable suspicion to make the traffic stop.

The majority of the United States Supreme Court recognized and discussed prior cases relating to an investigatory stop based upon an anonymous tip.

In *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), the United States Supreme Court upheld an investigatory stop of an individual that an anonymous tipster indicated would be transporting cocaine. The United States Supreme Court ruled that the anonymous tip was reliable because the tipster accurately predicted the future behavior of the target of the investigation.

In *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), the United States Supreme Court ruled that the anonymous tip was not reliable enough to provide reasonable suspicion to justify an investigatory stop. In that case, the anonymous tipster stated that a young black male is a plaid shirt standing at a bus stop would be carrying a gun.

In *Navarette*, the majority of the United States Supreme Court held that the anonymous 911 call was sufficiently reliable to authorize a traffic stop, based upon the following factors:

1. The 911 caller indicated that she had been run off the road by a specific vehicle, which indicated that she was an eyewitness to dangerous driving. An individual's explicit and detailed description of an alleged wrongdoing, along with a statement that the event was observed first-hand, entitles the tip to greater weight. See, *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

2. The use of the 911 system provided police with the means of identifying the caller and prosecuting that caller if false information was provided to the police. The majority of the United States Supreme Court stated that this does not mean that all 911 calls are *per se* reliable. However, given recent technological and regulatory developments, a reasonable officer could conclude that a false tipster would think twice about using the 911 system.

3. The information provided by the tipster, that she had been run off the road by a specific vehicle creates reasonable suspicion of ongoing drunk driving activity, as opposed to an isolated incident of recklessness or an isolated traffic violation. The majority of the United States Supreme Court held that the driving behavior reported by the 911 caller was strongly indicative of drunk driving.

The defendants argued on appeal that the driving behavior reported by the 911 called might not be indicative of drunk driving and could be explained by, for example, a driver responding to an unruly child or other distraction. The majority of the United States Supreme Court addressed this argument by noting that reasonable suspicion does not need to rule out the possibility of innocent conduct. See, *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002).

The defendants also argued on appeal that the California Highway Patrol Officers, when finding the pick-up truck in question, should have followed the vehicle for a time to see if the officers could personally observe driving behavior that was indicative of drunk driving. The majority of the United States Supreme Court rejected this argument, as well, noting that such a requirement would be particularly inappropriate "because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences."

The majority of the United States Supreme Court acknowledged that this was a "close case." However, examining the factors set forth above, the United States Supreme Court upheld the traffic stop as valid.

NOTE: For Indiana cases upholding tips from concerned citizens responding to drunk driving, see, *State v. Renzulli*, 958 N.E.2d 1143 (Ind. 2011) and *Russell v. State*, 993 N.E.2d 1176 (Ind. App. 2013).

Santana v. State, _____ N.E.3d _____ (Ind. App. 2014)

Decided: May 30, 2014

Turn Signal – 200 Feet

On December 4, 2011, Goshen Police Department Officer Todd Burks observed a pick-up truck being driven by the defendant, Jose Santana. Officer Burks ran the license plate of the pick-up truck through his in-car computer, but mistakenly put in the wrong plate number. The report came back that the plate was "Not on File."

Officer Burks then observed the defendant turn 100 to 150 feet after the defendant activated this turn signal. Observing this traffic violation (IC 9-21-8-25), Officer Burks initiated a traffic stop.

After making the traffic stop, Officer Burks discovered that the defendant was a habitual traffic violator and that his driver's license had been suspended for life. Officer Burks also discovered his mistake in running the license plate and determined that the license plate was, in fact, valid.

The State charged the defendant, Jose Santana, with the offense of Operating a Vehicle After License Forfeited for Life (a Class C felony). Prior to trial, the defense filed a motion to suppress evidence, alleging that the traffic stop by Officer Burks was constitutionally improper. The trial court denied the defendant's motion to suppress evidence.

The case proceeded to bench trial and the trial court found the defendant guilty as charged. The trial court sentenced the defendant, Jose Santana, to an executed term of imprisonment of four (4) years, to be served at the Indiana Department of Correction. The defendant appealed.

IC 9-21-8-5 states:

> "A signal of intention to turn right or left shall be given continuously during not less than two hundred (200) feet traveled by a vehicle before turning or changing lanes. A vehicle traveling in a speed zone of a least fifty (50) miles per hour shall give a signal continuously for not less than three hundred (300) feet traveled by the vehicle before turning or changing lanes."

On appeal, the defendant argued that, although Officer Burks testified that the defendant did not signal for at least 200 feet before turning, the evidence presented at the suppression hearing showed that there was a "real possibility" that the defendant may have signaled the turn 215 feet prior to turning. The Indiana Court of Appeals rejected this argument, holding that it was merely a request to reweigh the evidence.

Traffic Stop Update – Tinted Windows

Legislative Alert

During 2013, the Indiana Appellate Courts issued two (2) cases upholding the validity of traffic stops for tinted windows, pursuant to IC 9-19-19-4. See, *Sanders v. State*, 989 N.E.2d 332 (Ind. 2013) and *Johnson v. State*, 992 N.E.2d 955 (Ind. App. 2013). In those cases, the Indiana Appellate Courts interpreted IC 9-19-19-4 to mean that if a police officer could not see in the tinted windows of another vehicle so as to be able to clearly identify or recognize the individuals inside that vehicle, the officer had reasonable suspicion to initiate a traffic stop.

It *appears* that members of the Indiana General Assembly did not approve of this standard, which allowed the professional judgment of a police officer to be exercised. The Indiana General Assembly has amended IC 9-19-19-4 to remove the phrase in the statute prohibiting window tinting on a vehicle so that the occupants of the vehicle could not be easily recognized or identified through the tinted window.

Effective January 1, 2015, IC 9-19-19-4 states:

> "(a) This section does not apply to a manufacturer's tinting or glazing or motor vehicle windows or windshields that is otherwise in compliance with or permitted by FMVSS205 as promulgated in 49 CFR 571.205. Proof from the manufacturer, supplier, or installer that the tinting or glazing is in compliance with or permitted by FMVSS205 must be carried in the vehicle.
>
> (b) This section does not apply to the driver of a vehicle:
>
> > (1) that is owned by an individual required for medical reasons to be shielded from the direct rays of the sun; or
> >
> > (2) in which an individual required for medical reasons to be shielded from the direct rays of the sun is a habitual passenger.

The medical reasons must be attested to by a physician or optometrist licensed to practice in Indiana, and the physician's or optometrist's certification of that condition must be carried in the vehicle. The physician's or optometrist's certification must be renewed annually.

(c) A person may not drive a motor vehicle that has a:

(1) windshield;
(2) side wing;
(3) side window that is a part of a front door; or
(4) rear back window;

that is covered by or treated with sunscreening material or is tinted with material that has a solar reflectance of visible light or more than twenty-five percent (25%) as measured on the nonfilm side and light transmittance of less than thirty percent (30%) in the visible light range.

(d) A person may not tint or otherwise cover or treat with sunscreening the parts of a vehicle described in subsection (c) so that operation of the vehicle after the tinting or sunscreening is performed is a violation of subsection (c). However, it is not a violation of this chapter if the work is performed for a person who submits a physician's or optometrist's statement as described in subsection (b) to the person who is to perform the work.

(e) A vehicle may be stopped to determine compliance with this section. However, a vehicle, the contents of a vehicle, the driver of a vehicle, or a passenger in a vehicle may not be inspected, searched, or detained solely because of a violation of this section."

TERRY STOPS

Aslinger v. State, 2 N.E.3d 84 (Ind. App. 2014)

Decided: January 23, 2014
Memorandum Rehearing Opinion Issued on May 7, 2014
Length of a Terry Stop

On June 19, 2012, at around midnight, Huntington Police Department Officer Alan Foster was dispatched to an area on a report that two juveniles were breaking into vehicles. Officer Foster went to that area and found the defendant, Johnathon Aslinger, and another Huntington County heathen skulking around the area.

As Officer Foster approached, the defendant and his buddy began to walk away. Officer Foster told the two to stop, but they continued to walk away. When Officer Foster told them that he was a canine officer and that his dog was likely to take a big juicy bite out of various body parts, the defendant and his buddy became much more cooperative.

As Officer Foster was talking to the defendant, the officer noticed that the defendant had a "rolled cigarette/joint" tucked behind his ear. When questioned about his contraband earpiece, the defendant told Officer Foster that it was a rolled joint of Spice. Officer Foster took the joint and examined it. Based upon its smell and contents, Officer Foster believed that this was a marijuana joint. A quick field test confirmed that.

Officer Foster also noticed that the defendant had a knife in his pocket. Officer Foster told the defendant to remove everything from his pockets. It appears, from the opinion of the Indiana Court of Appeals, that Officer Foster went into the defendant's pockets and retrieved a glass pipe, a yellow pen barrel, and an electronic scale. During a further search of the defendant, Officer Foster discovered and seized a marijuana pipe and a small quantity of methamphetamine.

On June 20, 2012, the State charged the defendant, Johnathon Aslinger, with Possession of Methamphetamine (a Class D felony), Possession of Marijuana (a Class D felony), and Possession of Paraphernalia (a Class A misdemeanor). The State also filed the habitual substance offender sentence enhancement, due to the defendant's prior convictions for Operating While Intoxicated and Possession of Marijuana.

A jury trial on these charges was held on February 21, 2013. The jury found the defendant guilty of Possession of Methamphetamine (a Class D felony) and Possession of Paraphernalia (a Class A misdemeanor), but not guilty of the charge of Possession of Marijuana. In a bifurcated proceeding, the jury also determined that the defendant was a habitual substance offender, as charged.

With respect to these charges, the trial court sentenced the defendant to 1.5 years to serve on the conviction for Possession of Methamphetamine, enhanced by 5.5 years to serve due to the habitual substance offender sentence enhancement. The defendant appealed.

On appeal, the defendant alleged that Officer Foster went way beyond what was allowed during a Terry stop.

The Indiana Court of Appeals noted that a police officer may briefly detain a person for investigative purposes if the officer has reasonable suspicion that criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Armfield v. State*, 918 N.E.2d 316 (Ind. 2009). During a Terry stop, an officer is allowed to ask a few questions and, if there is reasonable suspicion to believe that the suspect is armed, pat-down the suspect for weapons. *Edmond v. State*, 951 N.E.2d 585 (Ind. App. 2011).

A Terry stop is temporary and can last no longer than is necessary to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Finger v. State*, 799 N.E.2d 528 (Ind. 2003). Once the purpose of the Terry stop has been satisfied, a police officer is not justified in continuing the investigation. *Holly v. State*, 918 N.E.2d 323 (Ind. 2009).

The Indiana Court of Appeals held that Officer Foster properly initially stopped the defendant and his buddy, due to the report that two juvenile males were breaking into cars. However, it quickly became clear that the two idiots stopped by Officer Foster were not the right idiots. The Court of Appeals went on to hold that Officer Foster nonetheless continued the Terry stop investigation of the joint in the defendant's ear and a search of the defendant's pockets.

The State argued that, after Officer Foster initially stopped the defendant, the officer observed, in plain view, the marijuana joint behind the defendant's ear. Therefore, the defendant was subject to immediate arrest and a search of his person incident to that arrest. The Indiana Court of Appeals rejected this argument, stating that "a hand-rolled cigarette is not per se illegal." The Court of Appeals also held that Officer Foster had to take the joint out from behind

the defendant's ear and examine it and sniff it to conclude that it was a marijuana joint. Because it was not "immediately apparent" to Officer Foster that the joint behind the defendant's ear was contraband, the continuation of the Terry stop was improper and that the methamphetamine seized from the defendant should have been suppressed.

In its unpublished Rehearing Opinion, the Indiana Court of Appeals noted that it had not held that the marijuana pipe seized from the defendant was inadmissible. Therefore, the State could retry the defendant on a charge of Possession of Paraphernalia.

In a separate case, the defendant, Johnathon Aslinger, was convicted of Dealing in Methamphetamine (a Class A felony) and sentenced to an executed term of imprisonment of 37 years. With respect to that conviction, which was upheld on appeal, the defendant is currently a long-term guest at the Wabash Valley Level 3 Facility. He is scheduled for release from imprisonment on March 26, 2031.

ENTRY UPON CURTILAGE

Jadrich v. State, 999 N.E.2d 1022 (Ind. App. 2013)

Decided: December 23, 2013
No further appeal
Opinion certified: February 5, 2014
Entry Upon Curtilage

During the early morning hours of Sunday, August 7, 2011, Hendricks County Sheriff's Department Deputy Butterfield went to a residence located at 8055 North State Road 267 to serve a protective order. Deputy Butterfield went to the front door of the residence and knocked several times. No one answered the door.

Deputy Butterfield then proceeded along a paved sidewalk to the back door of the residence. In doing so, Deputy Butterfield went through a closed gate of a chain link fence. There was a sign on the gate that read, "no trespassing" and "please use front door only." There was another sign on the garage door near the backyard that also read, "no trespassing."

On the way to the back door, Deputy Butterfield noticed a circular pile of firewood in the backyard that "seemed a little strange." Deputy Butterfield knocked on the back door of the residence and, again, received no response.

As Deputy Butterfield was leaving the back door, he took two steps off the back porch and into the backyard and saw marijuana plants growing inside the stacked circle of firewood. At this point, Deputy Butterfield contacted his supervisor.

Other officers arrived at the residence. The other officers were able to get the defendant, Duane Jadrich, to come to the door. After some discussion about the marijuana plants growing in his backyard, the defendant consented to the search of his residence. During that search, police discovered and seized a marijuana pipe. The police also seized the growing marijuana plants in the defendant's backyard.

The State charged the defendant, Duane Jadrich, with Possession of Marijuana (a Class D felony) and Possession of Paraphernalia (a Class A misdemeanor).

Prior to trial, the defense filed a motion to suppress evidence. After a hearing was held, the trial court denied the defendant's motion to suppress evidence.

The case then proceeded to bench trial. At the conclusion of the bench trial, the trial court found the defendant guilty of Possession of Marijuana (as a lesser-included Class A misdemeanor) and Possession of Paraphernalia (a Class A misdemeanor). The trial court sentenced the defendant to a total of 365 days, with 363 days suspended. The defendant appealed.

On appeal, both parties agreed that Deputy Butterfield entered the curtilage of the defendant's residence in an area that visitors would reasonably view as not open to the general public. The issue addressed by the Indiana Court of Appeals was whether Deputy Butterfield's act of going to the back door was constitutionally proper. The Court of Appeals recognized that legitimate police business may take police officers to parts of one's premises not ordinarily used by visitors.

The Indiana Court of Appeals examined *Hardister v. State*, 849 N.E.2d 563 (Ind. 2006). In that case, police went to a residence, due to a report of drug activity taking place at that residence. When the police knocked on the front door, two individuals inside saw the police and ran towards the back of the residence. The police ran around outside to the back of the residence, looked through a window, and saw Hardister pouring white powder down the drain of a sink. The Indiana Supreme Court ruled that the officer's entry onto the curtilage was justified by their observations that criminal activity may be afoot.

The Indiana Court of Appeals also examined a number of cases from other jurisdictions. The Court of Appeals noted that the overwhelming authority of those cases required some justification before a police officer may venture into curtilage spaces not normally used by the public. Such justification included a reasonable belief that a person may be contacted by such entry or observations of criminal activity.

