SEARCH AND SEIZURE HANDBOOK

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DISCLAIMER

All information in this handbook is subject to change and should only be used as a starting point for further investigation and study of current law and practice.

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I. DOES THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION OR ARTICLE 1, § 11 OF THE INDIANA CONSTITUTION APPLY?

A. WAS THERE A SEARCH OR SEIZURE?

1. Did the officer's conduct constitute a search or seizure?

The U.S. and Indiana Constitutions only protect against police conduct that constitutes a search or a seizure. Not all observations of a police officer are considered searches, and not all interactions between the police and the citizenry constitute seizures.

a. Was the Defendant seized?

Interactions between police and citizens:

Type of Encounter	Protection	Level of Suspicion
Consensual encounters where citizens feel free to leave at any time	Not constitutionally protected	Requires no suspicion
Stops made pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), where the citizen is not free to leave and is detained for a reasonable amount of time for investigative purposes	Protected by the Fourth Amendment	Requires reasonable suspicion that the citizen is involved in criminal activity
Arrests (police actions exceeded scope of an investigatory detention)	Protected by the Fourth Amendment	Requires probable cause that the person is involved in criminal activity

A seizure has occurred when a police officer, by physical force or show of authority, in some way restrains the liberty of a citizen. What constitutes a restraint on liberty prompting a person to conclude he is not free to leave varies according to the police conduct at issue and the setting in which the conduct occurs. Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975 (1988). The key consideration is whether the conduct objectively manifests the intent to restrain-- subjective perceptions are irrelevant. A command to stop or show of authority is not a seizure unless it actually causes the defendant to stop.

California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547 (1991) (when police are chasing a person who is running away, person is not seized until he either submits or is caught; item disposed of before that time is not the product of a seizure).

Torres v. Madrid, 141 S.Ct. 989 (2021) (a suspect who was shot by police while fleeing the scene in her vehicle was seized because the application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the suspect; here, the officers' shooting applied physical force to the suspect's body and objectively manifested an intent to restrain her from driving away, so the officers seized the suspect for the instant that the bullets struck her).

United States v. Mendenhall, 446 U.S. 544, 560, 100 S.Ct. 1870 (1980) (police have seized an individual "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382 (1991) (a seizure does not occur simply because police officer approaches a person, asks questions, or requests identification); cf. Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177, 124 S.Ct. 2451 (2004) (a person cannot be stopped and asked to identify himself without the stop being based on "objective facts establishing reasonable suspicion to believe that the suspect was involved in criminal activity").

Police actions a reasonable person might interpret as an intrusion on his freedom include operation of a police car in an aggressive manner to either block the person's course or control the person's direction or speed; the threatening presence of several officers, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Bentley v. State, 779 N.E.2d 70, 73-74 (Ind.Ct.App. 2002).

Clark v. State, 994 N.E.2d 252 (Ind. 2013) (a reasonable person would not feel free to leave and is "seized" for Fourth Amendment purposes when he is ordered to sit down).

(1) Was contact with police a consensual encounter or an investigatory stop?

A police officer who neither explicitly nor implicitly communicates that a person is not free to leave may ask questions to investigate allegations of criminal activity without implicating the Fourth Amendment. Clarke v. State, 868 N.E.2d 1114 (Ind. 2007).

However, a police encounter which is not based on suspicion but is random may violate Article I, Section 11 of the Indiana Constitution.

State v. Brown, 900 N.E.2d 820 (Ind.Ct.App. 2009) (where police were leaving private party after completing an investigation of a noise complaint, their approaching D and requesting D's identification violated article I, § 11 because it was random and did not serve any law enforcement needs).

An initially consensual encounter can be transformed into a seizure within the meaning of the Fourth Amendment by increasingly intrusive police procedures. Kaupp v. Texas, 538 U.S. 626, 123 S.Ct. 1843 (2003).

(a) Occupants of vehicle

An officer may approach an individual in a motor vehicle in the same manner as the officer may approach a person outside of a motor vehicle in an effort to obtain information during the course of an investigation. Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885, 888-91 (2004).

i. Investigatory stops (seizure):

Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391 (1979) (stopping automobile and detaining occupants constitutes "seizure" for Fourth Amendment purposes, even though purpose of stop is limited and resulting detention quite brief); see also Brendlin v. California, 127 S.Ct. 2400 (2007).

Finger v. State, 799 N.E.2d 528 (Ind. 2003) (police officer's retention of D's driver's license converted a consensual encounter into an investigatory stop).

Jefferson v. State, 780 N.E.2d 398 (Ind.Ct.App. 2002) (State's characterization of officer's encounter with D as consensual did not conform to evidence presented

at trial; officer stated that D was "temporarily detained" and that he would not have permitted her to walk or drive away even if she had tried to do so).

Shirley v. State, 803 N.E.2d 251 (Ind.Ct.App. 2004) (Fourth Amendment was not implicated when officer asked D as he rode by on bicycle if he was all right; however, after noticing signs of intoxication, officer requested D's identification and casual inquiry became an investigative stop).

Johnson v. State, 856 N.E.2d 706 (Ind.Ct.App. 2006) (investigatory stop clearly began at point during encounter when officer ordered D out of vehicle).

Greeno v. State, 861 N.E.2d 1232 (Ind.Ct.App. 2007) (ordering D to "stop" and "come back" required officer to have reasonable suspicion, which he did not).

Cannon v. State, 722 N.E.2d 881 (Ind.Ct.App. 2000) (D whose car was subjected to dog sniff was seized even though dog was already on scene).

Commonwealth v. Vasquez, 703 A.2d 25 (Pa. 1997) (officers who boarded bus during scheduled layover and asked passenger for consent to search her luggage seized passenger for purposes of state constitutional counterpart to Fourth Amendment).

State v. Alter, 953 N.E.2d 1182 (Ind.Ct.App. 2011) (conservation officer retained possession of D's fishing license after determining it was valid and asked D about contents of duffel bag; no reasonable person would feel free to terminate the encounter and ignore officer's directive to give him marijuana and whatever was illegal inside bag).

State v. Scott, 966 N.E.2d 85 (Ind.Ct.App. 2012) (before asking D for his driver's license, officer indicated that he had been following D and suggested that he had engaged in illegal behavior; at this point, Court could not say that D would have believed that he was free to leave).

(ii) Consensual encounters (no seizure):

Clarke v. State, 868 N.E.2d 1114 (Ind. 2007) (officer approaching D in parked car, asking for identification, running information, asking repeatedly whether there was anything illegal in the car and then asking for consent to search was not a seizure because officer did not convey a message that compliance was required); see also Powell v. State, 912 N.E.2d 853 (Ind.Ct.App. 2009); and Rutledge v. State, 28 N.E.3d 281 (Ind.Ct.App. 2015).

Simmons v. State, 781 N.E.2d 1151 (Ind.Ct.App. 2002) (D was not seized when officer who was involved in non-criminal investigation followed truck up driveway and activated emergency lights to announce his presence and get D's attention; D got out of truck, officer asked him who truck belonged to and why D was driving it; court held that D was not subjected to investigatory stop at time officer smelled alcohol on his breath because D was free to terminate conversation with officer and return to his residence); See also R.H. v. State, 916 N.E.2d 260 (Ind.Ct.App. 2009).

State v. Carlson, 762 N.E.2d 121 (Ind.Ct.App. 2002) (police approach of D's vehicle parked in public place and officer's subsequent questioning about erratic driving report involving car matching D's vehicle's description and whether D had been drinking did not constitute seizure; encounter might become seizure if

officer orders suspect to freeze or get out of vehicle); See also State v. Lefevers, 844 N.E.2d 508 (Ind.Ct.App. 2006); and Bentley v. State, 846 N.E.2d 300 (Ind.Ct.App. 2006).

Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975 (1988) (where police did not activate siren or flashers, command D to halt, display any weapon, operate car in aggressive manner to block D's course or speed of D's movement, police driving alongside D as he attempted to flee was not seizure).

McClain v. State, 963 N.E.2d 662 (Ind.Ct.App. 2012) (Fourth Amendment was not implicated after officer gave D his license, registration, and warning citation and told him he was free to leave; at that point, D was in fact free to leave, and he was not required to answer the officer's questions or consent to search).

(b) Occupants of home/motel

i. Investigatory seizures

Briggs v. State, 873 N.E.2d 129 (Ind.Ct.App. 2007) (D was improperly seized where officer grabbed his arm to prevent him from going to his bedroom; where D consented to police entry, the Fourth Amendment was not implicated and he was free to disregard the officers and leave the room).

United States v. Jerez, 108 F.3d 684 (7th Cir. 1997) (reasonable person would not feel free to leave home when police continually knock on windows and shine flashlights into home, and thus would be seized).

J.K. v. State, 8 N.E.3d 222 (Ind.Ct.App. 2014) (officers' repeated knocking and yelling into D's house devolved into an unlicensed physical intrusion and was unconstitutional).

McGee v. Commonwealth, 487 S.E.2d 259 (Va.Ct.App. 1997) (where several uniformed police officers pulled up in front of D's home in marked police cars, came up on his porch and told him he matched description of person they were told had been selling drugs on nearby street corner, D was effectively seized).

ii. Consensual encounters (no seizure)

United States v. Adeyeye, 359 F.3d 457 (7th Cir. 2004) (when police knocked only twice and suggested they could come back later, encounter was purely consensual and not a seizure).

Burkes v. State, 842 N.E.2d 426 (Ind.Ct.App. 2006) (detectives were lawfully inside home of known drug user when that user, who had an outstanding warrant for her arrest, appeared at front door with two other men, one of whom matched description of alleged drug dealer; ordering these two men to freeze was not a seizure, but a reasonable action to temporarily preserve status quo—allowing detectives a safe means of arresting subject of warrant).

(c) Pedestrians/Others

i. Investigatory stops (seizure):

Dowdell v. State, 747 N.E.2d 564 (Ind.Ct.App. 2001) (a reasonable person when faced with police officer pulling up to him in marked vehicle and calling for him to come over to car would not assume that he is free to turn and walk away; encounter between officer and D constituted Terry stop).

Crabtree v. State, 762 N.E.2d 241 (Ind.Ct.App. 2002) (D was subjected to investigatory stop where officer approached D with flashlight and yelled at him to get his hands up).

Bentley v. State, 779 N.E.2d 70 (Ind.Ct.App. 2002) (D was seized and subjected to investigatory stop where officer activated his emergency lights, stopped his vehicle in manner that blocked traffic and asked D for identification).

State v. Stickle, 792 N.E.2d 51 (Ind.Ct.App. 2003) (D was seized where officers approached him at restaurant, said he needed to come with them and blocked his vehicle so he could not drive away); see also State v. Felker, 819 N.E.2d 870 (Ind.Ct.App. 2004).

Sanchez v. State, 803 N.E.2d 215 (Ind.Ct.App. 2004) (although D's initial encounter with police officers in which they asked him to show identification was consensual, encounter evolved into an investigatory stop as soon as D remained detained after officer was advised that name D provided was "not on file"). See also Reynolds v. State, 746 A.2d 422 (Md.Ct.Spec.App. 1999).

State v. Calmes, 894 N.E.2d 199 (Ind.Ct.App. 2008) (although nothing in the record suggests that D was a motorist and needed his license to leave the location, nonetheless, upon being asked if he was armed, a reasonable person in D's position would not feel free simply to terminate the encounter, leave his license with the police, and walk away).

Woodson v. State, 960 N.E.2d 224 (Ind.Ct.App. 2012) (officer's encounter with D who was riding his bicycle was not consensual where D saw the car he just exited being pulled over, the officer claimed he would have pursued D had he fled and D was handcuffed in the absence of any apparent threat to the officer and before obtaining information about D from his police computer).

Gentry v. Sevier, 597 F.3d 838 (7th Cir. 2010) (where officer told D to "keep his hands up" when D waved to the officers and started walking towards them, this constituted a Terry stop requiring reasonable suspicion).

ii. Consensual encounters (no seizure):

United States v. Mendenhall, 446 U.S. 544, 560, 100 S.Ct. 1870 (1980) (D was not seized where, in a public concourse at airport, agents wore no uniforms and displayed no weapons, did not summon D to their presence but instead approached her and identified themselves as federal agents and requested, but did not demand, to see D's identification and airline ticket).

Molino v. State, 546 N.E.2d 1216 (Ind. 1989) (in 3-2 decision, Court held that contact between officers and individual meeting drug courier profile where

individual is merely asked if he will step aside and talk with them involves neither arrest nor stop but is "consensual encounter" which does not implicate Fourth Amendment interest).

Murphy v. State, 747 N.E.2d 557 (Ind. 2001) (seizure did not occur where police asked D to stop, D threw down baggie of cocaine and fled; seizure does not occur when suspect fails to yield to police authority).

Campbell v. State, 841 N.E.2d 1165 (Ind.Ct.App. 2006) (shining spotlight on D did not constitute seizure).

Cochran v. State, 843 N.E.2d 980 (Ind.Ct.App. 2006) (interaction with D and request for identification was a consensual encounter and was not unreasonable police activity under Ind. Constitution; but see Riley, J., dissenting on basis that investigatory stop was initiated once officer requested D's identifying information with purpose of running background check on him).

Manigault v. State, 881 N.E.2d 679 (Ind.Ct.App. 2008) (officer was engaged in consensual encounter when he approached D in street beside motel to determine if he was subject of an outstanding arrest warrant).

Baxter v. State, 103 N.E.3d 1180 (Ind.Ct.App. 2018) (D was parked at a car wash when police arrived to investigate a report of suspicious persons who appeared to be evading security cameras; action of officer "pulling up behind" D to assist another in a dispatch call was not a seizure).

Canfield v. State, 128 N.E.3d 563 (Ind.Ct.App. 2019) (D's agreement to meet two uniformed officers outside his place of employment amounts to a consensual encounter; Mathias, J., concurring to note that "few Hoosiers are aware of their right to refuse to speak with a uniformed law enforcement officer under circumstances like [D] faced in this case, other than to provide identification. This is similar to the law regarding the circumstances faced by Hoosiers in a roadside traffic stop").

(2) When does an investigatory stop/seizure become an arrest requiring probable cause?

When a seizure rises to the level of an arrest, the officer needs probable cause rather than reasonable suspicion to justify the additional seizure.

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983) (police exceeded limits of investigative stop where they retained D's license and ticket, told him he was suspected of transporting narcotics, asked him to accompany them to small police room, and indicated in no way that D was free to leave; seizure exceeded that authorized by Terry v. Ohio, 392 U.S. 1 (1968), and required probable cause to arrest).

Kelly v. State, 997 N.E.2d 1045 (Ind. 2013) (D's encounter with police during which she was ordered out of a car at gunpoint, handcuffed and questioned about suspected criminal activity constituted more than a Terry stop; it was an arrest lacking probable cause).

Williams v. State, 630 N.E.2d 221 (Ind.Ct.App. 1994) (where officers with guns drawn stopped D, ordered him out of car and onto ground with hands behind head,

stop was equivalent to arrest, and fact D was unrecognized black male driving in vicinity of burglary, with in-county license plate, was insufficient to support probable cause).

Taylor v. State, 464 N.E.2d 1333 (Ind.Ct.App. 1984) (holding D at gunpoint upon traffic stop constituted arrest which required probable cause); see also Reinhart v. State, 930 N.E.2d 42 (Ind.Ct.App. 2010).

Buckley v. State, 886 N.E.2d 10 (Ind.Ct.App. 2008) (even though police had reasonable suspicion that D committed recent murder, they did not have probable cause to justify ordering D out of car, handcuffing him, towing his car, transporting him to station and placing him in interview room for a few hours while they obtained search warrants).

State v. Atkins, 834 N.E.2d 1028 (Ind.Ct.App. 2005) (reasonable suspicion analysis does not apply where D is on his own property; probable cause to stop D is required). But see J.D. v. State, 902 N.E.2d 293 (Ind.Ct.App. 2009) (implicitly disagreeing with Atkins' proposition that Terry does not apply when D is on own property).

State v. Linck, 708 N.E.2d 60 (Ind.Ct.App. 1999) (D was in custody for purposes of Miranda after he admitted smoking marijuana because reasonable person would not have felt free to leave after making this admission).

Hayes v. Florida, 470 U.S. 811, 105 S.Ct. 1643 (1985) (arrest warrant was needed to bring individual down to police station for fingerprinting; however, Court suggested that person may be detained under Terry stop for reasonable time for fingerprinting). See also Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394 (1969); and Baker v. State, 449 N.E.2d 1085 (Ind. 1983).

Maryland v. King, 133 S.Ct. 1958 (2013) (when police make arrest based on probable cause to hold arrestee for serious offense, taking and analyzing cheek swab for DNA to help identify arrestee is like fingerprinting, minimally intrusive and reasonable police booking procedure under Fourth Amendment).

Loving v. State, 647 N.E.2d 1123 (Ind. 1995) (use of handcuffs would cause reasonable person to feel that one was not free to leave, and that one's freedom of movement was restrained to the degree associated with a formal arrest requiring probable cause rather than reasonable suspicion); but see Willis v. State, 907 N.E.2d 541 (Ind.Ct.App. 2009) (fact officers drew guns and handcuffed D did not convert investigatory stop into arrest requiring probable cause); Billingsly v. State, 980 N.E.2d 402 (Ind.Ct.App. 2012); and Payne v. State, 854 N.E.2d 1199 (Ind.Ct.App. 2006).

Hill v. State, 169 N.E.3d 1150 (Ind.Ct.App. 2021) (although D's encounter with police officer was initially commenced as consensual, it quickly evolved into an investigatory stop and became supported by probable cause to arrest D for the crime of false identity under IC 35-44.1-2.4(a)).

See also p. 68, *How long was the defendant detained*? and p. 70, *Was the arrest justified*?

(3) Seizure of property/mail

Soldal v. Cook County, 506 U.S. 56, 113 S.Ct. 538 (1992) (a seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property).

Rios v. State, 762 N.E.2d 153 (Ind.Ct.App. 2002) (there is no seizure of a mailed package within meaning of Fourth Amendment when it is briefly detained for further law enforcement investigation and its delivery is not substantially delayed; here, temporary detention of D's package for canine smell test was such that there was no meaningful interference with D's possessory interest in package).

b. Was there a search?

A search is generally considered to be the act of looking for something that is not openly or obviously visible to the person making the search. Kerr, 16 Indiana Practice § 2.2(a), 89-90 (1991). Where the Government uses a device that is not in general public use to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a search and is presumptively unreasonable without a warrant. Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038 (2001).

Hardister v. State, 849 N.E.2d 563, 572 (Ind. 2006) (searches involve exploratory investigation, prying into hidden places, or a looking for or seeking out).

(1) Actions that do not constitute a search

Dumbsky v. State, 508 N.E.2d 1274 (Ind. 1987) (mere identification of property; police trying gas cap on truck is not search).

Kenner v. State, 703 N.E.2d 1122 (Ind.Ct.App. 1999) (in Indiana, a dog sniff is not search); but see Florida v. Jardines, 133 S.Ct. 1409 (2013) (dog sniff at front door of house is a search).

Cornman v. State, 294 N.E.2d 812 (Ind.Ct.App. 1973) (police surveillance in and around stone quarry and wooded and cleared area of D's property was not search).

Palmer v. State, 679 N.E.2d 887 (Ind. 1997) (fingerprinting is not the type of intrusion protected by constitution, regardless of its use as evidence or for identification purposes).

Smith v. State, 744 N.E.2d 437 (Ind. 2001) (comparing D's court-ordered DNA profile from unrelated case in which D was acquitted with DNA obtained from rape victim did not constitute unreasonable search, seizure or invasion of privacy); see also Sharp v. State, 835 N.E.2d 1079 (Ind.Ct.App. 2005).

Engram v. State, 893 N.E.2d 744 (Ind.Ct.App. 2008) (police test-firing of D's handgun was not a search).

Wilkinson v. State, 743 N.E.2d 1267 (Ind.Ct.App. 2001), *overruled in part on other grounds*, 918 N.E.2d 316 (Ind. 2009) (suspicionless, random computer check of license plate number does not constitute a search).

George v. State, 901 N.E.2d 590 (Ind.Ct.App. 2009) (officer contacting pharmacist to determine pills' chemical composition was not a search).

Alexander v. State, 947 N.E.2d 966 (Ind.Ct.App. 2011) (a query of BMV records based on a person's name or license plate number is not a search); see also I.C. 9-32-3-7.

Lewis v. State, 949 N.E.2d 1243 (Ind. 2011) (when officer lowered his head to tell car passenger to exit car and happened to see handgun in plain view, officer did not conduct a search).

Possible argument: Although an officer running a license plate number in order to determine whether the owner of the car has a suspended license is not a search, a suspicionless, random license plate check is arguably unconstitutional because it provides unbridled discretion to police officers as to whose license plate to run. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979) (recognizing need for non-discretionary procedures in addressing State's concern in checking license plates and vehicle registrations). Also, the resulting stop must cease if the officer determines that the driver of the car does not match the description of the owner of the car from the random license plate check. Holly v. State, 918 N.E.2d 323 (Ind. 2009) (initial stop was justified where officer's license plate check revealed that car was registered to an African American female who had a suspended license; but, when the officer approached the driver who turned out to be a man, officer's request for identification was unconstitutional).

(2) Actions constituting a search

Carpenter v. United States, 138 S.Ct. 2206 (2018) (acquisition of cell phone location data allowing government to retrace a person's whereabouts, giving "near perfect surveillance" is a search requiring a warrant).

Maryland v. King, 133 S.Ct. 1958 (2013) (DNA cheek swab is a search).

White v. State, 517 N.E.2d 83 (Ind. 1987) (picking up tennis shoes to look at tread was not mere observation, but a search). See also State v. Tucker, 588 N.E.2d 579 (Ind.Ct.App. 1992).

Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149 (1987) (officer's moving of equipment constituted "search" separate and apart from search for shooter, victims and weapons that was lawful objective of entry into apartment).

Manning v. State, 459 N.E.2d 1207 (Ind.Ct.App. 1984) (opening doors and lifting hoods to search for VIN constituted a search).

Shultz v. State, 742 N.E.2d 961 (Ind.Ct.App. 2001) (although officer's use of flashlight to read VIN was not a search, using rag to wipe off dirt to read VIN constituted search).

Bond v. United States, 529 U.S. 334, 120 S.Ct. 1462 (2000) (because bus passenger who places bag in overhead bin expects that other passengers or bus employees may move it for one reason or another but does not expect that other passengers or bus employees will, as a matter of course, feel bag in exploratory manner, physical manipulation of bag by police was a search; physically invasive inspection is more intrusive than purely visual inspection).

Ackerman v. State, 774 N.E.2d 970 (Ind.Ct.App. 2002) (field sobriety tests are searches under the Indiana Constitution because they are designed to uncover hidden evidence of impairment that an operating while intoxicated suspect seeks to conceal).

Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038 (2001) (scanning residence with thermal-imaging device is a search for Fourth Amendment purposes).

United States v. Jones, 132 S.Ct. 945 (2012) (attaching a GPS on a suspect's car and then using the device to monitor vehicle's movements is a search).

Grady v. North Carolina, 135 S.Ct. 1368 (2015) (compelling sex offender recidivist to wear a GPS device is a search).

Perez v. State, 27 N.E.3d 1144 (Ind.Ct.App. 2015) (warrantless canine sniff of D's front door physically intruded onto curtilage of his home and was an unconstitutional search).

Armstrong v. State, 429 N.E.2d 647, 649 (Ind. 1982) (examination of a firearm for bullets or a ballistics test to determine if the gun fired a certain bullet are searches).

Hodgkins v. Goldsmith, 2000 U.S. Dist. LEXIS 9302 (urine or breath testing are searches); see also Kopkey v. State, 743 N.E.2d 331, 336 (Ind.Ct.App. 2001).

2. Did the Defendant have an expectation of privacy?

Even if the officer's conduct constituted a search, if the defendant does not have a legitimate expectation of privacy in the area searched or the object seized, the Fourth Amendment does not apply.

Hannoy v. State, 789 N.E.2d 977, *reh'g granted* 793 N.E.2d 1109 (Ind.Ct.App. 2003) (society does not recognize a reasonable expectation of privacy in blood alcohol test results obtained and recorded by hospital as part of its consensual treatment of patient, where those results were later released upon request to law enforcement solely for use in criminal investigation of accident; there is clear and substantial difference between allowing police to force a person to submit to having his or her blood withdrawn to look for evidence of crime, and police receiving blood test results after-the-fact pursuant to Ind. Code 9-30-6-6(a)).

State v. Eichhorst, 879 N.E.2d 1144 (Ind.Ct.App. 2008) (D did not have reasonable expectation of privacy in medical records after accident, despite fact she did not consent to treatment; D was intoxicated, and her treatment was an emergency).

Maloney v. State, 872 N.E.2d 647 (Ind.Ct.App. 2007) (D could have no reasonable expectation of privacy from law enforcement search of BMV records).

Rader v. State, 932 N.E.2d 755 (Ind.Ct.App. 2010) (no expectation of privacy in subscriber information of an individual's internet account).

Maryland v. King, 133 S.Ct. 1958 (2013) (State's interest in identifying arrestees held for serious offenses outweighs minimal intrusion and reduced expectation of privacy from DNA cheek swab).

a. Was the area searched considered part of the Defendant's home?

(1) Apartment

Criss v. State, 512 N.E.2d 858 (1987) (D has no expectation of privacy in an abandoned apartment).

(2) Hotel

Willis v. State, 780 N.E.2d 423 (Ind.Ct.App. 2002) (hotel room is "home" for purposes of Article 1, § 11 of Indiana Constitution).

Norwood v. State, 670 N.E.2d 32 (Ind.Ct.App. 1996) (person has expectation of privacy in hotel room until checkout time).

(3) Tent

Haley v. State, 696 N.E.2d 98 (Ind.Ct.App. 1998) (person has expectation of privacy in tent, even in public campground).

(4) Curtilage

A person has a reasonable expectation of privacy in an area surrounding his home if the area harbors intimate activity associated with the sanctity of his home and privacies of life. Curtilage—the area immediately surrounding the home—is considered part of the home itself under the Fourth Amendment. Florida v. Jardines, 569 U.S. 1, 6 (2013). Therefore, "[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Such conduct is presumptively unreasonable absent a warrant." Id. at 11. Curtilage questions should be resolved with particular reference to four factors: proximity of area claimed to be curtilage, whether area is included within enclosure surrounding home, nature of uses to which area is put, and steps taken to protect area from observations by a passerby. United States v. Dunn, 480 U.S. 294, 107 S.Ct. 1134 (1987).

United States v. Dunn, *supra* (barn which was 50 yards behind house was not part of curtilage and therefore was not protected by Fourth Amendment; D had not manifested an expectation of privacy in interior of barn, even presuming society was prepared to accept such an expectation as legitimate).

Dow Chemical Co. v. United States, 476 U.S. 227, 106 S.Ct. 1819 (1986) (surroundings of business are not curtilage).

Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735 (1984) (officers not limited by Fourth Amendment from invading open fields surrounding dwelling despite fences and no trespassing signs).

United States v. Jenkins, 124 F.3d 768 (6th Cir. 1997) (backyard partially surrounded by fence and set well back from public road constituted curtilage of residence).

Mundy v. State, 21 N.E.3d 114 (Ind.Ct.App. 2014) (detectives' intrusion onto private property while looking for another person despite clear signs of "no trespassing" was unreasonable under Art. 1, § 11).

Jadrich v. State, 999 N.E.2d 1022 (Ind.Ct.App. 2013) (where there was no indication that anyone was home after police knocked on D's front door, police entry into fenced backyard passing multiple "no trespassing" signs was not justified by the purpose of their visit, i.e., to serve a protective order).

Conn v. State, 89 N.E.3d 1093, 1095 (Ind.Ct.App. 2017) (police officers' warrantless entry onto a private conservation club was unreasonable under Indiana Constitution; "[o]ur courts have consistently held that when Indiana citizens put mechanisms in place to keep others out, ignoring these obstructions constitutes highly intrusive conduct by law enforcement").

Shultz v. State, 742 N.E.2d 961 (Ind.Ct.App. 2001) (it was unreasonable under Indiana Constitution for police to tour property to see if anyone was home after no one responded to their knocking on door).

Divello v. State, 782 N.E.2d 433 (Ind.Ct.App. 2003) (although officers' initial entry onto D's property was permissible, they failed to limit their visit to areas that could reasonably have been viewed as open to them for legitimate police business and remained on D's property after it became clear to them that purpose for their visit could not be properly fulfilled); see also J.K. v. State, 8 N.E.3d 222 (Ind.Ct.App. 2014).

Lundquist v. State, 834 N.E.2d 1061 (Ind.Ct.App. 2005) (unlike facts and circumstances presented in Divello, officers had legitimate reason for remaining on property after officer's knockon front door failed to elicit a response; because D was likely hiding on property, officers legitimately invaded curtilage of his property in an attempt to find him); see also Carpenter v. State, 974 N.E.2d 569 (Ind.Ct.App. 2012).

Hardister v. State, 849 N.E.2d 563 (Ind. 2006) (fact that officers entered D's curtilage to conduct otherwise lawful investigation did not ipso facto render physical invasion of curtilage an unlawful search; once officers were lawfully present in backyard, their looking into kitchen through side and rear windows was reasonable as an effort to locate fleeing suspects); see also Mullen v. State, 55 N.E.3d 822 (Ind.Ct.App. 2016).

Taylor v. State, 120 N.E.3d 661 (Ind.Ct.App. 2020) (distinguishing Jardines (above) and holding that officer's approaching front door and repositioning of his body to peer into house through crack in blinds covering window was not an illegal search).

Seidl v. State, 939 N.E.2d 679 (Ind.Ct.App. 2010) (police did not need reasonable suspicion to walk up D's gravel driveway and parking lot near his barn; thus, there was no constitutional violation when police saw into barn window from driveway and lot). See also Boggs v. State, 928 N.E.2d 855 (Ind.Ct.App. 2010); and Dora v. State, 957 N.E.2d 1049 (Ind.Ct.App. 2011).

Trimble v. State, 842 N.E.2d 798 (Ind. 2006) (a police officer receiving a credible report of a violation from an identified concerned citizen may properly enter onto private property through normal route of access to investigate; once there, publicly viewable evidence of a crime may properly be seized without a warrant, particularly when there is a need to act promptly to protect health or safety of another, whether human or animal); see also Rush v. State, 881 N.E.2d 46 (Ind.Ct.App. 2008); and Davis v. State, 907 N.E.2d 1043 (Ind.Ct.App. 2009).

Baxter v. State, 891 N.E.2d 110 (Ind.Ct.App. 2008) (fact that it was practicable to obtain a warrant, D posted a "no trespassing" sign by open field, and seizure of horses required officers to go past a fence where they were corralled is not enough to cause a different result from Trimble); but see Mundy v. State, *supra*.

Holder v. State, 847 N.E.2d 930 (Ind. 2006) (regardless of whether officers invaded D's curtilage, the significant degree of fumes from a known explosive and flammable chemical in a residential area compelled officers to find its source for safety and health of nearby residents).

Blalock v. State, 483 N.E.2d 439 (Ind. 1985) (greenhouse in remote section of D's property could not be described as curtilage, thus police observations through translucent roof of greenhouse was not a search).

Because the reasonableness analysis under the Indiana Constitution places an overriding weight on the need to restrict arbitrary selection of persons to be searched, reasonable suspicion is needed to conduct a dog sniff of a private residence. Hoop v. State, 909 N.E.2d 463 (Ind.Ct.App. 2009).

Cf. Blakenship v. State, 5 N.E.3d 779 (Ind.Ct.App. 2014) (even if dog sniff sweep at hotel, at manager's request, violated Indiana Constitution, officers acted in good faith when they executed warrant for D's hotel room).

(5) Fire-damaged premises

The constitutionality of warrantless and nonconsensual entries onto fire-damaged premises turns on three factors: (1) whether there are legitimate privacy interests in fire-damaged property which are protected by Fourth Amendment; (2) whether exigent circumstances justify the government intrusion regardless of any reasonable expectation of privacy; and (3) whether the object of the search is to determine the cause of the fire or to gather criminal evidence. Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641 (1984).

Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641 (1984) (some fires may be so devastating that no reasonable privacy interest remains in the ash and ruins).

Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942 (1978) (official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment; no diminution in reasonable expectation of privacy because official is firefighter rather than policeman).

Null v. State, 690 N.E.2d 758 (Ind.Ct.App. 1998) (owner/resident retains expectation of privacy in residence unless severely damaged).

(6) Common areas

Common areas of housing units and hotels generally are not considered part of the curtilage and tenants/guests do not maintain legitimate privacy expectations in common areas.

United States v. Concepcion, 942 F.2d 1170 (7th Cir. 1991) (no expectation of privacy in locked common area shared by five tenants).

United States v. Fields, 113 F.3d 313 (2nd Cir. 1997) (tenants had no legitimate privacy expectation in, side yard accessible to all tenants in a multi-family apartment building).

Wright v. State, 772 N.E.2d 449, 454-57 (Ind.Ct.App. 2002) (hotel hallway is a public place for the purpose of the public intoxication statute).

United States v. Nettles, 175 F.Supp.2d 1089 (N.D. Ill 2001) (storage closets controlled by hotel staff and tenants were more akin to common hallway than to personally rented storage space, which would retain a higher expectation of privacy).

But see:

United States v. Salgado, 250 F.3d 438, 456 n. 3 (6th Cir. 2001) (disagreeing with Seventh Circuit and noting established rule that tenant has a reasonable expectation of privacy in locked common areas of an apartment complex). See also United States

v. Heath, 259 F.3d 522 (6th Cir. 2001); and United States v. Carriger, 541 F.2d 545, 552 (6th Cir. 1976).

(7) Jail

Perkins v. State, 483 N.E.2d 1379 (Ind. 1985), *overruled in part on other grounds*, 823 N.E.2d 1187 (Ind. 2005) (although jail cell is person's home, inmate does not have expectation of privacy in cell); see also Hawkins v. State, 884 N.E.2d 939 (Ind.Ct.App. 2008).

b. Did the police search the defendant's trash?

Under the Fourth Amendment, there is no expectation of privacy in discarded trash that is not on the curtilage of a home. California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625 (1988); See also Moran v. State, 644 N.E.2d 536 (Ind. 1994); and Mast v. State, 809 N.E.2d 415 (Ind.Ct.App. 2004).

Article 1, § 11 prohibits police from randomly searching and seizing trash containers unless they have articulable, individualized suspicion that the trash may contain evidence of criminal conduct.

Litchfield v. State, 824 N.E.2d 356 (Ind. 2005) (reasonableness of officer conduct in searching a person's trash does not turn on whether police entered onto the citizen's property; however, police should not be permitted to enter a person's property and search trash "without reason").

Crook v. State, 827 N.E.2d 643 (Ind.Ct.App. 2005) (because an anonymous tip alone is not enough to constitute reasonable suspicion necessary for a valid "Terry stop," an anonymous tip concerning illegal drug activity alone is not enough to constitute reasonable suspicion necessary to search through D's garbage).

Edwards v. State, 832 N.E.2d 1072 (Ind.Ct.App. 2005) (because confidential informant's tip was lacking in indicia of reliability and credibility of informant was not established, tip was inadequate to support reasonable suspicion necessary under Litchfield to search D's trash).

Litchfield v. State, 849 N.E.2d 170 (Ind.Ct.App. 2006) (receiving growing supplies from growing supply company, alone, is not reasonable suspicion to search trash). See also State v. Cook, 853 N.E.2d 483 (Ind.Ct.App. 2006).

State v. Neanover, 812 N.E.2d 127 (Ind.Ct.App. 2004) (police violated both federal and state constitutions in seizing trash from open landing on top floor of apartment building that had not been abandoned for collection and was not readily accessible to public).

Love v. State, 842 N.E.2d 420 (Ind.Ct.App. 2006) (specificity of Crime Stoppers tip, plus independent identifications of a person matching D's description, provided police with articulable suspicion to justify trash search).

Corbett v. State, 179 N.E.3d 475 (Ind.Ct.App. 2021) (police actions surrounding trash pull were not unreasonable under totality of circumstances, and act of approaching front door for knock and talk in attempt to speak to occupants to determine who lived at the home did not violate D's rights under federal or state constitutions).

Eshelman v. State, 859 N.E.2d 744 (Ind.Ct.App. 2007) (search of D's trash was reasonable under either pre or post-Litchfield principles).

Turner v. State, 878 N.E.2d 286 (Ind.Ct.App. 2007) (heavy traffic in and out of D's home, a car belonging to a person with a prior cocaine conviction and towels covering the door and windows of home was reasonable suspicion supporting trash search).

Washburn v. State, 868 N.E.2d 594 (Ind.Ct.App. 2007) (although court shared detective's concern with citizen informant's criminal history and motive to come forward (i.e., revenge or jealousy), totality of circumstances established citizen as a reliable source; even though citizen had seen cocaine in D's residence two months before his meeting with detective, additional information established that cocaine would probably still be present in residence).

Fuqua v. State, 984 N.E.2d 709 (Ind.Ct.App. 2013) (anonymous and confidential informants' statements that D was dealing cocaine were corroborated by evidence the detectives discovered during trash pull and their personal observations while surveilling D's residence).

However, the rule announced in Litchfield v. State, 824 N.E.2d 356 (Ind. 2005), requiring reasonable suspicion for warrantless trash searches, only applies to searches that occurred after its enactment. Membres v. State, 889 N.E.2d 265 (Ind. 2008); see also Belvedere v. State, 889 N.E.2d 286 (Ind. 2008).

c. Did the police obtain historical cell phone location information records?

Individuals have an expectation of privacy in their physical movements. Allowing government access to cell-site records—which "hold for many Americans the 'privacies of life'…-- contravenes that expectation." Carpenter v. United States, 138 S.Ct. 2206, 2210 (2018).

d. Did the police search or look into Defendant's car?

Danner v. State, 931 N.E.2d 421 (Ind.Ct.App. 2010) (impoundment and warrantless search of parked car was justified by officer's observation of what appeared to be marijuana through car window). See also Lewis v. State, 949 N.E.2d 1243 (Ind. 2011).

Byrd v. United States, 138 S. Ct. 1518 (2018) (as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver).

e. Did the Defendant attempt to keep the area searched or the item seized private?

The more steps a person takes to keep an area private, the more likely the court will find the person has an expectation of privacy in that place. State v. Foreman, 662 N.E.2d 929 (Ind. 1996).

Bond v. United States, 529 U.S. 334, 120 S.Ct. 1462 (2000) (D sought to preserve privacy of bag in overhead luggage compartment on bus by using opaque bag and placing bag directly above his seat).

State v. Foreman, *supra* (D had reasonable legitimate subjective expectation of privacy in room searched, at least during times that door was closed, locked and general public

access denied; moreover, expectation of privacy in this case was one that society would recognize as reasonable).

United States v. Basinski, 226 F.3d 829 (7th Cir. 2000) (when D entrusted locked briefcase to friend, instructed him to hide it and later directed that he destroy it, he did not abandon his expectation of privacy in context of case; officers who opened briefcase without warrant based on friend's consent violated Fourth Amendment).

Sayre v. State, 471 N.E.2d 708 (Ind.Ct.App. 1984) (no expectation of privacy in illuminated kitchen with open curtains); But see People v. Camacho, 23 Cal. 4th 824, 98 Cal.Rptr. 2d 232, 3 P.3d 878 (2000) (D who was packaging drugs in his home at 11 p.m. had reasonable expectation that, at that hour, no one would enter his unfenced side yard and view his activities through uncurtained window).

Hardister v. State, 849 N.E.2d 563 (Ind. 2006) (public or private status of sidewalk running through D's backyard was not controlling, because officer's physical invasion of area surrounding house was not a search but involved nothing more than pursuit of fleeing suspects along sidewalk that led to back door; once officers were lawfully present in backyard, their looking into kitchen through side and rear windows was reasonable as an effort to locate suspects).

Troyer v. State, 605 N.E.2d 1183 (Ind.Ct.App. 1993) (a person does not create reasonable expectation of privacy in an open field by taking steps to conceal his or her activities such as by planting marijuana in cornfield in effort to conceal marijuana).

(1) Did the Defendant abandon the item searched?

A person has no expectation of privacy in abandoned property. Abandonment requires the voluntary relinquishment of possession or control of property under circumstances that indicate the defendant retained no justified expectation of privacy in the property. Miller v. State, 498 N.E.2d 53 (Ind.Ct.App. 1986).

Peele v. State, 130 N.E.3d 1195 (Ind.Ct.App. 2019) (when sock rolled out of D's pants during officer's patdown, he was handcuffed and no longer in possession or control of the sock, thus he could not have abandoned it).

California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547 (1991) (discarded contraband while suspect is fleeing is abandoned).

Murphy v. State, 747 N.E.2d 557 (Ind. 2001) (abandonment of cocaine by D before he was either physically seized or submitted to show of authority was not produced by a "seizure" and was therefore not subject to exclusionary rule even though abandonment may have been caused by unlawful police order to stop); see also Wilson v. State, 825 N.E.2d 49 (Ind.Ct.App. 2005).

Wilson v. State, 966 N.E.2d 1259 (Ind.Ct.App. 2012) (fact that vehicle was locked after D fled from it following traffic stop does not necessarily negate a reasonable inference that D abandoned it); see also Hall v. State, 975 N.E.2d 401 (Ind.Ct.App. 2012).

Gooch v. State, 834 N.E.2d 1052 (Ind.Ct.App. 2005) (only after D tossed bag did officer use force to restrain and handcuff him; thus, bag was subject to lawful seizure by police when he tossed it to ground; moreover, D had not been "seized" at time he dropped bag, so drugs found inside bag were not product of illegal seizure).

Emerson v. State, 648 N.E.2d 705 (Ind.Ct.App. 1995) (trash bag left in apartment building basement after moving out was abandoned, thus D lost all expectation of privacy in its contents).

(a) Did the Defendant deny ownership?

Disclaimer of ownership, alone, is not enough to support a finding of abandonment. Miller v. State, 498 N.E.2d 53 (Ind.Ct.App. 1986). There is no voluntary relinquishment if the suspect denies ownership of the items after they have been searched and illegal material has been found. Thus, the suspect does not lose an expectation of privacy in the item.

State v. Machlah, 505 N.E.2d 873 (Ind.Ct.App. 1987) (suitcase was not abandoned and D had expectation of privacy in it where D claimed it was not his suitcase after police found contraband).