In the case at bar, the Indiana Court of Appeals ruled that Deputy Butterfield had no justification for going to the back door. There was no evidence of on-going criminal activity, nor any evidence that would have led Deputy Butterfield to believe that a knock on the back door would have been more successful than a knock on the front door.

The State argued on appeal that Deputy Butterfield's entry into the backyard was justified by the fact that Deputy Butterfield was present at the residence to serve a protective order. The Indiana Court of Appeals rejected this argument, stating:

> "The State has failed to convince us that Deputy Butterfield's purpose for being at Jadrich's home – to serve a civil protective order – justified his foray into the back yard. The State points to no authority suggesting that the service of protective orders is a purpose that excuses police entry into areas that are otherwise constitutionally protected and off-limits. Likewise, our research has uncovered no such authority. Moreover, while we acknowledge that the service

> of protective orders is an important official function, there is no indication in the record of any emergency or special urgency particular to the order at issue here." 999 N.E.2d at 1029-1030.

The Indiana Court of Appeals held that the marijuana plants and the marijuana pipe were improperly seized by the police and reversed the defendant's convictions.

J.K. v. State, 8 N.E.3d 222 (Ind. App. 2014)

Decided: April 29, 2014
No further appeal as of June 10, 2014
Extended Knock and Talk

In the early morning hours of December 22, 2011, the Pulaski County Sheriff's Department received a complaint regarding a disturbance near a residence on Decker Drive in Winamac, Indiana. The report indicated that a number of juveniles were pushing a shopping cart through the neighborhood, making noise, and causing dogs to bark.

NOTE: An attempt was made to have federal authorities investigate this matter. However, the feds turned it down, noting that the number of dogs barking did not meet their minimum guidelines.

Officers with the Winamac Police Department and Pulaski County Sheriff's Department arrived at the residence on Decker Drive. The officers observed several vehicles parked outside of the residence. One of those vehicles was a pick-up truck with a shopping cart in the bed of the truck. The officers suspected that the shopping cart had been stolen from a nearby Alco store.

One officer knocked on the front door and two officers went around each side of the residence to make sure that no one fled out of the back door. No one answered the knocking on the front door, although the officer at the front door could see people moving around inside and peeking through the blinds. Meanwhile, the officers in the backyard could see through a window and observed numerous beer cans and wine cooler bottles on the kitchen counter.

After about 10 or 15 minutes of not getting a response from inside the residence, the police called for a tow truck to tow the pick-up truck containing the contraband shopping cart. For the next 40 minutes, while waiting for the tow truck, the police remained in the front and back of the residence. The officers continued to knock on the front door and yell inside, ordering the occupants to answer the door and advising the occupants that the pick-up truck was going to be towed.

NOTE: During that 40 minute period, one of the police officers called the Chief Deputy Prosecutor of Pulaski County, who advised the police that the pick-up truck should not be towed.

The tow truck arrived at 2:04 a.m. Upon arrival of the tow truck, the owner of the pick-up truck, juvenile T.T., stepped outside of the residence. T.T. was drunk. A short time later, juvenile occupant J.K. came outside. J.K. appeared to have been consuming alcohol.

The police then went inside of the residence and found a number of alcoholic beverage containers. The police also found several other minors in the residence and most of them had been consuming alcohol.

On March 6, 2012, the State filed a Petition Alleging Delinquency against J.K., alleging that J.K. had committed the offenses of Illegal Consumption of Alcohol, Illegal Possession of Alcohol, and Aiding Illegal Consumption of Alcohol. Those offenses would be Class C misdemeanors if committed by an adult.

Counsel for J.K. filed a motion to suppress evidence. The trial court denied the motion to suppress evidence, holding that the entry into the residence by the police was justified as a "protective sweep."

The case proceeded to fact-finding hearing. At the conclusion of that hearing, the trial court found J.K. to be a delinquent child. The Respondent, J.K., appealed.

In a 2-1 decision, the Indiana Court of Appeals reversed the decisions of the trial court and ruled that the actions by the police were constitutionally improper.

With respect to the initial approach to the residence by the police, the majority of the Indiana Court of Appeals had no problem with the police going to the front door and knocking. However, the majority of the Indiana Court of Appeals held that it was improper for the police to immediately go around the house to the back of the house, as the police were no longer in a place where visitors would be expected to go. See, *Divello v. State*, 782 N.E.2d 433 (Ind. App. 2003).

Moreover, the majority held that there were no exigent circumstances that would permit the officers to enter onto the curtilage in the back of the house. There was no evidence of fleeing drunken teenagers or any indication that criminal activity was afoot (other than the drinking teenagers, which did not provide an exigent circumstance).

Based upon the improper entry by the police upon the curtilage in the back of the residence, the majority of the Indiana Court of Appeals held that the observations by the police of alcoholic beverage containers on the kitchen counter should have been suppressed.

The majority of the Indiana Court of Appeals turned next to an examination of the knock and talk procedure at the front door of the residence. The majority of the Indiana Court of Appeals acknowledged that there was little binding authority regarding how long police may stand at a front door and knock. However, the majority did find some precedent in the recent decision of the United States Supreme Court in *Florida v. Jardines*, _____ U.S. _____, 133 S.Ct. 1409, 185 L.Ed.2d495 (2012). In that case, the United States Supreme Court stated that the implied right of police to conduct a knock and talk is a limited invitation that would permit a visitor to approach a home by the front path, knock promptly, wait briefly to be received and then, absent an invitation to linger longer, leave.

The majority of the Indiana Court of Appeals also noted that if the police knock on a citizen's door, the citizen has no obligation to open the door or otherwise acknowledge the knock. *Kentucky v. King*, _____ U.S. _____, 131 S.Ct. 1899, 179 L.Ed.2d 865 (2011).

In the case at bar, the police knocked on the door of the residence and the teenagers inside did not answer. The police continued for another 45 minutes, knocking on the door and demanding that the teenagers answer the door. The majority of the Indiana Court of Appeals held that such actions were constitutionally impermissible. The majority stated:

> "When a Hoosier exercises his constitutional right to remain inside his home, law enforcement may not pitch a tent on the front porch and wait in hopes of obtaining evidence."

Finally, the Indiana Court of Appeals addressed the actual entry of the police into the residence. The State argued on appeal that there were two (2) exigent circumstances that justified police entry into the residence without a warrant:

1. The officers entered the residence to ensure the safety of unsupervised juveniles who may have been drinking inside the residence.

2. The officers entered the residence to prevent the imminent destruction of evidence.

The majority of the Indiana Court of Appeals rejected both of these offered exigent circumstances holding, essentially, that the police did not have sufficient facts to support either assertion. Moreover, the Court of Appeals held that underage drinking is not so inherently dangerous (as is, for example, manufacturing methamphetamine in a populated area) as to allow the police to enter a residence without a warrant.

For all of the reasons set forth above, the majority of the Indiana Court of Appeals ruled that the actions by the police were constitutionally improper and that the evidence gathered by the police should have been suppressed. The Court of Appeals reversed the judgment of delinquency entered by the trial court against J.K.

DOG SNIFF CASES

Blankenship v. State, 5 N.E.3d 779 (Ind. App. 2014)

Decided: March 12, 2014
No further appeal
Opinion certified: April 23, 2014
Dog sniff in hallway of motel

In 2011, employees of the Holiday Inn Express in Martinsville, Indiana began finding drug paraphernalia in some of the guest rooms. The management of the motel did not want the motel to turn into some kind of drug haven and requested that the Martinsville Police Department bring a canine to the motel for a little "stroll and sniff" in the hallways outside of some of the rooms.

On December 1, 2011, Martinsville Police Department Officer Blake Long went with his trained canine partner, Dasko, to the Holiday Inn Express. Officer Long randomly picked some common hallways in the motel. While Officer Long and Dasko were on the third floor of the motel, Dasko alerted outside of Room 328.

Officer Long knocked on the door of Room 328 and the defendant, Kimberly Blankenship, answered. Officer Long explained the situation and asked for permission to enter the room. The defendant refused.

Officer Long saw an empty gun holster in the room. In addition, Officer Long observed another woman, Courtney Malone, asleep on the bed. Officer Long instructed the defendant to wake Courtney Malone. The defendant could not get Courtney Long to wake up and an officer, fearful that there was a medical problem, entered the room and was eventually able to awaken Courtney Malone.

The police applied for and obtained a search warrant to search Room 328 at the motel and to search Kimberly Blankenship and Courtney Malone. During the execution of the search warrant, police discovered and seized from Room 328 a quantity of methamphetamine, marijuana, a digital scale, plastic cups containing residue, two hypodermic needles and a glass smoking device.

On December 2, 2011, the State charged the defendant, Kimberly Blankenship, with Possession of Methamphetamine (a Class D felony), Possession of a Syringe (a Class D felony), Maintaining a Common Nuisance (a Class D felony), Possession of Marijuana (a Class A misdemeanor) and Possession of Paraphernalia (a Class D felony).

Prior to trial, the defense filed a motion to suppress evidence, seeking to suppress all items seized by the police from Room 328. The defense argued that the dog sniff in the hallway violated the defendant's rights under Article I, Section 11 of the Indiana Constitution. After a hearing, the trial court denied the defendant's motion to suppress evidence.

The case proceeded to bench trial. However, the defendant forgot to show up for her trial and was tried *in absentia*. At the conclusion of the bench trial, the trial court found the defendant guilty of Possession of a Syringe (a Class D felony), Maintaining a Common Nuisance (a Class D felony), and Possession of Paraphernalia (a Class D felony).

The trial court sentenced the defendant to a total executed term of imprisonment of 4 years. The defendant appealed.

On appeal, the defendant contended that the sniff by Dasko in the hallway outside of Room 328 was impermissible under Article I, Section 11 of the Indiana Constitution. The defendant pointed to *Hoop v. State*, 909 N.E.2d 463 (Ind. App. 2009). In that case, the Indiana Court of Appeals held that, under the Indiana Constitution, police must have reasonable suspicion of illegal activity before the police may have a trained canine sniff at the front door of a person's private residence. The defendant argued that her motel room door was no different and that the police had no reasonable suspicion before Dasko stuck his big nose into her business.

In a 2-1 decision (with Judge Baker concurring in the result), the Indiana Court of Appeals did not reach the constitutional issue framed by the defendant. Instead, the majority held that the search of Room 328 was conducted pursuant to a search warrant and that the police acted in good faith when executing that search warrant. See, *Hopkins v. State*, 582 N.E.2d 345 (Ind. 1991); IC 35-37-4-5.

The majority of the Indiana Court of Appeals stated:

> "In sum, we need not reach Blankenship's argument that Article I, Section 11 prohibited the officers from walking canine units in the common area of the hotel, at the hotel management's request, absent reasonable suspicion. The officer's searched Blankenship's room while objectively and reasonably relying on a search warrant. There is no evidence that the officers had knowledge, or should be charged with knowledge, that the sniff-search in the hallway may have been unconstitutional. Accordingly, there is no "wrongful police conduct" to deter, and suppression of the evidence under the exclusionary rule would not be appropriate in light of the facts and circumstances in this case." 5 N.E.3d at 785.

Based upon the good faith exception to the exclusionary rule, the majority of the Indiana Court of Appeals affirmed the defendant's convictions.

Concurring Opinion

Judge Baker concurred in the result, but parted ways with the majority with respect to the analysis. Judge Baker focused on the dog sniff in the hallway and was of the opinion that the dog sniff, without reasonable suspicion, was permissible under Article I, Section 11 of the Indiana Constitution.

Analysis

I believe that the majority of the Indiana Court of Appeals missed the mark on this one. The police gathered evidence through a dog sniff, which evidence was then presented to establish probable cause to support the issuance of a search warrant for the search of Room 328. If the evidence that constitutes probable cause for the issuance of a search warrant was itself gathered in violation of the Constitution, the good faith exception to the exclusionary rule cannot save the search under the search warrant.

In any event, the defendant, Kimberly Blankenship, is currently at the Madison Correctional Facility, with an earliest possible release date of May 15, 2015.

Richard v. State, 7 N.E.3d 347 (Ind. App. 2014)

Decided: April 23, 2014
Defendant Filed Petition for Transfer: May 20, 2014
No Ruling on Petition for Transfer as of June 10, 2014
Dog Sniff – Probable Cause to Arrest

On January 24, 2012, Plymouth Police Department Officer John Weir was on routine patrol with his canine partner, Rex. Officer Weir observed a vehicle repeatedly cross the center line and initiated a traffic stop. The vehicle was being driven by Christopher Fields and the defendant, Charla Richard, was a passenger in the vehicle.

Officer Weir recognized Christopher Fields and was aware that a warrant had been issued for the arrest of Christopher Fields the day before. This ended the day for Christopher Fields, who was handcuffed and placed in the back of a squad car (again).

Officer Weir then had Rex sashay around the vehicle to see if Rex could catch a whiff of anything illegal. Rex alerted on the driver's side door of the vehicle.

A female police officer got the defendant, Charla Richard out of the vehicle and searched her. During this search, the officer noticed that the defendant seemed to be favoring one side. The officer asked the defendant to raise her arm on that side. When the defendant did so, a small tin containing methamphetamine fell to the ground.

The State charged the defendant, Charla Richard, with Possession of Methamphetamine (a Class D felony). Prior to trial, the defense filed a motion to suppress evidence, seeking to suppress the methamphetamine. The trial court denied the defendant's motion to suppress evidence.

The case proceeded to bench trial and the trial court found the defendant guilty of Possession of Methamphetamine (a Class D felony). The trial court sentenced the defendant to an executed term of imprisonment of 1 ½ years. The defendant appealed.

On appeal, the defendant whined that when Rex indicated on the driver's side door, such indication did not mean that there was any reason to believe that the defendant, as a mere passenger in the vehicle, was in possession of any controlled substances.

The Indiana Court of Appeals disagreed. The Court of Appeals noted that it was well-settled that the positive alert by Rex on the driver's side door of the vehicle established probable cause to believe that the vehicle contained illegal drugs. *State v. Hobbs*, 933 N.E.2d 1281 (Ind. 2010). Because there was probable cause to believe that the vehicle contained illegal drugs, there was also probable cause to believe that any of the persons inside of the vehicle had at least constructive possession of illegal drugs. See, *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003).

When Rex indicated on the driver's side door of the vehicle, there existed probable cause to *arrest* the defendant, Charla Richard, for possession of illegal drugs. Therefore, the search of the defendant was proper as a search incident to arrest.

The Indiana Court of Appeals affirmed the order of the trial court, denying the defendant's motion to suppress evidence and affirmed the defendant's conviction.

The defendant, Charla Richard, was released from the Indiana Department of Correction on March 8, 2014 and is currently on parole.

SUFFICIENCY OF THE EVIDENCE

RESISTING LAW ENFORCEMENT

Walker v. State, 998 N.E.2d 724 (Ind. 2013)
Decided: December 12, 2013
Opinion certified: January 23, 2014
Resisting Law Enforcement – Evidence Sufficient

On March 12, 2012, at approximately 12:30 a.m., Indianapolis Metropolitan Police Department Officer Jason Ehret was dispatched to a fight in progress. When Officer Ehret arrived at the dispatched location, he encountered Cory Finch and the defendant, Demetrius Walker, fighting in the intersection of two streets.

Officer Ehret told the two men to quit fighting and lay flat on the ground. The two men ignored the commands and continued fighting. Finally, Officer Ehret gave them one final warning, telling the two men that if they refused to comply, they would be tased.

Cory Finch dropped to the ground with his arms flat out. The defendant, however, chose foolishly. The defendant walked towards Officer Ehret with his fists clenched and in an aggressive manner. Officer Ehret kept telling the defendant to stop and get on the ground. When the defendant got 3 to 4 feet from Officer Ehret, the officer tased the defendant. The defendant immediately fell to the ground and was handcuffed with no further problems.

The State charged the defendant, Demetrius Walker, with Resisting Law Enforcement (a Class A misdemeanor) and Disorderly Conduct (a Class B misdemeanor). The case proceeded to bench trial and the trial court found the defendant not guilty of Disorderly Conduct and guilty of Resisting Law Enforcement. The trial court sentenced the defendant to 90 days in the Marion County Jail and the defendant appealed.

On appeal, the defendant claimed that the State presented insufficient evidence to support the conviction for Resisting Law Enforcement. The defendant contended that the State failed to present any evidence that the defendant "forcibly" resisted Officer Ehret, and that the evidence showed that the defendant merely refused to comply with the officer's commands.

The Indiana Court of Appeals affirmed the defendant's conviction for Resisting Law Enforcement. The opinion of the Indiana Court of Appeals was, at first, a memorandum decision, but was later ordered published. See, *Walker v. State*, 984 N.E.2d 642 (Ind. App. 2013).

In its opinion, the Indiana Court of Appeals examined a number of cases defining the force necessary to support a conviction for forcibly resisting law enforcement. The Court of Appeals noted that, in the case at bar, despite the commands of Officer Ehret, the defendant clenched his fists and walked towards the defendant in an aggressive manner. The Indiana Court of Appeals concluded that the defendant displayed "strength and a threat of violence" and that such evidence was sufficient to uphold the conviction for Resisting Law Enforcement by force.

The defendant filed a Petition for Transfer, requesting that the Indiana Supreme Court consider this issue. The Indiana Supreme Court heard oral argument on August 22, 2013. On December 12, 2013, the Indiana Supreme Court granted transfer, thereby vacating the opinion of the Indiana Court of Appeals, and issued its decision in this case.

The Indiana Supreme Court reviewed a number of cases wherein the Indiana Appellate Courts issued opinions regarding the force necessary to constitute forcibly resisting law enforcement. In an effort to provide a clear definition of the required level of force, the Indiana Supreme Court stated:

> "So, in summary, not every passive – or even active – response to a police officer constitutes the offense of resisting law enforcement, even when that response compels the officer to use force. Instead, a person "forcibly" resists, obstructs or interferes with a police officer when he or she uses strong, powerful, violent means to impede an officer in the lawful execution of his or her duties. But this should not be understood as requiring an overwhelming or extreme level of force. The element may be satisfied with even a modest exertion of strength, power, or violence. Moreover, the statute does not require commission of a battery on the officer or actual physical contact – whether initiated by the officer or the defendant. It also contemplates punishment for the active *threat* of such strength, power or violence when that threat impedes the officer's ability to lawfully execute his or her duties." 998 N.E.2d at 727.

In the case at bar, the defendant acknowledged that a threat of violence can support a conviction for Resisting Law Enforcement by force. However, the defendant argued that he did not display a weapon and that there was no evidence of "purposeful aggressive behavior in defiance of arrest" directed at Officer Ehret.

The Indiana Supreme Court rejected both of these contentions by the defendant. With respect to the defendant's argument regarding the lack of display of a weapon, the Indiana Supreme Court held that the defendant did display a weapon to Officer Ehret – his fists.

With respect to the defendant's second argument that there was no evidence of purposeful aggressive behavior in defiance of arrest directed at Officer Ehret, the Indiana Supreme Court stated:

> "And as for his argument that he showed no evidence of "purposefully aggressive behavior in defiance of arrest," we note first the statute does not require his action to specifically be "in defiance of arrest," only a forcible resistance, obstruction, or interference with Officer Ehret's execution of his duties. And second, if advancing in an aggressive manner and with fists clenched to within three or four feet of the only police officer on the scene, who has been ordering you to the ground, is not at least "purposefully aggressive behavior," then we are not clear what conduct might ever merit such a label." 998 N.E.2d at 729.

The Indiana Supreme Court held that there was sufficient evidence to support the defendant's conviction for Resisting Law Enforcement by force and affirmed that conviction.

Gaddie v. State, 991 N.E.2d 137 (Ind. App. 2013)

Decided: July 3, 2013
State's Petition for Transfer GRANTED: December 6, 2013
Oral Argument Held: April 3, 2014
Resisting Law Enforcement – Evidence Insufficient

On August 4, 2012, Indianapolis Metropolitan Police Department Officer Jeffrey Newlin was dispatched to a report of a disturbance at a residence on 10th Street. When Officer Newlin arrived at the residence, he saw 6-8 people on the front porch and in the front yard, yelling and screaming. Officer Newlin also saw several other people, including the defendant, Keion Gaddie, walking along the side of the residence towards the back yard.

Officer Newlin tried to corral everyone in the front yard of the residence. When Officer Newlin told everyone to go to the front yard, everyone did so, except the defendant, who was walking towards the alley. Officer Newlin told that defendant that he was a police officer and twice ordered the defendant to stop. The defendant did not do so, but continued walking away. The defendant was intercepted by another police officer on the next street over, less than one minute later.

The State charged the defendant, Keion Gaddie, with Resisting Law Enforcement (a Class A misdemeanor), for allegedly fleeing from a police officer.

The case proceeded to bench trial. At the bench trial, Officer Newlin testified that he ordered everyone at the scene to the front yard of the residence for officer safety and for their safety. Officer Newlin also testified that he did not see the defendant or anyone else commit a crime when he ordered the defendant to stop.

The trial court found the defendant guilty of Resisting Law Enforcement (a Class A misdemeanor) and ordered the defendant to perform some community service work. The defendant appealed, arguing that there was insufficient evidence presented at trial to support the conviction for Resisting Law Enforcement.

The Indiana Court of Appeals noted, first, that the defendant was convicted of Resisting Law Enforcement, pursuant to IC 35-44.1-3-1(a)(3). That statute states, in relevant part:

> "(a) A person who knowingly or intentionally:
>
> * * *
>
> (3) flees from a law enforcement officer after the officer has, by visible or audible means, including the operation of the law enforcement officer's siren or emergency lights, identified himself or herself and order the person to stop;
>
> commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b)."

In the case at bar, there was no question that Officer Newling identified himself as a police officer and ordered the defendant to stop. There was also no question that the defendant did not stop when so ordered by Officer Newlin, but continued to walk away. However, the Indiana Court of Appeals stated that this was not the end of the sufficiency of the evidence analysis.

The Indiana Court of Appeals noted that the Indiana Appellate Courts have reached different results in cases where the Court has reviewed the sufficiency of the evidence where a person has refused to obey an order to stop by a police officer. In *Corbin v. State*, 568 N.E.2d 1064 (Ind. App. 1991), the Indiana Court of Appeals held that evidence of flight following a police officer's order to stop is admissible in a prosecution for resisting law enforcement, regardless of the lawfulness of the order to stop. See also, *Dandridge v. State*, 810 N.E.2d 746 (Ind. App. 2004); *State v. Howell*, 782 N.E.2d 1066 (Ind. App. 2003).

In a couple of other cases, the Indiana Court of Appeals has held that before an individual can commit the offense of Resisting Law Enforcement by fleeing, the individual must have a duty to stop when told to do so by a law enforcement officer. See, *Bovie v. State*, 760 N.E.2d 1195 (Ind. App. 2002); *Briggs v. State*, 873 N.E.2d 129 (Ind. App. 2007).

After examining these two lines of cases regarding fleeing from a law enforcement officer, the Indiana Court of Appeals held that, as long as a seizure of the person has not taken place within the meaning of the 4th Amendment, a person is free to disregard a police officer's order to stop and cannot be convicted of Resisting Law Enforcement by fleeing.

In the case at bar, it was clear that there was no seizure of the defendant by Officer Newlin. Clearly, Officer Newlin was not placing the defendant under arrest. Moreover, Officer Newlin had no reasonable suspicion that criminal activity was afoot and the defendant was not being seized for the purposes of a Terry stop and investigation.

The Indiana Court of Appeals ruled that, based upon the facts and circumstances of this case, the defendant, Keion Gaddie, was free to disregard the order to stop by Officer Newlin and, therefore, that there was insufficient evidence supporting the defendant's conviction for Resisting Law Enforcement.

As stated above, on December 6, 2013, the Indiana Supreme Court granted transfer in this case, thereby vacating this opinion by the Indiana Court of Appeals. A decision by the Indiana Supreme Court is expected very soon. In spite of the fact that the opinion of the Indiana Court of Appeals in *Gaddie* has been vacated, the case continues to cause problems for law enforcement.

See case below….

Murdock v. State, 5 N.E.3d 792 (Ind. App. 2014)

Decided: March 18, 2014
Defendant Filed Petition for Transfer: April 16, 2014
No Decision on Petition for Transfer as of June 10, 2014
Resisting Law Enforcement – Fleeing – Evidence Sufficient

On November 7, 2011, the defendant, Donald Murdock, entered pleas of guilty, in Madison County, to the offenses of Burglary (a Class C felony) and Theft (a Class D felony). On December 19, 2011, the trial court sentenced the defendant to a total term of imprisonment of 8 years, with 4 years to serve at the Indiana Department of Correction and with 4 years suspended to probation.

The defendant was shipped off to the Indiana Department of Correction to serve 4 years. According to the Indiana Department of Correction website, the defendant was scheduled to be released from prison on or about May 1, 2013. However, the defendant was released prior to that date and placed in the Madison County Community Transition Program.

On April 3, 2013, shortly after his release from prison, the defendant made his way to Indianapolis, because there was no way he could get in any more trouble in Indianapolis. On that date, Indianapolis Metropolitan Police Department Officer Vincent Stewart responded to a call regarding a subject fleeing from another officer at an apartment complex.

Officer Stewart went to that apartment complex and saw the defendant, Donald Murdock, running outside of one of the apartment buildings. Officer Stewart gave chase, identifying himself as a police officer and ordering the defendant to stop. The defendant continued to run and was caught by Officer Stewart in a creek. Interestingly, the name of the creek was "Pendleton Creek." After a bit of a tussle, Officer Stewart sprayed the defendant with pepper spray and took the defendant into custody.

A Notice of Probation Violation was filed in Madison County, alleging that the defendant had violated his probation by committing the offense of Resisting Law Enforcement by fleeing from Officer Stewart. A hearing was held on the Notice of Probation Violation and the trial court ruled that the defendant had violated his probation by fleeing from Officer Stewart. The trial court ordered that the defendant serve 3 ½ years of his previously suspended term of imprisonment.

The defendant appealed.

On appeal, the defendant did not dispute that he fled from Officer Stewart after being ordered to stop. However, the defendant claimed that he did not commit the offense of Resisting Law Enforcement because Officer Stewart had no reasonable suspicion supporting the order to stop. The defendant contended that he was free to walk or run away from Officer Stewart. In support of his position, the defendant cited *Gaddie v. State*, 991 N.E.2d 137 (Ind. App. 2013).

In a 2-1 decision, the Indiana Court of Appeals affirmed the judgment of the trial court. The majority of the Indiana Court of Appeals noted that on December 6, 2013, the Indiana Supreme Court granted transfer in *Gaddie*, thereby vacating the opinion of the Indiana Court of Appeals.

The majority of the Indiana Court of Appeals noted that, in the absence of *Gaddie*, it is well-settled in Indiana that an individual may not flee from a police officer who has ordered the person to stop, regardless of the apparent or ultimate lawfulness of the officer's order. See, *Cole v. State*, 878 N.E.2d 882 (Ind. App. 2007); *Dandridge v. State*, 810 N.E.2d 746 (Ind. App. 2004);

State v. Howell, 782 N.E.2d 1066 (Ind. App. 2003); *Lashley v. State*, 745 N.E.2d 254 (Ind. App. 2001); *Corbin v. State*, 568 N.E.2d 1064 (Ind. App. 1991).

The majority of the Indiana Court of Appeals, noting the grant of transfer in *Gaddie*, stated that unless and until the Indiana Supreme Court determines that one has the right to flee from an unlawful police request to stop, the Court of Appeals will follow the precedent set forth above.

The Dissent

Judge Mathias dissented. Judge Mathias wrote that, although transfer had been granted in *Gaddie*, the reasoning of that case was sound and that such reasoning should be applied to the case at bar.

Judge Mathias would have reversed the trial court's holding that the defendant violated the terms and conditions of his probation.

The Defendant

The defendant has been in and out (mostly in) of the Indiana Department of Correction since 2000. The Indiana Department of Correction website indicates that the defendant has been sentenced to the DOC as set forth below:

1. Operating While Intoxicated
   Date: 12-18-00
   Term: 1 year

2. Reckless Homicide
   Date: 6-19-00
   Term: 4 years
   NOTE: The defendant was sent back for another 2 ½ years on a probation/parole violation on 8-3-04

3. Resisting Law Enforcement, Possession of Cocaine and Operating While Intoxicated
   Date: 4-22-09
   Term: 2 years

4. Operating While HTV
   Date: 8-31-11
   Term: 1 year

5. Burglary and Theft
   Date: 12-19-11
   Term: 4 years
   NOTE: As set forth above, the defendant was sent back for another 3 ½ years due to a probation violation

6. Resisting Law Enforcement
Date: 9-3-13
Term: 6 months

The defendant is currently incarcerated at the Plainfield Correctional Facility, with a listed earliest possible release date of 2-3-15. Within hours of the defendant's release from prison, he will, undoubtedly commit another criminal offense. Unfortunately, because his criminal history is largely "low level" felonies, the defendant *might not* be eligible for the habitual offender sentence enhancement, as that statute was amended effective July 1, 2014.

Harper v. State, 3 N.E.3d 1080 (Ind. App. 2014)
Decided: February 26, 2014
No further appeal
Opinion certified: April 8, 2014
Evidence Insufficient – Execution of Lawful Duties

On December 3, 2012, the defendant, Robin Harper, called 911 to report a domestic dispute with her husband, Christian Harper. Indianapolis Metropolitan Police Department Officer James Gillespie went to the Harper's residence and was met by Robin Harper in the street outside of the residence. Robin Harper advised Officer Gillespie that she and her husband had been arguing and that the argument had escalated into a shoving match. Robin Harper stated that she was not in any pain and that Christian Harper had left the residence.

Officer Gillespie knew that the Harpers were frequent flyers on domestic violence calls, so he began to search the area for Christian Harper. At about the same time, Christian Harper called 911 from a location about two blocks from the Harper's residence.

Officer Gillespie and Officer Scott Hartman met Christian Gillespie at that location. Christian Harper had two small scratches on his head, a swollen left eye, and a small puncture wound in his abdomen. Christian Harper told the officers that Robin Harper had attacked him with a pair of scissors and struck him repeatedly with her fist.

Officer Gillespie and Officer Hartman then returned to the Harper residence, intending to arrest Robin Harper for Domestic Battery. The officers knocked on the front door and asked Robin Harper to step outside. She refused. Robin Harper also told the police that they could not come inside her home.

Officer Gillespie then asked Robin Harper if she would sign some papers he had on his clipboard, in order to get a protective order. There were no such papers and this was an attempt by the officers to get Robin Harper to open the door. When Robin Harper opened the door to get the clipboard, the officers stepped inside the residence and arrested Robin Harper.