(b) Was the abandonment the result of an unlawful search or seizure?

There is no abandonment if the officer is acting unlawfully in attempting to search the item or area, or if the abandonment was precipitated by an illegal arrest or detention.

Swanson v. State, 730 N.E.2d 205 (Ind.Ct.App. 2000) (regardless of whether D abandoned cocaine by it falling out of pocket, abandonment was result of illegal patdown, and thus, cocaine should have been suppressed).

United States v. Garzon, 119 F.3d 1446 (10th Cir. 1997) (there was no abandonment of backpack when police unlawfully ordered D to get off of bus with his luggage and D left his luggage on bus).

Gipson v. State, 459 N.E.2d 366 (Ind. 1984) (as long as investigatory stop is legal, anything thrown down by suspects is abandoned).

(2) Did the Defendant leave the object seized in a place where an officer could have found it while he was lawfully conducting a search or investigation? (Plain View Doctrine)

A person does not have an expectation of privacy in an object that she leaves in plain view. The plain view doctrine assumes that the police officer is already engaged in a lawful search and seizure. Three conditions must exist to justify a warrantless seizure of evidence under the plain view doctrine: (1) the officer must not have violated the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed; (2) the incriminating character of evidence must be immediately apparent; and (3) the officer must have a lawful right of access to the object itself. Horton v. California, 496 U.S. 128, 110 S.Ct. 2301 (1990); State v. Hollins, 672 N.E.2d 427 (Ind.Ct.App. 1996).

Combs v. State, 168 N.E.3d 985 (Ind. 2021) (the plain view exception to warrant requirement may justify the seizure of a vehicle believed to be the fruit, instrumentality, or evidence of a crime provided that police are lawfully in a position from which to view the vehicle, its incriminating character is immediately apparent, and police have a lawful right of access to the vehicle; here, police properly seized and inventoried van D parked on driveway as an instrumentality of his Class B misdemeanor leaving the scene of an accident offense).

(a) Was the officer in a place he had the right to be when he observed the incriminating evidence?

In order for a police officer's seizure of evidence to be justified by plain view, the officer must have a legal right to be at a place from which the evidence was plainly viewed. Houser v. State, 678 N.E.2d 95 (Ind. 1997).

Vanzo v. State, 738 N.E.2d 1061 (Ind.Ct.App. 2000) (because second officer could not justify second search based on safety for those still in apartment after shooting, she did not have legal right to be at place from which marijuana was viewed).

Frasier v. State, 794 N.E.2d 449 (Ind.Ct.App. 2003) (evidence seized in good-faith reliance on search warrant later held to be invalid is sufficient to satisfy first requirement of plain view doctrine, namely, that initial intrusion be authorized under Fourth Amendment).

Hannibal v. State, 804 N.E.2d 206 (Ind.Ct.App. 2004) (bag of marijuana seen floating in open toilet during protective sweep of house incident to arrest was properly viewed and seized).

Rush v. State, 881 N.E.2d 46 (Ind.Ct.App. 2008) (juveniles running into and out of D's house provided exigent circumstances justifying warrantless entry onto her back yard; officer's subsequent observation of beer and liquor containers through basement window was a lawful plain view observation from an area officer was lawfully entitled to be).

Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942 (1978) (once in a building, and for a reasonable time afterwards, firefighters may seize evidence of arson that is in plain view and investigate the causes of a fire).

A police officer may seize incriminating evidence that he observes in the following situations:

Harris v. United States, 390 U.S. 234, 88 S.Ct. 992 (1968) (properly impounding vehicle).

Hester v. State, 551 N.E.2d 1187 (Ind.Ct.App. 1990) (properly stopping vehicle).

Lewis v. State, 949 N.E.2d 1243 (Ind. 2011) (officer lowering his head to tell car passenger to exit car).

Mears v. State, 533 N.E.2d 140 (Ind. 1989) (upon consensual entry into home).

Sloane v. State, 686 N.E.2d 1287 (Ind.Ct.App. 1997) (emergency, i.e., putting out fire in home).

McReynolds v. State, 460 N.E.2d 960 (Ind. 1984) (executing search warrant for unrelated crime).

Tuggle v. State, 9 N.E.3d 726 (Ind.Ct.App. 2014) (securing bag of clothing worn by D who was shot; detective believed could be evidence in finding D's alleged assailant).

(b) Was the incriminating nature of the property seized readily apparent?

The "immediately apparent" or "inadvertence" prong of the plain view doctrine requires that law enforcement officials have probable cause to believe the evidence will prove useful in solving a crime. Taylor v. State, 659 N.E.2d 535 (Ind. 1995). The plain view doctrine applies when police are not searching for evidence against the accused, but nonetheless inadvertently come across the incriminating object. Warner v. State, 773 N.E.2d 239, 245 (Ind. 2002).

Horton v. California, 496 U.S. 128, 110 S.Ct. 2301 (1990) (inadvertence is not a necessary condition to be admissible under plain view theory, but it is nevertheless a characteristic of most legitimate plain view seizures).

Frasier v. State, 794 N.E.2d 449 (Ind.Ct.App. 2003) (inadvertence requirement still has application with respect to Article 1, § 11 of Indiana Constitution); see also Warner v. State, 773 N.E.2d 239, 243 (Ind. 2002).

State v. Figgures, 839 N.E.2d 772 (Ind.Ct.App. 2005) (noting the "immediately apparent" prong does not mean that the officer must "know" that an item is contraband but only that he have probable cause to believe so; a practical, nontechnical probability that incriminating evidence is involved is all that is required); see also Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535 (1983) (clarifying "immediately apparent" prong, which does not require showing that officer's belief is correct or even that it is more likely true than false).

Moore v. State, 827 N.E.2d 631 (Ind.Ct.App. 2005) (officer did not have probable cause to seize handgun he found in vehicle, where D had a valid permit for it and it was not seized as evidence of any crime, including criminal gang activity).

Hester v. State, 551 N.E.2d 1187 (Ind.Ct.App. 1990) (nothing about television in car window gave police probable cause that it was stolen).

Manning v. State, 459 N.E.2d 1207 (Ind.Ct.App. 1984) (fact that cars may have been stolen was not readily apparent).

Hewell v. State, 471 N.E.2d 1235 (Ind.Ct.App. 1984) (stolen nature of silver was not immediately apparent when officers called station and discovered report of stolen silver).

Aslinger v. State, 2 N.E.3d 84 (Ind.Ct.App. 2014) (officer's seizure of a hand-rolled cigarette behind D's ear and thorough search of his pockets was unrelated to the purpose justifying the original Terry stop and not subject to seizure under the plain view doctrine; a hand-rolled cigarette is not per se illegal, and the officer only deduced there was a drug in it after removing it from D's ear).

Frasier v. State, 794 N.E.2d 449 (Ind.Ct.App. 2003) (D failed to establish that officer's discovery of pornographic images during search for records relating to marijuana sales was not inadvertent).

Abner v. State, 741 So.2d 440 (Ala.Ct.App. 1998) (officer's knowledge that plastic bags are often used to carry drugs did not make incriminating nature of bags apparent and failed to justify his retrieval of bag he saw protruding from pocket of individual he encountered in high crime area).

Commonwealth v. Grimstead, 12 Va. App. 1066, 407 S.E.2d 47 (1991) (because observance of hemostat in ashtray of car created only suspicion of criminality, officer was not privileged either to seize it as evidence of crime or to examine it further to develop requisite probable cause).

Taylor v. State, 659 N.E.2d 535 (Ind. 1995) (criminal nature of bloodstained papers was apparent when investigating murder).

Crabtree v. State, 762 N.E.2d 217 (Ind.Ct.App. 2002) (officer's testimony that he observed baggie of marijuana hanging from front pouch of D's sweatshirt before he conducted weapons search was of sufficient probative value to support trial court's ruling on admissibility).

Wilson v. State, 606 N.E.2d 1314 (Ind.Ct.App. 1993) (bills with name of suspect were evidence of D's proprietary right to residence which was being searched for cocaine).

Edwards v. State, 762 N.E.2d 128 (Ind.Ct.App. 2002), *affirmed on reh'g*, 768 N.E.2d 506 (Ind.Ct.App. 2002) (fact that garbage bag in back of D's truck was filled with cartons of cigarettes was immediately apparent to officer).

NOTE: The distinction between looking at a suspicious object in plain view and moving it even a few inches is important for a Fourth Amendment analysis. Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149 (1987). If the officers must move or manipulate an object to determine whether it is contraband, plain view cannot justify the officer's seizure of the object.

Arizona v. Hicks, *supra* (because officer's moving of equipment constituted "search" separate and apart from search for shooter, victims and weapons that was lawful objective of entry into apartment, seizure was not justified by plain view).

Manning v. State, 459 N.E.2d 1207 (Ind.Ct.App. 1984) (opening doors and lifting hoods to search for VINs constituted search that was not justified by plain view).

Jones v. State, 783 N.E.2d 1132 (Ind. 2003) (police did not acquire any additional information or benefit that they could not see before they moved jewelry tray which was in plain view and placed it on bed during initial search).

State v. Tucker, 588 N.E.2d 579 (Ind.Ct.App. 1992) (evidentiary nature of tennis shoes was not immediately apparent because soles were not visible).

(c) Did the officer have lawful access to the property seized

Plain view does not justify an entry into a constitutionally protected area (place where there is an expectation of privacy), but only justifies seizure of items when the police are already legally in a constitutionally protected area.

Middleton v. State, 714 N.E.2d 1099 (Ind. 1999) (no re-entry into home without warrant, although police officer who was legally in home earlier in day saw marijuana in plain view). See also Haley v. State, 696 N.E.2d 98 (Ind.Ct.App. 1998); and Sayre v. State, 471 N.E.2d 708 (Ind.Ct.App. 1984).

Tuggle v. State, 9 N.E.3d 726 (Ind.Ct.App. 2014) (detective's seizure of bag of clothing worn by D who was shot—and later considered a murder suspect—did not violate his rights under state or federal constitutions; detective took clothing as evidence in accordance with police procedure).

f. Did the Defendant leave the seized object in an area which was open to the public (Open View Doctrine)?

The open view doctrine applies to items that can be viewed from areas which are not constitutionally protected. When a law enforcement officer is not conducting a search and seizure and is in a place where the officer is lawfully entitled to be, the officer may observe anything that is within open view without having to obtain a search warrant. Once the observations are made, a warrant may be necessary to seize items that are observed in open view.

Thurman v. State, 602 N.E.2d 548 (Ind.Ct.App. 1992) (discussing difference between plain view and open view); see also Justice v. State, 765 N.E.2d 161, 165 (Ind.Ct.App. 2002), *reh'g granted on other grounds*, 767 N.E.2d 995 (Ind.Ct.App. 2002).

Pavey v. State, 477 N.E.2d 957 (Ind.Ct.App. 1985) (simple observations by a police officer standing in place where he has right to be, are not searches in constitutional sense).

Haley v. State, 696 N.E.2d 98 (Ind.Ct.App. 1998) (recognizing distinction between observing items in open view and seizing items observed in plain view, court held that lawful view of illegal drug activity in tent provided only probable cause to obtain search warrant).

Sayre v. State, 471 N.E.2d 708 (Ind.Ct.App. 1984) (officer needs exception to warrant requirement in order to enter home without warrant even if illegal activity is in open view; although officer saw illegal activity through window of home, officer needed exigent circumstance to enter home without warrant).

Trimble v. State, 842 N.E.2d 798 (Ind. 2006) (there is no Fourth Amendment protection for activities or items that, even if within curtilage, are knowingly exposed to public; whether dog is inside doghouse or exposed to public view is irrelevant; there is no legitimate privacy interest in appearance of dog that has been tied up outside in an area readily observable by public); see also Baxter v. State, 891 N.E.2d 110 (Ind.Ct.App. 2008).

Justice v. State, 765 N.E.2d 161 (Ind.Ct.App. 2002) (officer's act of looking through window of D's car did not constitute search); see also Danner v. State, 931 N.E.2d 421 (Ind.Ct.App. 2010).

Matson v. State, 844 N.E.2d 566 (Ind.Ct.App. 2006) (observation of handgun in tote bag was not a search because it was within open view).

Troyer v. State, 605 N.E.2d 1183 (Ind.Ct.App. 1993) (if marijuana is observed in open view in an open field, field may be entered without search warrant to seize marijuana).

(1) Police observation/Surveillance

Wood v. State, 592 N.E.2d 740 (Ind.Ct.App. 1992) (warrantless observance of marijuana growing in D's backyard was permissible under "open view" doctrine because officer

was investigating alleged battery; officer had been informed of likelihood of finding marijuana in D's yard).

Cornman v. State, 294 N.E.2d 812 (Ind.Ct.App. 1973) (police surveillance in and around stone quarry and wooded and cleared area of D's property was not search).

Shultz v. State, 742 N.E.2d 961 (Ind.Ct.App. 2001) (it was unreasonable under Indiana Constitution for police to tour property to see if anyone was home after no one responded to their knocking on door).

Hardister v. State, 849 N.E.2d 563 (Ind. 2006) (officers pursuing fleeing suspects were lawfully present in D's backyard, thus their looking into kitchen through side and rear windows was proper "open view" observation and reasonable effort to locate fleeing suspects); cf. Collins v. Virginia, 138 S.Ct. 1663 (2018).

United States v. Fields, 113 F.3d 313 (2nd Cir. 1997) (officer standing in side yard of multi-family dwelling and looking through five- to six-inch gap below blinds did not violate expectation of privacy); see also Taylor v. State, 120 N.E.3d 661 (Ind.Ct.App. 2020).

People v. Camacho, 3 P.3d 878 (Cal. 2000) (observances of police officers who, without warrant, entered onto side yard of D's residence at 11:00 p.m. and looked through uncurtained window were not within open view).

(2) Use of aircraft to observe suspect's property

The U.S. Supreme Court is split as to the test to determine whether the police observing a suspect's property from the air constitutes open view. The plurality opinion stated that if the helicopter or plane were not violating the F.A.A. regulations on altitude, the suspect's property and any item on it was in open view. However, five members of the Court said that only observances made from a helicopter in public airways at an altitude at which the public travels with sufficient regularity would constitute open view. Florida v. Riley, 488 U.S. 445, 109 S.Ct. 693 (1989).

Blalock v. State, 483 N.E.2d 439 (Ind. 1985) (greenhouse located on heavily wooded, isolated rural property observed at altitude of 800-1,000 feet above ground level did not constitute search).

California v. Ciralo, 476 U.S. 207, 106 S.Ct. 1809 (1986) (observance of D's backyard with naked eye from aircraft lawfully operating at altitude of 1000 feet was within open view).

Dow Chemical Co. v. United States, 476 U.S. 227, 106 S.Ct. 1819 (1986) (aerial surveillance of commercial property with cameras that magnify sufficiently to see objects one-half inch in diameter "does not give rise to constitutional problems").

Leaders of a Beautiful Struggle, et. al. v. Baltimore Police Dept., 2 F.4th 330 (4th Cir., 2021) (warrantless aerial surveillance program violated Fourth Amendment because it uses high-tech cameras enabling police to deduce from the whole of individuals' movements and accessing its data is a search).

(3) Use of visual aids and other sense-enhancing techniques

Use of visual aids and other sense-enhancing techniques may change police officer's observations into a search only when the techniques are grossly intrusive.

Thomas v. State, 642 N.E.2d 240 (Ind.Ct.App. 1994) (secretly installed video camera in corner of store did not catch activity in open view and was search).

Rook v. State, 679 N.E.2d 997 (Ind.Ct.App. 1997) (using binoculars to see D carrying marijuana plant in his yard was within open view).

Fisher v. State, 291 N.E.2d 76 (Ind. 1973) (officer who is across street on vacant lot can take pictures of truck on private property).

Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038 (2001) (scanning residence with thermal-imaging device is search for Fourth Amendment purposes).

Florida v. Riley, 488 U.S. 445, 449, 109 S.Ct. 693 (1989) (video surveillance of a common or open area is generally not a search). See also People v. Lynch, 445 N.W.2d 803, 807 (Mich.Ct.App. 1989) (video surveillance of common area in public restroom did not violate D's reasonable expectation of privacy).

(4) Open Sound Doctrine

The open view doctrine applies to sound as well. An officer may listen to anything capable of being heard from a place he is lawfully entitled to be without a search warrant.

Holt v. State, 481 N.E.2d 1324 (Ind. 1985) (D had no reasonable expectation of privacy where he spoke in muffled voice 12 feet from officers who were guarding door and could not help but overhear D talking).

(5) Open Smell Doctrine

The open view doctrine applies to smells as well. An officer may smell anything capable of being detected from a place she is lawfully entitled to be without a search warrant. This usually arises when an officer stops an automobile in a public place and detects the smell of marijuana. See, e.g., Fyock v. State, 436 N.E.2d 1089, 1092 (Ind. 1982); Kenner v. State, 703 N.E.2d 1122 (Ind.Ct.App. 1999); and Perkins v. State, 451 N.E.2d 354 (Ind.Ct.App. 1983).

A trained dog may also be used to sniff luggage or other items without it constituting a search. United States v. Place, 462 U.S. 696, 103 S.Ct. 2637 (1983), Neuhoff v. State, 708 N.E.2d 889, 891 (Ind.Ct.App. 1999).

But see Florida v. Jardines, 133 S.Ct. 1409 (2013) (government's use of trained police dogs to investigate a home and its immediate surroundings is a "search" subject to the limitations of the Fourth Amendment).

Hoop v. State, 909 N.E.2d 463 (Ind.Ct.App. 2009) (Indiana Constitution requires reasonable suspicion to conduct a dog sniff of a private residence).

g. Third-party doctrine: did Defendant voluntary relinquish information to a third party?

The Fourth Amendment does not require police to obtain a search warrant to gather information an individual has voluntarily relinquished to a third party. See, e.g., Smith v. Maryland, 442 U.S. 735 (1979) (telephone users); and United States v. Miller, 425 U.S. 435 (1976) (bank customers).

However, historical cell-site location data is radically different; it is an exhaustive chronicle of location information casually collected by wireless carriers. Thus, the third-party doctrine does not apply, and a search warrant is required to access cell phone location information. Carpenter v. United States, 138 S.Ct. 2206 (2018).

h. Did the police use an electronic tracking device?

Electronic tracking devices, "beepers," may be used to track people or things only if the information they reveal could have theoretically been gained from public observation. I.C. 35-33-5-12 & 15 require court orders based upon finding of probable cause for obtaining geolocation information and use of real time tracking devices.

United States v. Knotts, 460 U.S. 276, 103 S.Ct. 1081 (1983) (police placing a beeper in a chemical drum purchased by D did not constitute a search, because it did not provide any information not available by visual surveillance from public places and it did not reveal information about D's movement within private places).

United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296 (1984) (beeper that allowed tracking of movement of chemicals within houses as well as on public streets was an illegal search; monitoring of property withdrawn from public view is too great a threat to property interests).

State v. Lagrone, 985 N.E.2d 66 (Ind.Ct.App. 2013) (police monitoring of GPS device to track package en route to D's home was not unlawful, but information obtained from parcel wire after package was opened inside D's home without a warrant violated D's Fourth Amendment rights).

United States v. Jones, 132 S.Ct. 945 (2012) (attaching a GPS on a suspect's car and then using the device to monitor vehicle's movements is a search).

Keeylen v. State, 14 N.E.3d 865 (Ind.Ct.App. 2014), *aff'd on reh'g*, 21 N.E.3d 840 (warrantless installation and use of GPS tracking device constituted improper search).

Sidener v. State, 55 N.E.3d 380 (Ind.Ct.App. 2016) (passenger tracked by GPS did not have expectation of privacy and could not challenge installation and subsequent tracking of GPS device on that vehicle).

Govan v. State, 116 N.E.3d 1165 (Ind.Ct.App. 2019) (for purpose of both 4th Amendment and I.C. 35-33-5-12(a)(2), exigent circumstances existed to obtain D's real-time cell phone location data without first seeking a court order, where police had ample reason to believe that D had committed violent felonies and presented an ongoing threat to the lives and safety of others).

Zanders v. State, 118 N.E.3d 736 (Ind. 2019) (rejecting State's argument that exigent circumstances justified warrantless acquisition of D's historical cell phone information but finding admission of this evidence was harmless beyond a reasonable doubt).

B. DOES THE DEFENDANT HAVE STANDING TO CHALLENGE THE SEARCH OR SEIZURE?

"Standing" is basically a person's ability to assert his or her constitutional rights, to challenge an unreasonable search and seizure. A person's Fourth Amendment rights against unreasonable search and seizure are personal. Minnesota v. Carter, 525 U.S. 83, 88, 119 S. Ct. 469 (1998). In order to challenge a search or seizure as unconstitutional under the Fourth Amendment, a defendant must have a legitimate expectation of privacy in the place that is searched, Id., or show a trespass on a constitutionally protected area. United States v. Jones, 132 S.Ct. 945 (2012). There is a striking difference between raising a standing argument based on Article 1, § 11 of the Indiana Constitution and the Fourth Amendment to the United States Constitution. The analysis under the Indiana Constitution is much more expansive and favorable to the defense.

PRACTICE POINTER: The term "standing" still appears in Fourth Amendment cases, although the U.S. Supreme Court disfavors the use of this language, as stated in Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421 (1978). See Minnesota v. Carter, 525 U.S. 83, 119 S.Ct. 469 (1998). The appropriate inquiry is first, whether the proponent of the right has alleged an injury in fact, and second, whether he is asserting his own legal rights rather than those of a third party. Rakas, *supra*.

1. Under the Indiana Constitution?

To challenge evidence as a result of an unreasonable search or seizure under Article I, § 11 of the Indiana Constitution, a person must establish ownership, control, possession, or interest in either the premises searched, or the property seized.

Peterson v. State, 674 N.E.2d 528 (Ind. 1996) (D did not have standing to challenge search of bedroom at mother's house but did have standing to challenge seizure of his guns in bedroom closet).

Best v. State, 821 N.E.2d 419 (Ind.Ct.App. 2005) (although D lacked Fourth Amendment protection because he was on property for business transaction, he did have standing under Article I, § 11 because he possessed interest in items seized).

Allen v. State, 893 N.E.2d 1092 (Ind.Ct.App. 2008) (where D does not claim interest in items seized but rather only premises searched, the standing analysis under the Indiana and U.S. Constitutions are the same).

Smith v. State, 744 N.E.2d 437 (Ind. 2001) (because D did not have possessory interest in DNA test results from unrelated case in which he was acquitted, he lacked standing to challenge retention of results as unreasonable under Indiana Constitution); see also I.C. 10-13-6-8 (allowing retention of DNA samples from any person arrested for alleged felony offense).

2. Under the U.S. Constitution?

To show a Fourth Amendment violation for a search or seizure, it must be established that your client had an actual or subjective expectation of privacy in the place or thing searched or seized, *and* that the claimed expectation was one that society recognizes as reasonable. Blalock v. State, 483 N.E.2d 439 (Ind. 1985); or by showing a trespass on privacy—on a constitutionally protected area. United States v. Jones, 132 S.Ct. 945 (2012). Whether an individual's expectation of privacy is "reasonable" depends on the context in which it arises. Thus, the question of whether an individual has a reasonable expectation of privacy must be addressed on a case-by-case basis.

O'Connor v. Ortega, 480 U.S. 709, 718, 107 S.Ct. 1492 (1987). The standing issue is only justiciable if the defendant asserts his privacy interest. Standing is not assumed; it must be shown on the record. Rawlings v. Kentucky, 448 U.S. 98, 105-06, 100 S.Ct. 2556 (1980).

The Fourth Amendment also applies to a seizure of property that involves an invasion of property or possessory interest, even if the search and/or seizure does not involve an invasion of privacy. Soldal v. Cook County, 506 U.S. 56, 113 S.Ct. 538 (1992); United States v. Jones, 132 S.Ct. 945 (2012) ("standing" to contest search and seizure depends on whether the person challenging it has a privacy interest against government trespass).

The Supreme Court does not treat the issue of standing as distinct from the substantive merits of a defendant's Fourth Amendment claim. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421 (1978). However, it is often preferable to continue to treat standing as a distinct inquiry, despite its similarity to the question of if the defendant had an expectation of privacy and therefore a search has occurred, *supra*.

United States v. Guitterez, 983 F.Supp. 905 (N.D.Cal. 1998), *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999) (illegal alien need not show "connection" to this country to be entitled to raise Fourth Amendment challenge to search or seizure occurring in this country).

Cox v. State, 392 N.E.2d 496 (Ind.Ct.App. 1979) (person does not have legitimate expectation of privacy in check and deposit slip at bank; no warrant needed).

Shelton v. State, 679 N.E.2d 499 (Ind.Ct.App. 1997) (Ds lacked standing to object to officers' entry onto another's private property to place decoy thereon).

a. Was the Defendant an occupant in a vehicle which was stopped?

Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400 (2007) (passengers have standing to challenge a stop of vehicle, even if they have no possessory or ownership interest in the car); See also McKnight v. State, 612 N.E.2d 586 (Ind.Ct.App. 1993); and Osborne v. State, 805 N.E.2d 435 (Ind.Ct.App. 2004).

Campos v. State, 885 N.E.2d 590 (Ind. 2008) (passenger, who was given permission to borrow car, has reasonable expectation of privacy in car and could challenge search under Fourth Amendment).

State v. Friedel, 714 N.E.2d 1231 (Ind.Ct.App. 1999) (passenger in car has standing to challenge search of her purse found in car).

Hester v. State, 551 N.E.2d 1187 (Ind.Ct.App. 1990) (driver of car had standing to challenge search and seizure of items found therein, even though he claimed no property interest in either car or items found inside).

State v. Lucas, 859 N.E.2d 1244 (Ind.Ct.App. 2007) (Ds had standing to challenge search of locked metal box found inside stolen van Ds were traveling in).

Wilson v. State, 173 N.E.3d 1063 (Ind.Ct.App. 2021) (D must show he was someone in lawful possession and control; here, D did not present any evidence at suppression hearing that he was an authorized driver on the rental agreement or that he had the renter's permission to use the car, only that there was nothing indicating he did not have permission or that it was stolen. Relying on Campos (above), Court concluded D failed to meet his burden to show he lawfully possessed the vehicle when it was searched and therefore lacked the requisite privacy interest in the vehicle that would confer standing to challenge the search).

Strangeway v. State, 720 N.E.2d 724 (Ind.Ct.App. 1999) (driver of car had no standing to challenge officer's request for passenger's identification).

Pollard v. State, 270 Ind. 599, 388 N.E.2d 496 (Ind. 1979) (mere passenger in automobile owned by another may not complain of an unlawful search of vehicle); see also Polk v. State, 822 N.E.2d 239 (Ind.Ct.App. 2005).

United States v. Posey, 663 F.2d 37 (7th Cir. 1981) (even though D had no property interest in car searched or guns seized, D did have standing to challenge search and seizure because D's wife owned car and D was, with her permission, exercising exclusive control over car at time of search).

Possible argument: Regardless of whether a passenger in a car has standing to challenge the search of the car, argue that the passenger has standing if he owns the items or has an interest in the items seized. See *Does the Defendant have a possessory interest in seized item?* p. 29; *Under the Indiana Constitution?* p. 25.

b. Was the Defendant in a home which was searched?

The Defendant bears the burden of demonstrating a legitimate expectation of privacy in the premises searched. Brown v. State, 691 N.E.2d 438 (Ind. 1998).

Brames v. State, 406 N.E.2d 252 (Ind.Ct.App. 1980) (D had standing to object to search because he was resident of location, even though D's parents, who owned the location, consented).

Emerson v. State, 648 N.E.2d 705 (Ind.Ct.App. 1995) (D had no expectation of privacy in basement of apartment from which he had been evicted).

Bradley v. State, 4 N.E.3d 831 (Ind.Ct.App. 2014) (D lacked standing to challenge probable cause to search his neighbor's apartment even though marijuana police found helped police find D and obtain warrant to search his apartment).

(1) Guests

Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684 (1990) (overnight guests have standing).

Harless v. State, 577 N.E.2d 245 (Ind.Ct.App. 1991) (D had standing to challenge warrantless search of girlfriend's home, where he had stayed overnight on many occasions, including evening preceding day of search).

Ceroni v. State, 559 N.E.2d 372 (Ind.Ct.App. 1990) (where D was allowed to stay in motel room by individual who had rented it, he had standing to challenge search of room).

Minnesota v. Carter, 525 U.S. 83, 119 S.Ct. 469 (1998) (those who are merely present with consent of householder for short period of time to complete commercial transaction have no standing).

Armour v. State, 762 N.E.2d 208 (Ind.Ct.App. 2002) (D did not have legitimate expectation of privacy in hotel room because he was not registered guest, nor was there any evidence in record to suggest that registered guest had given him permission to use room); see also Fox v. State, 983 N.E.2d 1165 (Ind.Ct.App. 2013).

Livermore v. State, 777 N.E.2d 1154 (Ind.Ct.App. 2002) (D failed to carry his burden of establishing he had reasonable expectation of privacy in his girlfriend's house).

NOTE: There are some cases which held that guests did not have standing; however, these cases were decided before Minnesota v. Olson, *supra*. See Livingston v. State, 542 N.E.2d 192 (Ind. 1989); Clifford v. State, 457 N.E.2d 536 (Ind. 1984); and Lee v. State, 419 N.E.2d 823 (Ind.Ct.App. 1981).

(2) Common areas

Common areas of apartment buildings and hotels generally are not part of a person's "dwelling," but they may be covered by the curtilage doctrine. Therefore, an expectation of privacy may exist in common areas of an apartment building. Robertson v. State, 765 N.E.2d 138 (Ind. 2002).

Robertson v. State, *supra* (doctrine of curtilage is not applicable to carrying handgun without license statute, which designates a person's "dwelling" as exception without also including curtilage; legislature did not intend to permit carrying of unlicensed handguns in all apartments' common areas that person may claim as part of their place of lodging).

State v. Neanover, 812 N.E.2d 127 (Ind.Ct.App. 2004) (D's expectation of privacy in open landing on top floor of apartment building was objectively reasonable).

Wright v. State, 772 N.E.2d 449, 454-57 (Ind.Ct.App. 2002) (hotel hallway is a public place for purposes of public intoxication statute).

Mays v. State, 719 N.E.2d 1263 (Ind.Ct.App. 1999) (no standing to challenge search of atrium of apartment where D hid cocaine).

Arcuri v. State, 775 N.E.2d 1095 (Ind.Ct.App. 2002) (D lacked standing to challenge search because he had no reasonable expectation of privacy in common area of residence).

c. Did the search of commercial property/workplace invade Defendant's expectation of privacy?

One need not have title to a property in order to have an expectation of privacy. Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960), *overruled on other grounds*. However, in general one's expectation of privacy may be less weighty for commercial premises. New York v. Burger, 482 U.S. 691, 700, 107 S.Ct. 2636 (1987).

State v. Thomas, 642 N.E.2d 240 (Ind.Ct.App. 1994) (operator of a camp store at a state-owned and licensed concession located on state property had an expectation of privacy in the concession, and State's covert video surveillance was an illegal warrantless search).

Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120 (1968) (where D shared a large office with several union officers, D has reasonable expectation of privacy of records and therefore had standing to challenge search of records in office).

O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987) (public employers are generally to be given wide latitude to enter employee offices for work-related, non-investigatory reasons, but an employee generally has an expectation of privacy in a desk or file cabinet not shared with other employees).

United States v. Britt, 508 F.2d 1052 (5th Cir. 1975), *cert. denied* 423 U.S. 825 (D who was president of corporation did not have standing to challenge search of storage area at corporate premises).

Tobias v. State, 479 N.E.2d 508 (Ind. 1985) (D had no expectation of privacy in a public restroom at his retail place of employment because the restroom was not part of D's workspace and was used by him only for the purpose of making drug transactions).

City of Ontario v. Quon, 130 S.Ct. 2619 (2010) (a police officer using his government-issued pager to send personal, non-work related messages had no reasonable expectation of privacy that would preclude his supervisors from retrieving and reading the messages without a warrant; Government supervisors may examine "private" texting by their employees without Fourth Amendment process if: (1) the device is provided by the agency; (2) the worker is told in advance that messages sent from the device would be subject to management audit; (3) the examination of the messages is not to discover evidence of crime but for work-related purposes such as restricting unauthorized misuse of the device; (4) there must be some grounds that indicate misuse by the employee).

Klen v. City of Loveland, 661 F.3d 498 (10th Cir. 2011) (owners of commercial premises that were still under construction had an expectation of privacy in the structure because among other things, they kept their wallets and briefcases in the building).

d. Does the Defendant have a possessory interest in searched item?

Even if the Defendant does not have a legitimate expectation in the automobile or home searched, he may still have standing if he has a legitimate expectation of privacy in the item searched, e.g., a backpack or suitcase.

State v. Machlah, 505 N.E.2d 873 (Ind.Ct.App. 1987) (D had legitimate expectation of privacy in suitcase he took in taxi on way to airport).

State v. Lucas, 859 N.E.2d 1244 (Ind.Ct.App. 2007) (Ds had standing to challenge search of locked metal box found inside stolen van Ds were traveling in).

e. Does the Defendant have a possessory interest in seized item?

Ownership of the goods seized is only a factor in considering whether the Defendant has standing to challenge the search and seizure. Rawling v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556 (1980); United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547 (1980) (overruling Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960)).

Cannon v. State, 335 N.E.2d 229 (Ind.Ct.App. 1975) (D had standing to challenge seizure of his drugs).

Snuffer v. State, 461 N.E.2d 150 (Ind.Ct.App. 1984) (D had no standing to challenge search of stolen vehicle).

United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619 (1976) (no legitimate expectation of privacy in contents of original checks and deposit slips because checks are not confidential communications).

Carpenter v. United States, 138 S.Ct. 2206 (2018) (individuals have a reasonable expectation of privacy in cell phone provider's historical cell phone location information records).

Remember: Simple possession establishes standing under the Indiana Constitution. See p. 25. Also, do not worry that a defendant's testimony that he owns the seized object will be admitted as substantive evidence to prove his guilt at trial. A defendant's testimony at a suppression hearing is not admissible in trial on the issue of guilt. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968).

Possible argument: If the State argues and the court finds that the Defendant did not have standing because he lacked sufficient control over the premises where the contraband was found or over the contraband itself, then argue that the State is judicially estopped from arguing that the Defendant had dominion and control over the contraband in order to prove constructive possession at trial. "Judicial estoppel is a judicially created doctrine that seeks to prevent a litigant from asserting a position that is inconsistent with one asserted in the same or a previous proceeding." Ogburn v. State, 53 N.E.3d 464, 470 (Ind. Ct. App. 2016) (defendant not judicially estopped from challenging search of vehicle on appeal even though he denied having possessory interest in vehicle at trial); see also Jennings v. State, 714 N.E.2d 730 (Ind.Ct.App. 1999).

f. Was there a search and/or seizure of a third person?

A person aggrieved by an illegal search and seizure of a third person has not had his Fourth Amendment rights violated.

United States v. Padilla, 508 U.S. 77, 113 S.Ct. 1936 (1993) (D did not have standing to challenge search of car driven by co-conspirator).

Strangeway v. State, 720 N.E.2d 724 (Ind.Ct.App. 1999) (driver of car had no standing to challenge officer's request for passenger's identification).

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963) (only arrestees have standing to challenge admissibility of evidence gained by exploiting unlawful arrest or by violations of Miranda).

3. State may not raise standing issue for first time on appeal

If the prosecution has failed to make any trial court challenge to standing, the government may not raise the issue for the first time on appeal. Steagald v. United States, 451 U.S. 204, 209, 101 S.Ct. 1642, 1646 (1981). Likewise, in resolving a claim of unlawful search and seizure, an appellate court should not invoke lack of standing, *sua sponte*. Everroad v. State, 590 N.E.2d 567, 569 (Ind. 1992).

Willis v. State, 780 N.E.2d 423 (Ind.Ct.App. 2002) (although State challenged whether D had reasonable expectation of privacy in hotel room, it did not challenge his standing to Indiana Constitutional claim and court could not raise issue *sua sponte* on appeal).

Conn v. State, 89 N.E.3d 1093, 1105 (Ind.Ct.App. 2017) (although at trial the prosecutor argued there was "no evidence that [D] has any kind of reasonable expectation of privacy on private property whether it's his or had any right to be there," Court concluded that the State waived its argument that D lacked standing to bring his state constitutional challenge because it failed to challenge his standing at trial).

C. WAS THE SEARCH CONDUCTED BY A GOVERNMENT ACTOR?

The constitutional prohibition against unreasonable searches and seizures provides protection from such acts by government agents. The state and federal constitutional provisions do not apply to the unauthorized acts of private citizens. Hutchinson v. State, 477 N.E.2d 850 (Ind. 1985). However, if

private persons act as instruments or agents of the State, their actions may be sufficiently connected with official law enforcement to fall within the scope of the Fourth Amendment.

Machlan v. State, 225 N.E.2d 762 (Ind. 1967) (warrantless search was invalid because it was undertaken by private person at instigation of police).

State v. Thomas, 642 N.E.2d 240 (Ind.Ct.App. 1994) (where Dept. of Natural Resources owned and leased property on which D's camp store was located, DNR's consent to allow video camera installed in store was invalid because DNR was acting as agent or instrument of State).

Shahid v. United States, 117 F.3d 322 (7th Cir. 1997) (shopping mall security officers are not government agents covered by Fourth Amendment); But see United States v. Dansberry, 500 F. Supp. 140, (N.D. Ill. 1980) (by detaining and searching D, policeman who was working as part-time private security guard for department store was using authority conferred upon him by State law to further not only his employer's interest in preventing retail theft but also State interest in apprehending a criminal; his actions were sufficiently connected with official law enforcement to fall within scope of Fourth Amendment).

Clanton v. State, 977 N.E.2d 1018 (Ind.Ct.App. 2012) (Fourth Amendment does not categorically fail to apply to off-duty police officers working as security officers on private property; officers in this case were in full uniform and used department-issued equipment and techniques that would have been unavailable to civilian security guards).

Ferguson v. City of Charleston, 532 U.S. 1281, 121 S.Ct. 1281 (2001) (Fourth Amendment's prohibition against unreasonable searches and seizures applied to a public hospital's policy of obtaining drug tests from pregnant patients suspected of using cocaine).

Stinchfield v. State, 367 N.E.2d 1150 (Ind.Ct.App. 1977) (informant was actually an agent of police when he entered D's home and removed drugs).

Henson v. State, 790 N.E.2d 524 (Ind.Ct.App. 2003) (although government played no part in illegally intercepting telephone call, Title III of Omninbus Crime Control and Safe Streets Act protects privacy of communication and requires exclusion of it from evidence, regardless of whether private party or government intercepts the communication).

Zupp v. State, 283 N.E.2d 540 (Ind. 1972) (warrantless search of D's apartment by landlord was valid despite fact that landlord had been informant for police in past).

Bone v. State, 771 N.E.2d 710 (Ind.Ct.App. 2002) (computer technician was not an instrument or agent of government, and his opening of files in D's computer did not violate Fourth Amendment).

Scott v. State, 855 N.E.2d 1068 (Ind.Ct.App. 2006) (off-duty police officers working for the Evansville Housing Authority to enforce rules on EHA's properties were not government actors).

Sloane v. State, 686 N.E.2d 1287 (Ind.Ct.App. 1997) (although police accompanied investigator for insurance company, search of burned home was not subject to Fourth Amendment because investigator initiated the search and was not a government actor).

D. DID THE DEFENDANT OR A THIRD-PARTY CONSENT TO THE SEARCH?

Because consenting to a search is the equivalent of waiving one's Fourth Amendment rights, probable cause is not required when the police obtain consent. The touchstone of the Fourth Amendment is reasonableness. Consensual searches are approved because it is reasonable for police to conduct a

search once police have been permitted to do so. Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801 (1991).

1. Was the Defendant read his rights?

a. Advisement of right to counsel for Defendants in custody?

A person in police custody must be informed of his or her right to consult with counsel about the possibility of consenting to a search before valid consent can be given. Pirtle v. State, 323 N.E.2d 634 (Ind. 1975); Sims v. State, 413 N.E.2d 556 (Ind. 1980), *overruled on other grounds*, 658 N.E.2d 563 (Ind. 1995). A police officer's subjective, undisclosed view regarding whether a person being interrogated is a suspect is irrelevant to the assessment of whether the person is in custody. Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526 (1994). Pirtle specifically places the burden on the State to show that the defendant's waiver of the right to counsel was explicit.

Ward v. State, 408 N.E.2d 140 (Ind.Ct.App. 1980) (advisement must be given at time officer requests consent to search).

Posso v. State, 180 N.E.3d 326 (Ind.Ct.App. 2022) (Pirtle advisement inadequate where detective did not read the consent form aloud or otherwise advise D of the right to consult with an attorney before giving consent to search, even after D said he did not understand what the consent form was for; video evidence also established D did not read either form before signing and State's argument that not reading the form was D's choice was unavailing).

Torres v. State, 673 N.E.2d 472 (Ind. 1996) (D's consent to search house was invalid because police failed to advise D of right to consult with counsel where D was handcuffed, police had read him Miranda rights and informed him that he was suspect in stabbing).

State v. Linck, 708 N.E.2d 60 (Ind.Ct.App. 1999) (D was in custody after he admitted smoking marijuana because reasonable person would not have felt free to leave after making this admission); see also Peel v. State, 868 N.E.2d 569 (Ind.Ct.App. 2007).

Jones v. State, 655 N.E.2d 49 (Ind. 1995) (D is not in custody when he is pulled over for traffic violation; thus, the right to receive Pirtle warning does not necessarily attach to motorists detained during traffic stops).

Sellmer v. State, 842 N.E.2d 358 (Ind. 2006) (distinguishing Jones (above), Court held D was in custody and entitled to Pirtle advisement, which officer did not provide); see also Miller v. State, 846 N.E.2d 1077 (Ind.Ct.App. 2006); and Friend v. State, 858 N.E.2d 646 (Ind.Ct.App. 2006).

State v. Janes, 102 N.E.3d 314 (Ind.Ct.App. 2018) (considering the totality of circumstances, Court agreed with trial judge's finding that D was in police custody during traffic stop for minor infraction in middle of night involving three uniformed officers in separate police cars with flashing lights, where one officer asked D incriminating questions about alcohol consumption, illegal items and weapons).