While still inside the Harper residence, Officer Hartman attempted to remove Robin Harper's wedding ring. This is part of IMPD standard procedure before transporting an arrestee to the Adult Processing Center. Robin Harper did not like this and thrust her shoulders forward and pulled away from Officer Hartman.

The State charged the defendant, Robin Harper, with Resisting Law Enforcement (a Class A misdemeanor). The case proceeded to bench trial and the trial court found the defendant guilty as charged. The trial court sentenced the defendant to 365 days, all suspended except time served. The defendant appealed.

On appeal, the Indiana Court of Appeals reversed the defendant's conviction, holding that the evidence presented at trial was insufficient to support the judgment of conviction entered by the trial court.

The Indiana Court of Appeals noted that IC 35-44.1-3-1 made it a crime to forcibly resist a law enforcement officer while the officer is lawfully engaged in the execution of the officer's duties. The problem addressed by the Indiana Court of Appeals was the manner in which the police arrested the defendant. The Court of Appeals held that it was entirely improper for the police to lie to the defendant to get her to open the door and that it was improper for the police to enter the defendant's residence to arrest her. The Court of Appeals stated:

> "Public trust and confidence in law enforcement officers would surely be eroded if we were to sanction an officer's fraudulent statements or activity in order to enter a residence where there were no exigent circumstances to justify such conduct." 3 N.E.3d at 1083.

The Indiana Court of Appeals concluded that, because of the actions of the police officers, those officers were NOT lawfully engaged in the execution of their official duties. Therefore, the evidence presented at the bench trial was insufficient to support the conviction for Resisting Law Enforcement.

Analysis

For decades, the well-settled rule in Indiana was that a citizen could not use force in resisting an arrest by a police officer, regardless of whether the arrest in question was lawful or unlawful. See, *Williams v. State*, 160 Ind. App. 294, 311 N.E.2d 619 (1974); *Fields v. State*, 178 Ind. App. 350, 382 N.E.2d 972 (1978), *Cassleman v. State*, 472 N.E.2d 1310 (Ind. App. 1985); *Shoultz v. State*, 735 N.E.2d 819 (Ind. App. 2000).

Over the last ten years or so, the Indiana Appellate Courts (and the Indiana General Assembly) have been chipping away at this rule, creating a number of exceptions to the rule. What I found interesting about the opinion of the Indiana Court of Appeals in the case at bar was that the Court of Appeals did not even mention this long-standing rule regarding resisting arrest. Instead, the Court of Appeals focused only on the issue of whether or not the actions by the police were permissible.

Based upon this case, I am comfortable stating that the long-standing rule that a person may not resist even an unlawful arrest has been placed in the scrap pile, along with telephone booths, 8-track tapes, and the Ford Pinto.

PUBLIC INTOXICATION

In 2012, the Indiana General Assembly amended the statute defining the offense of Public Intoxication, by adding four (4) new elements to the crime. Effective July 1, 2012, the offense of Public Intoxication was defined, as follows:

> "(a) Subject to section 6.5 of this chapter, it is a Class B misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication caused by the person's use of alcohol or a controlled substance (as defined in IC 35-48-1-9), if the person:
>
> (1) endangers the person's life;
> (2) endangers the life of another person;
> (3) breaches the peace or is in imminent danger of breaching the peace; or
> (4) harasses, annoys, or alarms another person.
>
> (b) A person may not initiate or maintain an action against a law enforcement officer based on the officer's failure to enforce this section."

Since July 19, 2013, the Indiana Court of Appeals has issued seven (7) published opinions regarding the amended Public Intoxication statute. In two (2) of those cases, the Indiana Supreme Court has granted transfer and will be issuing further opinions regarding the constitutionality of the amended statute, as well as the sufficiency of the evidence relating to the additional elements of the additional elements. In addition, the Indiana Court of Appeals has issued another two (2) non-published cases regarding the sufficiency of the evidence under this amended statute.

A review of the published Indiana Appellate Court decisions issued since the amendment of the Public Intoxication statute are set forth below.

Williams v. State, 989 N.E.2d 366 (Ind. App. 2013)

Decided: July 19, 2013
No further appeal
Opinion certified: July 30, 2013
Evidence sufficient

On July 14, 2012, the defendant, Josiah Williams, and some friends were celebrating the 21st birthday of one of the friends. The festivities concluded at Tiki Bob's, when that bar closed at 3:00 a.m. As the group crossed South Meridian Street, one of the members of the group (Michelle) as hit by a car.

Indianapolis Metropolitan Police Department Sgt. Jerry Durham and Officer Matthew Wooding were sent to the scene. When the police arrived at the scene, a large number of people were in the street and in the area around the accident. The officers attempted to clear the street so that emergency vehicles could get to the scene to treat Michelle.

The officers told the defendant to leave the street and go to the sidewalk, but the defendant refused. The officers observed that the defendant was extremely intoxicated and belligerent. After several unsuccessful attempts to persuade the defendant to move off the street and onto the sidewalk, the officers had to physically move the defendant onto the sidewalk. During that time, the defendant was staggering and physically resisting the officers' attempts to move him. Finally, the defendant was arrested.

The State charged the defendant, Josiah Williams, with the offense of Public Intoxication. The charging Information alleged that the defendant was in a public place in a state of intoxication and further alleged that the defendant had endangered his life or the life of another person that the defendant breached the peace, and that the defendant harassed, annoyed or alarmed another person.

The case proceeded to bench trial. At the conclusion of the bench trial, the trial court found the defendant guilty of Public Intoxication. The trial court sentenced the defendant to 180 days, with 178 days suspended. The defendant appealed.

This case is the first time that the Indiana Appellate Courts have reviewed the sufficiency of the evidence issue for the offense of Public Intoxication since the overhaul of the definition of that offense in 2012. Effective July 1, 2012, the offense of Public Intoxication was defined in IC 7.1-5-1-3, as follows:

> "(a) Subject to section 6.5 of this chapter, it is a Class B misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication caused by the person's use of alcohol or a controlled substance (as defined in IC 35-48-1-9), if the person:
>
> (1) endangers the person's life;
> (2) endangers the life of another person;
> (3) breaches the peace or is in imminent danger of breaching the peace; or
> (4) harasses, annoys, or alarms another person.
>
> (b) A person may not initiate or maintain an action against a law enforcement officer based on the officer's failure to enforce this section."

The defendant argued on appeal that the State failed to present sufficient evidence regarding the 2012 elements of the offense of Public Intoxication. In that regard, the defendant claimed that he never endangered himself or any other person because the police had already cleared and blocked off the street where Michelle was laying. The defendant also contended that there was no evidence of a nexus between his intoxication and his alleged breach of the peace and/or annoyance of others. Specifically, the defendant argued that because his friend was injured and laying in the street, the defendant would have been belligerent towards the police and would have attempted to stay by the side of his friend, even if he were sober.

The Indiana Court of Appeals rejected the defendant's sufficiency arguments and upheld the conviction for Public Intoxication, stating:

> "Moreover, with respect to Williams's assertion that the evidence is insufficient to prove the elements of the offense of public intoxication, the evidence most favorable to the conviction reveals that police attempted to clear the street where Michelle had been struck to that emergency vehicles could access the area to treat her, that Williams was extremely intoxicated and staggered from side to side, that he refused to move off of the street and to the sidewalk although commanded by the police multiple times to do so, that he was belligerent with the officers, which the officers believed was due to his intoxicated condition, that Williams did not move out of the street until officers physically escorted him off of the street, that he was staggering as the officers escorted him to the sidewalk, and that he jerked his arm away from Officer Woodings and shoved Sergeant Durham's hand away from him. Sergeant Durham testified that the officers had to escort Williams off of the street and "over to the sidewalk to deal with him so that [they] did not get struck by cars" and that the officers believed that Williams was "an intoxicated person who was a danger to himself." 989 N.E.2d at 370-371.

Naas v. State, 993 N.E.2d 1151 (Ind. App. 2013)

Decided: August 14, 2013
No further appeal
Opinion certified: September 26, 2013
Evidence sufficient

On September 20, 2013, the defendant, Christopher Naas, and two other men were involved in some kind of traffic incident with another vehicle containing a male and a female. The two vehicles involved in the incident ended up at a gas station in Indianapolis, where an argument ensued. Someone called the police.

Speedway Police Department Officer Robert Fekkes arrived at the gas station and saw the defendant and others involved in an argument. Officer Fekkes saw that the defendant was walking aggressively towards the male and the female occupants of the other vehicle, who were backing away from him.

Officer Fekkes intervened and observed that the defendant had red watery eyes, slurred speech, unsteady balance, and the odor of an alcoholic beverage upon his person. Officer Fekkes also noticed a half-empty bottle of whiskey on the passenger side floorboard of the car next to the defendant. Officer Fekkes questioned the defendant. At this point, the defendant was relatively calm, but largely uncooperative. Officer Fekkes arrested the defendant for Public Intoxication.

The State charged the defendant, Christopher Naas, with the offense of Public Intoxication (a Class B misdemeanor). The case proceeded to bench trial. At that bench trial, the defendant testified that he did not argue with anyone and that he was simply at the gas station to buy a pack of cigarettes.

The trial court found the defendant guilty of Public Intoxication and sentenced the defendant to four days in jail. The defendant appealed.

On appeal, the defendant claimed that there was insufficient evidence to support the conviction for Public Intoxication.

The Indiana Court of Appeals first examined the evidence presented at trial to determine if the evidence was sufficient to prove that the defendant was intoxicated. Using the definition of intoxicated set forth in IC 9-13-2-86 (wrong, wrong, wrong), the Court of Appeals determined that the evidence of intoxication was sufficient, based upon the observations of the defendant by Officer Fekkes at the gas station.

The defendant also argued on appeal that the evidence presented at the bench trial was insufficient to prove that the defendant breached the peach or that the defendant's behavior harassed, alarmed or annoyed another person. The defendant contended that there was no evidence of a breach of the peace because Officer Fekkes testified at trial that all of the individuals involved in the altercation at the gas station were yelling. The defendant also argued that the testimony by Officer Fekkes that the male and the female in the other car looked as if they were trying to back away from the defendant did not rise to the level of sufficient proof that the defendant was alarming another person.

The Indiana Court of Appeals rejected the defendant's arguments, holding that the evidence presented at trial that the defendant was yelling at and walking in an aggressive manner towards the male and the female and that they were backing away was sufficient for the trial court to infer that the male and the female were alarmed by the defendant's drunken behavior.

Based upon the above rulings, the Indiana Court of Appeals affirmed the defendant's conviction for Public Intoxication.

Stephens v. State, 992 N.E.2d 935 (Ind. App. 2013

Decided: August 15, 2013
No further appeal
Opinion certified: September 27, 2013
Evidence insufficient

In 2005, the defendant, Danny Stephens, suffered a brain injury so severe that a guardianship over his person was established. The defendant's guardian was his niece and the defendant lived with her.

On October 6, 2012, the defendant was at home with his niece and got drunk. At some point, a dispute erupted between the defendant and the boyfriend of the defendant's niece. The dispute evolved into a physical altercation wherein the boyfriend "body-slammed" the defendant to the floor. The police were called, but left the residence without making any arrests.

Shortly after the police left, the defendant walked away from the residence, went to a nearby convenience store, and called the police. Indianapolis Metropolitan Police Department Officer Haddad responded.

When Officer Haddad arrived at the store parking lot, he was met by the defendant. Officer Haddad observed that the defendant smelled of an alcoholic beverage, had bloodshot eyes, slurred speech and an unsteady gait. The defendant told Officer Haddad that he had been

drinking all night and that he was very drunk. The defendant also requested that Officer Haddad take him to jail because he did not want to return home where the body-slamming boyfriend of his niece was lying in wait. Officer Haddad obliged, arrested the defendant for Public Intoxication, and took the defendant to jail.

The State charged the defendant, Danny Stephens, with Public Intoxication (a Class B misdemeanor). The case proceeded to bench trial and the trial court found the defendant guilty. The defendant appealed.

On appeal, the defendant claimed that there was insufficient evidence to support the conviction for Public Intoxication.

The Indiana Court of Appeals examined IC 7.1-5-1-3 (the statute defining the offense of Public Intoxication), as that statute was amended by the Indiana General Assembly in 2012. The Court of Appeals also examined the definition of intoxicated, as set forth in IC 9-13-2-86 (wrong, wrong, wrong).

The Indiana Court of Appeals had no problem determining that the evidence that the defendant was intoxicated was sufficient. However, the Court of Appeals did have a problem with the evidence relating to the additional elements that were added to the offense of Public Intoxication during the 2012 legislative session. The Court of Appeals stated:

> "In contrast, here, Stephens was initially in a private place where he had every right to be intoxicated. When police made no arrests after he was assaulted in his home by his niece's boyfriend, Stephens sought to extricate himself from the situation by walking to a public place, calling the police, stating that he was drunk, and requesting that he be taken to jail rather than returning to the dangerous situation at home. Simply put, he was asking the police for help. The mere fact that he was intoxicated in a public place did not amount to a violation of the public intoxication statute. He did not breach the peace, and to the extent that the trial court reasoned that he was in "imminent danger of breaching the peace" if he returned home, we find such conclusion to be speculative. The danger, if any, was that he would be the victim of another assault, not the perpetrator." 992 N.E.2d at 938.

The Indiana Court of Appeals ruled that the evidence was not sufficient to prove that the defendant endangered himself or others, breached the peace or was in imminent danger of breaching the peace, or harassed, annoyed or alarmed another person. As a result, the Court of Appeals overturned the defendant's conviction for Public Intoxication.

Hobert v. State, 996 N.E.2d 396 (Ind. App. 2013)

Decided: October 8, 2013
State's Petition for Transfer Denied: January 9, 2014
Opinion certified: January 13, 2014
Evidence insufficient

On April 4, 2012, during the evening hours, Speedway resident Melissa Allen observed a man twice cross her yard and enter her neighbor's backyard. Melissa Allen then saw the man go into her neighbor's garage and called the police. After Melissa Allen called the police, she saw the man walk south on the sidewalk along 10th Street.

Speedway Police Department Officers Helmer and Hammel responded. They observed the defendant, David Holbert, walking south along 10th Street and stopped him. Melissa Allen, who was on the phone down the street, confirmed to the dispatcher that the police had stopped the same man who had been walking in her yard and into her neighbor's garage.

The officers placed the defendant in handcuffs and patted him down for officer safety. During the pat-down, the police discovered a bag of marijuana on the defendant. At that time, the officers observed that the defendant's eyes were glassy and bloodshot, he smelled of an alcoholic beverage, he swayed while walking and standing, and his speech was slow and slurred.

The State charged the defendant, David Holbert, with Possession of Marijuana (a Class A misdemeanor) and Public Intoxication (a Class B misdemeanor). The case proceeded to bench trial and the trial court found the defendant guilty as charged.

The defendant appealed.

The defendant argued on appeal that the State failed to present, at the bench trial, sufficient evidence to support the conviction for Public Intoxication. The defendant claimed that, while it was clear that he was intoxicated in a public place, the evidence was insufficient with respect to the elements added to the Public Intoxication statute by the Indiana General Assembly in 2012.

The State argued that the evidence was sufficient because Melissa Allen was alarmed when the defendant walked across her yard and that she continued to be alarmed when she observed the defendant walking away on the sidewalk.

The Indiana Court of Appeals sided with the defendant on this issue, holding that the behavior that alarmed Melissa Allen occurred while the defendant was walking across her yard, which the Court of Appeals stated was private property and, therefore, not a public place. Further, there was no evidence that anyone was alarmed, or that any of the other criteria set forth in the amended Public Intoxication statute was met, while the defendant was on the sidewalk or after the defendant had been intercepted by the police.

Therefore, the Indiana Court of Appeals ruled that the evidence was insufficient to support the conviction for Public Intoxication and reversed that conviction.

Thang v. State, 2 N.E.3d 702 (Ind. App. 2013)

Decided: October 31, 2013
State's Petition for Transfer GRANTED: February 3, 2014
Oral argument was held on May 15, 2014
Evidence insufficient

On December 2, 2012, Indianapolis Metropolitan Police Department Officer Michael Agresta was on duty and stopped at a gas station to use the restroom. When Officer Agresta came out of the restroom, he noticed the defendant, Tin Thang, talking with the cashier and also noticed that there was a car in the parking lot that had not been there when the officer arrived.

The cashier indicated to Officer Agresta that the defendant appeared to be intoxicated. Officer Agresta approached the defendant and also determined that the defendant was intoxicated. Officer Agresta ran a license plate check on the vehicle in the parking lot and determined that the vehicle was registered to the defendant. The keys to that vehicle were also in the defendant's pocket. The defendant was arrested and his vehicle towed.

The State charged the defendant, Tin Thang, with the offense of Public Intoxication (a Class B misdemeanor). The case proceeded to bench trial and the trial court found the defendant guilty as charged. The defendant appealed.

On appeal, the defendant admitted that he was in a public place and that he was intoxicated. However, the defendant contended that there was insufficient evidence presented at the bench trial to prove any of the four (4) additional elements added to the Public Intoxication statute in 2012.

The State argued on appeal that the evidence presented at trial was sufficient to show that the defendant alarmed the gas station cashier. The Indiana Court of Appeals disagreed, noting that the cashier did not testify at the bench trial and that the testimony of Officer Agresta was that the cashier waited on the defendant and then alerted Officer Agresta that the defendant was intoxicated. There was no evidence presented at the bench trial that the cashier was alarmed or afraid.

The State also contended on appeal that the evidence presented at the bench trial showed that the defendant endangered himself or others by driving to the gas station while intoxicated. The Indiana Court of Appeals rejected this argument, as well, holding that there was no evidence presented at the bench trial regarding the defendant driving his vehicle to the gas station. Moreover, there was no evidence that the defendant attempted to get into his vehicle and drive away, as Officer Agresta intervened and arrested the defendant before that could happen.

Based upon the above, the Indiana Court of Appeals held that the evidence presented at the defendant's bench trial was insufficient and reversed the defendant's conviction for Public Intoxication.

As set forth above, the Indiana Supreme Court has granted transfer in this case. Oral argument was held on May 15, 2014. A decision is expected from the Indiana Supreme Court in the near future.

Morgan v. State, 4 N.E.3d 751 (Ind. App. 2013)

Decided: February 13, 2014
State's Petition for Transfer GRANTED: May 8, 2014
Oral Argument Scheduled for September 18, 2014
Statute Unconstitutional

On August 31, 2012, Indianapolis Metropolitan Police Department Officer Brycen Garner was working his part-time job for IndyGo Bus Service. Officer Garner was at a bus stop on Ohio Street near the IPAC office. That bus stop had an enclosed plexiglass shelter.

The defendant, Rodregus Morgan, was asleep inside the bus stop shelter. The defendant's brother was yelling for the defendant to get up, but was having no luck with that. Officer Garner went over and tapped the defendant on the shoulder. The defendant raised his head, looked at Officer Garner, and said, "Get off of me." Way wrong answer. Officer Garner told the defendant to leave the bus stop shelter.

The defendant finally got to his feet and Officer Garner could smell the odor of an alcoholic beverage. The defendant's eyes were bloodshot and glassy and the defendant was unsteady on his feet. Officer Garner described the defendant's mood as agitated and angry.

Officer Garner believed that the defendant was intoxicated and that the defendant's behavior was "annoying" and arrested the defendant for Public Intoxication. This lit the fuse for the drunken defendant who then began playing the fool. The defendant yelled and screamed that he did nothing wrong and screamed at Officer Garner that he should be happy with himself for arresting a brother. Officer Garner warned the defendant several times that the defendant needed to fully exercise his right to remain silent. The defendant understood that he had the right to remain silent but, apparently, did not have the ability to do so.

While the defendant and Officer Garner were waiting for the wagon to arrive, the defendant told Officer Garner that, "he was going to kick his ass, just like he did in high school." (Yeah, right, like the defendant ever went to high school).

The State charged the defendant, Rodregus Morgan, with Intimidation (a Class D felony), Public Intoxication (a Class B misdemeanor) and Disorderly Conduct (a Class B misdemeanor). The case proceeded to bench trial. At the conclusion of the State's case-in-chief, the defense moved to "dismiss" the charges of Intimidation and Public Intoxication. With respect to the charge of Public Intoxication, the defense claimed that the statute defining the offense of Public Intoxication was unconstitutionally vague.

The trial court granted the defendant's motion to "dismiss" the charge of Intimidation, holding that the State had charged the defendant under the wrong section of the Intimidation statute. The trial court denied the defendant's motion to "dismiss" the charge of Public Intoxication. At the conclusion of the bench trial, the trial court found the defendant guilty of Public Intoxication and Disorderly Conduct and sentenced the defendant to an aggregate term of imprisonment of 180 days, with 164 days suspended.

The defendant appealed.

In 2012, the Indiana General Assembly amended the Public Intoxication statute by adding four (4) elements to the offense. IC 7.1-5-1-3 now states:

> "(a) Subject to section 6.5 of this chapter, it is a Class B misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication caused by the person's use of alcohol or a controlled substance (as defined in IC 35-48-1-9), if the person:
>
> (1) endangers the person's life;
> (2) endangers the life of another person;
> (3) breaches the peace or is in imminent danger of breaching the peace; or
> (4) harasses, annoys, or alarms another person.
>
> (b) A person may not initiate or maintain an action against a law enforcement officer based on the officer's failure to enforce this section."

At the defendant's bench trial, Officer Garner testified that the defendant was in a public place, was intoxicated, and that Officer Garner was annoyed by the defendant's drunken behavior. The defendant's constitutional attack on the amended Public Intoxication statute was that the word "annoy" was not defined and that there is no objective standard for evaluating what constitutes annoying behavior. That, the defendant argued, makes the amended Public Intoxication statute unconstitutionally vague.

The Indiana Court of Appeals noted that a statute is unconstitutionally vague if it fails to provide notice enabling ordinary people to understand the conduct it prohibits or authorizes or encourages arbitrary or discriminatory enforcement. *Adams v. State*. 968 N.E.2d 281 (Ind. App. 2012). A vagueness challenge is examined in light of the particular facts of the case and a defendant challenging a statute may not formulate hypothetical situations which might demonstrate vagueness. *Kaur v. State*, 987 N.E.2d 164 (Ind. App. 2013). A statute is not unconstitutionally vague simply because it does not provide a specific definition of a word or phrase. *Wright v. State*, 772 N.E.2d 449 (Ind. App. 2002).

The Indiana Court of Appeals reviewed some prior Indiana Appellate Court decisions and some prior United States Supreme Court decisions regarding a vagueness attack on a statute or ordinance that prohibited annoying conduct. After reviewing those prior cases, the Indiana Court of Appeals concluded that the use of the word "annoy" in the amended Public Intoxication statute was unconstitutionally vague.

Although the vagueness attack on the amended Public Intoxication statute focused only on the word "annoy," the Indiana Court of Appeals ruled that all of IC 7.1-5-1-3(a)(4) was unconstitutionally vague. The Court of Appeals further ruled that the remainder of the amended Public Intoxication statute remained effective and subject to enforcement.

The Indiana Court of Appeals also reviewed the defendant's conviction for Disorderly Conduct and ruled that the defendant's speech was not "political" and affirmed that conviction.

As stated above, the Indiana Supreme Court has granted transfer in this case, thereby vacating the opinion of the Indiana Court of Appeals. Oral argument is scheduled for September 18, 2014. A decision from the Indiana Supreme Court is not likely until the end of this year or early in 2015.

Sesay v. State, 5 N.E.3d 478 (Ind. App. 2014)

Decided: March 24, 2014
State Filed Petition for Transfer: April 23, 2014
No decision on Petition for Transfer as of June 10, 2014
Evidence Insufficient

On March 3, 2013, Indianapolis Metropolitan Police Department Officer Adam Jones was dispatched to an accident at a location in Indianapolis. When he arrived at the scene of that accident, Officer Jones found a vehicle in a four to five foot drainage ditch.

Officer Jones also found the defendant, David Sesay, standing three to four feet away from the road. The defendant was really drunk. The defendant was covered with mud and had vomited on himself. There was a strong odor of an alcoholic beverage on the defendant's breath and the defendant could barely stand without assistance. No one else was in the area. Officer Jones believed that the defendant was so intoxicated that he was a danger to himself and arrested the defendant for Public Intoxication.

The State charged the defendant, David Sesay, with Public Intoxication. The case proceeded to bench trial and the trial court found the defendant guilty as charged. The trial court specifically noted, in its ruling, that the defendant had endangered his own life. The trial court sentenced the defendant to 180 days, with 178 days suspended. The defendant appealed.

On appeal, the defendant contended that there was insufficient evidence to support the conviction for Public Intoxication. Specifically, the defendant argued that the evidence was insufficient to prove that the defendant endangered his own life.

The Indiana Court of Appeals noted that the word "endangers" in the Public Intoxication statute (as that statute was amended in 2012) is not statutorily defined. The Court of Appeals ruled that something more than mere intoxication is required to prove the crime of Public Intoxication. That is, a drunken defendant must engage in some conduct that causes "actual danger," not merely "possible danger."

The State argued on appeal that the defendant was standing near a road and was so drunk that he could have fallen into the road and been hit by a car. The Indiana Court of Appeals rejected this argument, holding that this was speculation regarding what might happen in the future and did not constitute proof that the defendant endangered his own life. The Indiana Court of Appeals stated:

> "If it is sufficient to speculate about all the various things that might befall a person, then, again, the legislature's addition of endangerment as an element would be rendered superfluous because there is virtually no scenario in which a person in a public place would not be found guilty of public intoxication for simply being intoxicated. Such a construction would stretch the statute to absurdity." 5 N.E.3d at 486.

Final Note Regarding the 2012 Amendment to the Public Intoxication Statute: The statute is an absurdity. The 2012 amendment to the Public Intoxication statute should be immediately repealed.

BURGLARY

Meehan v. State, 7 N.E.3d 255 (Ind. 2014)
Decided: April 29, 2014
Evidence Sufficient

O.J.S. Building Services is a business located in South Bend. The shop foreman, Scott Floyd, was responsible for closing the business and locking up at the end of the day and then opening the business at the beginning of the next day. On May 2, 2011, Scott Floyd locked up the business at the end of the day and everything was in order. The following morning, when he arrived at work to open-up, Scott Floyd discovered that a panel to an overhead door to the business had been damaged and removed. When Scott Floyd went inside, he found that two interior doors have been kicked open. The police were called.

The police and employees of O.J.S. Building Services discovered that a number of items were missing from the business, including laptop computers, computer bags, a jacket and some money. A glove was found inside the building near the overhead door where the burglar had gained access to the building. In addition, a screwdriver was found in one of the offices, which screwdriver did not belong to any of the employees of the business.

The glove and the screwdriver were sent to the Indiana State Police Lab. Testing on the glove revealed a single DNA profile for an unknown male. That DNA profile was entered into a database and the DNA profile matched the DNA profile of the defendant, Martin Meehan.

The police arrested the defendant on December 7, 2011. When interviewed by the police, the defendant denied any involvement in the burglary of O.J.S. Building Services. The police obtained a buccal swab from the defendant, which matched the DNA found on the glove. It does not appear that any of the items stolen from O.J.S. Building Services were ever recovered.

The State charged the defendant, Martin Meehan, with Burglary (a Class C felony) and also filed the habitual offender sentence enhancement. The case proceeded to jury trial and the jury found the defendant guilty of Burglary. Thereafter, the defendant waived jury and the trial court found that the defendant was a habitual offender.

The trial court sentenced the defendant to a total executed term of imprisonment of 13 years. The defendant appealed.

On appeal, one of the issues raised by the defendant was his claim that the State failed to present sufficient evidence at trial to support the Burglary conviction. The Indiana Court of Appeals found this issue to be dispositive and did not address the other issues raised by the defendant. *Meehan v. State*, 986 N.E.2d 371 (Ind. App. 2013).

The Indiana Court of Appeals began its analysis of the sufficiency of the evidence issue by setting forth the standard of review for a sufficiency of the evidence claim. Citing *Stewart v. State*, 866 N.E.2d 858 (Ind. App. 2007), the Indiana Court of Appeals stated the following:

> "When reviewing the sufficiency of evidence supporting a conviction, we will not reweigh the evidence or judge the credibility of the witnesses. We must look to the evidence most favorable to the conviction together with all reasonable inferences to be drawn from that evidence. We will affirm a conviction if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." 986 N.E.2d at 373.

The issue that was considered by the jury and again on appeal was whether or not the defendant's DNA on the glove found inside the burglarized building was sufficient to identify the defendant as the burglar. The jury believed that such evidence proved the identity, beyond a reasonable doubt. The Indiana Court of Appeals disagreed, stating:

> "In many cases, DNA is compelling evidence of identity. In this case, however, there was no evidence that would support an inference that Meehan's DNA was found on the glove because he handled it during the burglary, as opposed to some other time. Therefore, the guilty verdict was based upon speculation and must be reversed." 986 N.E.2d at 376.

It seems that the Indiana Court of Appeals was concerned that DNA evidence like the evidence in the case at bar could be used by criminals to frame innocent citizens for certain crimes. In that regard, the Indiana Court of Appeals stated:

> "Were we to affirm, we would be creating a precedent that would make it relatively easy for criminals to frame other individuals; all they would need to do is obtain an object with someone else's DNA and leave it at the crime scene. We reverse Meehan's conviction for burglary and the resulting habitual offender enhancement." 986 N.E.2d at 376.

The Indiana Supreme Court reversed the decision by the Indiana Court of Appeals and affirmed the defendant's conviction for Burglary. The Indiana Supreme Court noted that a reasonable jury could have inferred, based upon the DNA evidence, that it was the defendant, Meehan, who dropped the glove inside the building during the burglary. The Supreme Court went further, stating that this was the most obvious explanation for the presence of the glove at the scene of the burglary.

The Indiana Supreme Court addressed the concern by the Indiana Court of Appeals that using DNA as proof of identity would open the floodgates of criminals to frame other individuals. The Indiana Supreme Court stated:

> "The existence of the possibility of being "framed" does not amount to a lack of substantial evidence of probative value from which a jury could reasonably infer that Meehan committed the burglary. In reviewing sufficiency claims, we look at the evidence that *was* presented to the jury, not at what evidence was *not* presented."

Consecutive Habitual Sentence Issue

One of the issues raised by the defendant, but not considered by the Indiana Court of Appeals was the argument by the defendant that the trial court improperly imposed a term of imprisonment, pursuant to the habitual offender sentence enhancement. In another case in St. Joseph County (Cause Number: 71D02-0702-FC-37), the defendant was convicted of Burglary (a Class C felony) and the habitual offender sentence enhancement. The term of imprisonment imposed by the trial court in that case included an additional 6 year term of imprisonment relating to the habitual offender determination.