Atkins v. State, 143 N.E.3d 1025 (Ind.Ct.App. 2020) (considering factors identified in State v. Ruiz, 123 N.E.3d 675 (Ind. 2019) and Meredith v. State, 906 N.E.2d 867 (Ind. 2009), Court concluded that the interaction between police and D went from a Terry stop

to a custodial situation requiring a Pirtle warning before police searched the laptop in his backpack; D did not explicitly waive his right to counsel prior to the search).

Hammond v. State, 82 N.E.3d 880 (Ind.Ct.App. 2017) (passenger subject to non-custodial seizure during traffic stop was not entitled to Pirtle advisement).

Williams v. State, 611 N.E.2d 649 (Ind.Ct.App. 1993) (where D voluntarily went to police station for questioning, he was not in custody when asked if he would consent to search). See also Peterson v. State, 514 N.E.2d 265 (Ind. 1987).

West v. State, 755 N.E.2d 173 (Ind.Ct.App. 2001) (fact that D was subsequently taken to police station and his vehicle towed did not entitle him to Pirtle warnings when consent was given prior to his being taken into custody).

Huspon v. State, 545 N.E.2d 1078 (Ind. 1989) (a person is not in custody where he or she is unrestrained and has no reason to believe he or she could not leave).

Scott v. State, 924 N.E.2d 169 (Ind.Ct.App. 2010) (even though D was aware of two or three armed, uniformed officers and one plain clothes detective, D was not in custody when he consented to the search of his home; no officer drew or pointed weapon, and no one threatened him; Pirtle advisements were not necessary).

The Pirtle advisement only applies to the weightiest intrusions, such as a search of a home or vehicle, Garcia-Torres v. State, 949 N.E.2d 1229 (Ind. 2011), or cell phone Posso v. State, 180 N.E.3d 326 (Ind.Ct.App. 2022). It is required in circumstances involving great risk of involuntary consent and where there is a likelihood that police will come across inculpatory evidence beyond what they specifically seek. Dycus v. State, 108 N.E.3d 301 (Ind. 2018). The advisement is unnecessary when police already have a warrant, Brown v. State, 118 N.E.3d 763 (Ind.Ct.App. 2019) or have probable cause to conduct a search. Hill v. State, 169 N.E.3d 1150 (Ind.Ct.App. 2021).

Garcia-Torres v. State, 949 N.E.2d 1229 (Ind. 2011) (because the intrusion caused by a buccal swab for DNA is slight, Pirtle does not apply).

Ackerman v. State, 774 N.E.2d 970 (Ind.Ct.App. 2002) (police are not required to advise a person in custody that she may consult with attorney before administering field sobriety tests, which are qualitatively different from general, unlimited searches that concerned court in Pirtle); see also Datzek v. State, 838 N.E.2d 1149 (Ind.Ct.App. 2005).

Schmidt v. State, 816 N.E.2d 925 (Ind.Ct.App. 2004) (purpose of Pirtle would not be served by extending that doctrine to apply to chemical breath testing); see also Dycus v. State, 108 N.E.3d 301 (Ind. 2018) (drug recognition exams).

Cohee v. State, 945 N.E.2d 748 (Ind.Ct.App. 2011) (Pirtle warnings not required when asking for consent to blood draw).

Wilkerson v. State, 933 N.E.2d 891 (Ind.Ct.App. 2010) (Pirtle advisement is not required before D can consent to pat down search).

b. Advisement that the Defendant is free to go?

There is no bright-line rule under the Fourth Amendment requiring a "you are free to go" warning before a lawfully detained motorist may be asked for consent to search her vehicle. Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417 (1996).

State v. Pals, 805 N.W.2d 767 (Iowa 2011) (lack of a statement that D was free to leave or could decline to consent to the search cut against the voluntariness of the search under Iowa Constitution).

c. Advisement that the Defendant may refuse consent?

Warning a suspect of his right to withhold consent is not required but failing to so warn the suspect is a factor in the overall determination of voluntariness. Schneckloth v. Bustamonte, 42 U.S. 218, 93 S.Ct. 2041 (1973); see also State v. Scheibelhut, 673 N.E.2d 821 (Ind.Ct.App. 1996).

Callahan v. State, 719 N.E.2d 430 (Ind.Ct.App. 1999) (Indiana Constitution does not require police to tell Ds that they have right to refuse to consent).

Hayes v. State, 794 N.E.2d 492 (Ind.Ct.App. 2003) (better practice in conducting "knock and talk" investigation would be for police officer to identify himself and advise occupant of house of his right to deny entry).

(1) Advisement and consent during a "knock and talk" investigation

A "knock & talk" investigation involves police officers knocking on the door of a house, identifying themselves as officers, asking to talk to the occupant about a criminal complaint, and eventually requesting permission to search the house. Although this investigative procedure does not *per se* violate the Fourth Amendment, it "pushes the envelope" and can easily be misused. See, e.g., J.K. v. State, 8 N.E.3d 222 (Ind.Ct.App. 2014).

United States v. Alicea, No. CR15-0080, 2015 WL 7460004 (N.D. Iowa 2015) (legal authority to conduct a knock-and-talk does not permit police to shine flashlights in the windows when nobody answers).

Best practice would be for the officer to obtain written consent prior to entering a residence, and consent to search forms are commonly used. See, e.g., Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003); Ware v. State, 782 N.E.2d 478 (Ind.Ct.App. 2003); and Livermore v. State, 777 N.E.2d 1154 (Ind.Ct.App. 2002).

In dealing with a consent to search in a knock and talk setting, courts have considered the number of officers present, the age, maturity, intelligence, and experience of the consenting party, the officers' conduct and other circumstances under which consent was given, and the duration, location, and time of the encounter. Once a knock is not answered, police generally must leave the premises and obtain a warrant. Hardister v. State, 849 N.E.2d 563, 570 (Ind. 2006).

Warren v. State, 73 N.E.3d 203 (Ind.Ct.App. 2017) (D's consent to search his residence was not rendered invalid by repeated and prolonged knocking and yelling by officers investigating D for manufacturing methamphetamine).

Casillas v. State,___N.E.3d___ (Ind.Ct.App. 7/11/22) (substantial police presence at knock and talk does not in and of itself render a person's consent involuntary; here, D was not physically restrained before or while police entered his home, and officers did not threaten D or brandish their weapons).

Hayes v. State, 794 N.E.2d 492 (Ind.Ct.App. 2003) (D's consent to search motel room as result of "knock and talk" investigation was voluntary).

Redden v. State, 850 N.E.2d 451 (Ind.Ct.App. 2006) (D was not seized when two armed officers performed a "knock and talk" investigation and continued to talk with D after he denied them permission to enter).

At least two state Supreme Courts have established a bright-line requirement that before seeking consent to a warrantless search of a home, officers must inform the person from whom consent is sought of the right to refuse consent and the right to limit the scope of the search. State v. Ferrier, 960 P.2d 927 (Wash. 1998); State v. Brown, 156 S.W.3d 722 (Ark. 2004). The required advisement applies only to searches for contraband or evidence of a crime, not when the officers are seeking entry into a home to question a resident in the course of investigating a crime. State v. Khounvichai, 69 P.3d 862 (2003). However, other states have recently refused to adopt this bright-line rule. See Hayes v. State, 794 N.E.2d 492 (Ind.Ct.App. 2003); State v. Johnston, 839 A.2d 830 (N.H. 2004); and Scott v. State, 782 A.2d 862 (Md. 2001).

(2) Consent obtained because of officer's ultimatum

It is not inherently coercive for police to give conditional permission to step out of a vehicle during a traffic stop, subject to the motorist's consent to a pat-down search.

State v. Cunningham, 26 N.E.3d 21 (Ind. 2015) (giving D the choice between remaining in his car unsearched or being patted down as condition of getting out was not inherently coercive and having a truly free choice defeats his related argument that his consent was invalid because police never told him he could refuse consent).

2. Was the Defendant's consent voluntarily given?

In determining whether a consent to search was voluntary, courts should consider the "totality of circumstances," including but not limited to: 1) whether the Defendant was advised of his Miranda rights prior to the request to search; 2) the Defendant's degree of education and intelligence; 3) whether the Defendant was advised of his right not to consent; 4) whether the police officer made any express or implied claims of authority to search without consent; 5) whether the officer was engaged in any illegal action prior to request; 6) whether the Defendant previously was cooperative; and 7) whether the officer was deceptive as to his true identity or purpose of his search. State v. Scheibelhut, 673 N.E.2d 821 (Ind.Ct.App. 1996). The State has the burden of proving that consent was, in fact, freely and voluntarily given. Thurman v. State, 602 N.E.2d 548 (Ind.Ct.App. 1992).

State v. Barker, 734 N.E.2d 671 (Ind.Ct.App. 2000), *reh'g granted* 739 N.E.2d 192 (Ind.Ct.App. 2000) (officers' statement that they could go get search warrant if they were not allowed inside D's home rendered D's choice illusory and vitiated subsequent consent to search).

Daniel v. State, 582 N.E.2d 364 (Ind. 1991) (recognizing distinction between officer's advisement that search warrant would be obtained as opposed to merely sought). See also Weaver v. State, 556 N.E.2d 1386 (Ind.Ct.App. 1990).

Roehling v. State, 776 N.E.2d 961 (Ind.Ct.App. 2002) (State failed to justify vehicle search where officers incorrectly represented that they already had search warrant; D's post-Miranda admissions were involuntary and could not be used to establish probable cause for search).

Posso v. State, 180 N.E.3d 326, 340, n.13 (Ind.Ct.App. 2022) (Court noted D made a compelling claim his consents were not voluntary because detective told him he had to

conduct searches to help him understand what happened and that he would obtain a warrant regardless of consent).

McIlquham v. State, 10 N.E.3d 506 (Ind. 2014) (D's consent to search of his home was voluntary despite police officer's representation that he would probably get Division of Child Services involved and that he needed to go back to D's apartment to make sure it was suitable for his toddler who was found half-naked wandering around a retention pond).

Callahan v. State, 719 N.E.2d 430 (Ind.Ct.App. 1999) (where officer clearly told D that he was drug interdiction officer and that his purpose was to stem transport of illegal narcotics, D's consent to search his car was voluntarily given after completion of traffic stop).

Packer v. State, 800 N.E.2d 574 (Ind.Ct.App. 2003) (having received and acknowledged understanding of jail inmate handbook which stated that all phone calls from inmates were subject to being recorded and monitored, D consented to recording of his telephone conversations while he was incarcerated; under Indiana Wiretap Act, recording of telephonic communication is not an "interception" if it is done with consent of sender or receiver). See also Steinberg v. State, 941 N.E.2d 51 (Ind.Ct.App. 2011).

Camp v. State, 751 N.E.2d 299 (Ind.Ct.App. 2001) (Court rejected D's claims that his consent was not voluntary because officer was deceptive as to his motives for traffic stop, because of illegal activity by police prior to search request, and because his consent was stale).

Ammons v. State, 770 N.E.2d 927 (Ind.Ct.App. 2002) (scant but uncontroverted evidence revealed that D voluntarily consented to search).

Mannix v. State, 54 N.E.3d 1002 (Ind.Ct.App. 2016) (rejecting argument that D's consent to blood draw was not voluntary because police officers did not first offer her a portable breath test).

a. Was consent implicitly given?

A person's consent to a search is valid only if the person acted in such a way as to grant permission for the search. Mere acquiescence to a claim of lawful authority is not consent. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788 (1968). Although an express consent is not a requirement for a valid consent search, circumstances surrounding the search must demonstrate that the party involved implicitly gave consent, by word or deed and not merely acquiescence to a claim of lawful authority.

Ackerman v. State, 774 N.E.2d 970 (Ind.Ct.App. 2002) (when D apparently observed an officer outside her door when she looked out her window, act of opening the door and then stepping back after officers identified themselves was consented to enter her home).

State v. Jorgensen, 526 N.E.2d 1004 (Ind.Ct.App. 1988), *aff'd and adopted,* 574 N.E.2d 915 (Ind. 1991) (police told D that they were going to search her house to which she did not object; held, D did not consent to search of home but merely acquiesced).

LaMunion v. State, 740 N.E.2d 576 (Ind.Ct.App. 2000) (despite fact they asked neighbor to call 911, neither D nor his girlfriend manifested consent to full search of their home).

Kaupp v. Texas, 538 U.S. 626, 123 S.Ct. 1843 (2003) (police, without probable cause, woke 17-year-old D in his home at 3 a.m., telling him that they needed to talk to him about a murder investigation. D said "okay," whereupon officers handcuffed him and transported him, dressed only in boxer shorts and a t-shirt to a police facility; there is no

reason to think D's answer was anything more than a mere submission to a claim of lawful authority).

Smith v. State, 505 N.E.2d 81 (Ind.Ct.App. 1987) (where D being arrested asked police if he could get his jacket, D impliedly consented to police following him inside home).

Whipps v. State, 685 N.E.2d 697 (Ind. 1997) (where D handed officer incriminating shoe during interview at D's house, D consented to search of shoe).

Woolum v. State, 818 N.E.2d 517 (Ind.Ct.App. 2004) (even though D was informed that a search would only be conducted of common areas and son's bedroom, D nevertheless freely retrieved a bag of marijuana from his bedroom, which was excluded from scope of search).

Ammons v. State, 770 N.E.2d 927 (Ind.Ct.App. 2002) (consent was valid rather than submission to authority where show of force consisted of flashing lights, two officers, a request for license and registration, followed by request that D exit vehicle and give identifying information).

Gutenstein v. State, 59 N.E.3d 984 (Ind.Ct.App. 2016) (consent to blood draw valid, despite fact defendant handcuffed and in police car).

Meyers v. State, 790 N.E.2d 169 (Ind.Ct.App. 2003) (D freely and voluntarily consented to search of his car after he was stopped for traffic violation); see also Cox v. State, 160 N.E.3d 557 (Ind.Ct.App. 2020) (passenger consented after purpose of stop complete).

State v. Fugate, 150 P.3d 409 (Or.Ct.App. 2006) (D did not consent to officer's opening of small tin foil packet by handing it to officer in response to officer's request to "see" it).

b. Was the area searched a commercial premise?

When a home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if carried out in the store/the garage/the car/on the street. Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424 (1966).

Maynard v. State, 508 N.E.2d 1346 (Ind.Ct.App. 1987) (fact that citizen who was allowed into shop to buy engine was working for government did not invalidate consent).

c. Was the consent obtained in an intimidating atmosphere?

Thurman v. State, 602 N.E.2d 548 (Ind.Ct.App. 1992) (where five or six officers ordered occupants out of car and patted them down after blocking their exit, atmosphere was intimidating, and D's consent was involuntary, merely submission to supremacy of law rather than voluntary relinquishment of known right).

Galvin v. State, 582 N.E.2d 421 (Ind.Ct.App. 1991) (involuntary consent where police illegally entered home, would not allow D to call lawyer, did not tell D that court refused to issue warrant, and detained D for over one hour). See also Ware v. State, 782 N.E.2d 478 (Ind.Ct.App. 2003).

Harless v. State, 577 N.E.2d 245 (Ind.Ct.App. 1991) (because entry into home was illegal, D's consent given as consequence of illegal entry was "fruit of poisonous tree" and inadmissible).

Woolum v. State, 818 N.E.2d 517 (Ind.Ct.App. 2004) (Court rejected argument that after D volunteered first bag of marijuana, police officer coerced him into consenting to a full search of residence).

Melton v. State, 705 N.E.2d 564 (Ind.Ct.App. 1999) (D's contentions that she was intimidated and felt she could not leave her home or refuse search did not outweigh substantial evidence of voluntariness presented).

Martin v. State, 490 N.E.2d 309 (Ind. 1986) (consent was voluntary despite fact D was handcuffed and under control of five officers). See also Scott v. State, 924 N.E.2d 169 (Ind.Ct.App. 2010).

Navarro v. State, 855 N.E.2d 671 (Ind.Ct.App. 2006) (although there were multiple police officers, including a canine unit, present and D was not told he had right to refuse consent, D twice consented to search of his car without hesitation; atmosphere was not coercive).

d. Was the consent based on fraud or deception?

Consent that is obtained by fraud or deception is ordinarily considered to be invalid.

Campos v. State, 885 N.E.2d 590, 600 (Ind. 2008) (consent based on a misrepresentation of authority is invalid; here, D asked the officer and was told that D's companion had consented to a search of the car; D's consent was then invalid because he gave consent only after being told that the companion had given consent and the companion's consent was in fact invalid).

Navarro v. State, 855 N.E.2d 671 (Ind.Ct.App. 2006) (when officer asked for consent to search and implied, he was looking for guns, knives, or bazookas, officer did not engage in deceitful conduct even though he was also looking for drugs).

e. Was the Defendant's consent involuntary based on the length of detention?

The longer a Defendant is detained, or the police are at the home that they want to search, the more likely that any consent obtained is involuntary.

Galvin v. State, 582 N.E.2d 421 (Ind.Ct.App. 1991) (consent was involuntary and entry into home was illegal where officers obtained consent to search after one hour in home).

Possible argument: Even if a Defendant's consent is voluntary, police detention may result in the Defendant being in custody, which in return, requires the police to advise the defendant of his Sixth Amendment right to counsel before he consents to the search. See *Was the Defendant read his rights?* p. 32.

f. Was the consent procured as a result of an invalid stop or home entry?

Where consent is given after an unlawful stop or frisk, the State must show both that the Defendant's consent was voluntary and that there was a break in the causal connection between the unlawful stop and the evidence obtained.

Ransom v. State, 741 N.E.2d 419 (Ind.Ct.App. 2000) (D's consent given after invalid traffic stop was neither immediate nor given without hesitation; given short passage of time between unlawful stop and search and causal connection between stop and search, Court could not say that D's consent to search purged taint of officer's unlawful stop).

Ware v. State, 782 N.E.2d 478 (Ind.Ct.App. 2003) (D's consent to search was not given voluntarily and independent of officers' illegal entry into his home and was therefore invalid).

Camp v. State, 751 N.E.2d 299 (Ind.Ct.App. 2001) (driver's consent to search was voluntary despite pretextual stop and officer's inadequate justification for search).

g. Was the consent obtained after the purpose for the stop had been accomplished?

It is unclear whether Article 1, § 11 prohibits police from questioning motorists or seeking consent to search following a terminated traffic stop. State v. Washington, 898 N.E.2d 1200 (Ind. 2008) (holding that inquiries regarding criminal activity and consent during a traffic stop are constitutional if they do not unnecessarily extend the duration of the stop). Although the Court of Appeals has interpreted Washington, *supra*, to permit an officer to request consent to search after a stop has been completed, McClain v. State, 963 N.E.2d 662 (Ind.Ct.App. 2012), this interpretation of Washington is inconsistent with other Indiana Supreme Court's holdings. See Holly v. State, 918 N.E.2d 323 (Ind. 2009) (when purpose of stop was completed, officer's request for identification was unconstitutional).

Cox v. State, 160 N.E.3d 557 (Ind.Ct.App. 2020) (passenger validly consented to patdown search after the purpose of traffic stop was complete).

Any inquiries unrelated to the traffic stop may not "measurably extend the duration of the stop." Arizona v. Johnson, 555 U.S. 323, 129 S.Ct. 781 (2009).

People v. Brownlee, 713 N.E.2d 556 (Ill. 1999) (police officers who had completed traffic stop and then stood silently for "couple of minutes" next to car door before asking for consent to search car illegally detained occupants of car; illegal seizure tainted driver's consent to search car).

United States v. Digiovanni, 650 F.3d 498 (4th Cir. 2011) (officer violated Fourth Amendment by delaying the processing of a traffic violation to ask questions about drug trafficking and to request consent for a search; length of traffic stop was approximately 15 minutes, but officer failed to diligently pursue purpose of stop).

The Indiana Supreme Court has interpreted Indiana's seatbelt law as restricting police officers from asking for consent after pulling someone over for failing to wear a seatbelt. Baldwin v. Reagan, 715 N.E.2d 332 (Ind. 1999).

State v. Morris, 732 N.E.2d 224 (Ind.Ct.App. 2000) (plain language of seatbelt enforcement act evidence legislative intent that traffic stop based on seatbelt violation, standing alone, does not provide reasonable suspicion for police to unilaterally expand their investigation and "fish" for evidence of other possible crimes).

Clark v. State, 804 N.E.2d 196 (Ind.Ct.App. 2004) (officers are strictly prohibited from investigating anything else after a stop to determine seat belt compliance is completed; absent reasonable suspicion of criminal activity, officer could not even ask D for consent to search vehicle).

Pearson v. State, 870 N.E.2d 1061 (Ind.Ct.App. 2007) (during lawful pat-down search after seatbelt stop, officer was not justified in asking D if he had anything on his person, which led to discovery of marijuana and methamphetamine).

Harper v. State, 922 N.E.2d 75 (Ind.Ct.App. 2010) (declining to extend the language in the seatbelt law to the traffic violation of failing to illuminate license plate).

h. Was proper consent attained only after the search?

State v. Barker, 734 N.E.2d 671, 673 (Ind.Ct.App. 2000) (signing of a written consent form after a search has been conducted is not sufficient to validate oral consent improperly obtained prior to the search).

i. Did the Defendant rescind his or her consent?

A person can withdraw previously given consent, although such withdrawal is ineffective if given after incriminating evidence is discovered.

Jones v. State, 655 N.E.2d 49 (Ind. 1995) (seizure of cocaine during consensual search of car was proper, though driver rescinded his consent, where withdrawal of consent occurred after cocaine had been found).

3. Did a child consent?

Ind. Code 31-32-5-1 provides that rights of children guaranteed by U.S. Constitution, Indiana Constitution, or any other law may be waived only: (1) by counsel retained or appointed if the child knowingly and voluntarily joins with the waiver; or (2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:

A that person knowingly and voluntarily waives the right,
B. that person has no interest adverse to child,
C. meaningful consultation has occurred between that person and the child, and
D. the child knowingly and voluntarily joins with the waiver.

Williams v. State, 433 N.E.2d 769 (Ind. 1982) (special care is demanded to ensure propriety of waiver and compliance with statutory provisions governing waiver).

Stewart v. State, 754 N.E.2d 492 (Ind. 2001) (juvenile D's biological father did not qualify as "custodial parent" and could not waive juvenile's rights where juvenile was born out of wedlock, biological father was not awarded custody, and juvenile did not live with him); cf. Tingle v. State, 632 N.E.2d 345 (Ind. 1994) (grandmother was eligible as D's custodian because D was living with her at time of crime).

Turner v. State, 508 N.E.2d 541 (Ind. 1987) (consent to search and/or waiver of rights by child is not necessary when police, pursuant to a search warrant, obtained blood, saliva and fingerprint samples).

4. Did a third-party consent?

A third party cannot consent to a search of an item over which another party has exclusive control. Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801 (1991) (discussing scope of consent of closed containers).

Krise v. State, 746 N.E.2d 957 (Ind. 2001) (type of container is of great importance in reviewing third-party consent to search cases).

a. Did the third party have common authority over the area searched?

Consent to search given by a third party having common authority with the defendant over the premises is sufficient to justify a warrantless search of the defendant's residence.

Common authority is not to be implied from a mere property interest of the third party, but rather from the mutual use of property by persons generally having joint access or control for most purposes, including the right to permit inspection. United States v. Matlock, 425 U.S. 164, 94 S.Ct. 988 (1974).

Krise v. State, 746 N.E.2d 957 (Ind. 2001) (consent by male housemate to warrantless search of home he shared with D, a female, did not extend to D's purse; housemate clearly lacked any privacy interests in D's purse and had neither actual nor apparent authority to consent to search of D's purse).

Halsema v. State, 823 N.E.2d 668 (Ind. 2005) (third party did not have actual or apparent authority to give consent to search bureau she owned in her home but shared with D).

Bradley v. State, 54 N.E.3d 996 (Ind. 2016) (State failed to prove that person answering door had actual or apparent authority to consent to police entry into D's home).

Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776 (1961) (landlord cannot consent for tenant and cannot use right to inspect to allow officers to search).

Nowling v. State, 955 N.E.2d 854 (Ind.Ct.App. 2011) (fact that roommate invited police and probation officer into his home and, in response to officer's question, told them where D's room was located did not constitute consent to search room).

Godby v. State, 949 N.E.2d 416 (Ind.Ct.App. 2011) (wife's consent to search house did not extend to absent husband's locked wooden box, which fits into category of closed containers that normally hold highly personal items).

Lee v. State, 849 N.E.2d 602 (Ind. 2006) (because D's fiancée had actual authority to consent to police viewing the 16 videotapes she provided to them, police could exceed scope of fiancée's viewing of three tapes and view all tapes without a warrant; by living with his fiancée and taking no steps to deny her access to tapes, D assumed risk that she would take tapes to police station).

Best v. State, 821 N.E.2d 419 (Ind.Ct.App. 2005) (homeowner's consent to search home for drugs could encompass cigarette packs, even though D claimed ownership in them).

Stallings v. State, 508 N.E.2d 550 (Ind. 1987) (nonresident co-owner who used house, maintained right of entry to collect mail and to maintain premises can consent to search).

Caldwell v. State, 583 N.E.2d 122 (Ind. 1991) (although D rented motel room in his name, he invited girlfriend to stay with him; by consenting to her access and use of room, he created legitimate expectation of privacy in her and gave her common authority in room).

Taylor v. State, 587 N.E.2d 1293 (Ind. 1992) (where D gave friend keys to his home and asked him to remove certain items to friend's house, friend had authority to consent to search of file cabinet in his truck; D never asked friend not to disclose contents of cabinet).

Matson v. State, 844 N.E.2d 566 (Ind.Ct.App. 2006) (D presented no evidence that he had exclusive control or ownership over common area under trailer, to which ex-wife consented to search).

Hill v. State, 825 N.E.2d 432 (Ind.Ct.App. 2005) (fact that D and his wife were separated and that wife sometimes stayed at her mother's house does not in and of itself undermine her actual or apparent authority over premises).

Erickson v. State, 72 N.E.3d 965 (Ind.Ct.App. 2017) (confidential informant's consent to search package was valid because he shared common authority of package with D; CI negotiated drug deal, instructed D to ship him the drugs, and supplied tracking numbers of package to DEA agent).

b. Did the police reasonably believe that the third party had authority to consent?

Under the apparent authority doctrine, a search is valid if the government proves that the officers who conducted it reasonably believed that the person from whom they obtained consent had actual authority to grant consent. Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793 (1990); Trowbridge v. State, 717 N.E.2d 138, 144 (Ind. 1999).

State v. Friedel, 714 N.E.2d 1231 (Ind.Ct.App. 1999) (driver did not have apparent authority to consent to search of purse in car because officers knew D was only woman in car, officers found purse on floor in back seat where D had been sitting, and purse is generally not object for which two or more persons share common use or authority).

Polk v. State, 822 N.E.2d 239 (Ind.Ct.App. 2005) (unlike in Friedel, D was aware that third party gave consent to search her car, and it was objectively reasonable for officers to infer that D was asserting ownership interest in bag he took out of car and renouncing any ownership interest in bag he left).

Norris v. State, 732 N.E.2d 186 (Ind.Ct.App. 2000) (it was unreasonable for officer to believe driver's consent to search car included backpack in back seat where passenger was sitting).

Krise v. State, 746 N.E.2d 957 (Ind. 2001) (mere fact that purse was located in common area of house did not render reasonable a belief that male housemate had requisite authority to consent to search of purse).

Halsema v. State, 823 N.E.2d 668 (Ind. 2005) (because D enjoyed exclusive use of at least one of dresser drawers in lessee's bedroom and because lessee specifically advised officers of that fact, officer could not reasonably believe that lessee had authority to consent to search of drawer where methamphetamine was found).

Foreman v. State, 662 N.E.2d 929 (Ind. 1996) (lessor who consented to search of premises did not validly consent to search locked room, in light of fact that police officers removed door off its hinges to gain access to room instead of merely asking lessor to unlock door; where lessor never consented to search of room, apparent authority doctrine did not apply).

S.E. v. State, 744 N.E.2d 536 (Ind.Ct.App. 2001) (even if officer's belief that individual had authority to consent to entry into building was reasonable, search is still illegal if officers acted outside scope of their lawful duties).

Lee v. State, 849 N.E.2d 602 (Ind. 2006) (fiancée's authority to consent to search of home she shared with D extended to viewing of videotapes, which are not "closed containers" that contain personal items closely associated with an individual).

United States v. Basinski, 226 F.3d 829 (7th Cir. 2000) (D's friend had neither actual nor apparent authority to consent to search of D's briefcase, where briefcase was locked and friend did not know combination to lock and officers knew that D had instructed friend

never to open briefcase and to destroy its contents so that no one else could inspect what was inside).

Officer's failure to ask questions to determine who has authority to consent may result in the third-party consent being invalid.

Norris v. State, 732 N.E.2d 186 (Ind.Ct.App. 2000) (officer should have ascertained who owned backpack in back seat of vehicle before searching it; officer could not have reasonably believed that driver's consent to search car extended to backpack in back seat).

State v. Kieffer, 577 N.W.2d 352 (Wis. 1998) (officer's failure to ask pertinent questions about property owner's access to and use of loft-space over garage where daughter and son-in-law lived made it unreasonable for officers to rely on owner's "apparent authority" to consent to search); see also Commonwealth v. Porter P., 923 N.E.2d 36 (Mass. 2010).

c. Did a physically present co-occupant object to entry or search?

When one occupant of a residence is physically present and refuses to consent to a police search of the premises, warrantless entry and search are unreasonable and invalid as to him, even though another occupant of the residence consents to the search. Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515 (2006). But police may search a home without a warrant when two occupants disagree about allowing the officers to enter, and the resident who refuses access is then arrested and removed from the premises. Fernandez v. California, 134 S.Ct. 1126 (2014).

Starks v. State, 846 N.E.2d 673 (Ind.Ct.App. 2006) (at time homeowner consented to search of residence, including D's living quarters in basement, D was not present in her bedroom, nor did he express his refusal to consent to search; it was reasonable for officers to believe homeowner had actual or apparent authority to consent to search of residence).

Walker v. State, 986 N.E.2d 328 (Ind.Ct.App. 2013) (consent of both D's wife and mother who suffered from Alzheimer's disease justified warrantless search of home, where D did not object to search when it occurred and failed to present any evidence of progression of mother's disease or her mental state).

Bulthuis v. State, 17 N.E.3d 378 (Ind.Ct.App. 2014) (police were not required to give D the opportunity to object to the search after he had been taken into custody in a police vehicle on an active warrant for his arrest).

d. Was the third party an agent of the State?

A consent to search by a third party with common authority over the place searched is invalid where the third party is acting as an instrument or agent of the police. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971).

Thomas v. State, 642 N.E.2d 240 (Ind.Ct.App. 1994) (Dept. of Natural Resources (DNR) could not validly consent to search camp store it owned and leased to D; DNR exploited its dual role as licensor of concession and as law enforcement agency, and contract right did not confer upon DNR acting as law enforcement agency right to enter premises to install camera in attic to conduct covert surveillance).

Trowbridge v. State, 717 N.E.2d 138 (Ind. 1999) (although adult who consented to search of tackle box on trailer patio was law enforcement officer, court rejected argument that his status as an officer invalidated consent to search object over which he had common authority; adult was not involved in murder investigation and was acting only as a concerned, supervising adult in juvenile's home, not as agent of State).

e. Was the third party a minor?

A juvenile who is living with his or her parents in the family residence should not be able to give a valid consent to a search of the family residence that is binding on the parents or other family members living in the residence. Kerr, 16 Indiana Practice § 2.6(g), 276 (1991).

Deckard v. State, 425 N.E.2d 256 (Ind.Ct.App. 1981) (minor's Fourth Amendment waiver of rights as condition of probation did not authorize search for stolen weapons at D's trailer where minor was temporarily residing).

Williams v. State, 433 N.E.2d 769 (Ind. 1982) (because juvenile cannot waive his constitutional rights without consultation with parent or guardian, juvenile cannot give consent to search home unless he is provided with consultation; thus, minor cannot give valid consent to search home when parents are not home).

f. Was the third party a parent or guardian of a minor?

Most jurisdictions have held that parents or guardians possess superior authority over their households, which authorizes them to grant police permission to search the premises—including their child's bedroom.

R.B. v. State, 43 N.E.3d 648 (Ind.Ct.App. 2015) (while juvenile did not consent to the search of his bedroom, there was no serious question that it was reasonable under Fourth Amendment for officer to rely on his mother's voluntary consent to search his bedroom inside the parent's home).

Phillips v. State, 492 N.E.2d 10, 17-18 (Ind. 1986), *overruled on other grounds*, Moore v. State, 498 N.E.2d 1 (Ind. 1986) (based on theory of common authority, when child who has become an adult continues to live in parents' home, either parent may give valid consent for search of home that is binding on adult child). **NOTE:** The same may also be true if child is still under 18, but rigid waiver provisions of Ind. Code 31-32-5-1 may require greater protection of child's constitutional rights since meaningful consultation is required. See Kerr, 16 Indiana Practice § 2.6 (1991).

In re Scott K., 595 P.2d 105 (Cal. 1979) (parent has no authority to consent to search of locked toolbox for which child had only key and which parent regarded as child's exclusive property).

5. Did the search exceed the scope of the consent?

The standard for measuring the scope of a suspect's consent is objective reasonableness-- what would a typical reasonable person have understood by the exchange between the officer and the suspect? Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793 (1990).

Pinkney v. State, 742 N.E.2d 956 (Ind.Ct.App. 2001) (officer's searching of D's back pants pocket did not exceed scope of consent to check him for weapons and drugs).

a. Vehicles

Smith v. State, 713 N.E.2d 338 (Ind.Ct.App. 1999) (where D consented to search of car for drugs, money or illegal contraband, police exceeded scope of consent by accessing computer memory of phone to retrieve its electronic contents).

United States v. Elliott, 107 F.3d 810 (10th Cir. 1997) (where officer asked for permission to search trunk of car but told driver that he did not "want to look through each item," but just wanted to see how things were "packed" or "packaged," scope of driver's consent did not extend to opening suitcase found in trunk).

State v. Friedel, 714 N.E.2d 1231 (Ind.Ct.App. 1999) (where male driver consented to search of car, he did not consent to search of purse found in back seat).

Norris v. State, 732 N.E.2d 186 (Ind.Ct.App. 2000) (police officer's search of passenger's backpack in back seat of car exceeded driver's consent to search car).

Ammons v. State, 770 N.E.2d 927 (Ind.Ct.App. 2002) (prior to consensual search of D's vehicle, officer performed an unjustified pat-down search of D).

State v. Williams, 448 N.E.2d 54 (Ind.Ct.App. 1983) (where D disclaimed ownership in briefcase in car, consent to search car included consent to search briefcase).

Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801 (1991) (where officer informed D he was looking for narcotics and D did not limit scope of consent, it was reasonable to believe that D consented to search of brown paper bag on floor of car).

Sallee v. State, 785 N.E.2d 645 (Ind.Ct.App. 2003) (D gave officer permission to search her vehicle, but State failed to show that D consented to search of her purse).

Heald v. State, 492 N.E.2d 671 (Ind. 1986) (D who consented to search of handbag implicitly consented to search of items within handbag which were pertinent to investigation; thus, opening of envelope was within scope of consent).

b. Homes

Jones v. State, 409 N.E.2d 1254, 1260 n. 9 (Ind.Ct.App. 1980) (consent to police entry does not constitute a consent to search); see also Smith v. State, 889 N.E.2d 836 (Ind.Ct.App. 2008).

Deckard v. State, 425 N.E.2d 256 (Ind.Ct.App. 1981) (where Fourth Amendment waiver authorized police to search minor's person or property for alcohol or drugs, search of trailer where minor was temporarily residing for stolen weapons exceeded scope of waiver).

Buckley v. State, 797 N.E.2d 845 (Ind.Ct.App. 2003) (D's consent to search his home for officer safety did not allow officer to search any container in house).

Rush v. State, 881 N.E.2d 46 (Ind.Ct.App. 2008) (after officer's consensual entry into house, search and protective sweep to gather suspected underage drinkers and missing persons was justified); but see J.K. v. State, 8 N.E.3d 222 (Ind.Ct.App. 2014) (disagreeing with Rush to the extent it holds that underage drinking is an exigent circumstance in and of itself to justify warrantless home entry).

United States v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971) (where federal agents obtained consent to search house for narcotics, and while conducting search they opened and read

some personal papers which were later used to convict D of tax evasion, search exceeded reasonable limits of narcotics search).

Scott v. State, 924 N.E.2d 169 (Ind.Ct.App. 2010) (even though D's consent to search his home did not explicitly authorize box spring, his consent encompassed search of box spring because officers testified persons sometimes hide in hollowed out box springs and under reasonable person standard, D would understand officer's knowledge of potential hiding places).

c. Other

State v. Foreman, 662 N.E.2d 929 (Ind. 1996) (fact that police had to remove locked door from its hinges illustrated that lessor did not consent to have that room searched, despite fact that lessor consented to search of bar).

United States v. Segal, 299 F.Supp.2d 856 (N.D.Ill. 2004) (where Ds gave informant access to documents and petty cash receipts, they assumed the risk that he would provide them to third parties; a general instruction not to provide documents to third parties may prevent a court from finding that an employer assumed the risk that the employee would provide the documents to a competitor or to the media but does not insulate employer from risk of exposure of wrongdoing to government).

6. Was the consent based on a Fourth Amendment waiver as a condition of probation, parole, work release or pretrial release?

See probation/parole/work release searches, p. 135.

II. WAS THE FOURTH AMENDMENT VIOLATED?

A. WAS THE STOP OR DETENTION JUSTIFIED?

To determine whether police conduct constituted an investigatory seizure, otherwise referred to as a Terry stop, see p. 1.

1. Did the police have reasonable suspicion that the Defendant was involved in criminal activity?

A police officer can stop and detain an individual or an individual's property based on reasonable suspicion for an amount of time to investigate whether probable cause exists for a search or arrest. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). In making reasonable suspicion determinations, reviewing courts must look at the "totality of circumstances" of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690 (1981). This process allows officers to draw on their own experiences and specialized training to make inferences from and deductions about the cumulative information available. Id.

The appellate courts will review a trial court's ultimate determination regarding reasonable suspicion de novo. State v. Atkins, 834 N.E.2d 1028, 1032 (Ind.Ct.App. 2005).

a. Was the defendant stopped for activity that could be innocent?

A combination of irrelevant conduct and innocent conduct, without more, cannot be transformed into a suspicious conglomeration. State v. Quirk, 842 N.E.2d 334 (Ind. 2006).

State v. Bulington, 802 N.E.2d 435 (Ind. 2004) (store employee's information that two men had separately bought three boxes of antihistamines, entered same truck, and removed tablet packages from boxes was insufficient to provide officer with reasonable suspicion to stop D's truck; although there was some reason to believe criminal activity was afoot, employee's information was insufficient without other indicia of criminal activity, such as purchase of multiple precursors of meth, traffic violation, or officer having knowledge of D's previous involvement with meth).

Cash v. State, 593 N.E.2d 1267 (Ind.Ct.App. 1992) (swinging license plate did not create reasonable suspicion that car was stolen).

United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744 (2002) (evaluation and rejection of certain factors in isolation from each other does not take into account the "totality of circumstances" as cases have understood that phrase; a set of individually innocent facts, when observed in conjunction, can be sufficient to create reasonable suspicion of criminal activity); see also Finger v. State, 799 N.E.2d 528 (Ind. 2003).

Wilson v. State, 754 N.E.2d 950 (Ind.Ct.App. 2001) (violation of a non-traffic ordinance is sufficient reason to stop vehicle).

State v. Campbell, 905 N.E.2d 51 (Ind.Ct.App. 2009) (a traffic violation is not a condition precedent to a stop otherwise supported by the facts).

State v. Snyder, 538 N.E.2d 961 (Ind.Ct.App. 1989) (D's act of making U-turn to avoid sobriety roadblock justified Terry stop; however, merely turning off road where roadblock is located may not by itself give rise to reasonable suspicion). See also Bass v. State, 525 S.E.2d 921 (Va. 2000) (legally turning to avoid roadblock does not justify stop).

Dowdell v. State, 747 N.E.2d 564 (Ind.Ct.App. 2001) (because officer was uncertain if D was smoking "blunt" or cigar, he did not have reasonable suspicion that D was committing or about to commit crime, and thus investigative stop was illegal).

Aslinger v. State, 2 N.E.3d 84 (Ind.Ct.App. 2014) (officer's seizure of a hand-rolled cigarette behind D's ear was unconstitutional as a hand-rolled cigarette is not per se illegal, and the officer only deduced there was a drug in it after removing it from D's ear).

Smith v. State, 713 N.E.2d 338 (Ind.Ct.App. 1999) (fact that license plate was registered to car of same make but different color constitutes reasonable suspicion that car was stolen); see also State v. Bouye 118 N.E.3d 22 (Ind.Ct.App. 2019) (whether there was actually a registration violation is irrelevant to the constitutionality of the stop).

United States v. Uribe, 709 F.3d 646 (7th Cir. 2013) (disagreeing with Smith (above) court held that a color discrepancy between registration and actual car is, alone, insufficient to give rise to reasonable suspicion justifying traffic stop; Court did not address whether police can stop based on a color discrepancy to investigate possible violation of I.C. 9-18-2-27(a), which prohibits driving with registration number belonging to a different vehicle).

Arcuri v. State, 775 N.E.2d 1095 (Ind.Ct.App. 2002) (reasonable suspicion for stop based on fact that car was only two blocks from robbery scene, only about five to seven minutes had passed since robbery, there were no other cars on street at time, D fit description officer had received from dispatch, and D was evasive when vehicle turned in front of officers' patrol car).

Paul v. State, 189 N.E.3d 1146 (Ind.Ct.App. 2022) (traffic stop based on vehicle's evasive behavior approaching house under surveillance upheld).

Clenna v. State, 782 N.E.2d 1029 (Ind.Ct.App. 2003) (investigatory stop proper where officer received report of suspicious people in drug store; clerk was afraid D was going to rob store because he had been inside store for over 30 minutes, kept making advances on cash register, and would quickly retreat to back of store whenever someone entered store; moreover, when D observed officer, he began to quickly walk away).

J.D. v. State, 902 N.E.2d 293 (Ind.Ct.App. 2009) (although officer did not observe D actually drinking beer, fact that he is a minor, coupled with his close proximity to open cans of beer on porch, was sufficient to constitute reasonable suspicion to give PBT).

Bowers v. State, 980 N.E.2d 911 (Ind.Ct.App. 2012) (officer's observation of D's ex-wife's intoxication and the fighting between the two provided reasonable suspicion that D was also intoxicated).

Killebrew v. State, 976 N.E.2d 775 (Ind.Ct.App. 2012) (while driving through an intersection with an activated turn signal without turning or changing lanes might be a legitimate factor in creating a reasonable suspicion that a driver is impaired, such use of a turn signal alone is not sufficient).

Gentry v. Sevier, 597 F.3d 838 (7th Cir. 2010) (police lacked reasonable suspicion to stop D who was trotting down the street at 2:30 a.m. holding a beer and pushing wheelbarrow and lacked probable cause to search the wheelbarrow).

W.H. v. State, 928 N.E.2d 288 (Ind.Ct.App. 2010) (police had reasonable suspicion to stop juvenile where officer saw juvenile move his hands toward his waist, lift his shirt, and show something from his waistband to another person at black expo; less evidence is required to stop "a man suspected of being armed with a gun"); see also J.B. v. State, 30 N.E.3d 51 (Ind.Ct.App. 2015).

Moore v. State, 49 N.E.3d 1095 (Ind.Ct.App. 2016) (apartment complex courtesy officer had reasonable suspicion to stop D from leaving a pat-down search in order to determine whether D was same person whom officer had heard was on trespass list).

b. Was the stop based on a random license plate check?

An officer has reasonable suspicion to initiate a Terry stop when: (1) the officer knows that the registered owner of a vehicle has a suspended license; and (2) the officer is unaware of any evidence or circumstances which indicate that the owner is not the driver of the vehicle. Armfield v. State, 918 N.E.2d 316 (Ind. 2009). This rule does not require officers to match the physical description of the registered owner from the license plate check to the driver of the vehicle before initiating a Terry stop. Kansas v. Glover, 140 S.Ct. 1183 (2020). However, once it becomes apparent that the driver of the vehicle is not the owner, the officer simply has no reason to conduct additional inquiry. Holly v. State, 918 N.E.2d 323 (Ind. 2009). Reasonable suspicion to pull a car over does not confer unconditional authority to request the driver's license and registration. Id.

Holly v. State, 918 N.E.2d 323 (Ind. 2009) (initial stop was justified where officer's license plate check revealed that car was registered to an African American female who had a suspended license; but, when the officer approached the driver who turned out to be a man, officer's request for identification was unconstitutional).

Johnson v. State, 21 N.E.3d 841 (Ind.Ct.App. 2014) (when officer stopped the van D was driving on the ground that the van was registered to a suspended driver, and a passenger identified herself as the owner of the vehicle and stated that her license was indeed suspended, the officer, who testified that he had no reason to disbelieve the passenger, lacked reasonable suspicion to request D's identification, and all subsequent investigation violated D's Fourth Amendment rights).

Bannister v. State, 904 N.E.2d 1254 (Ind. 2009) (officer had reasonable suspicion to stop D based on license plate check of passing vehicle where check showed D had suspended license and gave description of D and vehicle that matched what officer had observed).

Kenworthy v. State, 738 N.E.2d 329 (Ind.Ct.App. 2000) (reasonable suspicion to stop vehicle where officer confirmed his suspicions regarding registered owner's license suspension); see also State v. Ritter, 801 N.E.2d 689 (Ind.Ct.App. 2004).

c. Was the stop based on a tip?

A reliable tip will justify an investigatory stop only if it creates reasonable suspicion that criminal activity may be afoot. Navarette v. California, 134 S.Ct. 1683, 1690 (2014). For an anonymous tip to constitute reasonable suspicion necessary for a valid stop, significant aspects of the tip must be corroborated by police and the tip must demonstrate an intimate familiarity with the suspect's affairs and be able to predict future behavior. Sellmer v. State, 842 N.E.2d 358 (Ind. 2006).

A tip must either be corroborated by evidence, consist of information the general public would not know, or be given by a proven reliable tipster. "An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity." Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375 (2000). Calls to 911 emergency lines are presumptively reliable because caller ID and other means of tracking callers makes it reasonable for people to "think twice" before making a false report. Navarette v. California, 134 S.Ct. 1683 (2014).

Sellmer v. State, 842 N.E.2d 358 (Ind. 2006) (anonymous tip provided information detailing color, make, and whereabouts of a vehicle but failed to provide identity/description of car's driver, car's license plate number, basis of caller's knowledge, or any information detailing future acts of car's driver that would demonstrate caller's intimate knowledge of suspect's activities and provide officers tools with which to verify its dependability).

Grayson v. State, 52 N.E.3d 24 (Ind.Ct.App. 2016) (distinguishing Sellmer in case where anonymous tipster reported an individual waving a gun, which warrants an immediate response by police for safety of the general public).

(1) Sufficient corroboration of tip

A tip may be sufficiently corroborated by the tipster revealing her identity in a manner that causes her reputation to be assessed and that makes herself subject to possible criminal liability. Adams v. Williams, 407 U.S. 143, 146-47, 92 S.Ct. 1921 (1972); State v. Stickle, 792 N.E.2d 51 (Ind.Ct.App. 2003). Alternatively, a tip may be corroborated by the investigating officers confirming information not known to the general public or specific predictions of the suspect's future behavior. Alabama v. White, 496 U.S. 325,

110 S.Ct. 2412 (1990); Washington v. State, 740 N.E.2d 1241, 1246 (Ind.Ct.App. 2000). Multiple anonymous tips may also provide sufficient corroboration. Lampkins v. State, 682 N.E.2d 1268 (Ind. 1997).

Alabama v. White, *supra* (anonymous tip predicting future behavior of woman in that she left described apartment building in described vehicle and took most direct route toward described motel involved activity not known to general public and constituted reasonable suspicion to stop car).

Navarette v. California, 134 S.Ct. 1683 (2014) (anonymous but reliable tip to 911 that truck swerved once, forcing tipster off the road, created reasonable suspicion of drunk driving).

State v. Renzulli, 958 N.E.2d 1143 (Ind. 2011) (based on totality of circumstances, concerned citizen supplied sufficient information re: possibly intoxicated driver to establish reasonable suspicion to support investigatory stop).

Smith v. State, 121 N.E.3d 669 (Ind.Ct.App. 2019) (anonymous tip had sufficient indicia of reliability to provide reasonable suspicion of criminal activity justifying a Terry stop of the D's vehicle where, while the anonymous caller gave no predictions of D's future behavior to indicate the reliability of the tip, he or she did provide the following other indicia of reliability: the call was placed to an emergency number; the caller gave a specific description of the vehicle's color and model; the caller stated gunshots were coming from that vehicle; and the caller gave a specific location where the vehicle was actually found soon after the tip was received).

Beverly v. State, 801 N.E.2d 1254 (Ind.Ct.App. 2004) (receipt of numerous 911 calls about gold SUV firing at or exchanging gunfire with another vehicle in a certain location in a relatively short amount of time distinguished this case from situations involving single anonymous caller; calls bear independent indicia of reliability because they corroborate each other).

State v. Eichholtz, 752 N.E.2d 163 (Ind.Ct.App. 2001) (although officer did not personally observe any erratic driving or traffic violations, Terry stops proper because tipster identified himself and gave pertinent information to 911 operator and continued to drive behind D).

Coates v. State, 650 N.E.2d 58 (Ind.Ct.App. 1995) (police may rely on unconfirmed citizen's report without proving reliability, if citizen is not anonymous).

Billingsley v. State, 980 N.E.2d 402 (Ind.Ct.App. 2012) (911 call from caller who stated D "held her hostage" previously, was armed at a VFW post in a dangerous area and was in a tan or brown Dodge Durango was not an anonymous caller, but a concerned citizen and fact she called 9-1-1 rather than a police station entitles the call to a degree of reliability).

Johnson v. State, 766 N.E.2d 426 (Ind.Ct.App. 2002) (eyewitness informants at scene, some of whom provided their names but wished to remain unidentified, were cooperative citizens, not anonymous informants, and are considered to be reliable for purposes of determining probable cause, unless incriminating circumstances exist which cast suspicion upon informants' reliability).

Lampkins v. State, 682 N.E.2d 1268 (Ind. 1997) (tips by three different people, one of whom has given reliable information in the past, constituted reasonable suspicion to make stop).

Moody v. State, 448 N.E.2d 660 (Ind. 1983) (police may rely on other police officer's information without proving reliability); But see State v. Glass, 769 N.E.2d 639 (Ind.Ct.App. 2002) (to the extent Moody suggests that every call to a police dispatcher is sufficient in itself to satisfy Fourth Amendment, it paints Fourth Amendment jurisprudence with too broad a brush).

Dunson v. State, 64 N.E.3d 250 (Ind.Ct.App. 2016) (officer who stopped D's motorcycle was acting upon department's collective knowledge that D was involved in earlier disturbance, and thus had reasonable suspicion to detain D further to investigate; distinguishing Murray and Jamerson, below).

Moultry v. State, 808 N.E.2d 168 (Ind.Ct.App. 2004) (where significant aspects of anonymous informant's prediction are verified, there is reason to believe not only that anonymous informant was honest, but also that anonymous informant's information is sufficiently credible to justify investigatory stop); see also Lampkins v. State *supra*.

Francis v. State, 764 N.E.2d 641 (Ind.Ct.App. 2002) (police officer properly corroborated information acquired from anonymous tip, where he confirmed informants' tip with dispatch and found D's car where informants said it would be).

Wells v. State, 772 N.E.2d 487 (Ind.Ct.App. 2002) (anonymous tip was corroborated in that police officer was able to verify tipster's specific information regarding color, make, plate number of car and manner in which D operated it).

State v. Augustine, 851 N.E.2d 1022 (Ind.Ct.App. 2006) (report of erratic driving made by citizen informant who identified himself called police and officer's observations of driver during consensual encounter in D's driveway was sufficient to provide reasonable suspicion, although officer did not observe erratic driving when following car).

Campbell v. State, 905 N.E.2d 51 (Ind.Ct.App. 2009) (officer investigated report that husband had dragged his wife into car at tavern by driving to tavern and speaking with three people in parking lot, one of whom witnessed the possible crime and provided officer with specific details of what she had observed, D's first name, town of residence and direction of travel; such information was adequate to give officers reasonable suspicion to stop the car for further investigation).

Danh v. State, 142 N.E.3d 1055 (Ind.Ct.App. 2020) (pat-down search and canine sniff did not unconstitutionally prolong traffic stop and were lawfully based on specificity of D's roommate's tip regarding stolen firearm and illegal substances).

Ertel v. State, 928 N.E.2d 261 (Ind.Ct.App. 2010) (officer had reasonable suspicion to stop where car waited at stop sign for over five seconds at 2:30 a.m., and both car and D matched descriptions given by recent, identified caller claiming that a man rung her doorbell and left).

(2) Insufficient corroboration of tip

A bare report of an unknown, unaccountable informant does not provide reasonable suspicion for an investigatory stop. Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375 (2000). Simply providing a name is insufficient to validate a tip. State v. Glass, 769 N.E.2d 639 (Ind.Ct.App. 2002); L.W. v. State, 926 N.E.2d 52 (Ind.Ct.App. 2010). While a tipster who discloses her identity leaves herself more open to prosecution for false reporting, heightening the reliability of the tip, the totality of circumstances determines whether the tip establishes reasonable suspicion. Kellems v. State, 842 N.E.2d 352 (Ind. 2006), *rev'd on reh'g on other grounds*, 849 N.E.2d 1110 (Ind. 2006).

Florida v. J.L., *supra*, (fact that anonymous tipster told police that black man wearing plaid shirt on corner was carrying gun did not create reasonable suspicion to stop man fitting tipster's description because there was no corroboration of illegal activity).

Johnson v. State, 659 N.E.2d 116 (Ind. 1995) (confidential informant's tip that D would be in brown Jaguar carrying cocaine was not supported by fact that D was actually in brown Jaguar or by fact that D displayed large amounts of cash, had indicated that he would be taking long trips, and that he was worried about his car's road worthiness; no reasonable suspicion to stop; officer personally knew D and arrested him previously for drug violation).

Washington v. State, 740 N.E.2d 1241 (Ind.Ct.App. 2000) (anonymous telephone tip, absent any independent indicia of reliability or any officer-observed confirmation of caller's prediction of D's future behavior, is not enough to permit police to subject citizen to Terry stop and detention).

Berry v. State, 766 N.E.2d 805 (Ind.Ct.App. 2002) (investigatory stop based on anonymous tip must be corroborated by police and must exhibit sufficient indicia of reliability; here, officer could not make Terry stop without meeting reliability requirement even though he stopped D to determine whether violence was imminent and whether armed felony had occurred).

State v. Glass, 769 N.E.2d 639 (Ind.Ct.App. 2002) (invalid investigatory stop based on unconfirmed information provided from named but unverified caller); see also Powell v. State, 841 N.E.2d 1165 (Ind.Ct.App. 2006).

State v. Stickle, 792 N.E.2d 51 (Ind.Ct.App. 2003) (as in Glass, record did not show whether caller identified himself in a way that would place his credibility at risk or subject himself to criminal penalties).

State v. Murray, 837 N.E.2d 223 (Ind.Ct.App. 2005) (in order to rely on collective knowledge, the knowledge sufficient for reasonable suspicion must be conveyed to investigating officer before the stop is made).

Jamerson v. State, 870 N.E.2d 1051 (Ind.Ct.App. 2007) (report over dispatch that officers were to locate D "in reference to a carjacking" was not supported by any specific and articulable facts linking D to alleged carjacking).

Castner v. State, 840 N.E.2d 362 (Ind.Ct.App. 2006) (police conducted unlawful stop based on uncorroborated tip of drug sales to children in high-crime area; officer did not observe D interacting with anyone and no children were even in the area).

Coleman v. State, 847 N.E.2d 259 (Ind.Ct.App. 2006) (officers lacked reasonable suspicion to stop D where they relied on a new informant who gave a tip consisting of little detail and they did not independently investigate tip prior to stopping him; police typically arrange more than one meeting and observe an actual drug transaction before instigating stop of suspect); cf. Bates-Smith v. State, 108 N.E.3d 399 (Ind.Ct.App. 2018) (distinguishing Coleman in case involving tip by known CI whose facts were immediately verifiable at scene before stop).

Segar v. State, 937 N.E.2d 917 (Ind.Ct.App. 2010) (anonymous tip that burglary was in progress and burglar was white and wearing a dark coat did not constitute reasonable suspicion to stop D who was white and wearing a dark coat while walking down the street).

State v. Rhodes, 950 N.E.2d 1261 (Ind.Ct.App. 2011) (call from concerned citizen, which failed to describe D or his vehicle, did not give officer reasonable suspicion that D was operating while intoxicated).

United States v. Packer, 15 F.3d 654 (7th Cir. 1994) (officer could not rely solely on report by a concerned citizen of a suspicious car).

NOTE: Florida v. J.L., *supra*, decided on March 28, 2000, implicitly overrules Bogetti v. State, 723 N.E.2d 876 (Ind.Ct.App. 2000), decided on February 3, 2000. In Bogetti, the court held that a tip by an unidentified concerned citizen that a driver may be intoxicated constituted reasonable suspicion justifying a traffic stop. Cf. State v. Renzulli, 958 N.E.2d 1143 (Ind. 2011) (involving uncorroborated tip from identified concerned citizen). However, because the officers did not corroborate the tip with any additional facts that Bogetti was intoxicated, the stop was unconstitutional under Florida v. J.L. *Compare* Wells v. State, 772 N.E.2d 487 (Ind.Ct.App. 2002) (after receiving anonymous tip of intoxicated driver, officer confirmed that D was driving well below speed limit and swerving in his lane).

d. Was the Defendant stopped due to the neighborhood, color of his skin, time of night, etc.?

The color of one's skin, the neighborhood one happens to be in, the time of night, and the fact that one turns away from police are not sufficient, individually or collectively, to establish reasonable suspicion of criminal activity. Even a combination of these factors, absent other reason to suspect illegal behavior, does not create reasonable suspicion. See Stalling v. State, 713 N.E.2d 922, 924 (Ind.Ct.App. 1999); and State v. Quirk, 842 N.E.2d 334 (Ind. 2006).

Tumblin v. State, 664 N.E.2d 783 (Ind.Ct.App. 1996) (stop could not be based upon officer's hunch that two black males turning away from police in bad neighborhood was indicative of criminal activity).

Johnson v. State, 856 N.E.2d 706 (Ind.Ct.App. 2006) (mere fact that D and three other individuals got into a car which did not have a visible license plate and inability to give social security number does not support investigatory stop).

Williams v. State, 745 N.E.2d 241 (Ind.Ct.App. 2001) (no reasonable suspicion to justify investigatory stop when police officer observed D and another person exchange something and then walk off in different directions after noticing police officer).

Green v. State, 719 N.E.2d 426 (Ind.Ct.App. 1999) (D's presence in alleged high crime area alone was insufficient to create reasonable suspicion justifying D's investigatory stop).

Stalling v. State, 713 N.E.2d 922 (Ind.Ct.App. 1999) (turning away from police officers, reaching for waistband, and being in a high crime area is not sufficient to create reasonable suspicion, even though officer knew of D's prior alleged criminal activities).

Webb v. State, 714 N.E.2d 787 (Ind.Ct.App. 1999) (12:00 a.m. on summer night in high crime area is not suspect time or location).

Williams v. State, 477 N.E.2d 96 (Ind. 1985) (stop was unconstitutional when it was based on D being only person on street in high crime area at 1:30 a.m. and carrying coat under his arm).

Burkett v. State, 736 N.E.2d 304 (Ind.Ct.App. 2000) (fact that D was only African-American standing on street corner in high crime area at late hour and wearing hooded sweatshirt with hood up in 76-degree weather and that he walked away when officer pulled up to curb did not constitute reasonable suspicion to stop D; people do not compromise their Fourth Amendment rights simply by wearing clothing that is baggy or somewhat warmer than would appear to be in season).

Bridgewater v. State, 793 N.E.2d 1097 (Ind.Ct.App. 2003) (mere fact that D walked or ran from police into apartment building when he saw them was not enough reasonable suspicion of illegal activity; police did not observe any sort of transaction among D and others standing with him, and he was not carrying anything unusual).

State v. Atkins, 834 N.E.2d 1028 (Ind.Ct.App. 2005) (officer safety is always a legitimate concern but standing alone and in combination with "officer's instinct and nervousness," it could not form the basis for a valid investigatory stop).

However, if the police receive a report of a crime in the area in which the defendant is located, depending on the time of day and the amount of people in the area, the police may have reasonable suspicion to stop the defendant. A report of a disturbance, without more, is not a sufficient basis upon which to conduct an investigatory stop. Gaddie v. State, 10 N.E.3d 1249, 1255 (Ind. 2014).

McKnight v. State, 612 N.E.2d 586 (Ind.Ct.App. 1993) (lateness of hour, emptiness of streets, proximity of car to fight scene, speed of car, and information that some participants had fled scene in big car, gave officer reasonable suspicion that D and friends were fight participants).

J.J. v. State, 58 N.E.3d 1002 (Ind.Ct.App. 2016) (police had reasonable suspicion to stop juvenile because he was part of a group of young men who matched description of a group that confronted another group at mall).

Shinault v. State, 668 N.E.2d 274 (Ind.Ct.App. 1996) (investigatory stop upheld where police observed D involved in some type of transaction with another person, who was known to be involved in illegal activity, in high narcotics traffic area, and where two walked away in different directions upon seeing patrol car); see also Ross v. State, 844 N.E.2d 537 (Ind.Ct.App. 2006).

Green v. State, 461 N.E.2d 108 (Ind. 1984) (where D was only person in vicinity of break-in at 3:37 a.m., told police when stopped he had been visiting friend but could give neither name nor address and was belligerent with police, stop was justified).

Frye v. State, 757 N.E.2d 684 (Ind.Ct.App. 2001) (police surveillance, combined with information provided by buyer of drugs, was sufficient to arouse reasonable suspicion that criminal activity was afoot in house and to justify brief detention for investigative purposes of individuals standing outside home).

Crabtree v. State, 762 N.E.2d 241 (Ind.Ct.App. 2002) (reasonable suspicion found where D was in high-crime area at 4:30 a.m., was seen next to car with open door, car was at location where there had been complaint of loud stereo, D appeared to be hiding behind car and straining to look over it).

Mullen v. State, 55 N.E.3d 822 (Ind.Ct.App. 2016) (investigatory stop at apartment complex upheld where officers enforcing no-loitering policy observed signs of illegal drug activity and D had no right to be present on property).

But a general report of criminal activity, even in combination with other indicators of suspicious behavior, does not always create reasonable suspicion to stop an individual.

Clark v. State, 994 N.E.2d 252 (Ind. 2013) (record did not support State's theory that D and two other men were trespassing in storage facility, and a police officer's subjective good faith belief that a crime might be occurring is not enough; the storage facility's location in a high-crime area did not justify suspicion that drug activity was underway).

Pinner v. State, 74 N.E.3d 226 (Ind. 2017) (assuming without deciding the tip from taxicab driver was reliable, the mere allegation that D possessed a handgun in a movie theater, without more, was insufficient to establish that D was or was about to be engaged in criminal activity); cf. Redfield v. State, 78 N.E.3d 1104 (Ind.Ct.App. 2017).

Jacobs v. State, 76 N.E.3d 846 (Ind. 2017) (D's suspected affiliation with gang due to his carrying red shirt was insufficient to justify investigatory stop at park two days after police received multiple reports of shots fired by youths wearing red clothes in the same area; although officer reasonably believed D was a truant, by the time of the stop, school was out of session, thus suspicion of truancy could not justify the stop, nor can fact D left park when police arrived).

Burkett v. State, 736 N.E.2d 304 (Ind.Ct.App. 2000) (anonymous tip that three or four black males were dealing in narcotics in area D was stopped was not specific and did not provide reasonable suspicion to stop D, despite D's unseasonable attire and walking away when officer approached).

Bovie v. State, 760 N.E.2d 1195 (Ind.Ct.App. 2002) (police officer's observations of D and his passenger, a known drug user and seller, leaving known drug house, proceeding to gas station, and stopping their vehicle did not rise to level of reasonable and articulable suspicion required to make investigatory stop); see also Woodson v. State, 960 N.E.2d 224 (Ind.Ct.App. 2012).

State v. Felker, 819 N.E.2d 870 (Ind.Ct.App. 2004) (after observing marijuana plant from air across street from D's house, trooper knocked on D's front door, and subsequently stopped and seized D in violation of Fourth Amendment).

e. Did the Defendant flee from the police or make furtive gestures?

Although a person approached by the police is free to walk away, and a simple refusal to cooperate, without more, does not furnish the reasonable suspicion needed to justify a Terry stop, unprovoked flight from law enforcement officers is suggestive of wrongdoing and may

justify a Terry stop. Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673 (2000). But a person cannot be prosecuted or arrested for resisting law enforcement by fleeing unless the officer has, at a minimum, the reasonable suspicion necessary to conduct a Terry stop. Gaddie v. State, 10 N.E.3d 1249 (Ind. 2014). A person's freedom to walk away is rendered illusory if she is subjected to arrest for exercising that freedom. Miller v. State, 51 N.E.3d 313 (Ind.Ct.App. 2016).

Carter v. State, 692 N.E.2d 464 (Ind.Ct.App. 1997) (neither officer's characterization of D turning and walking away when he saw officer as fleeing nor officer's knowledge of D's prior criminal record constituted reasonable suspicion).

Greeno v. State, 861 N.E.2d 1232 (Ind.Ct.App. 2007) (D's walking quickly away from officer was not reasonable suspicion).

Bridgewater v. State, 793 N.E.2d 1097 (Ind.Ct.App. 2003) (where D twice fled into a building in high crime area after seeing officers drive by, but officers did not see any transaction or interaction with other people and he was not doing anything suspicious, there was not reasonable suspicion to stop and search D).

Stalling v. State, 713 N.E.2d 922 (Ind.Ct.App. 1999) (improper investigatory stop based on "hunch" of criminal activity and D's movement toward his waistline). See also Webb v. State, 714 N.E.2d 787 (Ind.Ct.App. 1999).

Luster v. State, 578 N.E.2d 740 (Ind.Ct.App. 1991) (fact that D dove into truck attempting to hide something gave police reasonable suspicion to stop D where it was 1:35 a.m., in parking lot with no adjoining businesses, in area of frequent crime including drug trafficking, and truck's front beams and interior lights were on).

Person v. State, 764 N.E.2d 743, 748-49 (Ind.Ct.App. 2002) (where officers pulled up in front of a house where D was sitting on porch and police had served a narcotics search warrant a few days earlier, two men on sidewalk began to walk away and continued to do so after being asked to stop, and D ran inside and through back door, reasonable suspicion existed to stop D).

Platt v. State, 589 N.E.2d 222 (Ind. 1992) (immediately fleeing in car from encounter with police in middle of night provided reasonable suspicion). See also Cardwell v. State, 666 N.E.2d 420 (Ind.Ct.App. 1996).

Finger v. State, 799 N.E.2d 528, 534 (Ind. 2003) ("nervousness is of limited significance when determining reasonable suspicion"); see also Pinner v. State, 74 N.E.3d 226 (Ind. 2017) and Powers v. State, ___N.E.3d___ (Ind.Ct.App. 2022).

Bass v. State, 525 S.E.2d 921 (Va. 2000) (legally turning to avoid roadblock does not justify stop).

Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) ("where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department report documenting a pattern of racial profiling of black males in the city of Boston").

Sowell v. State, 784 N.E.2d 980 (Ind.Ct.App. 2003) (second stop of car in which D was passenger was lawful, where occupants appeared unusually nervous during first stop, car passed by intended destination, made series of circular turns, and passengers continued to turn around to see if officer was still following).

When a suspect has already been stopped and then flees from police, D's flight subsequent to investigatory stop cannot be considered in assessing adequacy of reasonable suspicion.

Polk v. State, 739 N.E.2d 666 (Ind.Ct.App. 2000) (where police stopped D without reasonable suspicion, Court did not address D's subsequent flight as factor in their consideration of reasonable suspicion to chase D).

f. Did the Defendant fit a drug courier profile?

United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581 (1989) (stop justified where D paid for two airline tickets from Honolulu to Miami for $2100 from $4100 roll of $20 bills, stayed only 48 hours on 20 hour round-trip, appeared nervous, checked no baggage, but carried some, and traveled under different name than his telephone listing).

Molino v. State, 546 N.E.2d 1216 (Ind. 1989) (police had reasonable suspicion to stop D who arrived at Indianapolis airport on express flight from Florida, exited flight with leather handbag, and quickly left airport and hailed cab).

Lyons v. State, 735 N.E.2d 1179 (Ind.Ct.App. 2000) (where police had reasonable and articulable suspicion that D was carrying illegal drugs, police had right to make investigatory stop upon D's arrival at airport to detain him briefly to complete their investigation).

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983) (seizure of person meeting drug courier profile exceeded that authorized by Terry and required probable cause to arrest; majority apparently avoided holding that drug courier profile is enough for Terry seizure).

2. Did police stop the Defendant for a traffic or ordinance violation?

Under the Fourth Amendment, police may stop a vehicle after observing minor traffic violations, regardless of the police officer's subjective motives in stopping the vehicle. As long as officers "could have" made a stop on the basis of a traffic violation, it does not matter what reasonable officers "would have" done. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996); State v. Voit, 679 N.E.2d 1360 (Ind.Ct.App. 1997). But the traffic stop must be based on the police officer's objectively reasonable justifications at the time the stop is made, not the State's post hoc theories. State v. Nesius, 548 N.E.2d 1201, 1203 (Ind.Ct.App. 1990); Webb v. State, 714 N.E.2d 787, 789 (Ind.Ct.App. 1999).

Baldwin v. Reagan, 715 N.E.2d 332 (Ind. 1999) (police officer may not stop motorist to enforce seat belt law unless officer observes circumstances that would cause ordinary person to agree that driver or passenger is not wearing seat belt).

State v. Massey, 887 N.E.2d 151 (Ind.Ct.App. 2008) (police may stop based on reasonable suspicion that passenger's seat belt is not "properly" fastened).

Denton v. State, 805 N.E.2d 852 (Ind.Ct.App. 2004) (stop based on suspect driving vehicle with broken rear window that was uncovered despite rain was not proper).

Turner v. State, 862 N.E.2d 695 (Ind.Ct.App. 2007) (where admittedly pretextual stop was facilitated by traffic violation of questionable validity, stop was unreasonable under Indiana Constitution; officer stopped D for speeding based on his visual estimation of D's speed and without knowing what speed limit in area was).

U.S. v. Paniagua-Garcia, 813 F.3d 1013 (7th Cir. 2016) (D was unlawfully stopped for suspicion of violating Indiana's "texting-while-driving" statute, where no fact perceptible to a

police officer glancing into a moving car and observing the driver using a cellphone would enable the officer to determine whether it was a permitted or a forbidden use. Note that in 2020, Legislature enacted Distracted Driving Law, IC 9-21-8-59, which makes it illegal for drivers to type a text message, transmit a message or read emails while driving or stopped at traffic light).

Lark v. State, 755 N.E.2d 1153, *reh'g granted on other grounds* 759 N.E.2d 275 (Ind.Ct.App. 2001) (although police did not stop D until he had driven several blocks from scene of infraction, there is no authority for proposition that police must be within certain proximity to scene of violation, nor is there rationale for creating such rule); see also Haynes v. State, 937 N.E.2d 1248 (Ind.Ct.App. 2010).

Merritt v. State, 829 N.E.2d 472 (Ind. 2005) (D's display of license plate inside rear window of his car violated Ind. Code 9-18-2-26, which requires licenses to be displayed and securely fastened upon rear of vehicle; any method other than statutory requirements concerning placement, secure attachment, illumination and legibility may serve as basis for reasonable suspicion to make a traffic stop).

Young v. State, 906 N.E.2d 875 (Ind. 2009) (because temporary license plate was not illuminated and not mounted on rear of vehicle but rather was displayed inside rear window, officer had reasonable suspicion to initiate traffic stop); see also Meredith v. State, 906 N.E.2d 867 (Ind. 2009); but see Darringer v. State, 46 N.E.3d 464 (Ind.Ct.App. 2015) (noting that 2013 amendment to I.C. 9-32-6-11 explicitly allows for interim license plates to be displayed on the left side of the rear window that is clearly visible and unobstructed; officer stopped D's vehicle based on an unreasonable mistake of law).

Potter v. State, 912 N.E.2d 905 (Ind.Ct.App. 2009) (circumstances warranted a brief traffic stop to confirm or dispel officer's reasonable suspicion of driver impairment, where he observed D's vehicle continuously weave from side to side in its lane and nearly strike a concrete median when making a turn).

Houston v. State, 898 N.E.2d 358 (Ind.Ct.App. 2008) (where officer testified that the D's license plate was "swinging," there was reasonable suspicion to stop D for violation of Ind. Code 9-18-2-26; moreover, Ind. Code 9-18-2-26(b)(1) is not unconstitutionally vague).

Peete v. State, 678 N.E.2d 415 (Ind.Ct.App. 1997) (police properly stopped vehicle for improperly lighted license plate); see also Porter v. State, 985 N.E.2d 348 (Ind.Ct.App. 2013) (police may stop drivers of cars with functional, but dim license plate bulb).

Freeman v. State, 904 N.E.2d 340 (Ind.Ct.App. 2009) (officer properly stopped D's vehicle because left tail lamp was not illuminated).

State v. Geis, 779 N.E.2d 1194 (Ind.Ct.App. 2002) (because D failed to signal, fact that D complied with I.C. 9-21-8-24 by making lane change with reasonable safety not affecting any other driver was irrelevant; statutes require turn signal at all times, not only when another vehicle will be affected).

United States v. Gold, 77 F. Supp 2d 936 (S.D. Ind. 1999) (because D did not cross any white line markings when he pulled in front of pickup truck while merging from two lanes into one, he did not "change lanes" pursuant to I.C. 9-21-8-24 and police officer's reliance on his failure to signal was unjustified).

Datzek v. State, 838 N.E.2d 1149 (Ind.Ct.App. 2005) (officer properly stopped vehicle for failing to signal while leaving gas station parking lot); see also Alexander v. State, 134

N.E.3d 470 (Ind.Ct.App. 2019); and Peak v. State, 26 N.E.3d 1010 (Ind.Ct.App. 2015) (D turned on signal while stopped at traffic light).

Robinson v. State, 5 N.E.3d 362 (Ind. 2014) (officer's observation of D drive over fog line twice constituted reasonable suspicion of impaired driving); see also Barrett v. State, 837 N.E.2d 1022 (Ind.Ct.App. 2005); cf. United States v. Peters, 2012 U.S. Dist. LEXIS 46977.

Pridemore v. State, 71 N.E.3d 70 (Ind.Ct.App. 2017) (officer properly stopped D for driving outside right-hand lane when D's tire went onto the yellow line and median between two opposite lanes of travel).

Wilson v. State, 754 N.E.2d 950 (Ind.Ct.App. 2001) (violation of non-traffic ordinance, in this case municipal noise ordinance, is sufficient reason to stop vehicle); see also Yates v. State, 15 N.E.3d 1139 (Ind.Ct.App. 2014) (bicycle infractions).

Sell v. State, 496 N.E.2d 799 (Ind.Ct.App. 1986) (investigatory stop reasonable where trooper observed motorist driving 15-20 m.p.h. below speed limit for 2-3 minutes, backing up traffic behind him).

Marshall v. State, 117 N.E.3d 1254 (Ind. 2019) (although officer did not document the radar speed, he clocked D was driving, the traffic stop for speeding did not violate Ind. Const. art. I, § 11 because the officer possessed sufficient knowledge that D was speeding, the initial stop was not intrusive, and law enforcement needs to be able to patrol speeding).

NOTE: In determining whether a stop was reasonable, the court may consider the pretextual nature of the stop. The pretextual nature of a stop is "not...totally irrelevant to questions that accompany" the stop. "A pretextual stop, by definition, harbors an underlying ambition to exceed its original scope. Once a traffic stop's pretextual nature is established, as it was in this case, we know that the true objective is to find a legal excuse to accomplish a warrantless search. This goal exposes to careful scrutiny disputes over ensuing events." People v. Thompson, 670 N.E.2d 1129 (Ill.Ct.App. 1996).

Mitchell v. State, 745 N.E.2d 775 (Ind. 2001) (it is not pretext of stop but ensuing policeinvestigation conduct that may be excessive and unrelated to traffic stop).

PRACTICE POINTER: In Whren, *supra*, the U.S. Supreme Court left open the ability to challenge the actions of police based on a claim that an officer's subjective motivation in conducting a stop was based on racial profiling. "The constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." Whren, 517 U.S. at 813. Thus, consider challenging discriminatory actions of the police under the 14th Amendment, "which will change the focus from objective bases for police actions to their subjective intent." Andre Vitale, "Fighting Racial Bias by the Police through Suppression Litigation" The Champion, July 2021, p. 12. *Cf.* State v. Bulington, 802 N.E.2d 435, 440 (Ind. 2004) (noting that the purpose of art 1 sec. 11 of the Indiana Constitution is to prevent "opportunities for official arbitrariness, discretion, and discrimination").

a. Was the officer mistaken as to whether the Defendant's actions constituted a traffic or ordinance violation?

Police cannot pull someone over to investigate whether that person is committing a traffic violation. State v. Eilers, 697 N.E.2d 969 (Ind.Ct.App. 1998). Although a police officer's good faith belief that a person committed an infraction or ordinance violation will justify a stop, Ind. Code 34-28-5-3, an officer's mistaken belief about what constitutes a violation does not amount to good faith. However, in Heien v. North Carolina, 135 S.Ct. 530 (2014), the U.S. Supreme Court held that a police officer's mistaken understanding of the law can

provide reasonable suspicion for a vehicle stop if the mistake is objectively reasonable. In this case, the officer's mistaken belief that North Carolina's brake-light statute required that both brake lights work was reasonable.

Darringer v. State, 46 N.E.3d 464 (Ind.Ct.App. 2015) (distinguishing Heien, Court concluded officer stopped D's vehicle based on an unreasonable mistake of law, i.e., that interim license plates must be placed on rear bumper of vehicle rather than rear window; despite the officer's belief to the contrary, for almost a year prior to the stop, statute allowed for an interim license plate to be displayed in such a manner).

Cash v. State, 593 N.E.2d 1267 (Ind.Ct.App. 1992) (because swinging license plate was not a traffic infraction, stop was unjustified).

Ransom v. State, 741 N.E.2d 419 (Ind.Ct.App. 2000) (stop of D's vehicle for driving in reverse was unlawful; Court rejected State's argument that stop was justified because officer had good faith belief that D had committed a traffic violation).

English v. State, 603 N.E.2d 161 (Ind.Ct.App. 1992) (fact that officer stopping D actually saw his registration tag before reaching driver's side door did not prevent valid investigatory stop, because tag was still not properly displayed and officer had good faith belief D had committed infraction; also, officer had car already stopped prior to seeing license plate).

State v. Rager, 883 N.E.2d 136 (Ind.Ct.App. 2008) (stop was unlawful because it was based on officer's mistaken belief that D violated Ind. Code 9-21-8-35, requiring D to change lanes when approaching a stationary emergency vehicle if possible).

Dora v. State, 736 N.E.2d 1254 (Ind.Ct.App. 2000) (fact that D spun and squealed his tires does not ipso facto mean that his conduct violated "reasonable safety" mandate, which is essence of statutory prohibition against performing unsafe start); but see Beasey v. State, 823 N.E.2d 759 (Ind.Ct.App. 2005) (distinguishing Dora, Court held that State presented sufficient evidence that D's start was unsafe thus creating a danger to himself and others, i.e., D's car fishtailed as he over accelerated on wet pavement and was not in control of vehicle).

State v. Sitts, 926 N.E.2d 1118 (Ind.Ct.App. 2010) (D's act of crossing the center line once between the adjacent southbound lane was not a violation of I.C. 9-21-8-2(a) because he did not cross into the opposite lane of travel; thus, officer did not have an objectively justifiable reason for stopping D's vehicle).

Gunn v. State, 956 N.E.2d 136 (Ind.Ct.App. 2011) (officer's mistaken belief that D committed an infraction by failing to enter roadway in the lane closest to the center line after making a left turn did not justify traffic stop; I.C. 9-21-8-12 only requires a person making a left turn to "leave the intersection to the right of the center line of the roadway being entered").

Toppo v. State, 171 N.E.3d 153 (Ind.Ct.App. 2021) (a driver's tires crossing center line even briefly such that tires are in opposite lane of travel is traffic violation for which police may initiate traffic stop).

Goens v. State, 943 N.E.2d 829 (Ind.Ct.App. 2011) (D did not commit an infraction by having one inoperable brake light; officer's stop of his car was invalid, and the resulting evidence of his intoxication should have been suppressed).

Kroft v. State, 992 N.E.2d 818 (Ind.Ct.App. 2013) (tail lamp with tiny crack that emitted a miniscule amount of white light from otherwise red tail lamp did not give officer reasonable suspicion to stop D under I.C. 9-19-6-4 or I.C. 9-21-7-1).

Combs v. State, 878 N.E.2d 1285 (Ind.Ct.App. 2008) (even if driving left-of-center requires sufficient room on right side of roadway, it is objectively reasonable for an officer to stop someone for driving left-of-center and subsequently determine whether there is sufficient room).

Sanders v. State, 989 N.E.2d 332 (Ind. 2013) (officer's mistaken but good faith belief that tint on D's rear windows violated Window Tint Statute justified stop of vehicle); see also Croom v. State, 996 N.E.2d 436 (Ind.Ct.App. 2013) (mistaken belief interim license plate was invalid).

Pruitt v. State, 934 N.E.2d 767 (Ind.Ct.App. 2010) (officer was not mistaken that D committed traffic violation by failing to activate his headlights while driving after midnight in a private parking lot, even though statute requiring activation of headlights is limited to vehicles on public highways).

T.D. v. State, 873 N.E.2d 184 (Ind.Ct.App. 2007) (officer's testimony that windshield was cracked sufficiently to obstruct driver's view was sufficient to support his reasonable belief that a traffic stop was required to determine whether the obstruction made the vehicle sufficiently unsafe to warrant a traffic citation).

Veerkemp v. State, 7 N.E.3d 390 (Ind.Ct.App. 2014) (officer's characterization of exhaust as excessive justified traffic stop).

Williams v. State, 28 N.E.3d 293 (Ind.Ct.App. 2015) (following Heien; officer's mistaken belief that D committed an infraction by driving a car with taillight that emitted both red and white light was objectively reasonable); see also Dowdy v. State, 83 N.E.3d 755 (Ind.Ct.App. 2017) (officer mistakenly believed license/registration expired).

Staten v. State, 946 N.E.2d 80 (Ind.Ct.App. 2011) (where D's actions violated different, albeit uncharged infraction, stop was legal even though officer was mistaken that D violated failure to obey stop sign statute).

NOTE: If the officer's justification for a stop turns out to be unconstitutional, the State cannot supply a valid reason for the stop. State v. Nesius, 548 N.E.2d 1201, 1203 (Ind.Ct.App. 1990) (no error in refusing to allow State to supply – after the fact - a possible justification for the investigative stop not contemplated by the officer at time of stop); Webb v. State, 714 N.E.2d 787, 789 (Ind.Ct.App. 1999) (rejecting State's argument that a stop was justified because "the State has imputed to [officer] a new theory for the stop despite [officer's] own testimony as to why he stopped Webb."); Dennis v. State, 693 A.2d 1150 (Md.Ct.App. 1997) (Whren v. United States, *supra*, does not change rule that courts are bound by officer's expression of his or her subjective motivation for stop).

b. Was it even possible for the driver, under the circumstances, to comply with the traffic regulation?

State v. Keck, 4 N.E.3d 1180 (Ind. 2014) (police officer did not have reasonable suspicion to stop D for driving left-of-center on a county road to avoid poor road conditions).

State v. Davis, 143 N.E.3d 343 (Ind.Ct.App. 2020) (turn signal statute does not apply to roundabouts).