In the case at bar, the trial court imposed an additional 8 year term of imprisonment, relating to the habitual offender sentence enhancement, and ordered the entire sentence to be served consecutively with the term of imprisonment in Cause Number: 71D02-0702-FC-37.

In *Breaston v. State*, 907 N.E.2d 992 (Ind. 2009), the Indiana Supreme Court held that, absent explicit legislative direction, the trial court could not order consecutive habitual offender sentences. Based upon *Breaston* (and other similar cases), the Indiana Supreme Court remanded the case at bar to the trial court, with an order that the trial court modify the habitual offender sentence enhancement portion of the defendant's sentence to make such term of imprisonment concurrent with the term of imprisonment imposed in Cause Number: 71D02-0702-FC-37.

NOTE: The 2014 amendment of the habitual offender sentence enhancement statute (IC 35-50-2-8) does NOT specifically authorize so-called "double enhancement." Therefore, under current case law, trial courts will be unable to impose consecutive habitual offender sentence enhancements and will be unable to impose the habitual offender sentence enhancement in "progressive penalty statutes."

ATTEMPTED CHILD EXPLOITATION

Delagrange v. State, 5 N.E.3d 354 (Ind. 2014)

Decided: March 18, 2014
Opinion certified: April 29, 2014
Evidence sufficient

The defendant, David "Upskirt" Delagrange, loved photography. He attached a camera to one of his shoes, with the camera connected to a digital recording device that stored the camera's images. The defendant fashioned a fishing line inside his pants to allow him to activate his shoe camera.

On February 27, 2010, Upskirt Delagrange went to the Castleton Square Mall in Indianapolis. While at the mall, the defendant approached several women who were wearing skirts and managed to take pictures up their skirts using his shoe camera. Four of the females who were given the full shoe-cam treatment by the defendant were under the age of 18.

The defendant's behavior at the mall brought him to the attention of a store manager. The store manager contacted an off-duty police officer, who approached the defendant. As the officer approached the defendant, the defendant attempted to flee. However, the defendant found it difficult to run with a camera in his shoe and fishing line up his pants. The defendant was immobilized with a taser and arrested. Incident to that arrest, the police discovered and seized the defendant's shoe camera and the digital images taken by the defendant that day.

The State charged the defendant, Upskirt Delagrange, with four (4) counts of Attempted Child Exploitation (a Class C felony), ten (10) counts of Voyeurism (a Class D felony) and one count of Resisting Law Enforcement (a Class A misdemeanor).

Prior to trial, counsel for the defendant filed a motion to dismiss the charges of Attempted Child Exploitation and Voyeurism. The trial court dismissed the Voyeurism charges, but refused to dismiss the four (4) counts of Attempted Child Exploitation. The defendant then pursued an interlocutory appeal.

On July 25, 2011, the Indiana Court of Appeals issued a decision in *Delagrange v. State*, 951 N.E.2d 593 (Ind. App. 2011), affirming the trial court's denial of the defendant's motion to dismiss the four (4) counts of Attempted Child Exploitation. On October 13, 2011, the Indiana Supreme Court denied transfer.

The case proceeded to jury trial on the four (4) counts of Attempted Child Exploitation and one count of Resisting Law Enforcement. At the conclusion of the State's case-in-chief, the defendant moved for a directed verdict of acquittal. The trial court denied that motion.

The jury found the defendant guilty of all four (4) counts of Attempted Child Exploitation (a Class C felony) and the one (1) count of Resisting Law Enforcement (a Class A misdemeanor). The trial court sentenced the defendant to a total term of imprisonment of 4 years, with 3 years suspended and a term of probation.

The defendant appealed.

The case then took its second trip to the Indiana Court of Appeals. *Delagrange v. State*, 981 N.E.2d 1227 (Ind. App. 2013). The Indiana Court of Appeals reversed the defendant's convictions, holding that the evidence presented at trial was not sufficient to support the convictions.

The Indiana Court of Appeals first examined the Child Exploitation statute. IC 35-42-4-4(b)(2) states:

> "(b) A person who knowingly or intentionally:
>
> (2) disseminates, exhibits to another person, offers to disseminate or exhibit to another person, or sends or brings into Indiana for dissemination or exhibition matter that depicts or describes sexual conduct by a child under eighteen (18) years of age:
>
> commits child exploitation, a Class C felony."

The term "sexual conduct" is defined in the Child Exploitation statute. IC 35-42-4-4(a)(4) states:

> "(4) "Sexual conduct" means sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, sadomasochistic abuse, sexual intercourse or deviate sexual conduct with an animal, any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person."

In a 2-1 decision, the majority of the Indiana Court of Appeals then interpreted the above provisions of IC 35-42-4-4 as follows:

1. That IC 35-42-4-4(b)(2) requires that the person disseminating the pictures (shoe camera or not) must be disseminating pictures that depict "sexual conduct" by a child;

2. That "sexual conduct," as defined in IC 35-42-4-4(a)(4) means that the *child* must be exhibiting the child's uncovered genitals with the intent to arouse or satisfy someone's sexual desires.

Therefore, the majority of the Indiana Court of Appeals ruled that, in the case at bar, the State was required to prove that the four (4) child victims had to be exhibiting their uncovered genitals and that the four (4) child victims had to act with the intent to arouse or satisfy someone's sexual desires. Since the State presented no evidence at trial that the four (4) child victims either voluntarily exhibited their genitals or acted with the intent to arouse or satisfy sexual desires, the Court of Appeals reversed the convictions for Attempted Child Exploitation, due to insufficient evidence.

On April 18, 2013, the Indiana Supreme Court granted transfer in this case, thereby vacating the opinion of the Indiana Court of Appeals, pursuant to Indiana Appellate Rule 58(A).

The defendant argued to the Indiana Supreme Court that the evidence supporting the convictions was insufficient because the images that he captured with his trusty shoe-cam did not depict any uncovered genitals and did not meet the requirements of the definition of "sexual conduct" in IC 35-42-4-4(a)(4). The Indiana Supreme Court brushed this argument aside, noting

that this argument was without merit because the defendant was charged with *attempted* child exploitation, not the completed crime.

The defendant's second argument to the Indiana Supreme Court was that it was unreasonable for the jury to infer that by taking "upskirt" photos with his shoe-cam, the defendant actually intended to capture images of uncovered genitals. The defendant testified at trial that his particular fetish was to capture images of "high heels, boots, pantyhose, panty shots, and nylons."

The Indiana Supreme Court noted that the jury was free to refuse to give credit to the defendant's self-serving testimony regarding his sexual fetish. Instead, the intent element of a crime may be inferred from the defendant's conduct and the natural and usual sequence to which such conduct usually points. *Bowles v. State*, 737 N.E.2d 1150 (Ind. 2000).

The Indiana Supreme Court held that the evidence presented at the jury trial was sufficient to support the four (4) convictions for Attempted Child Exploitation. The Supreme Court ruled that, based upon the evidence presented at trial, a jury could reasonably infer that, by using his shoe-cam, Upskirt Delagrange intended to take pictures of the uncovered genitals of his victims.

NOTE: The defendant, Upskirt Delagrange, has completed his executed term of imprisonment and is currently on probation in Marion County. Based upon his new life experiences at the Indiana DOC, the defendant's new fetish is tattooed men in orange jumpsuits.

CARRYING A HANDGUN WITHOUT A LICENSE

Moss v. State, 6 N.E.3d 958 (Ind. App. 2014)

Decided: March 20, 2014
State Filed Petition for Transfer: April 21, 2014
No decision on Petition for Transfer as of June 10, 2014
Prior felony conviction reduced to misdemeanor
Evidence of prior felony conviction insufficient

In Cause Number: 49F15-1112-FD-086565 (Marion Criminal Court 15), the defendant, Kevin Moss, was charged with the offense of Theft (a Class D felony). In July 2012, the defendant and the State submitted a written plea agreement to the trial court. The written plea agreement called for the defendant to enter a plea of guilty to the charge of Theft, with judgment of conviction to be initially entered as a Class D felony. The parties agreed that the defendant would be sentenced to a one year term of imprisonment, to be served on home detention. In addition, the plea agreement provided that the defendant *could* petition to have the judgment of conviction reduced to a Class A misdemeanor, "upon successful completion of probation without any violations."

On January 22, 2013, Marion County Community Corrections issued a discharge summary. That discharge summary stated that the defendant had completed all terms (apparently, of home detention, although the opinion of the Indiana Court of Appeals stated that it was a completion of all terms of probation) and that the defendant was discharged "by

operation of law." It is not clear from the opinion of the Indiana Court of Appeals whether the defendant was ever on probation in this case.

On January 29, 2013, just seven (7) days after the issuance of the discharge summary by Marion County Community Corrections, the defendant was driving a car when he was stopped for a traffic violation by Indianapolis Metropolitan Police Department Officer Larry Stargel. Since the defendant is a criminal, things did not go well for him during the traffic stop. First, the defendant had to admit that his driver's license had been suspended and the defendant was arrested for that. Then, during a search of the defendant's vehicle, the police found a handgun. The defendant admitted that the handgun belonged to him and that he had no license to carry a handgun.

On February 4, 2013, the State charged the defendant, Kevin Moss, with Carrying a Handgun Without a License (a Class C felony) in Cause Number: 49G20-1302-FC-006734 (Marion Criminal Court 20).

On April 4, 2013, the defendant filed a motion in Criminal Court 15, Cause Number: 49F15-1112-FD-086525, requesting that judgment of conviction be modified from a Class D felony to a Class A misdemeanor. The Marion Criminal Court 15 granted the motion and modified the conviction from a Class D felony to a Class A misdemeanor.

The defendant then returned to Marion Criminal Court 20, waiving the order from Marion Criminal Court 15 around, and filed a motion to dismiss the Class C felony enhancement portion of the charge of Carrying a Handgun Without a License. The defendant contended that since his Class D felony conviction for Theft had been changed to a Class A misdemeanor, there was now insufficient evidence for the State to proceed on the Class C felony portion of the charge.

The trial court denied the defendant's motion to dismiss and, for good measure, shredded the order from Marion Criminal Court 15. The trial court held that, at the time of the alleged offense, the defendant's prior conviction for Theft was a Class D felony. The trial court (the Honorable Michael Jensen) stated that the fact that the judgment of conviction was later modified to a Class A misdemeanor, pursuant to IC 35-50-2-7, was irrelevant.

The defendant then pursued an interlocutory appeal.

The Indiana Court of Appeals began its examination of the issue by noting that IC 35-38-1-1.5 controlled the modification of the defendant's judgment of conviction from a Class D felony to a Class A misdemeanor. The Court of Appeals went on the state that the plea agreement entered into by the parties created obligations that had to be fulfilled.

Based upon this analysis, the Indiana Court of Appeals concluded that the modification of the judgment of conviction from a Class D felony to a Class A misdemeanor was *mandatory* essentially at the time that the discharge summary was filed by Marion County Community Corrections. Therefore, to allow the State to continue to use the defendant's prior felony conviction against him in the handgun case would deprive the defendant of the benefit of the bargain in the plea agreement entered into in the Theft case.

The Indiana Court of Appeals reversed the decision of the trial court (Marion Criminal Court 20) and remanded the case to that court with instructions to dismiss the Class C felony enhancement portion of the charging Information.

Analysis

With all due respect to the Judges of the Indiana Court of Appeals, the Court missed the target on this case by about 16 miles.

First, IC 35-38-1-1.5 does NOT govern the judgment of conviction issue. That statute has very specific requirements which did not appear to be involved in the plea agreement in the Theft case. The plea agreement form in that case was a standard "fill-in-the-blank" form, which did not include any of the language or requirements of IC 35-38-1-1.5.

Second, the plea agreement submitted in the Theft case simply provided the defendant with the opportunity to request a reduction of the judgment from a Class D felony to a Class A misdemeanor "upon successful completion of probation without any violations." There was nothing mandatory in the plea agreement requiring the reduction of the judgment of conviction. The defendant did not lose the benefit of his bargain, because there simply was no such benefit.

Third, the Indiana Court of Appeals improperly distinguished and overlooked the precedent set forth in *McClure v. State*, 803 N.E.2d 210 (Ind. App. 2004). Faced with the same issue in a case involving a conviction for Carrying a Handgun Without a License (a Class C felony), the Indiana Court of Appeals in *McClure* held that the fact that the defendant might have been able to get the prior Class D felony conviction reduced to a Class A misdemeanor was "irrelevant." The Court stated:

> "The bottom line is that McClure had a prior felony conviction at the time he committed the instant offense that was sufficient to support the enhancement to a Class C felony conviction in this case." 803 N.E.2d at 215.

Perhaps the Indiana Supreme Court will grant transfer and clarify this issue.

DRIVING WHILE HTV

State v. Bryant, 4 N.E.3d 808 (Ind. App. 2014)

Decided: February 27, 2014
Defendant's Petition for Rehearing Denied: April 8, 2014
Defendant Files Petition for Transfer: May 8, 2014
No decision on Petition for Transfer as of June 10, 2014

On June 22, 2012, Hendricks County Sheriff's Department Deputy Joshua Faith stopped the defendant, Chad Bryant, because the brake lights on the defendant's vehicle were not working. At that time, the Indiana Bureau of Motor Vehicles had the defendant's status as a habitual traffic violator.

On June 25, 2012, the State charged the defendant, Chad Bryant, with Driving After Being Adjudged a Habitual Traffic Violator (a Class D felony). On March 5, 2012, the defense filed a motion to dismiss the charging Information, arguing that the records of the Indiana Bureau of Motor Vehicles listed three (3) prior convictions for the offense of Operating While Intoxicated. However, two (2) of those convictions listed the same Cause Number.

The trial court granted the defendant's motion to dismiss and the State appealed.

On appeal, the Indiana Court of Appeals reviewed several decisions by the Indiana Appellate Courts where challenges have been made by a defendant to the habitual traffic violator status determination by the Indiana Bureau of Motor Vehicles.

In *Stewart v. State*, 721 N.E.2d 876 (Ind. 1999), the Indiana Supreme Court held that a person who has been declared by the Indiana BMV to be a habitual traffic violator remains in that status until the BMV rescinds such a designation. The Indiana Supreme Court stated:

> "It follows that the crucial date, insofar as habitual violator status is concerned, is the date of driving, not the date on which the status is challenged or set aside. If the person is driving despite notification that he may not do so because he has been declared a habitual traffic violator, he is flaunting the law even if one or more of the underlying convictions is voidable." 721 N.E.2d at 880.

The rule set for in *Stewart* was modified by the Indiana Supreme Court in *State v. Hammond*, 761 N.E.2d 812 (Ind. 2002) and *State v. Oney*, 993 N.E.2d 157 (Ind. 2013). In those cases, the Indiana Supreme Court held that if a *material* error occurred in the determination by the Indiana BMV that the person was a habitual traffic violator, a defendant may be able to set aside a habitual traffic violator determination and a conviction for Driving After Being Adjudged a Habitual Traffic Violator. It is clear from these decisions that a material error is one in which it is determined that the defendant is NOT, in fact, a habitual traffic violator.

In the case at bar, the Indiana Court of Appeals reversed the order of the trial court, dismissing the charge of Driving After Being Adjudged a Habitual Traffic Offender. The Court of Appeals noted that, while there were errors in the Indiana BMV paperwork, the defendant's prior criminal history was such that he did, in fact, have three (3) prior convictions for Operating While Intoxicated and the defendant was, in fact, a habitual traffic violator. Therefore, the defendant was not entitled to a dismissal of the charge because there was no material error by the Indiana BMV in declaring the defendant to be a habitual traffic violator and the defendant had made no effort to correct the improper BMV paperwork through the administrative appeals process.