State v. Rhodes, 950 N.E.2d 1261 (Ind.Ct.App. 2011) (State did not show it was possible under circumstances for D to comply with turn signal statute).

State v. Torres, 159 N.E.3d 1018 (Ind.Ct.App. 2020) (regardless of whether compliance with turn signal statute was possible under the circumstances, Ds' failure to signal a turn until they reached a stop sign was enough for officer in both cases to establish a reasonable belief that the statute had been violated; Mathias, J., concurring to express his frustration "to be required to apply a statute that authorizes a traffic stop on any city street if the driver does not continuously signal for at least 200 feet before turning or changing lanes" and noting "this precise statute appears to be employed often to make arbitrary traffic stops").

c. What did the police do during the stop?

Police must use the least restrictive means to effectuate a stop. Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983). A seizure lawful at its inception can violate the Fourth Amendment if execution unreasonably infringes constitutional interests. Illinois v. Caballes, 543 U.S. 405, 407 (2005).

Wilson v. State, 745 N.E.2d 789 (Ind. 2001) (officer who suspected that D was intoxicated could have conducted a variety of field sobriety tests instead of putting D in officer's patrol car). See also Taylor v. State, 904 N.E.2d 259 (Ind.Ct.App. 2009); and Lucas v. State, 15 N.E.3d 96 (Ind.Ct.App. 2014).

(1) Seatbelt and window tint stops: Did the police conduct any investigation during the stop?

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 the seatbelt law or the window tint statute. I.C. 9-19-10-3.1; I.C. 9-19-19-4. These statutes do not permit investigatory behavior during a traffic stop unless circumstances arise after the stop that independently provide the officer with reasonable suspicion of other crimes. State v. Richardson, 927 N.E.2d 379 (Ind. 2010). "[W]hen a stop to determine seat belt law compliance is made, the police are strictly prohibited from determining anything else, even if other law would permit." For instance, the statute prohibits "a police officer making a seat belt stop from even asking the driver for consent to search the vehicle or its occupant." Baldwin v. Reagan, 715 N.E.2d 332, 339 fn. 8 (Ind. 1999).

State v. Richardson, 927 N.E.2d 379 (Ind. 2010) (fact that officer observed an "unusual bulge" in D's pocket, standing alone, did not provide the independent basis of reasonable suspicion as required under the seatbelt act, especially in light of D's immediate compliance and officer's prior peaceful exchange with D; thus, officer was not permitted to ask about the unusual bulge; moreover, officer was not permitted to run a criminal check on D after D provided officer with gun license).

Harris v. State, 60 N.E.3d 1070 (Ind.Ct.App. 2016) (mere fact motorist's name appeared on National Precursor Log Exchange showing she had purchased pseudoephedrine 9 times over past year did not provide reasonable suspicion to further detain her for a drug investigation).

State v. Morris, 732 N.E.2d 224 (Ind.Ct.App. 2000) (plain language of seatbelt enforcement act evidence legislative intent that traffic stop based on seatbelt violation, standing alone, does not provide reasonable suspicion for police to

unilaterally expand their investigation and "fish" for evidence of other possible crimes); see also Pearson v. State, 870 N.E.2d 1061 (Ind.Ct.App. 2007).

Taylor v. State, 904 N.E.2d 259 (Ind.Ct.App. 2009) (I.C. 9-19-10-3.1 did not prevent officer from asking D if he would go to station to discuss investigation unrelated to seatbelt stop).

Atwater v. Lago Vista, 532 U.S. 318, 121 S.Ct. 1536 (2001) (Fourth Amendment does not prohibit warrantless arrest for a minor criminal offense, even one so minor that it carries only a fine and not a jail sentence; here, D was arrested for driving with her seatbelt unfastened).

Harper v. State, 922 N.E.2d 75 (Ind.Ct.App. 2010) (declining to extend the language in the seatbelt law to the traffic violation of failing to illuminate license plate).

(2) All other stops: Was the officer's action inconsistent with the purpose of the stop?

Even where the officer's investigation lasts no longer than a typical traffic stop, the reasonableness of the scope of a pretextual stop may depend on the diligence with which the officer pursues the stated basis for the stop. Charity v. State, 753 A.2d 556 (Md. Ct. Spec. App. 2000); United States v. Digiovanni, 650 F.3d 498 (4th Cir. 2011).

D.K. v. State, 736 N.E.2d 758 (Ind.Ct.App. 2000) (given facts existing before officer informed D that he would not cite D for traffic offenses, Court did not find them to create reasonable suspicion of criminal activity to support continued detention for investigation).

Mitchell v. State, 745 N.E.2d 775 (Ind. 2001) (reasonable search under Article 1, § 11 would permit officer to briefly detain motorist only as necessary to complete officer's work related to illegality for which motorist was stopped; 100-minute detention of D was reasonable in this case because police discovered illegal weapon and drugs in possession of D's passenger).

State v. Quirk, 842 N.E.2d 334 (Ind. 2006) (under totality of circumstances, troopers' twenty-minute detention of D for canine sniff beyond period necessary to issue a warning ticket and subsequent search of his truck was unreasonable under Article 1, § 11 of Indiana Constitution).

Tumblin v. State, 736 N.E.2d 317 (Ind.Ct.App. 2000) (D was unlawfully detained and subjected to patdown search beyond parameters of routine traffic stop).

Santiago v. State, 127 N.E.3d 1285 (Ind.Ct.App. 2020) (officer's request to see D's license did not unlawfully prolong the initial purpose of the investigatory traffic stop).

Cade v. State, 872 N.E.2d 186 (Ind.Ct.App. 2007) (even if D was seized for purposes of Article 1, § 11, requesting passenger's identification during traffic stop was not unreasonable).

Lockett v. State, 747 N.E.2d 539 (Ind. 2001) (police may, as a matter of routine practice, ask motorist stopped for traffic violation if he has any weapons in vehicle or on his person); see also Delatorre v. State, 903 N.E.2d 506 (Ind.Ct.App. 2009).

Washington v. State, 784 N.E.2d 584 (Ind.Ct.App. 2003) (after valid traffic stop in which officer determined that D's license and registration were valid, officer was permitted to ask D to step to rear of car so that he could explain warnings).

(3) Did the police ask questions unrelated to the justification for the stop?

Both the Fourth Amendment and Article 1, § 11 allow officers to ask questions about drugs or make other inquiries unrelated to the traffic violation justifying the initial stop. Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465 (2005); State v. Washington, 898 N.E.2d 1200 (Ind. 2008). This does not convert the encounter into something other than a lawful seizure, so long as the inquiries unrelated to the traffic stop "do not measurably extend the duration of the stop." Arizona v. Johnson, 555 U.S. 323, 129 S.Ct. 781 (2009).

Graham v. State, 971 N.E.2d 713 (Ind.Ct.App. 2012) (D was not obligated to answer officer's question regarding presence of drugs or weapons in his car; it was his willingness to do so that led to extension of stop and his arrest, not the amount of time it took for officer to complete the routine tasks associated with the traffic stop).

United States v. Digiovanni, 650 F.3d 498 (4th Cir. 2011) (officer violated Fourth Amendment by delaying the processing of a traffic violation to ask questions about drug trafficking and to request consent for a search; length of traffic stop was approximately 15 minutes, but officer failed to diligently pursue purpose of stop).

(4) Did the police conduct a dog sniff?

A dog sniff conducted during a lawful traffic stop that reveals no information other than the location of an unlawful substance does not violate the Fourth Amendment. Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834 (2005); Gibson v. State, 886 N.E.2d 639 (Ind.Ct.App. 2008) (art. 1 § 11). However, absent reasonable suspicion, prolonging the duration of a traffic stop to conduct a dog sniff constitutes an unreasonable seizure. A police stop exceeding the time needed to handle the matter for which the stop was made is unreasonable and violates the Fourth Amendment. Rodriguez v. United States, 135 S.Ct. 1609 (2015). The burden is on the State to show that the time for the lawful traffic stop was not increased due to the canine sweep. Bush v. State, 925 N.E.2d 787 (Ind.Ct.App. 2010), *aff'd on reh'g*, 929 N.E.2d 897.

Bush v. State, 925 N.E.2d 787 (Ind.Ct.App. 2010), *aff'd on reh'g*, 929 N.E.2d 897 (because State failed to show that either the canine sniff was conducted while the purpose of the stop was ongoing or the canine sniff did not materially increase the duration of the stop, the sniff was not justified; officers had effectuated the arrest of the passenger for an outstanding warrant by the time they conducted the canine sniff, and there was no reason to detain driver; D and passenger were cooperative at all times).

State v. Gray, 997 N.E.2d 1147 (Ind.Ct.App. 2013), *trans. denied* (where officer suspended normal traffic stop for two to six minutes in order to conduct a canine sniff, the search was not incident to the traffic stop; a vague tip that D was involved in narcotics did not provide reasonable suspicion justifying the sniff and subsequent search).

Washington v. State, 42 N.E.3d 521 (Ind.Ct.App. 2015) (police dog alerted to odor of narcotics about 11 minutes after D was pulled over, which following Rodrigues (above) did not prolong the stop beyond the time reasonably required to complete the

mission of issuing a ticket); see also Doctor v. State, 57 N.E.3d 846 (Ind.Ct.App. 2016); and State v. Cassady, 56 N.E.3d 662 (Ind.Ct.App. 2016).

Hansbrough v. State, 49 N.E.3d 1112 (Ind.Ct.App. 2016) (dog sniff 16 minutes after valid traffic stop began did not unreasonably prolong stop, where officer testified he had not yet completed his paperwork and was still checking for outstanding warrants on D when canine unit arrived and conducted the sweep; Court deferred to trial court but acknowledged legitimacy of D's concerns that accepting officer's testimony could induce police to slow down their processes in order to allow time for canine to arrive); see also Tinker v. State, 129 N.E.3d 251 (Ind.Ct.App. 2019).

The police may not detain a passenger to get a drug-sniffing dog without reasonable suspicion. Regardless of whether officers had reasonable suspicion to stop the defendant in the first place, if the reasonable suspicion has dissipated, further detention is illegal. Cannon v. State, 722 N.E.2d 881 (Ind.Ct.App. 2000).

Cannon v. State, *supra* (after valid initial traffic stop, police lacked reasonable suspicion to detain D's vehicle for dog sniff and further investigation).

D.K. v. State, 736 N.E.2d 758 (Ind.Ct.App. 2000) (commission of traffic infractions, D's initial failure to roll down window, occupants' nervousness, failure to make eye contact, turning to look at officer, and information about D's possession of police radio in vehicle were unparticularized suspicions that did not create reasonable suspicion of criminal activity to support continued detention for canine sniff for drugs).

Wilson v. State, 847 N.E.2d 1064 (Ind.Ct.App. 2006) (officer did not have reasonable suspicion to detain D 10 minutes after traffic stop was concluded and until arrival of drug-sniffing dog that was summoned only after D declined consent to search).

Powers v. State, ___N.E.3d___ (Ind.Ct.App. 2022) (traffic stop was complete when police did not observe any indication of an impaired driver and issued a warning for traffic violations; D's nervousness, appearance, dark circles under her eyes and sores on her arms were not enough reasonable suspicion of criminal activity to justify detention beyond time for ticketing for traffic infractions; without any furtive movements or officer safety concerns, asking D to exit the vehicle, questioning her and having dog perform an open air sniff violated Fourth Amendment).

Wells v. State, 922 N.E.2d 697 (Ind.Ct.App. 2010) (D's extreme fidgetiness and other furtive gestures raised legitimate safety concerns that justified removing D from car and conducting a pat-down search, but once concerns were alleviated, there was no reasonable suspicion to keep D until K-9 unit arrived).

Myers v. State, 839 N.E.2d 1154 (Ind. 2005) (Fourth Amendment did not require reasonable individualized suspicion before school officials, assisted by police, could use a trained drug-detecting dog to sniff outside of D's unoccupied motor vehicle; But see Rucker, J., and Sullivan, J., dissenting opinions criticizing expansion of Caballes to this situation).

Bradshaw v. State, 759 N.E.2d 271 (Ind.Ct.App. 2001) (burden is on State to show the time for traffic stop was not increased due to canine sweep; here, where canine sweep was conducted prior to officers receiving information from dispatch on license and warrants check, it did not prolong traffic stop longer than necessary and was thus proper).

Thayer v. State, 144 N.E.3d 843 (Ind.Ct.App. 2020) (K9 sniff did not unjustifiably extend the length of initial stop where officer had a reasonably high level of concern or suspicion that D was engaged in criminal conduct at the time of the stop).

Kenner v. State, 703 N.E.2d 1122 (Ind.Ct.App. 1999) (officer's belief that he smelled raw marijuana while D was exiting car was sufficient to satisfy reasonable suspicion requirement justifying 45-minute investigatory detention for sniff test by trained dog).

Thayer v. State, 904 N.E.2d 706 (Ind.Ct.App. 2009) (further detention of D during stop was justified due to his extreme nervousness and lies to officer about where he had been the night before and that morning; when officer asked defendant specifically whether he had any cocaine, he giggled and looked away from officer).

Graham v. State, 705 A.2d 82 (Md.Ct.Spec.App. 1998) (after purpose of stop was complete, fact that passengers gave inconsistent information regarding purpose of their trip did not justify detention while police obtained dog).

United States v. Salzano, 149 F.3d 1238 (10th Cir. 1998) (following reasons did not constitute reasonable suspicion to detain D for dog sniff: (1) driver's uneconomical decision to rent and drive large R-V rather than fly; (2) discrepancy between number of persons listed on rental agreement and fact that driver was alone; (3) size of motor home and officer's knowledge that such vehicles are often used to haul large quantities of drugs; (4) odor of evergreen emerging from vehicle; (5) driver's visible nervousness while handing over rental papers; (6) driver's statement that he had come from California).

United States v. Jordan, 455 F. Supp. 3d 1247, 1256 (D. Utah 2020) (dog trained under the Utah POST's training program is unreliable as it does not remove the risk of handler bias or cuing; the K-9 certification process was not even single-blind, such that the K-9 handler "knows exactly how many hides will be present in the exam and can therefore continue to search until the K[-]9 finds them all."; K-9 also only underwent four narcotics trainings in the four months after he was certified).

Illinois v. Caballes, *supra* (dog sniff was sufficiently reliable to establish probable cause to conduct a search of trunk).

(5) Did the police offer a PBT?

Although police are not required to have probable cause to offer a PBT, PBTs may not be administered randomly. Thus, a police officer needs reasonable suspicion to offer a PBT to determine whether a driver is intoxicated. State v. Whitney, 889 N.E.2d 823 (Ind.Ct.App. 2008).

(6) What actions did the police take to control the stop or investigation?

A police officer making a lawful traffic stop may order a driver and passengers to get out of the car pending completion of the stop. Maryland v. Wilson, 519 U.S. 408, 117 S.Ct. 882 (1997); Lockett v. State, 747 N.E.2d 539 (Ind. 2001). Under Article 1, Section 11 of the Indiana Constitution, the officers must use investigative methods that are reasonable in scope, duration, and relation to the stop. Mitchell v. State, 745 N.E.2d 775, 788 (Ind. 2001); Ammons v. State, 770 N.E.2d 927 (Ind.Ct.App. 2002).

Walls v. State, 714 N.E.2d 1266 (Ind.Ct.App. 1999) (police officer may not order passenger of vehicle to stay at car and not walk away during stop unless officer has reasonable suspicion that criminal activity is afoot); but see Tawdul v. State, 720 N.E.2d 1211 (Ind.Ct.App. 1999) (disagreeing with Walls); and Harper v. State, 922 N.E.2d 75 (Ind.Ct.App. 2010) (agreeing with Tawdul and disagreeing with Walls; officer had authority to order passenger who was walking up to motel room back to car in order to assess the situation).

Wells v. State, 922 N.E.2d 697 (Ind.Ct.App. 2010) (D's extreme fidgetiness and other furtive gestures raised legitimate safety concerns that justified removing him from car and conducting a pat-down search, but once concerns were alleviated, there was no reasonable suspicion to keep D until K-9 unit arrived).

Washington v. State, 922 N.E.2d 109 (Ind.Ct.App. 2010) (where D fully cooperated with officer, answered all his questions, treated him with respect and made no furtive movements, fact D told officer he had a licensed handgun underneath the seat during a traffic stop justified the removal of D from the car but not a subsequent search).

State v. Harris, 702 N.E.2d 722 (Ind.Ct.App. 1998) (police may ask for driver's license to obtain name, address, etc. from driver).

Starr v. State, 928 N.E.2d 876 (Ind.Ct.App. 2010) (although police officers may request a passenger's verbal or documentary identification during a traffic stop, as a general proposition, citizens are not required to interact with police officers; because passenger did not commit an infraction or ordinance violation passenger could not be convicted of refusal to identify self for refusal to provide identification).

Washington v. State, 784 N.E.2d 584 (Ind.Ct.App. 2003) (after valid traffic stop in which officer determined that D's license and registration were valid, officer was permitted to ask D to step to rear of car so that he could explain warnings).

Mitchell v. State, 745 N.E.2d 775, 787 fn. 10 (Ind. 2001) (in dicta, the court stated that the test, under the Indiana Constitution, for determining whether a police officer was justified in ordering driver to exit car during traffic stop is whether the totality of circumstances supports a reasonable suspicion justifying the requiring the driver exit the car and submit to a pat-down search).

Arizona v. Johnson, 555 U.S. 323, 129 S.Ct. 781 (2009) (under U.S. Constitution, officers conducting traffic stops may order passengers out of vehicle and conduct a "pat-down" in the absence of reasonable suspicion of criminal activity, as long as officers have reason to believe that the passenger may be armed and dangerous).

Westmoreland v. State, 965 N.E.2d 163 (Ind.Ct.App. 2012) (Johnson requires articulable facts for believing the person is armed and dangerous; here, officer unlawfully patted down passenger of vehicle for "officer safety" without reasonable suspicion he was armed and dangerous).

(7) Did the police conduct a protective search?

Officers who have detained but not arrested a driver of an automobile under Terry may search those parts of the passenger compartment where a weapon may be hidden on reasonable belief that the detainee is dangerous and may gain access to a weapon. Michigan v. Long, 463 U.S. 1032, 1049-50 (1983).

Parish v. State, 936 N.E.2d 346 (Ind.Ct.App. 2010) (search of locked glove box was justified by officer safety, even though D was removed from car during traffic stop; police were on high alert that D, a suspect in several shootings, was armed at time of stop and police had a tip that D had threatened to kill the next police officer he encountered).

Lindsay v. State, 916 N.E.2d 230 (Ind.Ct.App. 2009) (officer safety justified police officer's actions in opening D's car door wider and visually inspecting car's interior, where officer reasonably believed that car may have been D's getaway car and that a possibly armed accomplice may have been inside; officer ceased his search as soon as he confirmed that no one was in car and no longer had safety concerns).

Davis v. State, 122 N.E.3d 1046 (Ind.Ct.App. 2019) (officer's limited search of D's truck for a gun that he admitted possessing in the midst of a felony auto-theft investigation was reasonable because officer had reasonable belief D was dangerous and could gain immediate control of gun).

For a discussion on actions police can take for safety reasons, see p. 101.

d. How long was the Defendant detained?

While Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996), upheld the use of pretextual traffic stops, officers still may not detain drivers longer than is necessary to issue the citation or warning. "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 1325 (1983); Miller v. State, 498 N.E.2d 53, 56 (Ind.Ct.App. 1986). The duration of an investigatory stop may abridge constitutional standards even where there is reasonable suspicion to support the stop. United States v. Odum, 72 F.3d 1279 (7th Cir. 1995). Whether the officer's detention violates the Fourth Amendment is evaluated by an objective standard, not the subjective motives of law enforcement officers. Ashcroft v. al-Kidd, 563 U.S. 731, 131 S.Ct. 2074 (2011).

Mitchell v. State, 745 N.E.2d 775 (Ind. 2001) (reasonable search under Article 1, § 11 would permit officer to briefly detain motorist only as necessary to complete officer's work related to illegality for which motorist was stopped; here, 100-minute detention of D after police found illegal weapon and drugs in possession of D's passenger was not unreasonable under Indiana Constitution and did not violate Fourth Amendment).

Florida v. Royer, *supra* (airport detention exceeded Terry limits where officers retained D's license and plane ticket, told him he was suspected of transporting drugs and retrieved his luggage without his consent).

Tumblin v. State, 736 N.E.2d 317 (Ind.Ct.App. 2000) (D was unlawfully detained and subjected to patdown search beyond parameters of routine traffic stop).

State v. Quirk, 842 N.E.2d 334 (Ind. 2006) (under totality of circumstances, troopers' twenty-minute detention of D for canine sniff beyond period necessary to issue a warning ticket and subsequent search of his truck was unreasonable under Article 1, § 11 of Indiana Constitution; D's nervousness, use of aliases, inconsistent answers regarding criminal history and fact he drove from "source state" were non-factors to support reasonable suspicion of criminal activity).

State v. Scott, 966 N.E.2d 85 (Ind.Ct.App. 2012) (officer violated Fourth Amendment when he detained D and retained his driver's license for an unreasonable period of time

without any reasonable suspicion that D had committed a criminal offense; as a result, D's act of opening his car door to obtain his registration was not voluntary).

Neeley v. State, 70 N.E.3d 866 (Ind.Ct.App. 2017) (even if officer could stop D, who "looked questionable," to issue a traffic citation for walking on the wrong side of the street, the stop was prolonged beyond the time necessary to issue a citation and officers never completed the tasks authorized by I.C. 34-28-5-3 for an infraction or ordinance violation).

United States v. Place, 462 U.S. 696 103 S.Ct. 2637 (1983) (investigative detention of traveler's luggage is permissible on less than probable cause under Terry principles; however, 90-minute detention of D's luggage was unreasonable).

People v. Shapiro, 687 N.E.2d 65 (Ill. 1997) (diverting package 300 miles away, resulting in 5-day delay in delivery, was unreasonable extension of Terry detention, although there was reasonable suspicion to suspect package contained narcotics, because inspection process could have been expedited). But see United States v. Aldaz, 921 F.2d 227 (9th Cir. 1990) (diverting package 700 miles, resulting in three-day delay, was reasonable because package was shipped to closest drug sniffing canine unit in Alaska and the authorities acted promptly).

United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568 (1985) (in evaluating reasonableness of length of detention after Terry stop, courts must consider diligence of police and time necessary to effectuate purpose of stop; here, 25-minute detention of driver of camper by police awaiting arrival of DEA agent followed by questioning and search of vehicle on smelling marijuana was not unreasonable).

Austin v. State, 997 N.E.2d 1027 (Ind. 2013) (where D's prior criminal history was much more significant and recent than D in Quirk (above), D's logs were incomplete and he could not give specifics regarding his destination, there was reasonable suspicion to justify canine search; moreover, intrusion of canine search was much less significant that the intrusion in Quirk).

Thayer v. State, 904 N.E.2d 706 (Ind.Ct.App. 2009) (further detention of D during traffic stop was justified due to D's extreme nervousness and lies to officer about where he had been the night before and that morning; when officer asked D specifically whether he had any cocaine in his car, D giggled and looked away from officer).

Doctor v. State, 57 N.E.3d 846 (Ind.Ct.App. 2016) (no evidence was presented to establish that the 8-10-minute period to issue a warning citation for window tint violation while conducting a K9 sniff was an unreasonable amount of time for a traffic stop).

Browder v. State, 77 N.E.3d 1209 (Ind.Ct.App. 2017) (officer reasonably decided to prolong traffic stop to continue his investigation of whether D was legally in possession of car, where no paperwork was in vehicle documenting sale to D or his wife and license plate was registered to a different vehicle whose owner did not share D's name).

NOTE: Many jurisdictions have held that consent obtained after the purpose of the traffic stop is completed may be invalid. Whitehead v. State, 698 A.2d 1115 (Md.Ct.App. 1997); Ferris v. State, 735 A.2d 491 (Md.Ct.App. 1999).

See *Was proper consent attained only after the search?* p. 40.

3. Did police stop the Defendant pursuant to the community caretaking function?

The community caretaking function exception may be used as a means of establishing the reasonableness of a stop under the Fourth Amendment. In so doing, courts must determine: (1) that a seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual. State v. Kramer, 759 N.W.2d 598, 605 (Wis. 2009). The community caretaking function is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady v. Dombrowski, 413 U.S. 433 (1973).

M.O. v. State, 63 N.E.3d 329 (Ind. 2016) (dispatch reported woman stuck under car at gas station, officer arrived to see D lawfully drive away; community caretaker function did not justify stop as no facts supported belief woman was in immediate need for assistance).

Cruz-Salazar v. State, 63 N.E.3d 1055 (Ind. 2016) (officer had objectively reasonable basis for warrantless entry into D's truck where he found D asleep with engine running for 30 minutes in early hours of cold morning and did not respond to officer's flashlight or taps on window).

Caniglia v. Strom, 141 S. Ct. 1596 (2021) ("community caretaking" exception cannot justify warrantless home entry and search).

State v. Smith, ___P.3d___, 2022 WL 601927 (community caretaking doctrine did not justify officer's warrantless seizure of D because he was sleeping in his parked car, he was seized when officers parked their car, blocking his, and the seizure of D was incommensurate with either his minimal need for assistance or the low risk to the community of an impaired driver on the road).

B. WAS THE ARREST JUSTIFIED?

An "arrest" is defined as "the taking of a person into custody that he may be held to answer for a crime." Ind. Code 35-33-1-5. Even when police officers do not intend to effectuate an arrest, their conduct may result in an arrest which would require probable cause that the suspect committed a felony.

Williams v. State, 630 N.E.2d 221 (Ind.Ct.App. 1994) (where officers with guns drawn stopped D, ordered him out of car and onto ground with hands behind head, stop was equivalent to arrest; fact D was unrecognized black male driving in vicinity of burglary, with in-county license plate, was insufficient to support probable cause).

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (seizure for purpose of questioning or investigation is not arrest, but it is subject to requirements of Fourth Amendment).

For a discussion on when a seizure rises to the level of an arrest, *When does an investigatory stop/seizure become an arrest requiring probable cause*, p. 6.

1. Was there an arrest warrant?

Assuming the law enforcement officer has probable cause, he or she is almost never required to obtain an arrest warrant to make an arrest. An arrest warrant may be obtained only after formal

charges have been filed against the person to be arrested, either by information or indictment. Ind. Code 35-33-2-1(c).

Stevens v. State, 691 N.E.2d 412 (Ind. 1997) (in felony cases, arrest warrants are only required when physical entry of home is necessary to effect arrest; warrantless arrests outside home are permissible so long as arresting officer has probable cause to believe D committed felony).

Kinnaird v. State, 242 N.E.2d 500 (Ind. 1968) (mere allegation, without more, that D whose arrest is sought has committed crime is insufficient basis upon which to issue arrest warrant; affidavit will be deemed sufficient if allegation is supported by enough underlying facts and circumstances to allow neutral and detached magistrate to draw conclusion as to existence of probable cause).

2. If no arrest warrant, were the statutory requirements for a warrantless arrest met?

Probable cause is required for an arrest that is made with a warrant as well as for an arrest that is made without a warrant. The evidence required to establish guilt is not necessary for probable cause to arrest. Because situations that officers face in course of executing their duties are more or less ambiguous, probable cause allows for reasonable mistakes by the officer.

Decker v. State, 19 N.E.3d 368 (Ind.Ct.App. 2014) (facts reported to officers gave them probable cause to arrest D, even though trial court eventually dismissed that charge).

Pursuant to Ind. Code 35-33-1-1, a law enforcement officer may make a warrantless arrest if the officer:

- has probable cause to believe the person has committed or attempted to commit, or is committing or attempting to commit a felony;
- has probable cause to believe the person is committing or attempting to commit a misdemeanor in the officer's presence;
- has probable cause to believe that the person has: (1) failed to stay at the scene of an accident; (2) committed an offense involving driving while under the influence; (3) committed a battery resulting in bodily injury under Ind. Code 35-42-2-1 or domestic battery under Ind. Code 35-42-2-1.3; (4) committed invasion of privacy or violated a no contact order; (5) violated Ind. Code 34-47-6-1.1 by transporting an undisclosed dangerous device; (6) committed carrying a handgun without a license or counterfeit handgun license; (7) interfered with the reporting of a crime/crime involving domestic or family violence; (8) violated a probation order issued under Ind. Code 35-50-7; (9) committed theft;
- has a removal order issued for the person by an immigration court;
- has a detainer or notice of action for the person issued by the U.S. Department of Homeland Security;
- has probable cause to believe that the person has been indicted for or convicted of one or more aggravated felonies (as defined in 8 U.S.C. 1101(a)(43)).

Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889 (1968) (mere fact that officer, who had no information concerning D, saw D talking to known drug addicts over 8-hour period without

knowing conversations' contents or seeing anything pass between D and addicts did not give police probable cause to arrest D).

Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795 (2003) (police had probable cause to arrest everyone in vehicle, where none of three occupants of vehicle admitted ownership of drugs hidden in back seat, and totality of circumstances supported reasonable belief that car's occupants were involved in common drug enterprise); see also Richard v. State, 7 N.E.3d 347 (Ind.Ct.App. 2014); but see I.G. v. State, 177 N.E.3d 75 (Ind. Ct.App. 2021) (unlike Pringle, where money and cocaine were found in car before passenger was arrested, here no evidence was admitted that marijuana was found in car after officer smelled marijuana, thus arrest and search of passenger based on odor alone was unlawful).

Buquer v. City of Indianapolis, 2013 U.S. Dist. LEXIS 45084 (S.D. Ind. 2013) (Indiana statute allowing suspected aliens, who do not have a removal proceeding pending, to be arrested based on a prior conviction violates the Fourth Amendment).

Andrews v. State, 588 N.E.2d 1298 (Ind.Ct.App. 1992) (passage of three months from date of drug sale to arrest did nothing to eliminate probable cause as grounds for warrantless arrest).

Walker v. State, 764 N.E.2d 741 (Ind.Ct.App. 2002) (Court rejected D's argument that warrantless arrest for minor consumption was unlawful because offense was not committed in officer's presence; direct evidence of offense in a sense continues while alcohol is in minor's body).

Johnson v. State, 747 N.E.2d 623 (Ind.Ct.App. 2002) (police may not enter home to effectuate misdemeanor arrest absent exigent circumstances or another exception to warrant requirement); see also Willis v. State, 780 N.E.2d 423 (Ind.Ct.App. 2002).

Scarborough v. State, 770 N.E.2d 923 (Ind.Ct.App. 2002) (despite officer's statement that D's arrest was for misdemeanor, facts known to officer at time supplied sufficient probable cause to believe D had attempted to break and enter victim's home, which constituted class D felony; therefore, pursuant to statute, warrantless arrest of D was legal).

State v. Barnes, 562 N.E.2d 63, 64 (Ind.Ct.App. 1990) (indicating in dicta that officer should not be required to obtain arrest warrant to arrest person for misdemeanor committed out of officer's presence if person in fact admits to officer that he or she committed offense).

3. Was the arrest properly executed?

a. Did the police enter the Defendant's home to effectuate the arrest?

(1) Without an arrest warrant

A police officer may not enter the home to arrest a suspect without an arrest warrant unless the officer is in hot pursuit of the suspect. United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406 (1976).

Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684 (1990) (where police had home surrounded and there was no suggestion that anyone inside home was in danger, entry into home to make warrantless arrest for aiding in murder was unconstitutional).

Phillips v. State, 492 N.E.2d 10 (Ind. 1986), *rev'd on other grounds* 498 N.E.2d 1 (Ind. 1986) (probable cause together with valid consent to be inside D's home

constitutes exception to arrest warrant requirement). See also Lander v. State, 762 N.E.2d 1208 (Ind. 2002).

Casselman v. State, 472 N.E.2d 1310 (Ind.Ct.App. 1985) (officer may not use force to enter home to execute a civil order of arrest).

Barnes v. State, 946 N.E.2d 572 (Ind. 2011), *clarified on reh'g*, 953 N.E.2d 473 (there is no right to reasonably resist unlawful entry by police officers; note that I.C. 35-41-3-2(i)(2) was amended in response to Barnes to restore a citizen's right to use reasonable force to protect himself against unlawful police entry).

Cupello v. State, 27 N.E.3d 1122 (Ind.Ct.App. 2015) (D exercised reasonable force under amendment to I.C. 35-41-3-2(i)(2) to prevent or terminate an unlawful entry by a public servant into his home, i.e, an off-duty constable employed as courtesy officer placing his foot inside threshold of apartment door).

Timmons v. State, 734 N.E.2d 1084 (Ind.Ct.App. 2000) (where telephonic misdemeanor arrest warrant was issued so improperly that no reasonable officer would have relied on it, officer's illegal entry into home required suppression of officer's observance of D's demeanor).

Johnson v. State, 747 N.E.2d 623 (Ind.Ct.App. 2002) (police may not enter home to effectuate misdemeanor arrest absent exigent circumstances or another exception to warrant requirement); see also Willis v. State, 780 N.E.2d 423 (Ind.Ct.App. 2002).

Kirk v. Louisiana, 536 U.S. 635, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002) (Fourth Amendment draws a firm line at entrance to the house, which may not reasonably be crossed without a warrant in absence of exigent circumstances).

Foster v. State, 950 N.E.2d 760 (Ind.Ct.App. 2011) (warrantless entry to make in-home warrantless arrest based on a controlled buy 21-days earlier was unreasonable and violated Indiana Constitution; while police had a high degree of concern that a violation occurred, the degree of intrusion was also high, and law enforcements needs did not require a warrantless entry).

The police may not cause a suspect to come into public view, i.e., the threshold of the home, and then invoke Santana, *supra*, to enter the home without an arrest warrant. Adkisson v. State, 728 N.E.2d 175 (Ind.Ct.App. 2000).

Barnes v. State, 946 N.E.2d 572 (Ind. 2011), *reh'g granted*, 953 N.E.2d 473 (Indiana no longer recognizes common law right to reasonably resist unlawful police entry into a person's residence because public policy disfavors such a right; note that I.C. 35-41-3-2(i)(2) was amended in response to Barnes to restore a citizen's right to use reasonable force to protect himself against unlawful police entry).

Adkisson v. State, *supra* (D coming to door to discuss alleged battery with police did not justify police entry to arrest D for misdemeanor battery).

Harper v. State, 3 N.E.3d 1080 (Ind.Ct.App. 2014) (given officers' use of "ruse" to unlawfully enter D's residence, they were not engaged in the lawful execution of their duties at the time they caused D to come into public view and arrested her).

Jean-Baptiste v. State, 71 N.E.3d 406 (2017), *sum aff'd,* 82 N.E.3d 878 (Ind. 2017) (a law enforcement officer who attempts to effect a civil arrest warrant is not "lawfully

engaged in the excecution of [his] duties" where, as here, he reaches across the threshold of a residence without permission or other legal justification and grabs D).

For more information on fresh/hot pursuit, see the exigent circumstances exception to the warrant requirement, p. 128.

(2) With an arrest warrant

A criminal arrest warrant founded on probable cause gives the police "limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." Duran v. State, 930 N.E.2d 10 (Ind. 2010) (quoting Payton v. New York, 445 U.S. 573, 576, 100 S. Ct. 1371 (1980)). And Ind. Code § 35-33-2-3 provides that an officer who is serving an arrest warrant "may break open any outer or inner door or window in order to execute an arrest warrant, if the officer is not admitted following an announcement of the officer's authority and purpose." A writ of body attachment or civil arrest warrant is not a criminal arrest warrant. Casselman v. State, 472 N.E.2d 1310, 1312 (Ind.Ct.App. 1985).

Duran v. State, 930 N.E.2d 10 (Ind. 2010) (tip from an unidentified man in front of apartment building that D lived in the apartment with the green door and the fact an officer had dropped D off at the same apartment building a day earlier did not establish a reasonable belief that D would be found in the apartment with the green door; thus, the arrest warrant did not authorize entering the apartment).

State v. Ruden, 774 P.2d 972 (Kan. 1989) (police intrusion into D's home to execute bench warrants for failure to appear in civil matter violated state and federal constitutions).

Stickrod v. State, 108 N.E.3d 385 (Ind.Ct.App. 2018) (trial court did not violate D's 4th Amendment rights by admitting evidence police found in his house because they were serving two arrest warrants in accordance with Ind. Code § 35-33-2-3 and had ample reason to believe that he was present in the house).

NOTE: In Duran v. State, *supra*, the Indiana Supreme Court left open the question of whether "reasonable belief" is more akin to a probable cause analysis or a reasonable suspicion analysis.

b. Did the police enter into someone other than the arrestee's home?

An arrest warrant does not authorize entry into home of third party to look for suspect absent exigent circumstances; a search warrant for the home is required. Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642 (1981).

Hunt v. State, 550 N.E.2d 838 (Ind.Ct.App. 1990) (police officers properly entered home of D's girlfriend with the consent of the girlfriend and arrested D without a warrant).

c. Who made the arrest?

An arrest is valid only if it is made with the proper authority. Arrests may be made by law enforcement officers (defined at I.C. 9-13-2-92 and I.C. 35-31.5-2-185), judges, and private citizens, but the arrests are made under a variety of different rules.

(1) Police officer

(a) Was the officer in uniform and/or a marked car?

Ind. Code 9-30-2-2 provides that in order for a police officer to make an arrest or issue a traffic information or summons for a violation of a law regulating operation of a motor vehicle, the officer must be either wearing a uniform and badge or driving a clearly marked police vehicle. The purpose behind the statute is to protect drivers from police impersonators and to protect officers from resistance should they not be recognized as officers. State v. Hart, 669 N.E.2d 762 (Ind.Ct.App. 1996).

State v. Caplinger, 616 N.E.2d 793 (Ind.Ct.App. 1993) (officer who is not in uniform or driving marked car may not make arrest for any law relating to motor vehicles).

Bovie v. State, 760 N.E.2d 1195 (Ind.Ct.App. 2002) (officer showing badge was not enough).

Davis v. State, 858 N.E.2d 168 (Ind.Ct.App. 2006) (officer's attire, consisting of dark hooded sweatshirt, jeans, badge on his shoulder, and a vest that said "POLICE" in plain white letters, was not a "uniform" as required by I.C. 9-30-2-2).

Hatcher v. State, 762 N.E.2d 189 (Ind.Ct.App. 2002) (arrest by plain clothes officer is proper if uniformed officer is present).

Miller v. State, 641 N.E.2d 64 (Ind.Ct.App. 1994) (Court rejected State's argument that special deputy status is excluded from requirements of I.C. 9-30-2-2; special deputies have powers of law enforcement officers).

Walker v. State, 813 N.E.2d 339 (Ind.Ct.App. 2004) (State failed to prove that park ranger was a law enforcement officer).

James v. State, 622 N.E.2d 1303 (Ind.Ct.App. 1993) (focusing on meaning of "arrest," and not fact that officer was out of uniform and driving in unmarked car, in determining that officer did not take D into custody and could detain an individual for erratic driving); But see Bovie v. State, *supra* (declining to follow James; given purpose behind statute, there is no difference between an actual "arrest" or an investigative stop).

Samaras v. State, 640 N.E.2d 770 (Ind.Ct.App. 1994) (D was arrested, not merely detained).

Thompson v. State, 702 N.E.2d 1129 (Ind.Ct.App. 1998) (fact that officers were neither in uniform nor driving marked police vehicle at time of D's arrest for criminal recklessness is of no moment, because D was not arrested or charged with violating law regulating operation and use of motor vehicle); see also Ervin v. State, 968 N.E.2d 315 (Ind.Ct.App. 2012).

State v. Williamson, 852 N.E.2d 962 (Ind.Ct.App. 2006) (D was not detained for purposes of arrest, although police officer without uniform and in unmarked car would have prevented D from entering her home if she had tried to and second uniformed officer at scene described first officer as "detaining" D while awaiting his arrival).

Maynard v. State, 859 N.E.2d 1272 (Ind.Ct.App. 2007) (uniform/marked vehicle statute does not apply where officer has no contact with D).

(b) Was the officer in her jurisdiction?

State v. Russ, 480 N.E.2d 248 (Ind.Ct.App. 1985) (officer from one Indiana jurisdiction can stop someone for traffic violation in another Indiana jurisdiction); see also Lashley v. State, 745 N.E.2d 254 (Ind.Ct.App. 2001).

Jones v. State, 54 N.E.3d 1033 (Ind.Ct.App. 2016) (officer's action of entering home for welfare check fell squarely within Butler University police department's extended jurisdiction of providing aid to members of the community).

(c) Was the officer properly qualified?

Myers v. State, 714 N.E.2d 276 (Ind.Ct.App. 1999) (university police officer may make arrest without having completed basic training requirements at board-certified law enforcement academy).

Baker v. State, 483 N.E.2d 772 (Ind.Ct.App. 1985) (arresting officer need not complete training in order to be able to effectuate arrest).

Richard v. State, 482 N.E.2d 282 (Ind.Ct.App. 1985) (pursuant to statute, conservation officer is law enforcement officer).

Jones v. State, 928 N.E.2d 285 (Ind.Ct.App. 2010) (Gaming Commission agents have full police power).

Rogers v. State, 741 N.E.2d 395, 397-98 (Ind.Ct.App. 2000) (private security guard does not have law enforcement authority unless it is otherwise specifically given).

State v. Oddi-Smith, 878 N.E.2d 1245 (Ind. 2008) (police officers transitioning into consolidated police department need not be re-sworn).

(2) Citizens

Pursuant to Ind. Code 35-33-1-4(a), any person may arrest any other person if:

(1) The other person committed a felony in his presence;

(2) A felony has been committed and he has probable cause to believe that the other person has committed that felony; or

(3) A misdemeanor involving a breach of peace is being committed in his presence and the arrest is necessary to prevent the continuance of the breach of peace.

A person making an arrest under this section shall, as soon as practical, notify a law enforcement officer and deliver custody of the person arrested to a law enforcement officer. Ind. Code 35-33-1-4(b). The officer may then process the arrested person as if the officer had arrested him. Ind. Code 35-33-1-4(c).

Mishler v. State, 660 N.E.2d 343 (Ind.Ct.App. 1996) (I.C. 35-33-1-4 does not authorize bondsman to forcibly enter private dwelling of third party to arrest principal); see also Dewald v. State, 898 N.E.2d 488 (Ind.Ct.App. 2008) (bail bondsman may not stop and detain third parties).