INTIMIDATION

C.L. v. State, 2 N.E.3d 798 (Ind. App. 2014)
Decided: January 30, 2014
No further appeal
Opinion certified: March 14, 2014
Evidence insufficient

Terry Landis had a home in Blackford County, which he shared with his loving and appreciative grandson, C.L. Terry Landis was hoping to obtain a $5,000 loan to repair the water lines to his residence.

Terry Landis told C.L. about the loan and the intended water pipe project and C.L. demanded $3,500 of the proceeds of the loan. Apparently, C.L. wanted to buy a car instead of drink fresh water.

C.L. started threatening this grandfather, stating that he was going to beat him if the grandfather did not give him the money for the car and also telling his grandfather that he would kill his grandfather if he (C.L.) was ever sent to jail. When Terry Landis stated that he was going to just leave the waterless residence, C.L. threatened to go after him and drag him back.

Terry Landis was concerned that his grandson, C.L., was going to hurt him. Terry Landis felt that he could no longer "handle" C.L., especially since C.L. had been "locked up for three years."

On April 29, 2013, at approximately 1:00 a.m., Terry Landis was able to escape from his own home, while his grandson was asleep. Landis walked about one-half mile and then called the police and explained the situation to the police.

On May 6, 2013, the State filed a Petition Alleging Delinquency against C.L., alleging that C.L. had committed three (3) counts of Intimidation (as a Class A misdemeanor if committed by an adult) and one count of Possession of Marijuana. The Petition Alleging Delinquency alleged that C.L. had communicated a threat to Terry Landis with the intent to place Terry Landis in fear of retaliation for a lawful prior act.

The case proceeded to a fact-finding hearing. At the conclusion of the fact-finding hearing, the trial court adjudicated C.L. a delinquent child, finding that C.L. had committed one count of Intimidation. The Respondent, C.L., appealed.

In a 2-1 decision, the Indiana Court of Appeals reversed the juvenile delinquency adjudication, holding that there was insufficient evidence to support the trial court's determination that C.L. had committed the offense of Intimidation.

The majority of the Indiana Court of Appeals noted that, for a person to commit the offense of Intimidation, pursuant to IC 35-45-2-1(a)(2), the State must prove that the legal act by the victim occurred prior to the threat by the defendant and that the defendant intended to place the victim in fear of retaliation for that act. See, *Griffith v. State*, 898 N.E.2d 412 (Ind. App. 2008). If the State fails to prove that the defendant threatened the victim in order to place the

victim in fear of retaliation for a prior lawful act, the conviction for the offense of Intimidation should be vacated. *H.J. v. State*, 746 N.E.2d 400 (Ind. App. 2000).

The majority of the Indiana Court of Appeals ruled that C.L.'s threats of violence towards his grandfather, Terry Landis, were not designed to retaliate against a prior lawful act of the grandfather. Instead, the threats made by the loving, grateful grandson C.L. towards his grandfather were conditional and aimed at future, rather than past, conduct.

The majority of the Indiana Court of Appeals reversed the adjudication of C.L. as a delinquent child, due to insufficient evidence.

Judge Najam dissented. Judge Najam was of the opinion that the threats made by C.L. were in response to and in retaliation for a lawful act by the grandfather – that is, the grandfather's decision not to give C.L. a portion of the $5,000 loan. Judge Najam would have upheld the trial court's adjudication of C.L. as a delinquent child.

McCaskill v. State, 3 N.E.3d 1047 (Ind. App. 2014)

Decided: February 17, 2014
No further appeal
Opinion certified: March 31, 2014
Evidence insufficient

The defendant, Rakiea McCaskill, was having an affair with a married man for approximately two (2) years. The defendant and the married man had a child together. Apparently, the married man had been telling the defendant that he was going to leave his wife, but had not done so.

NOTE: The Indiana Court of Appeals did not name the married man in the middle of this love triangle, but instead only referred to him as "Husband." It is not clear why the Court of Appeals did not identify the married man.

The victim in this case was Tamika Matlock, who was married to the man in the middle.

On October 28, 2012 and October 29, 2012, the defendant called Tamika Matlock four times, stating that the defendant was going to come over to Tamika Matlock's house and "beat her ass." The defendant also contacted Tamika Matlock through Facebook and, again informed Tamika Matlock that she was going to beat her ass and that "everybody in the city knew that she would beat her ass."

On December 10, 2012, the State charged the defendant, Rakiea McCaskill, with Intimidation (a Class A misdemeanor), pursuant to IC 35-45-2-1(a)(1). The charging Information alleged that the defendant threatened the victim, Tamika Matlock, with the intent that Tamika Matlock engage in conduct against her will, namely, "to leave her husband and/or cause her husband to leave her."

The case proceeded to bench trial. During that bench trial, the victim, Tamika Matlock, testified that the defendant "kind of wants my husband to leave me." However, when questioned directly, Tamika Matlock admitted that the defendant did not say why she was going to beat her ass.

At the conclusion of the bench trial, the trial court found the defendant, Rakiea McCaskill, guilty of Intimidation, a Class A misdemeanor. The trial court sentenced the defendant to 365 days, with 363 days suspended.

The defendant appealed.

On appeal, the defendant contended that the evidence presented at the bench trial was insufficient to support the conviction for Intimidation, as charged under IC 35-45-2-1(a)(1). That statute states:

> "(a) A person who communicates a threat to another person, with the intent:
> (1) that the other person engage in conduct against the other person's will;
> * * *
> commits intimidation, a Class A misdemeanor."

The defendant did not deny on appeal that she threatened the victim, Tamika Matlock. Instead, the defendant claimed that there was insufficient evidence to prove her intent when threatening the victim.

The State contended on appeal that the defendant's intent had been proven by circumstantial evidence. Specifically, the State argued that because the defendant and the victim did not have a relationship, other than unhappily sharing the victim's husband, the defendant's aim must have been for the victim to leave her husband.

The Indiana Court of Appeals rejected the State's argument, concluding that it was mere speculation. The Court of Appeals held that, given the evidence presented at the bench trial, the defendant's intent in threatening the victim was unclear and, therefore, there was insufficient evidence to support the conviction for Intimidation.

The Indiana Court of Appeals also noted that, at the conclusion of the bench trial, the State argued to the trial court for a conviction for a lesser-included offense of Harassment (a Class B misdemeanor), pursuant to IC 35-45-2-2(a). The Indiana Court of Appeals concluded that there was sufficient evidence presented at the defendant's bench trial to support a conviction for Harassment. Therefore, the Court of Appeals remanded the case to the trial court with instructions to vacate the conviction for Intimidation (a Class A misdemeanor) and enter judgment of conviction for the lesser-included offense of Harassment (a Class B misdemeanor).

Brewington v. State, 7 N.E.3d 946 (Ind. 2014)

Decided: May 1, 2014
Evidence Sufficient
Free Speech vs. True Threats

The defendant, Daniel Brewington, was divorced in 2009. He was extremely unhappy during and after the divorce proceedings and engaged in a years-long smear campaign against the trial judge (Judge James Humphrey) and the child custody evaluator in the divorce proceedings (Doctor Edward Conner). The defendant posted messages on blogs, used bulk e-mail, faxes and other forms of communication to accuse the Judge and the Doctor of unethical and criminal behavior.

In February 2011, a grand jury in Dearborn County indicted the defendant for the following crimes:

1. One (1) count of Intimidation, a Class D felony, relating to the Judge;
2. One (1) count of Intimidation, a Class A misdemeanor, relating to the Judge's wife;
3. One (1) count of Intimidation, a Class A misdemeanor, relating to the Doctor;
4. One (1) count of Obstruction of Justice, a Class D felony, relating to the Doctor;
5. One (1) count of Perjury, a Class D felony, relating to the defendant's testimony before the grand jury; and
6. One (1) count of Unlawful Disclosure of Grand Jury Proceedings, a Class B misdemeanor.

The case proceeded to jury trial. The jury found the defendant not guilty of the charge of Unlawful Disclosure of Grand Jury Proceedings and guilty of all of the other charges. The defendant appealed.

In 2013, the Indiana Court of Appeals issued a decision in this case. *Brewington v. State*, 981 N.E.2d 585 (Ind. App. 2013). The Indiana Court of Appeals reversed the conviction for Intimidation (a Class A misdemeanor) against the doctor, due to State double jeopardy issues relating to the conviction for Obstruction of Justice. The Court of Appeals also reversed the conviction for Intimidation (a Class A misdemeanor) against the Judge's wife, holding that the evidence was insufficient to support the conviction. The Court of Appeals affirmed the three (3) Class D felony convictions.

The defendant filed a Petition for Transfer. While the Petition for Transfer was being considered by the Indiana Supreme Court, several organizations and individuals received permission to appear as amicus curiae, including the following:

1. Digital Media Law Project;
2. The Hoosier State Press Association;
3. The Indiana Coalition for Open Government;
4. The James Madison Center for Free Speech;
5. ACLU of Indiana;
6. The Indianapolis Star;
7. The Indiana Association of Scholars;
8. Nuvo;
9. Professor James W. Brown;
10. Professor Anthony Fargo;
11. Professor Sheila Kennedy; and
12. Professor Eugene Volokh.

On May 1, 2014, the Indiana Supreme Court accepted transfer and issued an opinion in this case. In a thoughtful, well-written opinion authored by Justice Rush, the Indiana Supreme Court discussed the issue of statements made by an individual that are protected free speech versus true threats, which are not protected by the First Amendment.

Key to this discussion by the Indiana Supreme Court was a review of the "actual malice" standard, as it applies to statements made concerning public figures (such as the Judge and, arguably, the Doctor). The Indiana Supreme Court suggested that the actual malice standard is so steep that prosecutions involving public figures as victims under IC 35-45-2-1(c)(6) and IC 35-45-2-1(c)(7) are all but impossible.

After reviewing the substantial protections regarding free speech, the Indiana Supreme Court then discussed the fact that a "true threat" is not protected by the First Amendment. A "true threat" is a statement wherein a speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or a group of individuals.

The Indiana Supreme Court summarized the distinction, by stating:

> "It is every American's constitutional right to criticize, even ridicule, judges and other participants in the judicial system – and those targets must bear the burden as the price of free public discourse. But that right does not permit threats against the safety and security of any American, even public officials, regardless of whether those threats are accompanied by some protected criticism. Defendant's true threats against the Judge and the Doctor therefore find no refuge in free speech protections. To the contrary, they undermine the core values of judicial neutrality and truthful witness testimony upon which every aggrieved citizen depends."

Applying these standards to the case at bar, the Indiana Supreme Court held that there were communications by the defendant, Daniel Brewington, that could be viewed, in an overall context, by a reasonable jury, as true threats against the Judge and the Doctor. In particular, the defendant's publication, on the internet, of the addresses of the private residences of these two victims could be seen by a reasonable jury as a true threat.

The Indiana Supreme Court affirmed the defendant's convictions for Intimidation (a Class D felony) against the Judge and for Obstruction of Justice (a Class D felony) relating to the Doctor. In all other respects, the Indiana Supreme Court summarily affirmed the opinion of the Indiana Court of Appeals.

HUNTING ON PRIVATE PROPERTY WITHOUT PERMISSION

Schath v. State, 2 N.E.3d 136 (Ind. App. 2014)

Decided: January 28, 2014
No further appeal
Opinion certified: March 12, 2014
Evidence insufficient
Rocky Raccoon

This is the story about Rocky Raccoon.

On November 17, 2012, the defendant, Jeremy Schath, was hunting, with permission, on property located on the south side of County Road 640 in Decatur County. The defendant had his hunting dog with him (a 3 year old female blue tick hound named Magill – but everyone knew her as Nancy). The property on the north side of County Road 640 was owned by Coffee Tree Farms and the defendant did not have permission to hunt on that property.

At some point, Magill crossed over County Road 640 and went onto the property owned by Coffee Tree Farms. The defendant also went onto the property of Coffee Tree Farms to retrieve Magill. The defendant was not armed at the time.

The defendant located his dog on the Coffee Tree Farms property. Magill had cornered a raccoon named Rocky in a drainage pipe. The defendant got his dog and put Magill back in his truck for a time-out. The truck was located on the south side of County Road 640.

On March 12, 2013, the State charged the defendant, Jeremy Schath, with hunting on private property without permission, a Class C misdemeanor. The case proceeded to bench trial. At the conclusion of the State's case, the State requested permission to amend the charging Information to include an allegation that the defendant chased a raccoon onto the Coffee Tree Farms property, without permission. The trial court allowed the amendment and found the defendant guilty of the amended charge.

The defendant appealed.

The Indiana Court of Appeals examined the statutes relating to the offense. IC 14-22-10-1 states, in relevant part:

> "A person may not:
> (1) fish, hunt, trap, or chase;
> * * *
> upon privately owned land without having the consent of the owner or tenant of the land."

IC 14-8-2-39 defines the word "chase" as follows:

> "Chase", for purposes of IC 14-22 means following wildlife without the intent to take."

The Indiana Court of Appeals held, without a lot of discussion, that the evidence presented at the bench trial was not sufficient to support the conviction. Essentially, the Court of Appeals ruled that the defendant neither hunted nor chased a raccoon on the property owned by Coffee Tree Farms. The Court of Appeals stated that the defendant was merely retrieving his dog.

Epilogue

Blue tick hound Magill lost her master hunting certificate from the National Blue Tick Hound Association over this stunt. Magill is now retired from hunting and is being used for breeding purposes only.

Rocky Raccoon was unhappy with the decision of the Indiana Court of Appeals. Rocky does not know much about the statutes in Title 14. However, he does know that Magill chased him into a drainage pipe and that Coffee Tree Farms is not the sanctuary he thought it was. Fortunately, Rocky Raccoon was not injured in this incident (it was only a scratch).

Rocky Raccoon has moved and now resides in the black mountain hills of Dakota.

Kelley v. State, 2 N.E.3d 777 (Ind. App. 2014)

Decided: January 28, 2014
No further appeal
Opinion certified: March 12, 2014
Guilty But Mentally Ill Verdict Overturned

The defendant, Tammy Kelley, lived with Derrick Shepard and Shepard's twelve year old daughter, D.S.

On March 6, 2011, Derrick Shepard left the apartment that the three shared, leaving his daughter with the defendant. While D.S. was eating breakfast, the defendant came into the room, looking for money and an ID. The defendant began punching D.S. in the face, saying that she had had enough of D.S.'s shit. The defendant then grabbed a steak knife from the kitchen and proclaimed, "I can't take this anymore. I've had enough." The defendant then proceeded to stab twelve year old D.S. nine times, almost killing her.

It turns out that D.S. was WAY tougher than the defendant thought. Despite severe stab wounds, D.S. managed to escape the attack and run out of the apartment. D.S. obtained the help of a neighbor, who called the police. Several officers with the Logansport Police Department arrived and went to the apartment where the defendant was located. The police found the defendant in the apartment, with blood all over her and the apartment. A blood-stained steak knife with a bent blade was located on the floor about six feet away from the defendant.

The police took the defendant into custody at gunpoint. When a Logansport Police Department Officer attempted to advise the defendant of her Miranda rights, the defendant told the police to "fuck off" and demanded water, stating, "I didn't do anything. I just need water."

When the police assisted the defendant to her feet, the handcuffed defendant began fighting wildly, kneeing one officer in the groin and kicking another officer in the groin. When the police brought the defendant out of the apartment, she was screaming and kicking and had to be held down. As the Cass County Jail, the defendant continued to act-up and was placed in a padded cell.

On March 9, 2011, the State charged the defendant, Tammy Kelley, with the following offenses:

1. Attempted Murder (Class A felony);
2. Criminal Confinement (Class C felony);
3. Battery of a person under the age of 14 (Class D felony);
4. Battery on a police officer (Class D felony);
5. Battery on a police officer (Class D felony); and
6. Resisting Law Enforcement (Class A misdemeanor).

The defense interposed the defense of insanity and two psychiatrists were appointed by the trial court to evaluate the defendant. Both psychiatrists interviewed the defendant, who did not provide the psychiatrists with much information regarding the stabbing incident. The defendant claimed that she did not remember the incident.

Both of the psychiatrists also reviewed reports concerning the defendant's long history of mental illness, including a prior diagnosis of bipolar disorder. In prior reports, the defendant reported hearing command voices and having hallucinations. The defendant had previously been prescribed anti-psychotic medications, but had a history of discontinuing mental health treatment and medications.

The psychiatrists each submitted a report to the trial court, concluding that the defendant was unable to appreciate the wrongfulness of her conduct at the time of the offense, as a result of mental disease.

The case proceeded to bench trial. During the bench trial, no testimony was presented by either party. Instead, the parties stipulated to the police reports, the reports of the two psychiatrists, and some of the medical reports relating to D.S.'s stay at the hospital after the stabbing. The parties gave closing arguments and the trial court took all matters under advisement.

On January 11, 2013, the trial court issued a written order, finding the defendant not guilty of the charge of Attempted Murder and finding the defendant guilty but mentally ill on all of the remaining charges. On February 8, 2013, the trial court sentenced the defendant to an aggregate executed term of imprisonment of 4,800 days.

NOTE: At the time of sentencing, the defendant had two prior felony convictions, two prior misdemeanor convictions and one pending felony charge in another county.

The defendant appealed.

On appeal, the defendant argued that it was contrary to law for the trial court to find her guilty but mentally ill when the medical examinations were unanimous that she was insane at the time of the offense and there was no contradictory lay testimony upon which the trial court could rely in reaching its verdict.

In its opinion, the Indiana Court of Appeals reviewed a number of Indiana Supreme Court cases where the Supreme Court discussed the manner of and standard of review in cases where the fact-finder had reached a verdict of guilty but mentally ill, in spite of unanimous expert opinions that the defendant was insane at the time of the crimes. See, *Barany v. State*, 658 N.E.2d 60 (Ind. 1995); *Thompson v. State*, 804 N.E.2d 1146 (Ind. 2004); *Galloway v. State*, 938 N.E.2d 699 (Ind. 2010).

The Indiana Court of Appeals stated that the issue was whether there was sufficient probative evidence in the record from which the trial court could have determined that the defendant was sane at the time of the crimes, contrary to the opinions of the psychiatrists. The Court of Appeals held that there was not such sufficient evidence.

The Indiana Court of Appeals noted that the defendant had a long history of mental illness. Moreover, the actions of the defendant when the police arrived did not support a finding of sanity. While the foundation of the opinions of the psychiatrists was limited, there was nothing in the record, either through the testimony of lay witnesses or the demeanor of the defendant, that would support a finding of guilty but mentally ill.

The Indiana Court of Appeals reversed the trial court's verdicts of guilty but mentally ill and remanded the case to the trial court with instructions to replace those verdicts with verdicts of not guilty by reason of insanity.

Gore v. State, 7 N.E.3d 387 (Ind. App. 2014)

Decided: April 29, 2014
Defendant filed Petition for Transfer: May 29, 2014
No decision on Petition for Transfer as of June 10, 2014
Guilty But Mentally Ill Verdict Upheld

The defendant, Jamal Gore, has a long history of mental illness. The defendant was diagnosed with schizophrenia at age thirteen. He was hospitalized for mental illness at least five times between 2002 and 2009.

In May 2010, the defendant's parents requested an emergency detention order because the defendant was not taking his medication and was acting very strangely. The emergency detention order was never executed and the defendant was not picked-up.

On May 24, 2010, the defendant met with an old friend from school, John Davis, Jr. and his girlfriend, Melissa Maida. The three drove to a gas station and then, at the request of the defendant, drove around looking to buy marijuana.

As Melissa Maida was driving down a road after a failed attempt to buy marijuana, the defendant shot John Davis, Jr. five times in the head, neck and back, killing him. The defendant also shot Melissa Maida once in the leg. The defendant then opened the back door to the car and ran away.

The police found the defendant about four blocks away from where the shooting occurred. The police observed that the defendant was calm, straight-forward, not agitated or aggressive, and the defendant answered questions like a "normal person." However, within about 24 hours, medical personnel at the jail noted that the defendant was agitated, withdrawn, depressed and paranoid.

The State charged the defendant, Jamal Gore with Murder and Battery (a Class C felony). On September 30, 2010, the trial court found that the defendant was not competent to stand trial and sent the defendant to a facility operated by the Division of Mental Health. After the Division of Mental Health got the defendant back on his medication and otherwise stabilized, the trial court, on January 4, 2011 found that the defendant was competent to stand trial.

The trial court appointed three (3) doctors to examine the defendant and determine whether the defendant was insane at the time that he shot and killed John Davis, Jr. The defendant also retained his own expert.

A jury trial began on October 12, 2012. All four (4) experts testified at the jury trial. The jury found the defendant guilty but mentally ill with respect to both charges. The trial court sentenced the defendant to a total executed term of imprisonment of 52 years. The defendant appealed.

On appeal, the defendant contended that there was insufficient evidence to support the verdict of guilty but mentally ill and that the only proper verdict was one of not guilty by reason of insanity. Specifically, the defendant argued that there was no conflict among the experts and, therefore, no sufficient probative evidence from which a conflicting inference of sanity reasonably could be drawn.

The Indiana Court of Appeals ruled that the defendant was factually incorrect about the testimony of the four (4) mental health experts, as follows:

1. One doctor applied the incorrect standard.
2. One doctor testified that the defendant's ability to appreciate the wrongfulness of his conduct "might" have been affected by his mental illness.
3. One doctor testified that the defendant was insane.
4. One doctor testified that the defendant was sane.

The Indiana Court of Appeals held that there was disagreement among the experts as to whether the defendant was sane at the time of the offense. This kind of conflicting evidence is for the jury to weigh and the Court of Appeals stated that it would not reweigh the evidence.

The Indiana Court of Appeals affirmed the verdicts of guilty but mentally ill.

EVIDENCE – HEARSAY

Blount v. State, 4 N.E.3d 787 (Ind. App. 2014)
Decided: February 24, 2014
Transfer GRANTED: May 15, 2014
Hearsay – Conviction Reversed

In November 2012, Indianapolis Metropolitan Police Department Detective Terry Smith was conducting general surveillance at a motel located near the intersection of I-465 and South Harding Street (State Road 37). Detectives were conducting surveillance in and around that area because the area has, for decades, been a cesspool of narcotics and prostitution activity.

Shortly before 11:00 a.m., Detective Smith saw two individuals walk out of the Best Inn motel. One man was wearing a black hoodie and the other a gray sweatshirt. A woman walked past Detective Smith's undercover car and met up with the man in the gray sweatshirt.

A few minutes later, Detective Smith saw the woman and the man in the gray sweatshirt quickly walk away from the corner of the building. The man in the black hoodie stepped out, with his arm extended downward at a 45 degree angle. Detective Smith saw a muzzle flash and heard a gunshot coming from the man in the black hoodie. Because his view was obstructed, Detective Smith did not actually see the man in the black hoodie with a gun.

Indianapolis Metropolitan Police Department Detective Andrews was conducting surveillance at another of the 5-star motels in the area when he heard the gunshot. Detective Andrews quickly joined Detective Smith at the Best Inn motel to look for the person that fired the gun.

By this time, 911 calls were flooding in, where the callers claimed that the suspect had run into Room 150 of the Best Inn motel. Detectives proceeded to that room and saw a woman who Detective Smith knew as Ricky Brock run out of Room 150 and up the stairs.

The detectives gave chase upstairs and were directed to Room 240. The police made forced entry into that room, where they encountered Ricky Brock, her five year old son, and two other women. Upon questioning, both Ricky Brock and her son advised detectives that the nickname of the person she believed fired the gun was "Big D."

The police searched the area and were unable to locate the suspect or the gun. The police did recover a spent round from a hole in the ground where the suspect fired the gun.

Based upon the nickname provided by Ricky Brock and her son, Detective Andrews believed that the person who fired the gun might be frequent flyer Shawn Blount. Detective Andrews prepared a photo array, which included the picture of Shawn Blount, and showed the photo array to Detective Smith. Detective Smith identified the picture of Shawn Blount as the person in the black hoodie who had fired the gun.

The State charged the defendant, Shawn Blount, with Possession of a Firearm by a Serious Violent Felon (a Class B felony). The case proceeded to jury trial. During the jury trial, Detective Smith testified, over the objection of the defense, that Ricky Brock and her son provided detectives with the nickname of the person they believed fired the gun.

The jury found the defendant guilty of Possession of a Firearm by a Serious Violent Felon. The trial court sentenced the defendant to an executed term of imprisonment of 12 years. The defendant appealed.

On appeal, the defendant alleged that the trial court erred in allowing Detective Smith to testify about what Ricky Brock and her son told him about the nickname of the person who fired the gun. The defendant claimed that such testimony was inadmissible hearsay.

NOTE: Ricky Brock is the girlfriend of the defendant, Shawn Blount. Not surprisingly, Ricky Brock did not testify for the State during the jury trial.

The State made a couple of arguments on appeal. First, the State contended that the testimony by Detective Smith was not hearsay because Detective Smith merely testified that Ricky Brock and her son gave the detectives a nickname and did not testify what nickname was provided.

The majority of the Indiana Court of Appeals (it was a 2-1 decision) rejected this argument, stating:

> "Because his testimony described out-of-court assertions susceptible of being true or false, namely, that the person Brock and her son identified as the shooter, they constitute statements within the hearsay rule." 4 N.E.3d at 791.

The State also argued on appeal that the testimony of Detective Smith did not constitute hearsay because the statement was not offered to prove the truth of the matter asserted, but instead offered to show the course of the investigation. See, *Swanson v. State*, 666 N.E.2d 297 (Ind. 1996).

The majority of the Indiana Court of Appeals did not like this argument either, noting that course of investigation evidence is generally irrelevant and hearsay evidence within such course of investigation testimony may be used by a jury as proof of the matter asserted. The Indiana Court of Appeals held that the testimony by Detective Smith in the case at bar was similar to the testimony deemed hearsay by the Indiana Supreme Court in *Williams v. State*, 544 N.E.2d 161 (Ind. 1989).

The majority of the Indiana Court of Appeals summarized its decision on this issue, stating:

> "How the police narrowed the investigation to Blount was irrelevant to any contested issue in this case. Moreover, the prejudicial impact of the testimony was great: in a jury trial to determine whether Blount unlawfully possessed a firearm, Detective Smith related out-of-court statements asserting that Blount possessed a firearm. Any probative value to the statements were thus substantially outweighed by the danger of unfair prejudice. We therefore conclude that Detective Smith's testimony was inadmissible hearsay and that the trial court abused its discretion by admitting it." 4 N.E.3d at 792.

After determining that the testimony of Detective Smith was inadmissible hearsay, the Indiana Court of Appeals then examined whether the error in admitting such testimony was harmless. The majority of the Indiana Court of Appeals ruled that the hearsay testimony was not harmless because the hearsay statements by Ricky Brock and her son buttressed Detective Smith's identification of the defendant, Shawn Blount, as the person who shot the gun.

Based upon the above, the Indiana Court of Appeals reversed the defendant's conviction for Possession of a Firearm by a Serious Violent Felon and remanded the case to the trial court for a new trial.

As set forth above, the Indiana Supreme Court has granted transfer in this case. As of June 10, 2014, no decision has been issued by the Indiana Supreme Court.

PLEA AGREEMENT

Russell v. State, _____ N.E.3d _____ (Ind. App. 2014)
Decided: June 5, 2014
84A01-1312-CR-532
Plea Agreement – Illegal Provisions

The defendant, Larry Russell, and his wife adopted three teenage children. Between August 23, 2012 and November 23, 2012, the defendant engaged in repeated acts of abuse and neglect with respect to these three children.

The children were locked in one room and deprived of food and water and access to a bathroom for extended periods of time. The defendant poured urine over the children's heads, placed "Icy-Hot" on their genitals and rectums, waterboarded them, and tied them to their beds.

On November 23, 2012, one of the children, P.G., escaped from the hellish prison and went to a nearby hospital. Although P.G. was 17 years old, he weighed only 82 pounds.

The State charged the defendant, Larry Russell, with the following:

1. Five (5) counts of Neglect of a Dependent (Class C felony);
2. Two (2) counts of Criminal Confinement (Class C felony);
3. Three (3) counts of Criminal Confinement (Class D felony); and
4. One (1) count of Neglect of a Dependent (Class D felony).

On September 25, 2013, the defendant and the State entered into a plea agreement whereby the defendant agreed to plead guilty to the seven (7) Class C felony charges. In return, the State agreed to dismiss the four (4) Class D felony charges. The plea agreement left sentencing to the discretion of the trial court, but capped the executed term of imprisonment at ten (10) years, pursuant to IC 35-50-1-2(c).

The trial court accepted the plea agreement and the defendant's guilty pleas. The trial court sentenced the defendant to a total of three 8-year terms of imprisonment, to be served consecutively. However, the trial court noted that, pursuant to the limitations set forth in IC 35-50-1-2, the total executed term of imprisonment was ten (10) years.

The defendant foolishly appealed his sentence.

On appeal, the defendant claimed that the trial court was limited in sentencing the defendant to a total term of imprisonment of 10 years. The defendant argued that the Indiana Department of Correction was treating his sentence as a 24 year sentence, with all but 10 years suspended. The defendant whined that this interpretation of the sentence by the Indiana Department of Correction meant that the defendant was placed in a more restrictive setting that he otherwise would have been.

The Indiana Court of Appeals did not really address the defendant's ridiculous concerns, but instead focused on the agreement of the parties, which was accepted by the trial court, that the executed term of imprisonment was limited by the provisions of IC 35-50-1-2(c).

Without much discussion, the Indiana Court of Appeals held that the defendant's multiple crimes did NOT constitute an episode of criminal conduct, as defined in IC 35-50-1-2(b). The Indiana Court of Appeals stated:

> "Here, the factual basis for Russell's guilty plea encompasses evidence of multiple acts of neglect and confinement that occurred repeatedly over the course of three months. Russell's crimes do not constitute an episode of criminal conduct. Therefore, the law does not require that Russell's sentence be limited."

The Indiana Court of Appeals then went on to hold that the sentence imposed by the trial court contravened the statute and was an illegal sentence. The Court of Appeals stated that it would not uphold a plea agreement with an erroneous sentencing cap.

The Indiana Court of Appeals vacated the defendant's sentence and remanded the case to the trial court. The Court of Appeals ruled that the defendant had the option of entering an open plea of guilty to the seven (7) counts, where the trial court could sentence the defendant to an executed term of imprisonment of up to 56 years. If the defendant chose not to exercise this option, the guilty pleas and the plea agreement must be vacated.