State v. Hart, 669 N.E.2d 762 (Ind.Ct.App. 1996) (citizen may make arrest for a breach of peace, including driving while intoxicated).

Walker v. State, 503 N.E.2d 883 (Ind. 1987) (although Chicago police officers were outside their jurisdiction, they had authority to arrest Ds under citizen's arrest statute).

d. Did the police use excessive force?

A law enforcement officer may use "reasonable force" to make an arrest "if he reasonably believes that the force is necessary to effect a lawful arrest." Ind. Code 35-41-3-3(b). To satisfy Fourth Amendment requirements, the force need not be the least or even a less deadly alternative so long as the use of force is reasonable under Graham, infra. Plakas v. Drinski, 19 F.3d 1143, 1149 (7th Cir. 1993). No specific use of force has been held to be *per se* unreasonable but must be examined in the totality of the circumstances. Tilson v. City of Elkhart, 96 Fed. Appx. 413 (7th Cir. 2004).

Maravilla v. United States, 867 F.Supp. 1363 (N.D. Ind. 1994) (claim that police used excessive force during arrest or other seizure must be analyzed under standard of objective reasonableness; focus of reasonableness determination is very moment when officer makes split-second judgment that leads to use of force). *Affirmed by* Maravilla v. United States, 60 F.3d 1230 (7th Cir. 1995) (affirming district court decision but noting that, though not raised on appeal, the reasonableness of an early-morning raid by a dozen or more well-armed officers on a home in which several family members were present merely to arrest a 17-year-old suspected of possessing an illegal shotgun could certainly be questioned).

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865 (1989) (right to arrest or stop carries with it the right to use reasonable force; reasonableness is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight).

Ellis v. State, 553 N.E.2d 829 (Ind. 1990) (officer was justified in shooting D in back to affect arrest after D resisted being arrested by striking officer with bag of stolen goods and knocking officer to ground). But see Ellis v. Wynalda, 999 F.2d 243 (7th Cir. 1993) (finding no basis for Indiana Supreme Court's conclusions in Ellis v. State and denying arresting officer qualified immunity on civil claim of excessive force for shooting D in back).

United States v. Green, 111 F.3d 515, 471 U.S. 1, 105 S.Ct. 1694 (1985) (statute may constitutionally permit officer to use deadly force if he has probable cause to believe suspect poses threat of serious bodily harm to officer or others).

Conwell v. State, 714 N.E.2d 764 (Ind.Ct.App. 1999) (preventing suspect from swallowing drugs did not justify officer's use of choke hold). See also Grier v. State, 868 N.E.2d 443 (Ind. 2007) (analysis and rule from Conwell is equally compelled under Article 1, § 11 of Indiana Constitution).

Gaines v. State, 973 N.E.2d 1239 (Ind.Ct.App. 2012) (distinguishing Conwell, court held officer did not use unreasonable force by ordering D to spit out contraband under threat of being tazed).

Scott v. Harris, 550 U.S. 372, 127 S.Ct. 1769 (2007) (police officer's attempt to terminate a dangerous high-speed chase by using his patrol car to ram D's car was not a use of

excessive force in the course of seizing D, even though the action placed the fleeing motorist at risk of serious injury or death and threatened the lives of innocent bystanders).

Tilson v. City of Elkhart, 96 Fed. Appx. 413 (7th Cir. 2004) (use of K-9 dog to detain and hold fleeing subject was not objectively unreasonable because suspect may have been a risk to others, even though officer had only witnessed traffic offenses and suspect had not threatened officer or others or displayed a weapon).

Eaton v. State, 111 N.E.3d 1039 (Ind.Ct.App. 2018) (officer's placement of his hand onto D's chest to keep him in vehicle did not entail excessive use of force and was a reasonable attempt to control D, who failed to comply with commands to stop moving and remain in car).

C. WAS THE SEARCH PURSUANT TO A VALID SEARCH WARRANT?

To determine whether the police action constituted a search, see p. 7.

1. Was the warrant supported by probable cause?

Facts obtained through an illegal procedure violating constitutional rights may not form the basis of probable cause required for issuance of a search warrant. Watt v. State, 412 N.E.2d 90 (Ind.Ct.App. 1980). A probable cause determination has two parts: (1) whether the particular items to be seized are sufficiently connected with criminal activities, and (2) whether the items are to be found in a particular place. Probable cause assessments are to be made from "all the circumstances set forth in the affidavit." Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317 (1983).

McGrew v. State, 673 N.E.2d 787 (Ind.Ct.App. 1996), *sum aff'd*, 682 N.E.2d 1289 (search warrant may include items that, although may not be directly connected to alleged crime, may make victim's testimony more credible).

Raymer v. State, 482 N.E.2d 253, 255 (Ind. 1985) (stale information cannot support a finding of probable cause; see below).

Kail v. State, 528 N.E.2d 799 (Ind.Ct.App. 1988) (testimony that D's car was at field where marijuana was being grown and officer's experience-based statement that most growers store cultivating equipment and marijuana leaves in home sufficiently connected criminal activity with D's home).

Eaton v. State, 889 N.E.2d 297 (Ind. 2008) (it is reasonable to believe that drug dealers keep evidence of their activities in their home; thus, fact that D was present at and associated with those involved in a large drug deal was probable cause to search his home).

Heuring v. State, 140 N.E.3d 270 (Ind. 2020) (search warrants for D's home and father's barn were invalid because the affidavits lacked information that any control over GPS device police had planted on D's vehicle was knowingly unauthorized or that there was intent to deprive the sheriff's department of the tracker's value or use).

Hensley v. State, 778 N.E.2d 484 (Ind.Ct.App. 2002) (police officer's affidavit did not link drugs allegedly purchased by D with premises described in affidavit; affidavit merely contained description of home and allegation that D had purchased drugs the previous day); see also Walker v. State, 829 N.E.2d 591 (Ind.Ct.App. 2005).

Merritt v. State, 803 N.E.2d 257 (Ind.Ct.App. 2004) (officer's affidavit failed to link unidentified black male with drugs to D's residence; it did not set forth facts from which a reasonable inference could be drawn that numerous drug transactions had taken place at D's residence, or that unidentified male frequented, resided, or concealed contraband there); Cf. Massey v. State, 816 N.E.2d 979 (Ind.Ct.App. 2004) (distinguishing Merritt).

Marlowe v. State, 786 N.E.2d 751 (Ind.Ct.App. 2003) (although controlled buys occurred at D's place of business rather than his home, totality of evidence supported finding that probable cause existed for search of D's home; informant told police that D had drugs at his residence on day before search and that D was selling drugs at his business).

Allen v. State, 798 N.E.2d 490 (Ind.Ct.App. 2003) (it was reasonable for detective to believe that weapons would be found at apartment belonging to one of suspect's cousins and where at least one suspect spent a significant amount of time).

Cheever-Ortiz v. State, 825 N.E.2d 867 (Ind.Ct.App. 2005) (considering anonymous tip, stale information involving D, and police surveillance of D's home, there was substantial basis to determine that probable cause existed to issue search warrant for D's home); see also Scott v. State, 883 N.E.2d 147 (Ind.Ct.App. 2008).

Edwards v. State, 832 N.E.2d 1072 (Ind.Ct.App. 2005) (presence of marijuana seeds and stems in D's trash, along with testimony from detective that he found packaging material such as would be used to receive large quantities of marijuana and divide it for distribution, provided probable cause for issuance of search warrant); see also Love v. State, 842 N.E.2d 420 (Ind.Ct.App. 2006).

Gray v. State, 758 N.E.2d 519 (Ind. 2001) (similar characteristics found between first handwriting sample and crime scene post-it note provided substantial basis to support issuance of warrant; manner in which D became connected to case was not important to affidavit).

Casady v. State, 934 N.E.2d 1181 (Ind.Ct.App. 2010) (after voyeuristic images were found in D's camera, warrant to search D's home was supported by probable cause based in part on officer's opinion that, based on his experience with voyeurism cases, voyeuristic people often collect and keep voyeuristic material, and that he therefore expected to find more evidence of criminal voyeurism in D's home).

Albrecht v. State, 159 N.E.3d 1004 (Ind.Ct.App. 2020) (substantial basis for second search warrant for hard drive found in bathroom of residence during execution of warrant in child molesting investigation).

Herron v. State, 44 N.E.3d 833 (Ind.Ct.App. 2015) (incomplete boilerplate affidavit for search warrant authorizing a blood draw failed to establish probable cause because it failed to allege that D was driving).

Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942 (1978) (to secure a warrant to investigate the cause of a fire, official must show more than bare fact that a fire occurred).

Mehring v. State, 884 N.E.2d 371 (Ind.Ct.App. 2008) (in determining whether an affidavit provided probable cause for issuance of search warrant, doubtful cases are to be resolved in favor of upholding the warrant). See also Pattison v. State, 958 N.E.2d 11 (Ind.Ct.App. 2011).

United States v. Gourde, 440 F.3d 1065 (9th Cir. 2006) (all data necessary to show probable cause for issuance of search warrant must be contained within the four corners of a written affidavit given under oath).

McGrath v. State, 95 N.E.3d 522 (Ind. 2018) (substantial basis existed to support warrants for thermal imaging scanners where informant reported having observed criminal activity firsthand and was corroborated by officer who saw covered windows and high intensity glow consistent with indoor grow operations).

a. Hearsay

A probable cause affidavit based on hearsay must either contain: 1) reliable information establishing the credibility of the hearsay source and a factual basis for the information furnished; or 2) information that establishes that the totality of circumstances corroborates the hearsay. Ind. Code 35-33-5-2(b).

The trustworthiness of hearsay for the purpose of proving probable cause can be established in a number of ways, including where: 1) the informant has given correct information in the past; 2) independent police investigation corroborates the informant's statements; 3) some basis for the informant's knowledge is demonstrated; or 4) the informant predicts conduct or activity by the suspect that is not ordinarily easily predicted. Jaggers v. State, 687 N.E.2d 180, 182 (Ind. 1997).

(1) Is the hearsay declarant reliable?

(a) Confidential informant ("CI")

Uncorroborated hearsay from a source whose credibility is itself unknown is insufficient by itself to support a finding of probable cause. Illinois v. Gates, 462 U.S. 213, 227, 103 S.Ct. 2317 (1983). Use of information received from anonymous informants presents heightened reliability concerns. Jaggers v. State, 687 N.E.2d 180, 182-83 (Ind. 1997) (noting that this situation is "rife with the potential for pranks and mischief," so some form of corroboration of informant's accusations is even more essential when informant is anonymous).

Doss v. State, 649 N.E.2d 1045 (Ind.Ct.App. 1995) (officer's personal feelings about CI's credibility was irrelevant and did not meet requirements of Ind. Code 35-33-5-2(a)(2)).

Bradley v. State, 609 N.E.2d 420 (Ind. 1993) (probable cause affidavit was insufficient where it did not contain reliable information establishing credibility of anonymous CI); see also Cartwright v. State, 26 N.E.3d 663 (Ind.Ct.App. 2015).

Snover v. State, 837 N.E.2d 1042 (Ind.Ct.App. 2005) (conclusory statement that CI provided information in the past which was determined to be credible and reliable without further evidence is insufficient to establish reliability); see also Gerth v. State, 51 N.E.3d 368 (Ind.Ct.App. 2016).

Powers v. State, 440 N.E.2d 1096 (Ind. 1982) (where informant provided accurate and correct information on eight prior occasions, affidavit showed informant was reliable).

Robinson v. State, 888 N.E.2d 1267 (Ind.Ct.App. 2008) (in addition to declaration against interest, face-to-face nature of informant's tip tended to establish its reliability because officers were able to judge informant's credibility first-hand, and face-to-face tipster surrendered her anonymity, making herself accountable for lodging false complaint).

Marlowe v. State, 786 N.E.2d 751 (Ind.Ct.App. 2003) (although officer did not offer factual basis for hearsay at probable cause hearing, officer responded affirmatively when magistrate asked him whether police department had relied on CI in past and whether information from CI had always proven truthful and accurate).

NOTE: In order for an independent magistrate to make a probable cause determination, the police may not select only the information which makes the judicial determination of probable cause more likely and omit other relevant information. Thus, if dealing with a search warrant based on a CI's hearsay, file a motion to compel the discovery of any promises, foregone prosecutions, or deals made in return for the CI's help. For such a motion, contact IPDC's general litigation assistance or see the similar language in "Motion to reveal agreement entered into between the State and Prosecution Witnesses" and "Motion to reveal the identity of the confidential informant", available in the IPDC website.

Newby v. State, 701 N.E.2d 593, 596 (Ind.Ct.App. 1998) (probable cause affidavit that did not include that State promised not to prosecute CI in return for his help on this case was misleading).

Ware v. State, 859 N.E.2d 708 (Ind.Ct.App. 2007) (it is improper for police to mislead judge by failing to disclose evidence questioning informant's credibility).

(b) Family relationships

In re M.R.D., 482 N.E.2d 306 (Ind.Ct.App. 1985) (hearsay was not reliable simply because mother whose minor daughter was attending party with alcohol was declarant). But see Brooks v. State, 526 N.E.2d 1027 (Ind.Ct.App. 1988) (family relationships may illustrate reliability of informant).

Hurst v. State, 938 N.E.2d 814 (Ind.Ct.App. 2010) (although father is not automatically reliable as a concerned citizen, father showing police photograph of marijuana which was allegedly texted from his daughter who was living with mother and mother's boyfriend sufficiently corroborated the father's claim that his daughter told him that mother and boyfriend kept marijuana in home; children are likely to report suspicious activity to their parents, who in turn will transmit that information to law enforcement).

Richard v. State, 820 N.E.2d 749 (Ind.Ct.App. 2005) (D's eight-year-old daughter's personal observation of marijuana, the specificity of her statements with regard to location of marijuana, and her statement that she knew appearance of marijuana from being around it before, formed a substantial basis to determine that there was a fair probability that evidence of possession of marijuana would be found in D's barns and house; daughter was considered reliable citizen informant and no incriminating circumstances cast suspicion on her reliability).

(c) Eyewitnesses/Victims

Information gleaned from cooperative citizens who are either eyewitnesses or victims of a crime may be relied upon in determining whether probable cause exists for a search where there are no circumstances which call the informant's motives into question. Pawloski v. State, 269 Ind. 350, 354-55, 380 N.E.2d 1230, 1232-33 (1978); Bryant v. State, 655 N.E.2d 103, 108 (Ind.Ct.App. 1995).

Illinois v. Gates, 462 U.S. 213, 233-34, 103 S.Ct. 2317 (1983) ("if an unquestionably honest citizen comes forward with a report of criminal activity– which if fabricated would subject him to criminal liability–we have found rigorous scrutiny of the basis of his knowledge unnecessary").

Short v. State, 443 N.E.2d 298 (Ind. 1982) (citizen/victim of crime is reliable informant). See also Clifford v. State, 474 N.E.2d 963 (Ind. 1985); and Washington v. State, 496 N.E.2d 392 (Ind. 1986).

Riddle v. State, 275 N.E.2d 788 (Ind. 1971) (not all alleged victims are credible sources of information; malicious or spiteful pointing out of another person as criminal without basis in fact is not unknown in our society).

Ruth v. State, 462 N.E.2d 269 (Ind.Ct.App. 1984) (even if court were to presume corporation-victim's credibility, it could not presume that all of employees speaking on its behalf were credible informants possessing first-hand knowledge of pertinent facts).

Healthscript, Inc. v. State, 724 N.E.2d 265 (Ind.Ct.App. 2000), *sum aff'd*, 770 N.E.2d 810 (Ind. 2002) (credibility of informant is established for issuance of search warrant if informant is cooperative citizen aiding in investigation of ongoing criminal investigation of conduct informant has witnessed).

Billingsley v. State, 980 N.E.2d 402 (Ind.Ct.App. 2012) (911 call from caller who stated D "held her hostage" previously, was armed at a VFW post in a dangerous area and was in a tan or brown Dodge Durango was not an anonymous caller, but a concerned citizen and fact she called 9-1-1 rather than a police station entitles the call to a degree of reliability).

(d) Cooperative citizens

A cooperative citizen who is neither a victim nor an eyewitness must be corroborated in order to be a basis of probable cause for a search warrant. Bryant v. State, 655 N.E.2d 103 (Ind.Ct.App. 1995).

Kellems v. State, 842 N.E.2d 352 (Ind. 2006), *rev'd on reh'g on other grounds*, 849 N.E.2d 1110 (Ind. 2006) (there may well be greater indicia of reliability in report of "concerned citizen" as distinguished from "professional informant," but this goes only to reasonable suspicion, not probable cause); cf. Scott v. State, 883 N.E.2d 147 (Ind.Ct.App. 2008).

Brown v. State, 905 N.E.2d 439 (Ind.Ct.App. 2009) (search warrant was defective for lack of probable cause when detective, who both applied for and executed the warrant, relied on information from a concerned caller completely unknown to him and did not corroborate the information or caller's credibility).

Kelly v. State, 997 N.E.2d 1045 (Ind. 2013) (officers' reliance on an untested concerned citizen's uncorroborated report about a man coming to house to sell cocaine was not sufficient; susceptibility to prosecution for false informing or participation in criminal enterprise is a relevant factor in the analysis but not enough on its own to infuse citizen's statements with reliability sufficient to support a finding of probable cause).

(e) Police dispatch

Where police officers in the street act in good faith reliance on a dispatch from their own or another police agency that a crime has been committed, there is no need to show the source of the dispatched information or the reliability of the dispatcher's informant. Moody v. State, 448 N.E.2d 660 (Ind. 1983).

Redden v. State, 850 N.E.2d 451 (Ind.Ct.App. 2006) (officer's assertions regarding another officer's assertions based on that officer's observations could establish probable cause to support search warrant). But see State v. Glass, 769 N.E.2d 639 (Ind.Ct.App. 2002) (to extent Moody suggests that every call to a police dispatcher is sufficient in itself to satisfy Fourth Amendment, it paints Fourth Amendment jurisprudence with too broad a brush).

State v. Stevens, 33 N.E.3d 1200 (Ind.Ct.App. 2015) (police had probable cause to arrest D for buying pseudoephedrine at drug store even though the suspect had not been convicted of a prior methamphetamine charge, as the Indiana Data and Communication System erroneously reported).

Possible argument: The police officer must rely in good faith on the dispatch. Thus, if the first police officer makes the dispatch upon evidence or a tip which a reasonably prudent officer would know is not enough to justify a stop or investigation, then the officer was not acting in good faith.

(f) Statements against penal interest

Declarations against penal interest can furnish a sufficient basis for establishing the credibility of the informant or the hearsay within the meaning of Ind. Code 35-33-5-2(b). Houser v. State, 678 N.E.2d 95 (Ind. 1997).

United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075 (1971) ("The underlying thread binding these cases together is that an informant, after arrest or confrontation by police, admitted committing criminal offenses under circumstances in which the crimes otherwise would likely have gone undetected.").

State v. Spillers, 847 N.E.2d 949 (Ind. 2006) (informant was caught "red-handed" with drugs in his possession before revealing his source; although informant admitted committing additional crimes of possession of cocaine, this was not a declaration against penal interest because it did not subject him to any additional criminal liability).Hirshey v. State, 852 N.E.2d 1008 (Ind.Ct.App. 2006) (where informant had already been arrested for dealing methamphetamine, and her statements did not tend to expose her to any greater criminal liability, her statements to the police were not against penal interest).

Newby v. State, 701 N.E.2d 593 (Ind.Ct.App. 1998) (statement that placed declarant near drugs was not statement against interest because it was made pursuant to immunity deal with prosecutor).

Iddings v. State, 772 N.E.2d 1006 (Ind.Ct.App. 2002) (fact that informant may have been offered a "break" for providing information and implicating himself in manufacturing methamphetamine at D's residence was insufficient to undermine his credibility for purpose of concluding that probable cause existed to search D's residence).

Snover v. State, 837 N.E.2d 1042 (Ind.Ct.App. 2005) (statement was not against penal interest because drugs had already been found in car prior to individual's statements).

Robinson v. State, 888 N.E.2d 1267 (Ind.Ct.App. 2008) (potential crimes admitted by informant in face-to-face meeting she initiated with police would almost certainly have gone undetected, thus her admissions carried their own indicia of credibility sufficient at least to support a finding of probable cause under Spillers (above)); see also State v. Stone, 151 N.E.3d 815 (Ind.Ct.App. 2020).

Phillips v. State, 174 N.E.3d 635 (Ind.Ct.App. 2021) (informant's statements against penal interest beyond that for which she was arrested were sufficient to establish probable cause for a warrant to search D's home; although the better course would have been for the officer to reveal informant's statement about her recent drug use, D failed to establish that the officer omitted any material facts in the affidavit that would have left probable cause in doubt).

Creekmore v. State, 800 N.E.2d 230 (Ind.Ct.App. 2003) (informant's credibility could be inferred because in reporting source of drugs in his car, informant implicated himself in delivery of marijuana and mushrooms to another residence on other occasions).

Leicht v. State, 798 N.E.2d 204 (Ind.Ct.App. 2003) (informant's hearsay statements about long-term relationship dealing marijuana for D were statements against penal interest; Baker, J., dissenting, noted that informant did not subject herself to additional criminal liability by revealing her source and argued that Newby compelled different outcome in this case).

Lanham v. State, 937 N.E.2d 417 (Ind.Ct.App. 2010) (informant's statement that she had smoked marijuana with D was a statement against penal interest, not a statement motivated to curry favor with the police where she had not been caught in commission of an unlawful act, nor was she facing a criminal charge or juvenile allegations).

Smith v. State, 953 N.E.2d 651 (Ind.Ct.App. 2011) (although officer told CI that he would not go to jail and that any possible theft charges would vanish, the officer made these statements after the CI and D committed the theft; before the CI committed the theft with the D, the officer told him not to commit the theft; thus, CI's statements that he committed theft with D were against his penal interest).

(2) Did the declarant have firsthand knowledge?

Firsthand observation by an informant indicates the basis of his knowledge and may compensate for a deficient showing of the informant's credibility. Illinois v. Gates, 462 U.S. 213, 234, 103 S.Ct. 2317 (1983).

Dolliver v. State, 598 N.E.2d 525 (Ind. 1992) (general rule is that affidavit to obtain warrant based on "second-hand hearsay" is insufficient to support warrant).

Bradley v. State, 609 N.E.2d 420, 423 (Ind. 1993) (statement from officer that CI's tip was based on personal knowledge was insufficient, where affidavit contained no facts stating how CI obtained firsthand observation or knowledge of D's wrongdoing).

Mers v. State, 482 N.E.2d 778 (Ind.Ct.App. 1985) (search warrant that is based on inference upon inference fails to establish probable cause). See also Everroad v. State, 590 N.E.2d 567 (Ind. 1992).

State v. Spillers, 847 N.E.2d 949 (Ind. 2006) (CI's assertion that D was his drug source and he observed event firsthand carries little weight because there was no corroboration of his claim); see also State v. Mason, 829 N.E.2d 1010 (Ind.Ct.App. 2005).

Bradley v. State, 4 N.E.3d 831 (Ind.Ct.App. 2014) (for search warrant based on affidavit largely relying on hearsay, trustworthiness of witnesses' statements were established by showing basis for their knowledge and independent police investigation).

Culver v. State, 519 N.E.2d 197 (Ind.Ct.App. 1988) (firsthand observation of D with particular kind of revolver and drugs indicates basis of knowledge and compensates for less than full demonstration of credibility).

Carnes v. State, 480 N.E.2d 581 (Ind.Ct.App. 1985) (informant's personal observance of marijuana in D's home within 72 hours of affidavit was not remote factual information and established probable cause).

Benefiel v. State, 578 N.E.2d 338 (Ind. 1991), *cert. den'd* (if affidavits presented to a trial judge requesting a search warrant contain "second-hand hearsay information," they are insufficient as far as search for property is concerned).

(3) Was the hearsay corroborated?

The totality of circumstances must corroborate the hearsay statements and the informant's information. The confirmation of "easily obtained facts and conditions existing at the time of the tip" is insufficient to establish an informant's credibility. Newby v. State, 701 N.E.2d 593, 601 (Ind.Ct.App. 1998) (quoting Illinois v. Gates, 462 U.S. 213 (1983)).

Newby v. State, *supra* (informant's description of D's residence, its location, and vehicles observed there were easily observable and within public domain; thus, they did not corroborate tip).

Jaggers v. State, 687 N.E.2d 180 (Ind. 1997) (although police investigation corroborated informant's assertion that D lived where informant claimed he did and

that marijuana was being grown on plots where informant said it was, investigation did not corroborate that D's house contained evidence of crime).

State v. Mason, 829 N.E.2d 1010 (Ind.Ct.App. 2005) (while police corroborated most of an anonymous informant's allegations re: D's age, address, and color/make of D's truck, they failed to corroborate the "critical claim" that D was engaged in criminal activity; further, the search warrant and affidavit tell nothing about the anonymous informant to lend credibility to the tip).

Bryant v. State, 655 N.E.2d 103 (Ind.Ct.App. 1995) (there was insufficient probable cause for warrant where supporting affidavit contained assertions which were entirely speculative, misleading, and were based upon questionable conclusions made by investigating officers).

Bradley v. State, 609 N.E.2d 420 (Ind. 1993) (fact that person with D's name resided at address given in tip and that crime fitting description of one related by CI had actually occurred did not constitute probable cause to believe caller was telling truth; although officer did not relate details of crime to anyone, he could not state that victims or other personnel did not do so).

Flaherty v. State, 443 N.E.2d 340 (Ind.Ct.App. 1982) (affidavit was deficient because only by speculation could neutral magistrate have singled out D's apartment as one where informant obtained drug).

Dolliver v. State, 598 N.E.2d 525 (Ind. 1992) (fact that police verified that person living in trailer was D and that D was a convicted felon just as anonymous caller had said did not sufficiently corroborate fact that D was selling drugs out of trailer; police should have set up surveillance of trailer).

Hayworth v. State, 904 N.E.2d 684 (Ind.Ct.App. 2009) (totality of circumstances did not corroborate informant's statements because police did not corroborate any illegal activity by D and only confirmed information that was readily available to the general public).

Buford v. State, 40 N.E.3d 911 (Ind.Ct.App. 2015) (neither smell of burnt marijuana outside D's home nor observation of marijuana "shake" on table corroborated anonymous tipster's hearsay statement that there was drug dealing activity at the house).

Edwards v. State, 682 N.E.2d 800 (Ind.Ct.App. 1996) (officer's observance of activities which are indicative of drug trade corroborated CI's tip).

Houser v. State, 678 N.E.2d 95 (Ind. 1997) (statement against penal interest along with some corroboration constituted probable cause).

b. Controlled buys

Where controls are adequate, the affiant's personal observation of a controlled buy may suffice as grounds for a finding of probable cause. Mills v. State, 379 N.E.2d 1023 (Ind.Ct.App. 1978).

Methene v. State, 720 N.E.2d 384 (Ind.Ct.App. 1999) (affidavit presented issuing magistrate with virtually no factual basis that controlled buy had occurred; affiant's failure to set forth any facts to establish adequate controls rendered affidavit alleging controlled buy insufficient to establish probable cause).

Flaherty v. State, 443 N.E.2d 340 (Ind.Ct.App. 1982) (where police officer stated in affidavit that he saw informant enter apartment building but did not state that he saw informant enter specific unit for which he sought a search warrant, affidavit was insufficient to support warrant).

State v. Vance, 119 N.E.3d 626 (Ind.Ct.App. 2019) (search for D's residence was not supported by probable cause due to State's omission of material facts indicating irregularities in controlled buy, including a break in surveillance, failure to search drug dealer and inference that dealer lived in residence he was seen leaving, but was instead a visitor; these omissions combined indicated drugs could have come from location other than residence to be searched).

Wright v. State, 836 N.E.2d 283 (Ind.Ct.App. 2005) (pat-down search of informant was sufficient in controlled buy; adequacy of controls in police buy go to weight and credibility of evidence presented rather than State's burden of proof). See also Ramsey v. State, 853 N.E.2d 491 (Ind.Ct.App. 2006); and Heyen v. State, 936 N.E.2d 294 (Ind.Ct.App. 2010).

Caudle v. State, 749 N.E.2d 616, (Ind.Ct.App. 2001), *reh'g granted on other grounds,* 754 N.E.2d 31 (detective's actions and observations while using confidential informant to effectuate controlled buy, as outlined in affidavit, were sufficient to justify magistrate's finding of probable cause to issue warrant).

Haynes v. State, 431 N.E.2d 83 (Ind. 1982) (officers observed informant leave residence but did not see him enter; controls over buy held adequate; search warrant was upheld because officers watched (house entire time and testified that no one else entered or left house).

Iddings v. State, 772 N.E.2d 1006 (Ind.Ct.App. 2002) (despite concerns regarding inadequate controlled buy and misleading portions of detective's testimony, there was substantial basis upon which to conclude there was probable cause to believe evidence of methamphetamine dealing and manufacturing might be recovered at D's residence).

c. Staleness

(1) Information used to support probable cause

The information given to the magistrate or judge in the application for a search warrant must be timely. Breitweiser v. State, 704 N.E.2d 496, 499 (Ind.Ct.App. 1999). Stale information cannot support a finding of probable cause. Raymer v. State, 482 N.E.2d 253, 255 (Ind. 1985). It only gives rise to a mere suspicion and not a reasonable belief, especially when the items to be obtained in a search are easily concealed and moved.

State v. Haines, 774 N.E.2d 984 (Ind.Ct.App. 2002) (at probable cause hearing, deputy sheriff failed to tell issuing judge that reliable confidential informant purchased cocaine from residence anywhere from two to six weeks prior to hearing; this information was stale).

Frasier v. State, 794 N.E.2d 449 (Ind.Ct.App. 2003) (although it was difficult, if not impossible, to tell age of much of the information in probable cause affidavit, evidence which D sought to suppress was admissible under "good faith" exception to exclusionary rule).

Allen v. State, 798 N.E.2d 490 (Ind.Ct.App. 2003) (although shootings occurred two months prior to execution of search warrant, initial probable cause continued to exist at time of search).

Foster v. State, 633 N.E.2d 337 (Ind.Ct.App. 1994) (there was probable cause to believe that handgun could be found 29 days after murder).

Cheever-Ortiz v. State, 825 N.E.2d 867 (Ind.Ct.App. 2005) (trial court neither erred in questioning detective about 1999 drug investigation involving D nor in considering that information as part of totality of circumstances creating probable cause).

Scott v. State, 883 N.E.2d 147 (Ind.Ct.App. 2008) (officer's information regarding detecting odor of ether at D's residence within previous two months was not stale).

Mehring v. State, 884 N.E.2d 371 (Ind.Ct.App. 2008) (computer images depicting child pornography linked to D's IP address were not stale after 10.5 months, considering nature of crime/evidence sought and detective's opinion regarding retention habits of people having child pornography); see also Chiszar v. State, 936 N.E.2d 816 (Ind.Ct.App. 2010).

Shell v. State, 927 N.E.2d 413 (Ind.Ct.App. 2010) (court rejected argument that, because information given by confidential informant was approximately three weeks old and evidence could have been placed in trash in the two weeks before the search, the search warrant was based on stale information).

Byers v. State, 134 N.E.3d 1051 (Ind.Ct.App. 2019) (four-day interval between drug activity in video and the finding of probable cause did not render the warrant stale).

(2) Time between issuance of warrant and execution

Ind. Code 35-33-5-7 requires a search warrant to be executed within ten days after the date it is issued. Whether the probable cause supporting a warrant becomes stale due to the passage of time between the issuance and execution of the warrant depends on the nature of the evidence establishing probable cause and the nature of the crime alleged.

Ashley v. State, 241 N.E.2d 264 (Ind. 1968) (probable cause to search for items that are easily moved or concealed, e.g., illegal drugs, is more subject to staleness problems; thus, search warrant for marijuana could not be based on information that was eight days old).

Huffines v. State, 739 N.E.2d 1093 (Ind.Ct.App. 2000) (although police executed search warrant for D's home within ten-day statutory limit, considering totality of circumstances, probable cause dissipated in eight days that elapsed between time of warrant's issuance and search of D's home).

Caudle v. State, 749 N.E.2d 616 (Ind.Ct.App. 2001), *reh'g granted* 754 N.E.2d 33 (even if warrant was stale, evidence from search was admissible because police executed search warrant in good faith).

Breitweiser v. State, 704 N.E.2d 496 (Ind.Ct.App. 1999) (due to ongoing nature of crime, lapse of eight days from finding of marijuana stems in D's trash and issuance of warrant and lapse of three days between issuance and execution of warrant did not invalidate probable cause).

McGrew v. State, 673 N.E.2d 787 (Ind.Ct.App. 1996), *sum aff'd*, 682 N.E.2d 1289 (court rejected staleness challenge to search warrant for sexual device issued 81 days after alleged commission of crime; sexual device was type of property which D could reasonably be expected to keep for length of time in question).

Moran v. State, 644 N.E.2d 536 (Ind. 1994) (court rejected federal and state staleness challenges to issuance of warrants, where most recently acquired evidence was nearly two weeks old and trash search had been conducted three months prior to execution of warrant).

Williams v. State, 426 N.E.2d 662 (Ind. 1981) (no staleness problems where there was probable cause to believe burnt remains of purse would be at house that burned down 67 days earlier).

Brown v. Eaton, Hancock Co. Prosecutor, 164 N.E.3d 153 (Ind.Ct.App. 2021) (in civil forfeiture proceeding, trial court erred in excluding data obtained from D's cell phone on basis of a nine-day delay in officer's execution of search warrant).

d. Anticipatory search warrants

Probable cause may not be based on the occurrence of a future event. Article I, § 11 of the Indiana Constitution and Ind. Code 35-33-5-1 & -2 require that probable cause exist before the warrant is issued. Although a search warrant may contain conditions precedent which must occur prior to its execution, those conditions should appear within the four corners of the warrant and the warrant must be supported by probable cause at the time it is issued. A warrant which relies on the occurrence of a future event to supply the requisite probable cause is deficient on its face. Ind. Code 35-33-5-2(a)(2)(A).

Newby v. State, 701 N.E.2d 593 (Ind.Ct.App. 1998) (warrant which lacked probable cause until controlled buy occurred was invalid); but see United States v. Grubbs, 547 U.S. 90, 126 S.Ct. 1494 (2006) (anticipatory search warrants are not barred by Fourth Amendment; probable cause may be established on the basis of a belief that an item will be in a specified place when a triggering event occurs if probable cause exists that the triggering event will occur; warrant's failure to specify triggering condition does not invalidate search).

Marchetti v. State, 725 N.E.2d 934 (Ind.Ct.App. 2000) (language in Newby suggesting that anticipatory search warrants are invalid in Indiana is dicta and need not be followed; anticipatory search warrants are statutorily valid in Indiana when probable cause exists at time search warrant is issued).

Rios v. State, 762 N.E.2d 153 (Ind.Ct.App. 2002) (anticipatory search warrant for delivery residence and persons present therein was not deficient because affidavit plainly stated that law enforcement authorities believed that package contained cocaine, which had been examined pursuant to search warrant, and was being shipped to D, which permitted reasonable inference that D may have been trafficking controlled substances).

e. Change in circumstances between issuance and service of warrant

It is important for the government to accurately present all relevant information to the judge issuing a warrant. Newby v. State, 701 N.E.2d 593 (Ind.Ct.App. 1998); Jaggers v. State, 687 N.E.2d 180 (Ind. 1997). After the search warrant has been issued but before its execution, if the State learns that a material fact establishing probable cause underlying the warrant is

incorrect, the State must inform the issuing magistrate of the new facts. If the State fails to do so, the warrant is per se invalid.

Query v. State, 745 N.E.2d 769 (Ind. 2001) (court found extremely unusual example of immaterial change where, although new information undermined crime suggested by information supplied to magistrate, it also simultaneously provided probable cause for second crime; if second search warrant had been issued, police would have been authorized to search same location for virtually identical items).

Majko v. State, 503 N.E.2d 898 (Ind. 1987), *overruled on other grounds*, 658 N.E.2d 563 (Ind. 1995) (where statement used to establish probable cause is recanted after sentencing, D has right to hearing on question of probable cause for original arrest warrant).

f. False or omitted information in affidavit

If a defendant establishes by a preponderance of the evidence that a false statement knowingly, intentionally, or with a reckless disregard for the truth was included by the affiant in the search warrant affidavit, and the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided, and the fruits of the search excluded. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674 (1978).

Stephenson v. State, 796 N.E.2d 811 (Ind.Ct.App. 2003) (probable cause affidavit contained several false and misleading statements by investigating officer; affidavit suggests that officer had personal knowledge and witnessed drug purchase and did not indicate that informant simply told him these facts).

Ware v. State, 859 N.E.2d 708 (Ind.Ct.App. 2007) (when State omits information from probable cause affidavit, in order for warrant to be invalid D must show: 1) police omitted facts with intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading; and 2) that affidavit if supplemented by omitted information would not have been sufficient to support finding of probable cause; here, fact police omitted from pc affidavit a witness's identification of a man other than D did not invalidate warrant).

Gerth v. State, 51 N.E.3d 368 (Ind.Ct.App. 2016) (officer omitted highly material information from affidavit regarding confidential informant's (CI's) credibility by failing to mention that the CI was deactivated for failing to complete requirements of his CI agreement, and that once that happened, officer stopped investigating D).

Bradley v. State, 4 N.E.3d 831 (Ind.Ct.App. 2014) (witnesses backtracking at trial from earlier allegations that D sold them marijuana did not negate probable cause determination; legality of search warrant focuses on facts presented to issuing judge, not on facts alleged after warrant was issued).

Keeylen v. State, 14 N.E.3d 865 (Ind.Ct.App. 2014), *aff'd on reh'g*, 21 N.E.3d 840 (detective explained that the reason he omitted information regarding improper GPS searches was not to mislead trial judge, but to keep from D the fact that police had been tracking his movements; moreover, it is unlikely he was attempting to mislead the judicial officer issuing the search warrant because the same officer who issued the warrant had previously authorized the GPS tracking and was thus well aware of it).

For a discussion on this topic, see subsection on exception to good faith doctrine, *Did the officer include false or misleading information in the affidavit in order to obtain the warrant?* p. 152.

g. Dog alert

Florida v. Harris, 133 S.Ct. 1050 (2013) (dog's training records regarding drug detection sufficiently established its reliability for sniffs as tool to determine if there is probable cause to search).

Rios v. State, 762 N.E.2d 153 (Ind.Ct.App. 2002) (given dog's training and experience, dog's alert to D's package clearly established fair probability that it contained drugs, and thus established probable cause necessary for warrant).

Neuhoff v. State, 708 N.E.2d 889 (Ind.Ct.App. 1999) (where more than one dog alerted to suspicious-looking package, there was probable cause to support warrant for package).

United States v. Cruz-Roman, 312 F.Supp.2d 1355 (W.D. Wash. 2004) (drug dog's alert in front of D's apartment did not provide probable cause for arrest because dog-handler team was not certified, and dog had no track record of reliability).

Possible argument: In Neuhoff, the dog's reliability was established through its training and participation in a number of searches. A dog hit, without establishing the dog's reliability, does not constitute probable cause. To attack the reliability of the dog, move for a hearing regarding the admissibility of dog-alert evidence under Ind. Evid. Rule 702(b). For materials addressing challenges to dog sniff evidence, contact IPDC's general litigation assistance. See, e.g., United States v. Jordan, 455 F. Supp. 3d 1247, 1256 (D. Utah 2020) (dog found unreliable as training program did not remove the risk of handler bias or cuing and only underwent four narcotics trainings in the four months after he was certified).

h. Odor of marijuana

Police officers' assertion they detected the smell of raw marijuana based on "training and experience" presents substantial basis for probable cause to support a search warrant. The officers "need not further detail their qualifications to recognize this odor beyond their basic 'training and experience.'" Bunnell v. State, 172 N.E.3d 1231 (Ind. 2021).

i. Multiple units

Figert v. State, 686 N.E.2d 827 (Ind. 1997) (when police obtained warrant to jointly search three trailers situated in U-shape and alone in rural area, affidavit needed to establish probable cause to justify search of each trailer and not all trailers collectively).

Tungate v. State, 899 N.E.2d 60 (Ind.Ct.App. 2009) (where there was probable cause to search barn and white camper trailer on property, trial court properly concluded that State lacked probable cause to search tan camper, absent evidence that there was a nexus between the barn and the tan camper; fact that trooper observed the tan camper next to the barn is insufficient).

2. Did the warrant describe the place/person to be searched and the items to be seized with sufficient particularity?

If the warrant fails to describe the things to be seized with reasonable detail, the warrant is defective. Lack of particularity in a warrant cannot be cured by a detailed warrant affidavit

unless it is specifically incorporated by reference. Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284 (2004).

a. Description of items to be seized

A search warrant is invalid if it leaves the executing officer with any discretion concerning the items to be seized. Thompson v. State, 613 N.E.2d 461, 465 (Ind.Ct.App. 1993). The search must be limited in scope to certain specifically enumerated items. Ind. Code 35-33-5-2. The items may include "mere evidence" and is not limited to fruits of a crime, criminal instrumentalities and contraband. Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 (1967). General warrants authorizing the seizure of any and all items are proscribed by both the U.S. and Indiana Constitutions. Layman v. State, 407 N.E.2d 259 (Ind.Ct.App. 1980). While items to be searched for and seized must be described with some specificity, there is no requirement that there be an exact description. Phillips v. State, 514 N.E.2d 1073 (Ind. 1987); Overstreet v. State, 783 N.E.2d 1140, 1158 (Ind. 2003).

Warren v. State, 760 N.E.2d 608 (Ind. 2002) (search warrant that included language authorizing search for "any other indicia of criminal activity including but not limited to books, records, documents, or any other such items" granted police officers unlawful unbridled discretion to conduct general exploratory search).

Levenduski v. State, 876 N.E.2d 798 (Ind.Ct.App. 2007) (evidence of methamphetamine manufacturing was illegally seized as part of over-broad catch-all phrase of warrant because State failed to present any evidence that the evidence was in plain view).

Conn v. State, 496 N.E.2d 604 (Ind.Ct.App. 1986) (where search warrant specified nine items as object of search, plain view could not justify seizure of 254 items; suppression granted).

Hester v. State, 551 N.E.2d 1187 (Ind.Ct.App. 1990) (warrant authorizing search of D's car for "any and all property which may have been the subject of Theft or Burglary" at any of six homes listed was improper general warrant).

State v. Foy, 862 N.E.2d 1219 (Ind.Ct.App. 2007) (circumstances of case and nature of crime under investigation can help define parameters of relevant evidence; thus, warrant that authorized seizure of "any and all trace evidence" that might be relevant in determining victim's death within context of murder investigation was sufficiently specific).

Carter v. State, 105 N.E.3d 1121 (Ind.Ct.App. 2018) (warrant was sufficiently specific for search of cell phone; a computer search may be as extensive as reasonably necessary to locate the items described in the warrant); see also Price v. State, 119 N.E.3d 212 (Ind. Ct. App. 2019) (evidence seized from D's phone was not pursuant to an impermissibly general warrant).

Ramirez v. State, 174 N.E.3d 181 (Ind. 2021) (warrant covered seizure of photos and videos but security footage seized while further warrant obtained; search reasonable under Indiana constitution and exigent circumstances exception).

b. Description of place to be searched

When a warrant is challenged for insufficient particularity, the State must show that the description was such that an officer executing the warrant could, with reasonable effort,

identify the place intended to be searched. The validity of the warrant must be assessed on the basis of information officers had a duty to discover and disclose to the magistrate, but facts that emerge after the warrant is issued have no bearing on its initial validity. Maryland v. Garrison, 480 U.S. 79, 107 S.Ct. 1013 (1987).

Ewing v. State, 613 N.E.2d 53 (Ind.Ct.App. 1993), *overruled on other grounds*, 629 N.E.2d 1238 (Ind. 1994) (fact that warrant specified house that belonged to wrong person who happened to have same name as D did not invalidate warrant when officers actually found appropriate home).

Taylor v. State, 614 N.E.2d 907 (Ind.Ct.App. 1993) (place to be searched adequately identified even though warrant did not specifically state D lived there).

Marlowe v. State, 786 N.E.2d 751 (Ind.Ct.App. 2003) (warrant sufficiently described property to be searched despite mistake in identifying address of D's house; besides address, warrant identified house as white in color and as single-family dwelling); see also Lundquist v. State, 179 N.E.3d 1051 (Ind.Ct.App. 2021).

Dost v. State, 812 N.E.2d 232 (Ind.Ct.App. 2004) (warrant did not contain address of residence to be searched but did contain an imprecise description of residence; inaccuracies in description of property were not significant enough to warrant suppression because officer involved with search knew exact location of property); see also Salyer v. State, 938 N.E.2d 239 (Ind.Ct.App. 2010).

c. Description of persons

A search warrant for a person or persons must be as specific as a search warrant for a particular location and property. McAllister v. State, 306 N.E.2d 395 (Ind.Ct.App. 1974). Warrants to search individuals present at the place to be searched must be particularized and supported by probable cause. Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338 (1979).

State v. Thomas, 540 N.W.2d 658 (Iowa 1995) (warrant authorizing search of all persons at public tavern, based on application stating that investigation of drug activity at tavern had resulted in 30 arrests and 8 controlled buys of crack cocaine, was not specific enough to be constitutional).

Cutter v. State, 646 N.E.2d 704 (Ind.Ct.App. 1995) (search warrant that identified murder suspect by name was sufficiently specific, even though it did not distinguish suspect physically from other occupants of home in which suspect resided).

Sisk v. State, 785 N.E.2d 271 (Ind.Ct.App. 2003) (fact that search warrant wrongly identified person responsible for selling cocaine out of premises did not render warrant invalid, where place to be searched and items to be seized were clearly specified, and D was arrested because he was in possession of cocaine, not due to misapprehension that he was wrongly identified person).

3. Did the warrant meet other statutory requirements?

a. Telephonic/electronic warrants

Where there is substantial compliance with the hearing requirements of Ind. Code 35-33-5-8, a telephonic or electronic search warrant will be upheld. Cutter v. State, 646 N.E.2d 704 (Ind.Ct.App. 1995).

Timmons v. State, 734 N.E.2d 1084 (Ind.Ct.App. 2000) (because telephonic warrant hearing was so defective, resulting arrest warrant was characterized as "nonexistent" and good faith exception could not save it).

State v. Davis, 770 N.E.2d 338 (Ind.Ct.App. 2002) (trial court properly granted D's motion to suppress evidence seized from his residence, because telephonic warrant conversation between police officer and judge was not recorded, resulting in near total failure to comply with statutory requirements).

Volz v. State, 773 N.E.2d 894 (Ind.Ct.App. 2002) (because of incomplete recording, neither validity of warrant nor officer's reasonable belief that warrant was valid is capable of independent verification through judicial review; thus, good faith exception did not apply).

Creekmore v. State, 800 N.E.2d 230 (Ind.Ct.App. 2003) (police could rely on telephonic addendum to search warrant which was not recorded because probable cause for the search was demonstrated in the presence of a judge at an earlier probable cause hearing and addendum only dealt with directional coordinates of streets listed in warrant and did not go to basis of probable cause).

Cutter v. State, 646 N.E.2d 704, 712 (Ind.Ct.App. 1995) (where it was discovered after search had been completed that the testifying officer had not signed the telephonic transcript and the issuing judge had not certified the tape, the oversights were merely technical, and the search warrant was valid).

b. Neutral and detached magistrate

The determination of probable cause to justify the issuance of a search warrant must be made by an impartial or neutral and detached magistrate. A person who is involved in any way in law enforcement may therefore not be authorized to issue search warrants. Mitchell v. State, 115 N.E.2d 595 (Ind. 1953).

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319 (1979) (town Justice's presence and participation in search did not ensure that no items would be seized absent probable cause to believe that they were obscene; nor did his presence provide immediate adversarial hearing on issue; Justice was not acting as neutral and detached judicial officer).

Green v. State, 676 N.E.2d 755 (Ind.Ct.App. 1997) (judge who learned about related matters from third party prior to issuance of search warrant did not err by failing to recuse himself from issuing search warrant).

Schiro v. State, 451 N.E.2d 1047 (Ind. 1983) (commissioner may issue search warrant).

Wilson v. State, 333 N.E.2d 755 (Ind. 1975) (part-time city judge was not disqualified from issuing search warrant even though he was law partner of deputy prosecutor who administered oath to affiant police officer).

c. Supported by oath or affirmation

An oath or affirmation is a condition precedent to a properly issued search warrant. Ind. Code 35-33-5-1(a) states that a court may issue warrants "only upon probable cause, supported by oath or affirmation."

State v. Brown, 840 N.E.2d 411 (Ind.Ct.App. 2006) (trial court properly suppressed evidence seized as a result of a warrant, where police officer was not sworn under oath when she testified at probable cause hearing).

d. Filing PC affidavit and warrant with judge before search is executed

Ind. Code 35-33-5-2(a) requires law enforcement officers to file with the judge a probable cause affidavit and warrant for search or arrest before the search is executed. State v. Mason, 829 N.E.2d 1010 (Ind.Ct.App. 2005). The primary objective of Indiana's statutory filing requirement is to ensure the defendant is provided prompt access to a complete and accurate record of sworn testimony considered by the judicial officer who issued the warrant. Ryder v. State, 148 N.E.3d 306, 316 (Ind. 2020). This access ensures that both the State and the judicial officers can promptly be held accountable when warrants are issued based on questionable legal or factual bases. By requiring contemporaneous filing, the statute also seeks to ensure accuracy by limiting opportunities for later tampering with the documents' contents.

Ryder v. State, 148 N.E.3d 306, 316 (Ind. 2020) (filing requirement was satisfied where the signing judge certified that the probable cause affidavit for a blood-draw search warrant had been delivered to her at the time of the warrant's authorization).

State v. Rucker, 861 N.E.2d 1240 (Ind.Ct.App. 2007) (due to officer's failure to file affidavit and warrant before conducting search, warrant was not supported by "oath or affirmation" as required by constitutional provision against unreasonable search and seizure and was illegal).

Jefferson v. State, 891 N.E.2d 77 (Ind.Ct.App. 2008) (unlike in Rucker, search warrant signed by judge in this case stated that an affidavit had been filed with judge, which meets requirements of Ind. Code 35-33-5-2, even though affidavit was filed with trial court fifteen days late).

Johnson v. State, 952 N.E.2d 305 (Ind. Ct. App. 2011) (despite fact that probable cause affidavit was not properly filed, good faith exception allowed admission of evidence from D's computer).

Moseby v. State, 872 N.E.2d 189 (Ind.Ct.App. 2007) (statutory requirement to "file with the judge" is satisfied by leaving the affidavit with judge's staff).

Bowles v. State, 820 N.E.2d 739 (Ind.Ct.App. 2007) (detective substantially complied with Ind. Code 35-33-5-2(a) by filing documents one day after conducting search; court warned officers to abandon practice of late filing and comply with requirements of statute).

e. Form of search warrant/Ministerial acts

The search warrant should state the date and county of issuance, be addressed to an appropriate law enforcement officer, and be signed by the judge issuing the warrant. Ind. Code 35-33-5-3. However, a search warrant is not necessarily invalidated by the fact that it contains a typographical error. Clifford v. State, 474 N.E.2d 963 (Ind. 1985).

State v. Smith, 562 N.E.2d 428 (Ind.Ct.App. 1990) (there is no requirement that service of copy of warrant be made upon person whose property is to be searched; failure of issuing judge to sign service copy of search warrant does not invalidate warrant as long as judge found probable cause to support warrant).

Owens v. State, 659 N.E.2d 1250 (Ind. 1995) (absent a showing of prejudice, the belated filing of a return of a warrant (and even a complete failure to file a return) is not reversible error); see also Webster v. State, 579 N.E.2d 667 (Ind.Ct.App. 1991).

United States v. Clemens, 58 F.3d 318 (7th Cir. 1995) (search warrant that contains incorrect information is still valid if other information in application, standing alone, is sufficient to establish probable cause).

Brannon v. State, 801 N.E.2d 750 (Ind.Ct.App. 2004) (trial court did not err in concluding that Vermillion County judge had jurisdiction and authority to issue a Parke County search warrant docketed in Parke County; Ind. Code 35-33-5-7 provides that warrant issued by court of record may be executed anywhere in state; fact that judge failed to cross out "Parke County" and write in "Vermillion County" on warrant form was minor technical anomaly and did not invalidate otherwise valid search warrant).

Taylor v. State, 69 N.E.3d 502 (Ind.Ct.App. 2017) (noting that I.C. 35-33-5-8 allows for a judge to transmit a duplicate copy of a warrant via electronic means as long as the affidavit and warrant are printed and retained as if they were original; a photograph or PDF of a warrant transmitted via email is as valid and effective as a paper copy).

Abd v. State, 120 N.E.3d 1126 (Ind.Ct.App. 2019) (detective's failure to place electronic signature directly next to his verification did not render probable cause affidavit deficient; nothing in the search warrant statute requires that an affiant's signature appear directly under the verification).

4. Was the warrant properly executed?

a. Did the officers knock and announce their presence before entering the place to be searched?

Under both the Fourth Amendment and Article 1, § 11, there exists a requirement that police officers, under ordinary circumstances, knock and announce their presence and authority before forcibly entering a dwelling to execute a warrant. Willingham v. State, 794 N.E.2d 1110 (Ind.Ct.App. 2003). Further, once police comply with the knock and announce rule, they must give inhabitants a reasonable opportunity to respond. Id. Exceptions include circumstances presenting a threat of violence or circumstances in which police reasonably believe that evidence will be destroyed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963); See also Ind. Code 35-33-5-7(d) (requiring officer executing search warrant to announce authority and purpose of visit).

Richards v. Wisconsin, 520 U.S. 385, 117 S.Ct. 1416 (1997) (blanket rule allowing "no knock" entry with warrant for felony drug investigations violated Fourth Amendment).

United States v. Banks, 540 U.S. 31, 124 S.Ct. 521 (2003) (under totality of circumstances of this case, police officers' use of battering ram to knock down D's door was not unconstitutional where officers waited 15 to 20 seconds after announcing their intent to execute a search warrant).

Hudson v. Michigan, 547 U.S. 1096, 126 S.Ct. 2159 (2006) (violation of knock and announce rule does not require suppression of evidence under Fourth Amendment). See also Wilkins v. State, 946 N.E.2d 1144 (Ind. 2011).

United States v. Dice, 200 F.3d 978 (6th Cir. 2000) (police need not only knock and announce, but also wait reasonable time before forcefully entering home).

Willingham v. State, 794 N.E.2d 1110 (Ind.Ct.App. 2003) (despite conflicting testimony, detective's testimony provided sufficient evidentiary basis for trial court to determine that detectives waited at least seven seconds, and possibly as long as 15 to 20 seconds, before forcing entry into D's residence).

United States v. Ramirez, 523 U.S. 65, 118 S.Ct. 992 (1998) (no greater exigency is required to justify no-knock entry involving property damage).

Ingram v. City of Columbus, Ohio, 185 F.3d 579 (6th Cir. 1999) (officers who are justified in making warrantless entry pursuant to "hot pursuit" exception to Fourth Amendment warrant requirement may not be justified in not complying with Fourth Amendment's "knock and announce" requirement; separate inquiry still needed).

Lacey v. State, 946 N.E.2d 548 (Ind. 2011) (Indiana Constitution does not require prior judicial authorization for no-knock execution of a warrant when justified by exigent circumstances, even if such circumstances are known by police when the warrant is obtained; rather, courts will assess the reasonableness of entry based on totality of circumstances at the time the warrant was served).

Ware v. State, 78 N.E.3d 1109 (Ind.Ct.App. 2017) (Court rejected argument that Art. 1, § 11 requires knock-and-announce procedures unless exigent circumstances are present).

Davenport v. State, 464 N.E.2d 1302 (Ind. 1984) (after officers knocked on door and showed identification, D ran toward back of house; D's attempt to escape/destroy drugs presented exigent circumstances; police must have some indicator of D's intent to evade lawful execution of warrant). But see United States v. Banks, *supra*, where police simply heard no response from inside a hotel room and forceful entry was permissible; Banks implies that exigency of threat of drugs being flushed or otherwise disposed of automatically exists whenever a search warrant is issued for drugs).

Beer v. State, 885 N.E.2d 33 (Ind.Ct.App. 2008) (police had reasonable suspicion that knocking and announcing their presence would be dangerous, thus no-knock aspect of search warrant was justified; during controlled buys, informants observed firearms in D's house and stated that D intended to use them if police attempted to enter his home).

Crabtree v. State, 479 N.E.2d 70 (Ind.Ct.App. 1985) (exigent circumstances justified violation of knock and announce rule, although there was evidence that police did knock and announce at same time, they opened door with pass key).

Possible argument: Although the federal constitution only requires reasonable suspicion that evidence will be lost in order to justify no knock and announce, argue that the Indiana Constitution requires probable cause that evidence will be lost. See Commonwealth v. Macia, 711 N.E.2d 130 (Mass. 1999) (Massachusetts Constitution requires probable cause).

b. Did police use unreasonable, extraordinary force?

A search must be reasonable in its scope and manner of execution. Maryland v. King, 133 S.Ct. 1958 (2013). Even a show of force in executing a search warrant, without actual harm to property or person, may be questioned on constitutional grounds. This includes so-called "dynamic entry" by use of a SWAT team and pointing firearms directly at a person. See 2 Wayne R. LaFave, Search and Seizure, § 4.8(h) at 891; Herring v. United States, 129 S.Ct. 695, 707 (Ginsburg, J., dissenting) (arguing that integrity values demand suppression for manner violations); but see Hudson v. Michigan, *supra*.

Watkins v. State, 85 N.E.3d 597 (Ind. 2017) (although police used highly intrusive, military-style tactics to execute a search warrant (including use of "flash bang" grenade), their actions were reasonable under Indiana Constitution because the degree of suspicion and law enforcement needs were high).

Money v. State, 170 N.E. 89 (Ind.Ct.App. 1930) (officers not authorized to use unreasonable or unnecessary force in executing search warrant but use of such once inside premises would not affect the admissibility of evidence discovered in the search).

United States v. Ankeny, 502 F.3d 829, 835-38 (9th Cir. 2007) (SWAT team's violent entry into a house did not trigger suppression because discovery of evidence at issue was not causally related to the manner of executing the search).

United States v. Song Ja Cha, 597 F.3d 995 (9th Cir. 2010) (suppressing fruits of an unconstitutionally lengthy search where police conduct was "deliberate, systematic and culpable," even though supported by a valid warrant).

c. Did the police exceed the warrant's scope?

The scope of a search pursuant to a warrant is defined by the terms of the warrant.

Conn v. State, 496 N.E.2d 604 (Ind.Ct.App. 1986) (where search warrant specified nine items as object of search, plain view could not justify seizure of 254 items; suppression granted).

State v. Figgures, 839 N.E.2d 772 (Ind.Ct.App. 2005) (warrant to search for drugs and information pertaining to drug sales was valid as to two individuals named in warrant but did not allow police to open mail of D who was not named in warrant but lived at address named in warrant).

Hardin v. State, 148 N.E.3d 932 (Ind. 2020) (though not explicitly listed in the search warrant, it was not improper for police to search D's vehicle which he drove up and parked on his driveway while they were executing the warrant); see also Ector v. State, 111 N.E.3d 1053 (Ind.Ct.App. 2018).

Pavey v. State, 764 N.E.2d 692 (Ind.Ct.App. 2002) (police did not exceed scope of warrant when they seized D's black leather jacket, which was not expressly included in warrant but was similar to that specifically listed).

State v. Dills, 514 S.E.2d 917 (Ga.Ct.App. 1999) (search of D at his workplace exceeded scope of warrant, which only authorized search at his home).

United States v. Carey, 172 F.3d 1268 (8th Cir. 1999) (warrant authorizing police to search computer for files related to drug trafficking did not authorize officer's opening of more than 100 JPEG image files labeled with sexually suggestive names).

Frasier v. State, 794 N.E.2d 449 (Ind.Ct.App. 2003) (when search warrant only permitted search of computer for files related to marijuana dealing, officer's testimony that he opened image files by accident and discovered it contained child pornography was not incredibly dubious even though officer had previously sought and been denied warrant to search for child pornography; plain view doctrine permitted use of opened images to obtain subsequent warrant).

United States v. Foster, 100 F.3d 846 (10th Cir. 1996) (where warrant was validly issued to search D's home for marijuana and four specific weapons, officer's disregard of these

terms and execution of warrant as if it were "general" one required suppression of all evidence obtained in the search, including those specifically listed in the warrant).

Tongut v. State, 197 Ind. 539, 151 N.E. 427 (1926) (officers had no authority to make second search under search warrant even though they had obtained more specific information regarding contraband).

(1) Search of premises - vehicles and containers

A valid initial warrant authorizes the search of vehicles and containers found on the premises which reasonably might conceal items listed in the warrant, without the need for a second warrant. State v. Lucas, 112 N.E.3d 726 (Ind.Ct.App. 2018).

Lee v. State, 715 N.E.2d 1289 (Ind.Ct.App. 1999) (search warrant for person only allows police officer to search areas which would be big enough to hide that person; thus, police officers were not justified in searching pocket of coat in closet in hopes of finding 180-pound man therein).

Manning v. State, 459 N.E.2d 1207 (Ind.Ct.App. 1984) (where search extended to places object of warrant could not have been found, search exceeded scope of warrant).

Green v. State, 676 N.E.2d 755 (Ind.Ct.App. 1997) (police were authorized to take locked safe during search for objects which could have been found inside safe).

Brown v. State, 118 N.E.3d 763 (Ind. Ct. App. 2019) (search warrant allowing officers to search all buildings "and any other enclosed area and/or closed containers" authorized the opening of defendant's safe; defendant's consent therefore was not necessary to open the safe, and no Pirtle advisement was necessary).

Allen v. State, 798 N.E.2d 490 (Ind.Ct.App. 2003) (a pistol is an object that reasonably might fit inside a cigar box).

Sowers v. State, 724 N.E.2d 588 (Ind.Ct.App. 2000) (D's tent was structure within curtilage of dwelling; thus, when police obtained valid warrant to search residence, they were also authorized to search tent in backyard of residence).

Childers v. State, 281 S.E.2d 349 (Ga. 1981) (in executing a warrant for marijuana, it was improper to search purse of person who was only a visitor on premises).

(2) Search of persons

The fact that an officer is armed with a search warrant for a particular building does not authorize searching all persons found in it. McAllister v. State, 306 N.E.2d 395 (Ind.Ct.App. 1974).

Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338 (1979) (valid search warrant to search premises and one named individual does not authorize search of other persons on premises).

Hayes v. Commonwealth, 514 S.E.2d 357 (Va.Ct.App. 1999) (warrant to search residence for evidence of drug dealing did not authorize search of persons who happened to be present).

Baker v. State, 449 N.E.2d 1085 (Ind. 1983) (it is not beyond scope of warrant to take picture and fingerprint suspect when specified in warrant).

Even if the warrant specifies that all individuals in the place to be searched should also be searched, there must be probable cause supporting each and every search. Otherwise, a provision calling for a search of all persons is not constitutional. See State v. Thomas, 540 N.W.2d 658 (Iowa 1995); and United States v. Guadarrama, 128 F.Supp.2d 1202 (E.D. Wis. 2001) (collecting cases on "all person" search warrants).

d. Did the police detain anyone during the application for/execution of the warrant?

For Fourth Amendment purposes, a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587 (1981).

Bailey v. United States, 133 S.Ct. 1031 (2013) (Summers allows detention pursuant to a search only within the immediate vicinity of the place to be searched; because the detention here was nearly one mile from the residence being searched, it was an illegal detention).

Illinois v. McArthur, 531 U.S. 326, 121 S.Ct. 946 (2001) (police officers could prevent D from entering his home unescorted for two hours while they obtained and served search warrant; officers had probable cause to believe that D had hidden marijuana in his home, had good reason to fear that D would destroy drugs if permitted back in home, and restraint lasted no longer than reasonably necessary to obtain warrant).

Shotts v. State, 53 N.E.3d 526 (Ind.Ct.App. 2016) (Court rejected D's argument that he was not an "occupant" of the premises because he was not a resident of the house but only approached it as police were executing a search warrant; requiring officers to determine whether D was a resident before detaining him would diminish utility of Summers' bright-line rule).

Sugg v. State, 991 N.E.2d 601 (Ind.Ct.App. 2013) (police did not violate Fourth Amendment or Ind. Const. Art. 1, Sec. 11 when they allowed D to enter her home only if accompanied by an officer while they sought a search warrant).

Carroll v. State, 822 N.E.2d 1083 (Ind.Ct.App. 2005) (warrantless search of D was proper when he was being detained while officers executed a search warrant on his residence; as in Summers, D was occupant of house being served, was outside house when search warrant was served, was not allowed to leave, and after contraband was found in house, D's person was searched; D waived claim that he was entitled to relief under Indiana Constitution).

Cutter v. State, 646 N.E.2d 704, 711 (Ind.Ct.App. 1995) (valid search warrant authorizing the taking of bodily samples also authorizes such detention of the subject of the warrant as is necessary to obtain the samples).

e. If the search warrant is invalid, would a reasonably prudent police officer have relied on it?

See page 150.

D. WAS THE SEARCH JUSTIFIED UNDER AN EXCEPTION TO THE WARRANT REQUIREMENT?

The burden is on the State to show that an exception to the warrant requirement applies, and courts should take a very hard line against a search of a person's home without a warrant or consent. United States v. Salgado, 807 F.2d 603 (7th Cir. 1986).

1. Officer safety (pat down)

During an investigative detention, a police officer may conduct a limited frisk of an individual if the officer has reason to believe that his safety or that of others is in danger. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Berry v. State, 121 N.E.3d 633, 637 (Ind.Ct.App. 2019). To determine whether an officer acted reasonably, courts consider the specific, reasonable inferences that the officer is entitled to draw from the facts in light of his experience. Patterson v. State, 958 N.E.2d 478, 486 (Ind.Ct.App. 2011).

C.D.T. v. State, 653 N.E.2d 1041 (Ind.Ct.App. 1995) (purpose of Terry search is not to discover evidence of crime, but rather to allow officer to pursue his investigation without fear of violence).

State v. Atkins, 834 N.E.2d 1028 (Ind.Ct.App. 2005) (officer safety is always a legitimate concern but standing alone it cannot form the basis for a valid investigatory stop; a lawful stop, based on objective facts and reasonable suspicion, is the predicate for a pat down).

N.W. v. State, 834 N.E.2d 159 (Ind.Ct.App. 2005) (right to pat down frisk is automatic when a suspect has been stopped on suspicion of committing or preparing to commit an "inherently dangerous" crime such as burglary); see also Holbert v. State, 996 N.E.2d 396 (Ind.Ct.App. 2013).

Johnson v. State, 157 N.E.3d 1199, 1206 (Ind. 2020) (evidence that an individual is suspected of the crime of selling drugs, as opposed to perhaps just using them, is more likely to support a reasonable belief that the individual is armed and dangerous).

Triblet v. State, 169 N.E.3d 430 (Ind.Ct.App. 2021) (officer could rely on criminal history to determine if D was armed and dangerous).

a. Did the officer articulate specific facts as to why he reasonably feared for his safety?

General assertions that a pat down or search was conducted for "officer safety" does not articulate specific facts giving rise to reasonable suspicion to justify the pat down or search. Standard practice is not a permissible reason to conduct a pat down. State v. Pease, 531 N.E.2d 1207 (Ind.Ct.App. 1988).

(1) Unjustified searches

L.A.F. v. State, 698 N.E.2d 355 (Ind.Ct.App. 1998) (even if officers were aware of additional facts and circumstances which caused them to believe D was armed and dangerous, State failed to present them). Cf. State v. Joe, 693 N.E.2d 573 (Ind.Ct.App. 1998) (uncontradicted evidence pointed unerringly to conclusion that D's actions gave rise to reasonable belief that limited search of car for weapons was necessary to ensure officer's safety).

Mitchell v. State, 745 N.E.2d 775 (Ind. 2001) (neither police officer's routine traffic stop of D for stop sign violation nor D's nervous demeanor after being stopped provided any basis justifying officer's pat-down search of D; immediately before pretextual traffic stop, D and his passenger were under surveillance and suspected of dealing cocaine).

Swanson v. State, 730 N.E.2d 205 (Ind.Ct.App. 2000) (where officers were investigating possible alcohol offense, neither officer's standard practice of patting down everyone he stops nor fact that D was in "high drug area" with his hands in his pockets justified pat down of D; individuals who enter "high drug areas" do not lose their Fourth Amendment protections).

Howard v. State, 862 N.E.2d 1208 (Ind.Ct.App. 2007) (although D was fidgeting and failed to comply with officer's initial request to show his hands and only complied with order to step out of car when officer opened driver-side door, neither officer testified that D's actions caused them concern for their safety; further, one officer testified that he had previously told D that he was going to search him every time he saw him; thus, patdown search was improper).

Malone v. State, 882 N.E.2d 784 (Ind.Ct.App. 2008) (police officers may not seize a handgun from an individual standing on front porch of his home without a search warrant and in absence of articulable basis for concerns of officer safety or reasonable belief that a crime was afoot).

Sanders v. State, 576 N.E.2d 1328 (Ind.Ct.App. 1991) (officers were not justified in searching car and envelope found near passenger's seat because officers were not informed that occupants were armed and did not suspect occupants of committing an inherently dangerous crime, occupants did nothing at scene to indicate they posed danger to officers, and two occupants were outside of car at officers' direction; police need to articulate why they were in fear for their safety in order to search passenger's belongings or containers in car).

United States v. Johnson, 170 F.3d 708 (7th Cir. 1999) (officers' general suspicions about drug dealing at particular apartment did not justify stop and frisk of person who opened door and attempted to leave as officers were standing outside listening in).

Rybolt v. State, 770 N.E.2d 935 (Ind.Ct.App. 2002) (warrantless pat-down search of D was unlawful, where officer's reasons for pat-down search was that he was sole officer initially present at traffic stop and that he believed that individuals who used narcotics also carried weapons; D was asleep when approached by officer, was cooperative and made no furtive movements).

Ammons v. State, 770 N.E.2d 927 (Ind.Ct.App. 2002) (prior to consensual search of D's vehicle, officer performed unjustified pat-down search of D).

Jackson v. State, 785 N.E.2d 615 (Ind.Ct.App. 2003) (after traffic stop, officer observed D "furiously moving around in vehicle" and D initially hesitated to follow officer's command to raise his hands in air; although limited search of interior of D's car for weapons was necessary to ensure officer safety, officers exceeded lawful scope of lawful Terry stop by conducting multiple protective searches of D's car).

Dixon v. State, 14 N.E.3d 59 (Ind.Ct.App. 2014) (pat-down search following traffic stop unlawful, where officer conceded D did not exhibit any threatening conduct prior to the pat-down, there were no irregularities in D's identification or open warrants found, and D was allowed to return to his car, which belied any belief that officer was concerned for

his safety; "extreme" nervousness displayed by D while in the car, failure to make eye contact with the officer, rocking back and forth in his seat, and sticking his hands in his pockets can reasonably be explained by the fact the officer displayed his taser during the entire duration of the stop); see also K.G. v. State, 81 N.E.3d 1078 (Ind.Ct.App. 2017).

Hill v. State, 956 N.E.2d 174 (Ind.Ct.App. 2011) (where D complied with officer's order to take his hand out of his pocket, fact that D was looking around as if he was going to flee, and officer had general concern about people having weapons did not justify pat-down).

Harper v. State, 922 N.E.2d 75 (Ind.Ct.App. 2010) (officers did not have legitimate safety concerns to perform pat downs after passenger and driver had complied with all their orders; however, search was constitutional because both passenger and driver consented).

(2) Justified searches

Sweeney v. State, 704 N.E.2d 86 (Ind. 1998) (officer's decision to conduct warrantless search of vehicle was reasonable where he noticed D lean over as though he was placing something under seat, D was nervous and shaking, officer observed two loaded handgun clips in trunk, and he learned of D's extensive criminal history); see also O'Keefe v. State, 139 N.E.3d 263 (Ind.Ct.App. 2020).

State v. Dodson, 733 N.E.2d 968 (Ind.Ct.App. 2000) (once officer saw D's empty shoulder holster during investigatory stop, warrantless search of car was justified).

Williams v. State, 754 N.E.2d 584 (Ind.Ct.App. 2001) (officer feared for his safety and believed he was in danger due to D's nervousness, his refusal to remove his hands from his pockets, and his attempt to grab officer's waist); see also Woodson v. State, 966 N.E.2d 780 (Ind.Ct.App. 2012).

Johnson v. State, 157 N.E.3d 1199 (Ind. 2020) (evidence of drug involvement, and whether the suspect and officer are in a confined space, are both part of the totality of the circumstances contributing to an officer's reasonable belief that a subject is armed and dangerous as to permit a Terry frisk).

Johnson v. State, 38 N.E.3d 658 (Ind.Ct.App. 2015) (pat down justified by D putting his hand in his pants pocket and refusing to remove it after informing officer at bus station that he did not have identification; Crone, J., dissenting).

Durstock v. State, 113 N.E.3d 1272 (Ind.Ct.App. 2018) (patdown search justified when officers were aware a loaded gun had been found in a backpack in adjacent restroom D had just left; backpack contained men's clothing and other resident of apartment was female, and D appeared to be "nervous and shaking and sweating").

Abel v. State, 773 N.E.2d 276 (Ind.Ct.App. 2002) (whether first officer was reasonably justified in his belief concerning possible robbery had no bearing on whether his fellow officers were entitled to rely on his representation; although not every robbery is committed while armed with deadly weapon, officer need not be absolutely certain that individual is armed, and considering early morning high-speed chase by car and on foot, a reasonably prudent officer would be warranted in belief that his safety or that of others was in danger).

A.M. v. State, 891 N.E.2d 146 (Ind.Ct.App. 2008) (distinguishing L.A.F. (above), court noted that officers had received reports of gunshots fired in the area in which they were

patrolling; moreover, officer knew that D was a juvenile walking several miles from home well after curfew, that D previously had been shot in the leg and frequented the area with other individuals the officer had arrested); see also A.A. v. State, 31 N.E.3d 1046 (Ind.Ct.App. 2015); and Scisney v. State, 55 N.E.3d 321 (Ind.Ct.App. 2016).

Redfield v. State, 78 N.E.3d 1104 (Ind.Ct.App. 2017) (D's behavior during consensual encounter in becoming nervous, blading his body away from motion and making a hand motion consistent with drawing a firearm, gave rise to fear for officer safety and reasonable suspicion for patdown frisk); see also Bell v. State, 144 N.E.3d 791 (Ind.Ct.App. 2020).

Bell v. State, 81 N.E.3d 233 (Ind.Ct.App. 2017) (patdown search upheld where D did not answer officer's question about bulge in his pocket, was sweating and nervous and repeatedly scanned the area to see if anyone was watching him; Robb, J., dissenting).

Berry v. State, 121 N.E.3d 633 (Ind.Ct.App. 2019) (taken together, D's behavior of dropping beer bottle and appearing as if he was going to flee, backing up, having large bulge in his waistline, placing hands in his pockets, along with fact that group of men were congregating in middle of street after dark in a high-crime area known for gun violence, were enough to form objectively reasonable basis for patdown); see also Negash v. State, 113 N.E.3d 1281 (Ind.Ct.App. 2018).

b. Did the pat down or search for safety follow a traffic citation or minor infraction?

The threat to an officer's safety during the issuance of a traffic citation is much less than during a custodial arrest. Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484 (1998). However, under the U.S. Constitution, officers conducting traffic stops may order passengers out of vehicle and conduct a "pat-down" in the absence of reasonable suspicion of criminal activity, as long as officers have reason to believe that the passenger may be armed and dangerous. Arizona v. Johnson, 555 U.S. 323, 129 S.Ct. 781 (2009). And officers may search those parts of the passenger compartment where a weapon may be hidden on reasonable belief that the detainee is dangerous and may gain access to a weapon. Michigan v. Long, 463 U.S. 1032, 1049-50 (1983); Parish v. State, 936 N.E.2d 346 (Ind.Ct.App. 2010).

Porter v. State, 512 N.E.2d 454, 456 (Ind.Ct.App. 1987) (traffic violation does not give rise to reasonable suspicion that D is armed and dangerous).

Jett v. State, 716 N.E.2d 69 (Ind.Ct.App. 1999) (suspect exiting car immediately upon being stopped by officer did not justify Terry frisk because suspect then complied with officer's order to get back in car).

Swanson v. State, 730 N.E.2d 205 (Ind.Ct.App. 2000) (investigation of possible alcohol offense did not justify pat down).

Banks v. State, 681 N.E.2d 235 (Ind.Ct.App. 1997) (officer's suspicion that person is drinking underage is insufficient to justify Terry frisk; officer's testimony that he was "uncomfortable" because nobody knew to whom car belonged and because he thought he might be dealing with intoxicated persons was insufficient).

Cannon v. State, 722 N.E.2d 881 (Ind.Ct.App. 2000) (sniff test of D's truck was not premised upon reasonable suspicion that it contained narcotics; officer's safety concerns had been alleviated before he retrieved his canine and led him around truck).

Jackson v. State, 785 N.E.2d 615 (Ind.Ct.App. 2003) (reasonableness of officers' belief that they may have been in danger diminished after patdown search and canine search discovered no weapons; multiple vehicle searches exceeded scope of lawful Terry stop).

Warr v. State, 580 N.E.2d 265 (Ind.Ct.App. 1991) (although car was stopped for traffic violation, officer was permitted to open van door and request rear passenger to place his hand in officer's view).

Jackson v. State, 669 N.E.2d 744 (Ind.Ct.App. 1996) (officers were justified in conducting initial pat-down search of passenger in vehicle based upon his reluctance to comply with officer's order to place his hands up and passenger's actions of later dropping his hands and moving around in automobile after officers had returned to their patrol car to write ticket).

Trigg v. State, 725 N.E.2d 446 (Ind.Ct.App. 2000) (although D was pulled over for not wearing seatbelt, officer was justified in searching D because officer observed D fidget and place something underneath seat which officer feared was gun); see also Saffold v. State, 938 N.E.2d 837 (Ind.Ct.App. 2010).

Bell v. State, 13 N.E.3d 543 (Ind.Ct.App. 2014) (smell of raw marijuana on passenger as she exited vehicle gave officer probable cause to arrest and conduct patdown search); see also State v. Parrott, 69 N.E.3d 535 (Ind.Ct.App. 2017).

In re Welfare of M.D.B., 601 N.W.2d 214 (Minn.Ct.App. 1999) (officer who does not have reasonable suspicion for Terry frisk may not rely on possibility that suspect will flee to justify frisk for weapons during traffic stop).

Westmoreland v. State, 965 N.E.2d 163 (Ind.Ct.App. 2012) (Johnson (above) requires articulable facts for believing the person is armed and dangerous; here, officer unlawfully patted down passenger of vehicle for "officer safety" without reasonable suspicion he was armed and dangerous).

United States v. Powell, 666 F.3d 180 (4th Cir. 2011) (frisk of passenger pursuant to lawful traffic stop at night was unlawful when based only on "caution data" that passenger had "priors" for armed robbery and his misrepresentation that his driver's license was valid).

Mitchell v. State, 745 N.E.2d 775, 787 fn 10 (Ind. 2001) (in dicta, the court stated that the test, under the Indiana Constitution, for determining whether a police officer was justified in ordering driver to exit car during traffic stop is whether the totality of circumstances supports a reasonable suspicion justifying the requiring the driver exit the car and submit to a pat-down search).

c. Did the officer act beyond the scope of *Terry*'s protective purpose?

The purpose of a Terry protective search "is not to discover evidence of a crime but rather to allow the officer to pursue his investigation without fear of violence." Minnesota v. Dickerson, 508 U.S. 366, 373 (1993). Accordingly, the Terry search should be confined to its protective purpose. Shinault v. State, 668 N.E.2d 274, 277 (Ind. Ct. App. 1996). Reasonable suspicion that gives authority for a Terry stop does not, without more, authorize the examination of the contents of items carried by suspicious persons. Berry v. State, 704 N.E.2d 462, 466 (Ind. 1998).

Peele v. State, 130 N.E.3d 1195 (Ind.Ct.App. 2019) (warrantless search of a rolled-up sock that fell from D's pants during patdown while he was handcuffed broadened scope of Terry search beyond its protective purpose; plain feel doctrine did not excuse the search because the officer only suspected the object was something illegal and did not know what it was in particular; Court noted that "the testimony of possibility is insufficient").

(1) Plain Feel Doctrine - did the officer feel a weapon or contraband during the pat down?

Police officers may seize non-threatening contraband detected during a pat down search as long as the search stays within the confines of a valid Terry search. Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993). In reviewing the admissibility of contraband seized without a warrant under the "plain feel" doctrine, two issues are dispositive: (1) whether the contraband was detected during an initial pat down for weapons rather than during a further search; and (2) whether the identity of the contraband was immediately apparent to the officer. Johnson v. State, 710 N.E.2d 925 (Ind.Ct.App. 1999). "Merely suspecting the nature of an object is insufficient." Parker v. State, 697 N.E.2d 1265, 1268 (Ind. Ct. App. 1998).

(a) Cases where police violated Plain Feel doctrine

Johnson v. State, 710 N.E.2d 925 (Ind.Ct.App. 1999) (where officer only "believed" what he felt in D's pocket could "possibly" have been narcotic and admitted that it "could have been something else" besides narcotic, incriminating nature of contraband was not readily apparent).

C.D.T. v. State, 653 N.E.2d 1041 (Ind.Ct.App. 1995) (because incriminating character of plastic bag and contents was not immediately apparent at time officer patted down D and felt crumbled plastic bag, seized evidence was suppressed).

Jackson v. State, 669 N.E.2d 744 (Ind.Ct.App. 1996) (although officer lawfully removed partially transparent container from D's pocket, D's Fourth Amendment rights were violated when officer opened and seized contents of container; at point officer removed container, he determined that it did not contain weapon and identity of contents was not immediately apparent).

Granados v. State, 749 N.E.2d 1210 (Ind.Ct.App. 2001) (police officer's removal of folded five-dollar bill from D's sock and subsequent search of folded bill exceeded protective scope of Terry search).

James v. State, 795 So.2d 1146 (La. 2000) (officer exceeded scope of valid Terry stop when he removed film canister from D's pocket and began manipulating it to determine its contents).

D.D. v. State, 668 N.E.2d 1250 (Ind.Ct.App. 1996) (State failed to prove that identity of cocaine in D's pocket was immediately apparent to officer, or that he had probable cause; officer's general declaration that the bulge felt like "contraband" and made him believe it was "probably cocaine or marijuana" was insufficient to satisfy plain feel doctrine).

Burkett v. State, 785 N.E.2d 276 (Ind.Ct.App. 2003) (officer's removal of pill bottle containing Alprzolam from D's pants pocket and subsequent testing of it during

Terry search for weapons exceeded permissible bounds of legitimate pat-down search; identity of pills as contraband was not immediately apparent to officer); see also Harris v. State, 878 N.E.2d 534 (Ind.Ct.App. 2007).

Corwin v. State, 962 N.E.2d 118 (Ind.Ct.App. 2011) (illicit nature of pill bottle was not immediately apparent from fact that part of the label with prescription written on it was torn off).

Clanton v. State, 977 N.E.2d 1018 (Ind.Ct.App. 2012) (after removing pen cap from D's pocket during patdown, officer exceeded scope of a reasonable search at point when he saw that the pen cap was not a weapon, but removed a small plastic baggie stuffed inside the pen cap and searched it; officer admitted he had to make a closer examination of the bag before he realized it contained drugs).

Barfield v. State, 776 N.E.2d 404 (Ind.Ct.App. 2002) (State argued that unusual weighting and movement of contents of cigarette box justified its removal from D's pocket because it could legitimately have contained weapon. However, officer never testified that he thought cigarette box contained weapon or that box itself was weapon; moreover, when officer felt box, there was no immediate perception that it was contraband).

(b) Cases where Plain Feel doctrine applied

Shinault v. State, 668 N.E.2d 274 (Ind.Ct.App. 1996) (although incriminating character of object protruding from D's jacket was not immediately apparent to officer, seizure of marijuana was permissible because officer had not dispelled fear that object was not weapon until he pulled it out of D's pocket).

Parker v. State, 662 N.E.2d 994 (Ind.Ct.App. 1996) (seizure of cocaine did not exceed permissible scope of Terry because officer was still in process of conducting pat down search when he reached object in D's pocket and had not yet concluded that D did not have weapon).

Walker v. State, 661 N.E.2d 869 (Ind.Ct.App. 1996) (officer's warrantless seizure of marijuana was justified under Terry because officer determined that item was marijuana contemporaneous with lawful weapons search).

Johnson v. State, 157 N.E.3d 1199 (Ind. 2020) (officer could seize baggie when he immediately identified the lump as contraband the moment he touched it through D's pocket, based on his training and knowledge of the situation).

Williams v. State, 754 N.E.2d 584 (Ind.Ct.App. 2001) (identity of cocaine was immediately apparent to arresting officer, whose extensive training and experience led him to believe that rock-like substance seized from D's coat pocket was crack cocaine).

Burkett v. State, 691 N.E.2d 1241 (Ind.Ct.App. 1998) (officer immediately recognized "one-hitter").

Durstock v. State, 113 N.E.3d 1272, 1278 (Ind.Ct.App. 2018) ("tubular object" officer felt in D's pocket that was "consistent with being a syringe" could be seized under Terry because its identity was immediately apparent").

Smith v. State, 780 N.E.2d 1214 (Ind.Ct.App. 2003) (officer's testimony did not suggest that he had to actually manipulate object in any way before he was able to determine if it was contraband).

Willis v. State, 907 N.E.2d 541 (Ind.Ct.App. 2009) (because officer was unable to confirm by pat down alone the identity of a hard object in D's front pant pocket because of the placement of a soft object on top of the hard object, the officer was justified in removing both the soft and hard object from D's pants).

(2) Did the officer perform an act other than a pat down in the name of safety?

Officers' actions beyond performing a pat down may exceed the scope of Terry.

Porter v. State, 512 N.E.2d 454 (Ind.Ct.App. 1987) (officer may not search whole car based on fear for safety). But see Joe v. State, 693 N.E.2d 573 (Ind.Ct.App. 1998).

Jackson v. State, 785 N.E.2d 615 (Ind.Ct.App. 2003) (police officers exceeded lawful scope of lawful Terry stop by conducting multiple protective searches of D's car).

Wilson v. State, 745 N.E.2d 789 (Ind. 2001) (Court declined to hold that Fourth Amendment permits police routinely to place traffic stop detainees in police vehicle if this necessarily subjects detainee to pat-down frisk; here, neither officer nor State identified any reasonably necessary basis to place D in police car justifying heightened intrusion of pat-down search).

Reinhart v. State, 930 N.E.2d 42 (Ind.Ct.App. 2010) (even though officers may take reasonable steps during a Terry stop to ensure safety, drawing a gun on D, ordering him to kneel with hands behind his head and then lie flat on his stomach were excessive and not least intrusive means to investigate a traffic stop).

Taylor v. State, 904 N.E.2d 259 (Ind.Ct.App. 2009) (where D agreed to talk to police at station after traffic stop was completed without consenting to being transported by the police to the station, police could not rely on safety concerns during transportation as reason for pat down).

Webster v. State, 908 N.E.2d 289 (Ind.Ct.App. 2009) (while need of officers to protect themselves from armed suspects is great, the concern for officer safety cannot justify the warrantless search of every purse that is stretched in a manner that suggests it could conceivably contain a gun).

Miller v. State, 991 N.E.2d 1025 (Ind.Ct.App. 2013) (because officer did not point to facts supporting a suspicion of criminal activity or a concern over the possibility of harm, his search of D's backpack was not permissible under the Fourth Amendment)

Lockett v. State, 747 N.E.2d 539 (Ind. 2001) (police may routinely inquire about presence of weapons during traffic stop).

State v. Washington, 898 N.E.2d 1200 (Ind. 2008) (under both federal and state constitutions, a police officer, without reasonable suspicion, can inquire as to possible further activity when a motorist is stopped for a traffic infraction).

State v. Pease, 531 N.E.2d 1207 (Ind.Ct.App. 1988) (where officer did not have to place D in car in order to run license check on D, officer could not use fact that D was alone in car with him as support for safety search).

Granados v. State, 749 N.E.2d 1210 (Ind.Ct.App. 2001) (police officer's removal of folded five-dollar bill from D's sock and subsequent search of folded bill exceeded protective scope of Terry search; although sharp instruments such as razor blades and needles can pose serious safety risks to investigating officers, such instruments are not a threat when out of D's immediate reach).

State v. Smith, 693 A.2d 749 (Md.Ct.App. 1997) (police officer exceeded bounds of lawful Terry frisk when, after detecting no weapon-shaped object during patdown, he performed "double-check" by lifting suspect's shirt).

State v. Webber, 694 A.2d 970 (N.H. 1997) (during valid pat-down, search of wallet for purpose of finding suspect's identification was beyond scope of permissible Terry stop and was unreasonable under New Hampshire Constitution).

Upshur v. United States, 716 A.2d 981 (D.C.Ct.App. 1998) (officers exceeded scope of investigative detention and protective search by forcing suspect to open his fist, which officers testified they believed contained drugs).

Stone v. State, 671 N.E.2d 499 (Ind.Ct.App. 1996) (requesting removal of shoe is not overly intrusive in situation where police officer sincerely fears hidden weapon might be concealed).

State v. Gladney, 793 N.E.2d 264 (Ind.Ct.App. 2003) (based on D's actions, including fidgeting with object in his sweatshirt, officer had reasonable suspicion to believe D may have been hiding a weapon under his sweatshirt, thus request for D to put down sweatshirt and show his hands was proper)

2. Incident to an arrest

Police may search incident to a lawful arrest. Such search must be substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest. Townsend v. State, 460 N.E.2d 139 (Ind. 1984). However, where D does not challenge the warrant's validity, and the record is otherwise devoid of any indication of invalidity, the State need not produce an active arrest warrant to support a search incident to an arrest. Lewis v. State, 904 N.E.2d 290 (Ind.Ct.App. 2009).

Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484 (1998) (search incident to arrest exception to requirement of search warrant does not justify search of car following issuance of traffic citation).

Jones v. State, 467 N.E.2d 1236 (Ind.Ct.App. 1984) (to have valid search incident to arrest, initial arrest must be lawful); see also Miller v. State, 51 N.E.3d 313 (Ind.Ct.App. 2016).

Best v. State, 817 N.E.2d 685 (Ind.Ct.App. 2004) (an unlawful arrest cannot be foundation of a lawful search; here, arrest warrant under which D had been previously detained was no longer valid, rendering D's arrest under warrant illegal and an egregious violation of D's right to due process).

Thompson v. State, 824 N.E.2d 1265 (Ind.Ct.App. 2005) (where search occurs in a private place and police are in complete control of circumstances surrounding search, there is no justification for law enforcement to allow a civilian to film or photograph strip search of suspect naked below waist).

Maryland v. King, 133 S.Ct. 1958 (2013) (when police make arrest based on probable cause to hold arrestee for serious offense, taking and analyzing cheek swab for DNA to help

identify arrestee is like fingerprinting, minimally intrusive and reasonable police booking procedure under Fourth Amendment.

D.Y. v. State, 28 N.E.3d 249 (Ind.Ct.App. 2015) (firearm was obtained through a pat-down search incident to D's unlawful arrest, prior to being placed in a police vehicle).

a. Did the search precede the arrest?

The search incident to arrest may not precede the arrest and serve as part of the justification for the arrest. Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288 (1990). As with many search cases and probable cause issues, the timing of events and the officer's knowledge are critical in determining the validity of the search.

Perkins v. State, 695 N.E.2d 612 (Ind.Ct.App. 1998) (justification for arrest must have been established prior to search; where the record was unclear as to whether search which revealed marijuana was conducted before or after D provided information justifying arrest for carrying handgun without license, evidence supporting conviction for marijuana possession was obtained as result of unconstitutional search and should have been suppressed).

Gonser v. State, 843 N.E.2d 947 (Ind.Ct.App. 2006) (search of D's vehicle did not occur contemporaneously in both time and place with his arrest).

VanPelt v. State, 760 N.E.2d 218 (Ind.Ct.App. 2001) (search incident to arrest exception, which typically applies when search and arrest are contemporaneous, also applies where, as here, law enforcement conducts lawful search but merely delays an otherwise valid arrest until after consultation with prosecutor; critical issue is not when arrest occurs but whether there was probable cause to arrest at time of search).

b. Was there probable cause for the arrest?

The fact that police do not formally place the Defendant under arrest or inform him that he is under arrest does not invalidate a search incident to arrest as long as there was probable cause to arrest at the time of the search. Fentress v. State, 863 N.E.2d 420 (Ind.Ct.App. 2007); Moffitt v. State, 817 N.E.2d 239 (Ind.Ct.App. 2004). Probable cause exists when, at the time of the arrest, the officer has knowledge of facts and circumstances that would warrant a person of reasonable caution to believe that the suspect committed a criminal act. Griffith v. State, 788 N.E.2d 835, 840 (Ind. 2003). The amount of evidence necessary to meet the probable cause for a warrantless arrest is determined on a case-by-case basis.

Miller v. State, 51 N.E.3d 313 (Ind.Ct.App. 2016) (search incident to arrest violated D's right to walk away as recognized in Gaddie v. State, 10 N.E.3d 1249 (Ind. 2014), where police had no basis to order her to stop; even if D had disobeyed a direct and unambiguous order from a police officer to stop, she could not be subjected to an arrest or a search based solely on her failure to obey the order).

Bean v. State, 142 N.E.3d 456 (Ind.Ct.App. 2020) (officer's bare, conclusory assertion that the substance found on passenger seat and floorboard was marijuana "shake" did not establish probable cause for subsequent non-consensual searches).

Tigner v. State, 142 N.E.3d 1064 (Ind.Ct.App. 2020) (presence alone, without more, in a house where drugs are found, does not provide sufficient probable cause to arrest a person for visiting a common nuisance or drug possession).

Virginia v. Moore, 553 U.S. 164, 128 S.Ct. 1598 (2008) (police did not violate Fourth Amendment when they made an arrest that was based on probable cause but prohibited by state law, or when they performed a search incident to arrest).

Devenpeck v. Alford, 543 U.S. 146, 125 S.Ct. 588 (2004) (an arrest is lawful even though there is no probable cause to support the offense cited by the arresting officer, so long as the facts known to the officer establish probable cause as to some offense, even if that offense is not closely related).

Stevens v. State, 701 N.E.2d 277 (Ind.Ct.App. 1998) (subjective belief of police officer that he did not have probable cause to arrest D when he handcuffed her has no legal effect; nor did officer's failure to tell D that she was under arrest invalidate search); see also Wilson v. State, 754 N.E.2d 950 (Ind.Ct.App. 2001).

Rhodes v. State, 996 N.E.2d 450 (Ind.Ct.App. 2013) (search incident to arrest proper where D found near crime scene matched description given by witness).

Kyles v. State, 888 N.E.2d 809 (Ind.Ct.App. 2008) (officer's observation of crack pipe on driver's seat shortly after D exited vehicle constituted probable cause to arrest D for misdemeanor possession of paraphernalia, although possession of paraphernalia can also be an infraction).

Thomas v. State, 81 N.E.3d 621 (Ind. 2017) (given tip from reliable informant, inconsistent answers D and driver provided about why they were in Indiana, and positive canine alert when they were inside vehicle, Court found probable cause to detain and transport D to police station).

Herron v. State, 991 N.E.2d 165 (Ind.Ct.App. 2013) (police had probable cause to arrest D for dealing in cocaine at time they removed him from car and removed money from his pockets).

Moffitt v. State, 817 N.E.2d 239 (Ind.Ct.App. 2004) (officer had probable cause to arrest D for disorderly conduct based upon observing his involvement in multi-person altercation in middle of street).

Winebrenner v. State, 790 N.E.2d 1037 (Ind.Ct.App. 2003) (police officer had probable cause to arrest D for invasion of privacy, where officer knew that minor's parents had obtained court order to protect minor from D, officer saw protective order just hours before he encountered D and minor, and D admitted that he was violating protective order).

c. Was the item seized found in an area within the Defendant's control?

The search incident to an arrest must be of an area within the Defendant's immediate control. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969). However, searches have often been permitted even after a suspect is arrested and handcuffed, so the test is often one of Defendant's hypothetical 'control' of area prior to arrest. See, e.g., Covelli v. State, 579 N.E.2d 466 (Ind.Ct.App. 1991). Officer safety is a primary concern when taking an arrestee into custody, and the objective reasonableness of the search is controlling, not the officer's subjective views. Garcia v. State, 47 N.E.3d 1196 (Ind. 2016).

Ceroni v. State, 559 N.E.2d 372 (Ind.Ct.App. 1990) (search of satchel found in drawer in motel room was not permissible search incident to arrest of occupants after marijuana was observed on table).

Tata v. State, 486 N.E.2d 1025 (Ind. 1986) (bloodied clothes found in closed laundry hamper when officer opened louvered doors to laundry area should not have been admitted; clothes were not seized incident to arrest because D had been removed from apartment).

Smith v. State, 889 N.E.2d 836 (Ind.Ct.App. 2008) (search of toilet tank in bathroom of motel where D was being arrested exceeded the scope of a reasonable search incident to arrest; D was no longer a safety risk, and police only believed, based on a porcelain-to-porcelain sound they heard prior to entering the room, that D hid, not destroyed, drugs).

Gibson v. State, 733 N.E.2d 945 (Ind.Ct.App. 2000) (where D was in parking lot, walking towards store when he was arrested, search of van was not justified because it was not within his control).

United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234 (1974) (when officers suspected paint chips from burgled building may be on D's clothing, bought arrested D new clothing and seized old clothes for testing ten hours after arrest, warrantless search was justified as incident to arrest, due to possibility that D could destroy any paint chips on clothes; a search of the person that may be done at the time of arrest may also be done upon arrival at the place of detention).

Rodriguez v. United States, 135 S.Ct. 1609 (2015) (police may not search digital contents of cell phone without a warrant).

Kirk v. State, 974 N.E.2d 1059 (Ind.Ct.App. 2012) (although officer was within his rights to confiscate cell phone during search incident to arrest, there was no real law enforcement need to open the cell phone, press a button to access the inbox, and read six to eight text messages; search violated article 1, § 11 of Indiana Constitution).

Guilmette v. State, 14 N.E.3d 38 (Ind. 2014) (no violation of article 1, § 11 where police arrested D for theft but seized his shoe to search for evidence of unrelated murder).

Johnson v. State, 831 N.E.2d 163 (Ind.Ct.App. 2005) (police were searching pursuant to arrest, not consent, and had probable cause to believe information in pager would be useful in solving identity of cocaine dealer).

Culpepper v. State, 662 N.E.2d 670 (Ind.Ct.App. 1996) (warrantless search of bag incident to lawful arrest was proper in scope, where bag was within D's immediate control and officers had legitimate interest in protecting themselves and preventing destruction of evidence).

Covelli v. State, 579 N.E.2d 466 (Ind.Ct.App. 1991) (even though Ds had been secured and bag was placed out of their reach, search of bag was still valid as search incident to arrest); see also State v. Crager, 113 N.E.3d 657 (Ind.Ct.App. 2018).

DeLong v. State, 670 N.E.2d 56 (Ind.Ct.App. 1996) (search of D's jacket following his arrest was lawful even though D removed his jacket and officer did not search jacket until after D was placed in police car and officer was taking jacket into home).

d. Was the item seized unrelated to the crime for which D was arrested?

A warrant is not required to seize, examine and test evidence unrelated to the crime for which the defendant is lawfully arrested. Guilmette v. State, 14 N.E.3d 38 (Ind. 2014). "Unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest." Riley v. California, 134 S.Ct. 2473, 2485 (2014).

Garcia v. State, 47 N.E.3d 1196 (Ind. 2016) (opening a pill bottle found in D's pants pocket during a pat-down search incident to his arrest for driving without a valid license was reasonable under Article 1, § 11 of the Indiana Constitution); see also Klopfenstein v. State, 439 N.E.2d 1181 (Ind.Ct.App. 1982).

e. Was the Defendant's vehicle searched incident to arrest?

(1) Fourth Amendment

Police may search the passenger compartment of a vehicle incident to a recent occupants arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of the arrest. Arizona v. Gant, 129 S.Ct. 1710, (2009) (interpreting New York v. Belton, 453 U.S. 454, 460, 101 S.Ct. 2860 (1981) and Thornton v. United States, 124 S.Ct. 2127 (2004)).

Arizona v. Gant, 129 S.Ct. 1710 (2009) (where D was arrested for driving with suspended license, handcuffed, and locked in the back of patrol car, there was neither the possibility of access to his car nor the likelihood of discovering offense-related evidence; thus, search was unreasonable).

Chest v. State, 922 N.E.2d 621 (Ind.Ct.App. 2009) (search of D's car was unreasonable because the only evidence relevant to refusing to identify charge was D's actual refusal to identify himself, and there was no probable cause that D had committed other crimes); see also Hathaway v. State, 906 N.E.2d 941 (Ind.Ct.App. 2009).

Anderson v. State, 64 N.E.3d 903 (Ind.Ct.App. 2016) (warrantless search of arrestee's jacket that he had removed and left on front seat before stepping out of vehicle was not reasonable in accordance with Gant; inventory search exception did not apply because police did not follow established procedure).

Washington v. State, 922 N.E.2d 109 (Ind.Ct.App. 2010) (May, J., concurring on basis that Gant said police may search vehicle incident to arrest only if arrestee is within reaching distance of passenger compartment; because D was removed from car, handcuffed and directed to stand nearby while officer recovered gun, his statement about gun could not justify search based on safety concerns).

Meister v. State, 933 N.E.2d 875 (Ind. 2010) (on remand from U.S. Supreme Court for reconsideration in light of Gant, Court held that search was justified under the automobile exception although search did not meet requirements of Gant).

Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484 (1998) (Fourth Amendment does not permit search incident to traffic citation). See also Cannon v. State, 722 N.E.2d 881 (Ind.Ct.App. 2000).

Bell v. State, 818 N.E.2d 481 (Ind.Ct.App. 2004) (Court rejected State's argument that Belton would allow dismantling of interior structures of vehicles without a search warrant).

Washburn v. State, 121 N.E.3d 657 (Ind.Ct.App. 2019) (use of pry bar to open locked safe found in D's car did not violate Indiana Constitution given fact that the officers' degree of concern, suspicion, or knowledge that drugs were inside the safe was extremely high and the degree of intrusion into D's ordinary activities was very low).

Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964) (when officer arrests the driver of a vehicle but does not search the car until after it is towed to the police garage, the search cannot be justified as incident to arrest).

Black v. State, 810 N.E.2d 713 (Ind. 2004), *overruled in part by* Arizona v. Gant, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (police may search passenger compartment of a D's car even in situations where police first make contact with the D after he has stepped out of his vehicle).

Indiana courts have explicitly recognized a factual and legal distinction between persons who are arrested while in a vehicle or in the process of exiting the vehicle and persons who are arrested when they are outside the vehicle. Edwards v. State, 768 N.E.2d 506 (Ind.Ct.App. 2002); But see Black v. State, *supra*.

Gibson v. State, 733 N.E.2d 945 (Ind.Ct.App. 2000) (where D was in parking lot, walking towards store when he was arrested, search of van was not justified because it was not within his control). See also People v. Fernengel, 549 N.W.2d 361 (Mich.Ct.App. 1996); and State v. Charpentier, 131 Idaho 649, 962 P.2d 1033 (1998).

Edwards v. State, 762 N.E.2d 128 (Ind.Ct.App. 2002), *affirmed on reh'g*, 768 N.E.2d 506 (search of garbage bag located in back of truck and outside of D's reach did not pose threat to police and was not justified as search incident to arrest).

(2) Indiana Constitution

Under Article 1, Section 11 of Indiana Constitution, each case must be considered upon its own facts to decide if police behavior was reasonable. Brown v. State, 653 N.E.2d 77, 79 (Ind. 1995). Thus, it is possible that the Indiana Constitution may prohibit searches which the Federal Constitution does not.

State v. Moore, 796 N.E.2d 764 (Ind.Ct.App. 2003) (search of passenger compartment of vehicle D was driving was not justified on basis of officer safety or as search incident to D's arrest for driving while suspended; D and two passengers were cooperative, officer did not express concern for his safety, and there was no need to search passenger compartment to find evidence of a licensing offense; no error in concluding that vehicle search was not reasonable under totality of circumstances); see also Baniaga v. State, 891 N.E.2d 615 (Ind.Ct.App. 2008); and Chest v. State, 922 N.E.2d 621 (Ind.Ct.App. 2009).

Parham v. State, 875 N.E.2d 377 (Ind.Ct.App. 2007) (because officer had no safety concerns, it was unreasonable under Indiana Constitution to search the car prior to allowing D's girlfriend, who was not being arrested, to drive the car home).

Bell v. State, 818 N.E.2d 481 (Ind.Ct.App. 2004) (dismantling glove compartment to view behind it into vehicle's chassis was unreasonable under Indiana Constitution and was unlawful under Fourth Amendment).

f. Were passengers searched incident to the Defendant's arrest?

Where unrestrained passengers remain in a vehicle, a search of the vehicle incident to the defendant's arrest is permissible to alleviate officer safety concerns and to prevent the destruction of evidence.

Stark v. State, 960 N.E.2d 887 (Ind.Ct.App. 2012) (because three occupants were unsecured during arrest, D had behaved suspiciously regarding his jacket and they were in a high crime area, an objective officer would have been warranted in conducting a search incident to arrest under Gant's officer safety consideration).

Richard v. State, 7 N.E.3d 347 (Ind.Ct.App. 2014) (after police dog's positive alert to presence of narcotics in vehicle, police officer had probable cause to arrest passenger; there was no indication only driver was involved in drug activity); but see Thomas v. State, 81 N.E.3d 621 (Ind. 2017) (departing from Richard regarding the amount of evidence needed to establish probable cause to arrest).

I.G. v. State, 177 N.E.3d 75 (Ind.Ct.App. 2021) (unlawful arrest and search of passenger based on officer's smell of marijuana and no drugs found after searching car).

g. Was the search part of a protective sweep?

Police may, incident to an arrest, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched as a precautionary measure without a warrant, probable cause or reasonable suspicion; such a "protective sweep" may last no longer than necessary to dispel a reasonable suspicion of danger and, in any event, no longer than it takes to complete an arrest and depart the premises. Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093 (1990). Warrantless entry into a building/residence to do a protective sweep may sometimes be justified even if the arrest takes place outside, if there are articulable facts supporting reasonable suspicion of safety threats. United States v. Cavely, 318 F.3d 987, 995-96 (10th Cir. 2003); Reed v. State, 582 N.E.2d 826 (Ind.Ct.App. 1991).

Smith v. State, 565 N.E.2d 1059 (Ind. 1991) (protective sweep of house upon execution of arrest warrant did not justify warrantless search of locked storage room because there was no evidence room immediately adjoined place of arrest from which an attack on officers could be launched, and no specific and articulable facts demonstrating any reasonable suspicion of danger existed).

Johnson v. State, 70 N.E.3d 890 (Ind.Ct.App. 2017) (protective sweep improper where D was arrested outside his apartment, door to apartment was closed/locked, and officers had no reason to think there was anyone inside); cf. Reed v. State, *supra*.

United States v. Colbert, 76 F.3d 773 (6th Cir. 1996) (circumstances surrounding arrest of murder suspect who had come out of apartment and was arrested nearly 50 feet away did not justify warrantless entry of apartment and protective sweep).

Vanzo v. State, 738 N.E.2d 1061 (Ind.Ct.App. 2000) (when determining whether search is to secure crime scene, court should consider number of officers on scene and their actions before victim-or-suspect search is performed, nature of search -- such as whether it is investigative, and timing of search; here, although second officer claimed she was searching for safety, fact that first officer already searched apartment, victim had been removed from scene, and another officer had been guarding door to apartment illustrated that scene was already secured).

State v. Estep, 753 N.E.2d 22 (Ind.Ct.App. 2001) (protective sweep and search incident to arrest was improper where D stated no one was in residence and arrest occurred at front door).

Harris v. State, 878 N.E.2d 534 (Ind.Ct.App. 2007) (rejecting State's argument that methamphetamine inside pill bottle was properly seized pursuant to search incident to D's arrest, Court could not say a person of reasonable caution would believe D committed a crime simply because he was hiding behind water heater and basement contained evidence suggesting drugs had been used there in the past).

Weddle v. State, 989 N.E.2d 371 (Ind.Ct.App. 2013) (protective sweep of D's residence was justified because officers searched only adjoining rooms from which attack could immediately occur; moreover, officers had specific and articulable facts that an individual, who could jeopardize their safety, was hiding in the back of the house).

Hannibal v. State, 804 N.E.2d 206 (Ind.Ct.App. 2004) (officers outside house had reasonable suspicion that safety was threatened by possible presence of an individual on the second floor, based on violent nature of arrestees and sound of someone running upstairs; officers may be as much at risk immediately outside a dwelling as inside it; therefore, protective sweep of second floor during which marijuana was seen in toilet was proper).

Rush v. State, 881 N.E.2d 46 (Ind.Ct.App. 2008) (after officer's consensual entry into house, search and protective sweep to gather suspected underage drinkers and missing persons was justified).

h. Was the Defendant strip searched?

Routine, warrantless jail strip-searches of pre-trial detainees do not violate the Fourth Amendment, even if the arrest is for a minor offense. Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 132 S. Ct. 1510 (2012) (jail officials may subject arrestees to strip searches without need for individualized suspicion in order to ensure for the safety and security of the staff and other prisoners). However, strip searches of misdemeanor arrestees are unreasonable and impermissible under the Indiana Constitution in the absence of reasonable suspicion that the arrestee is concealing weapons or contraband. Edwards v. State, 759 N.E.2d 626 (Ind. 2001). In determining the reasonableness of a search under the Fourth Amendment, courts consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

State v. Pitchford, 60 N.E.3d 1100 (Ind.Ct.App. 2016) (following Edwards, which Court noted did not establish a general exception for crimes of violence).

Frye v. State, 757 N.E.2d 684 (Ind.Ct.App. 2001) (although D's arrest for fleeing from police would not by itself justify strip search, additional facts were present which rendered strip search permissible, i.e., discovery of illegal drugs and paraphernalia in plain view). See also Bryant v. State, 959 N.E.2d 315 (Ind.Ct.App. 2011).

Powell v. State, 898 N.E.2d 328 (Ind.Ct.App. 2008) (cutting D's underwear in order to retrieve cocaine from pocket-type enclosure in the underwear during a search incident to arrest along side of road in a non-residential area was reasonable).

Porter v. State, 82 N.E.3d 898 (Ind.Ct.App. 2017) (distinguishing Powell and finding unlawful roadside exploratory search inside D's pants).

White v. State, 24 N.E.3d 535 (Ind.Ct.App. 2015) (although underlying arrest constituted a misdemeanor, strip search at jail was justified because of officers' reasonable suspicion

that weapons or contraband would be introduced into the jail due to the lingering odor of raw marijuana which engulfed D even after having been transported to jail).

Reagan v. State, 157 N.E.3d 1266 (Ind.Ct.App. 2020) (warrantless strip search of misdemeanor arrestee at jail was reasonable under totality of circumstances and did not violate Indiana Constitution).

3. Vehicle searches - "automobile exception"

A motor vehicle may be searched without a warrant when there is probable cause to believe that the vehicle contains contraband or other items that are related to criminal activity and are therefore seizable. There is a reduced expectation of privacy which stems from a vehicle's ability to move and the public nature of automobile travel. Rogers v. State, 396 N.E.2d 348 (Ind. 1979). Under the Fourth Amendment, there is no separate exigency requirement, aside from the inherent mobility of the vehicle and a diminished expectation of privacy, needed to justify the warrantless search and seizure of evidence from a car. Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013 (1999); Meister v. State, 933 N.E.2d 875 (Ind. 2010).

California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982 (1991) (police with probable cause to believe container in a vehicle holds contraband or evidence may stop movable vehicle and search the container without a warrant regardless of lack of probable cause to search the entire car; search may be conducted immediately or if probable cause existed at time of stop, a reasonable time thereafter).

Myers v. State, 839 N.E.2d 1154 (Ind. 2005) (as D's car was parked and unoccupied while he was in school, it was subjected to a dog sniff test conducted by school officials assisted by police, which provided probable cause to conduct warrantless search).

State v. Hobbs, 933 N.E.2d 1281 (Ind. 2010) (despite D's lack of proximity to his car at time of his arrest inside restaurant, dog alert gave police probable cause to believe his car contained illicit drugs, thus no warrant was required to search his car in parking lot).

Cleveland v. State, 129 N.E.3d 227 (Ind.Ct.App. 2019) (passenger of car and bag that was inside vehicle at time of initial seizure were properly searched under automobile exception despite fact passenger exited the vehicle and walked away).

The automobile exception extends no further than the vehicle itself, and thus does not justify physical entry of the curtilage in order to conduct a search under a tarp covering a motorcycle unless there are exigent circumstances. Collins v. Virginia, 138 S. Ct. 1663 (2018).

a. Was there probable cause?

Probable cause exists when there is a fair probability that contraband, criminal activity or evidence of a crime will be found in a particular place. It requires only a probability or substantial chance of criminal activity, not proof or a prima facie showing of such activity. Hodges v. State, 125 N.E.3d 578, 582 (Ind. 2019); Eaton v. State, 889 N.E.2d 297 (Ind. 2008). Probable cause is a fluid concept incapable of precise definition and must be decided based on the facts of each case. Casady v. State, 934 N.E.2d 1181, 1188 (Ind.Ct.App. 2010). An officer's subjective belief regarding whether probable cause existed has no legal effect. K.K. v. State, 40 N.E.3d 488, 491 (Ind. Ct. App. 2015).

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983) (police investigating person who is merely suspected of criminal activity may not conduct full search of person or his/her vehicle).

Sanders v. State, 576 N.E.2d 1328 (Ind.Ct.App. 1991) (fact that officers had tip that D would be in area and possibly in possession of narcotics did not give officers probable cause to search car when stopping for traffic infraction; court stated that this was fishing expedition, and it will be sad day when officers can search car based on allegations of suspicious behavior).

Jones v. State, 814 N.E.2d 298 (Ind.Ct.App. 2004) (fact that police had information that a black duffel bag had been involved in armed robbery earlier in day did not provide probable cause to search children's backpack found near black duffle bag inside "popped open" trunk of vehicle parked a mile away from scene of robbery).

Myers v. State, 839 N.E.2d 1146 (Ind. 2005) (positive reaction of drug-detecting dog to exterior of D's vehicle, especially in light of D's dilated pupils, his extreme nervousness, and presence of heavy cologne mist, constituted probable cause for further police investigation regarding contents of vehicle's interior).

Porter v. State, 512 N.E.2d 454 (Ind.Ct.App. 1987) (D's earlier suspicious activity and fact that his license plate did not match car was not probable cause to search car).

State v. Branham, 952 P.2d 332 (Ariz.Ct.App. 1997) (fact that D did not have registration did not create probable cause that car was stolen); see also State v. Bauder, 181 Vt. 392, 924 A.2d 38, 51 n.8 (Vt. 2007).

Johnson v. State, 766 N.E.2d 426 (Ind.Ct.App. 2002) (given facts known to officers and significant threat of harm and loss of evidence, it was not unreasonable for them to search under hood of D's car to locate and retrieve gun; determination of whether any of individuals who were present in car would have been or were allowed to drive car after D was arrested is not necessary because D had diminished expectation of privacy in car).

McAnalley v. State, 134 N.E.3d 488 (Ind.Ct.App. 2019) (warrantless search of D's wife's vehicle and seizure of handgun found therein was proper under automobile exception; although there is no crime for possession of a handgun by a person with an outstanding felony warrant, the handgun here was seized only after D admitted ownership and that he should not have it).

When a trained or experienced officer detects the odor of burnt marijuana coming from a vehicle, the officer has probable cause to search the vehicle under both the Fourth Amendment and Article 1, § 11 of Indiana Constitution. State v. Hawkins, 766 N.E.2d 749 (Ind.Ct.App. 2002); see also Marcum v. State, 843 N.E.2d 546 (Ind.Ct.App. 2006) (odor need not be independently confirmed by a trained dog).

State v. Holley, 899 N.E.2d 31 (Ind.Ct.App. 2008) (State failed to sustain its burden of proof justifying warrantless search of D's vehicle, where there was no evidence that officer who conducted search had any formal training regarding detection of raw marijuana by odor or in distinguishing it from other substances).

State v. Carlson, 762 N.E.2d 121 (Ind.Ct.App. 2002) (officers did not have probable cause to search D's vehicle where evidence regarding odor of marijuana was conflicting).

Thomas v. State, 81 N.E.3d 621 (Ind. 2017) (in dicta, Court suggested that a single canine alert to presence of drugs, followed by fruitless search of vehicle, would not provide probable cause necessary to conduct a lawful arrest); see also I.G. v. State, 177 N.E.3d 75 (Ind.Ct.App. 2021) (following Thomas and holding that odor of burnt and raw marijuana, by itself, was not enough to establish probable cause to arrest D after no

marijuana was found in car and no evidence that the odor was strong or came from D's person).

Patterson v. State, 958 N.E.2d 478 (Ind.Ct.App. 2011) (although record was void of any evidence that officer received specific training in identifying marijuana by odor, D was free to cross-examine officer on that point; officer's general training was sufficient).

Shorter v. State, 144 N.E.3d 829 (Ind.Ct.App. 2020) (officer's training and experience permitted him to recognize the distinctive odor of burnt synthetic drugs and was sufficient to support probable cause to search D's vehicle).

Cody v. State, 702 N.E.2d 364 (Ind.Ct.App. 1998) (odor of marijuana, coupled with fact that D admitted smoking marijuana cigarette earlier, was enough to establish probable cause to search D's vehicle); see also Meek v. State, 950 N.E.2d 816 (Ind.Ct.App. 2011).

Edmond v. State, 951 N.E.2d 585 (Ind.Ct.App. 2011) (sole occupant of vehicle and smell of burnt marijuana from vehicle supported probable cause to search D's person)

b. Was the vehicle "readily mobile"?

The automobile exception does not require any additional consideration of the likelihood, under the circumstances, of a vehicle being driven away. Rather, the "ready mobility" requirement means that all operational, or potentially operational, motor vehicles are inherently mobile, and thus a vehicle that is temporarily in police control or otherwise confined is generally considered to be "readily mobile" and subject to the automobile exception to the warrant requirement if probable cause is present. Myers v. State, 839 N.E.2d 1146 (Ind. 2006); Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013 (1999).

Cheatham v. State, 819 N.E.2d 71 (Ind.Ct.App. 2004) (State is not required to prove exigent circumstances on a case-by-case basis to invoke automobile exception under Fourth Amendment; D's vehicle was readily mobile when police first seized it, and trooper had probable cause to conduct search).

Board of Education v. Earls, 536 U.S. 822, 830, 122 S.Ct. 2559 (2002) (automobile exception to Fourth Amendment is no longer substantially grounded upon concern that suspected evidence in question may be driven away and lost forever; rather, this exception is based upon balancing of exclusionary rule, civil remedies available to suspects searched for improper motives, reduced privacy expectation associated with regulated highways and fact that warrant requirement merely exchanges an unwanted search for an unwanted seizure against costs necessary to provide for warrant requirement).

California v. Carney, 471 U.S. 386, 105 S.Ct. 2066 (1985) (due to its mobility, motor home was vehicle and not home).

Payne v. State, 136 N.E.3d 1164 (Ind.Ct.App. 2019) (police properly seized D's car parked on property open to public until obtaining a search warrant).

c. Notwithstanding the automobile exception, was the warrantless search reasonable under the Indiana Constitution?

The Indiana Constitution may provide more protection for defendants involved in vehicle stops than the U.S. Constitution. Under Article 1, § 11 of the Indiana Constitution, each case must be considered upon its own facts to decide if police behavior was reasonable. Brown v.

State, 653 N.E.2d 77 (Ind. 1995); State v. Bulington, 802 N.E.2d 435 (Ind. 2004); Litchfield v. State, 824 N.E.2d 356 (Ind. 2005) (balancing of non-exclusive factors to determine reasonableness of warrantless search).

Brown v. State, 653 N.E.2d 77, 80 (Ind. 1995) (warrantless search was unreasonable because there were no exigent circumstances and D's automobile was located in residential parking area; court noted particular importance, in state that hosts Indy 500, to recognize that cars are a source of pride and status in this state; "…We are extremely hesitant to countenance their casual violation, even by law enforcement officers who are attempting to solve serious crimes.").

Scott v. State, 775 N.E.2d 1207 (Ind.Ct.App. 2002), *criticized on other grounds by* Myers v. State, 839 N.E.2d 1146 (Ind. 2006) (although officer smelled marijuana coming from D's vehicle, warrantless search of D's car was unreasonable under Article 1, § 11 of Indiana Constitution because vehicle was parked legally, D was detained some distance from vehicle and there were no exigent circumstances).

State v. Moore, 796 N.E.2d 764 (Ind.Ct.App. 2003) (Indiana Constitution requires a case-by-case analysis of officer safety in order to justify search of passenger compartment incident to lawful arrest of driver).

Fox v. State, 797 N.E.2d 1173 (Ind.Ct.App. 2003) (warrantless search of D's unoccupied truck was unreasonable under Art. 1, § 11 of Indiana Constitution, where truck was locked, parked in motel lot and flanked by several officers).

But see:

Masterson v. State, 843 N.E.2d 1001 (Ind.Ct.App. 2006) (unlike in Brown, *supra*, searched vehicle here was unquestionably the one involved in a late-night armed robbery that had just occurred. Even assuming a warrant could have been obtained, under circumstances it was reasonable for police to concentrate their efforts on safeguarding community by quickly and efficiently pursuing suspects).

d. Were containers in the car searched?

The police may search a driver or passenger's container in a car when they have probable cause that the car contains contraband, and the contraband could reasonably be found in the container. Wyoming v. Houghton, 562 U.S. 295, 119 S.Ct. 1297 (1999). Electronic storage devices are not properly treated as "containers" that may be searched under the automobile exception to warrant requirement. Riley v. California, 134 S.Ct. 2473 (2014).

State v. Friedel, 714 N.E.2d 1231 (Ind.Ct.App. 1999) (limiting Houghton to situations where police have probable cause to search car and not where police searched based on consent). See also Norris v. State, 732 N.E.2d 186 (Ind.Ct.App. 2000).

Wertz v. State, 41 N.E.3d 276 (Ind.Ct.App. 2015) (warrantless search of D's GPS device, found near his wrecked vehicle at scene of a fatal accident, violated 4th Amendment).

State v. Nixon, 593 N.E.2d 1210 (Ind.Ct.App. 1992) (if the police have probable cause to believe drugs are in car, they may search passenger's purse for drugs).

e. Was the car searched as part of a roadblock?

Three factors should be weighed in determining the reasonableness of seizures that are less intrusive than a traditional arrest: (1) the gravity of the public interests served by the seizure; (2) the degree to which the seizure serves these interests; and (3) the severity of interference with individual liberty. Garcia v. State, 500 N.E.2d 158 (Ind. 1986).

Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447 (2000) (narcotics roadblock violated Fourth Amendment; where, as here, primary purpose of roadblock program is merely to serve general interest in crime control, individualized suspicion is required before drivers are stopped; drug trafficking does not present same immediate threat to life and limb that driving while intoxicated does, and seriousness of drug trafficking problem alone cannot justify suspicionless seizures).

Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885, 157 L.Ed. 843 (2004) (distinguishing Edmond, Court held that police may use random roadblocks to seek information regarding recent specific crimes; roadblock was constitutional under general balancing test for reasonableness set out in Brown v. Texas, 443 U.S. 47 (1979)).

Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481 (1990) (roadblocks or checkpoints selected pursuant to guidelines by using uniformed officers who stop every car upheld as reasonable under Fourth Amendment).

State v. Gerschoffer, 763 N.E.2d 960 (Ind. 2002) (to be constitutionally reasonable, location and timing of sobriety checkpoints should take into account police officer safety, public safety and public convenience, and roadblock should also effectively target public danger of impaired driving; trial court properly suppressed evidence obtained from roadblock in this case because procedures followed did not satisfy requirements of Article 1, § 11 of Indiana Constitution).

Sublett v. State, 815 N.E.2d 1031 (Ind.Ct.App. 2004) (factors listed in Gerschoffer are not required elements that must be satisfied for roadblock to be reasonable under Ind. Constitution; checkpoint in this case was reasonable even though police could have used less intrusive means of observing drivers for signs of intoxication).

King v. State, 877 N.E.2d 518 (Ind.Ct.App. 2007) (two sobriety checkpoints set up by police officers on private property were unreasonable and violated Article 1, § 11 of Indiana Constitution).

Howard v. State, 818 N.E.2d 469 (Ind.Ct.App. 2004) (seat belt enforcement zone did not violate Ind. Constitution, because it did not randomly detain motorists without reasonable suspicion of criminal activity, but only detained motorists who were observed driving without proper use of their seat belt; officer was permitted to detain D long enough to discover D's true identity).

Covert v. State, 612 N.E.2d 592 (Ind.Ct.App. 1993) (where roadblock is not conducted pursuant to established plan, roadblock, despite its purpose, is unconstitutional; although intrusion in this case was minimal, public interest in automobile safety and registration was not great enough to justify roadblock).

Cleer v. State, 929 N.E.2d 218 (Ind.Ct.App. 2010) (operation of a sobriety checkpoint did not violate state constitution's provision on separation of powers).

Commonwealth v. Marconi, 619 Pa. 401, 64 A.3d 1036 (2013) (sheriffs cannot establish sobriety checkpoints, only police officers).

4. Inventory searches

a. Vehicles

The inventory search exception applies when a vehicle is properly impounded and the search stays within a permissible scope. Such searches are allowed to ensure the protection of private property in police custody; protection of police against claims of lost or stolen property; and to protect the police from danger. The State bears the burden of showing both a need for the inventory search exception and that the police conduct fell within its bounds. In determining the reasonableness of an inventory search, courts must examine all the facts and circumstances of a case, typically focusing on: 1) the propriety of the impoundment, and 2) the scope of the inventory.

Fair v. State, 627 N.E.2d 427 (Ind. 1993) ("[i]n borderline cases, the ultimate character of the search is often revealed most clearly when both the necessitousness of the impoundment and the scrupulousness of the inventorying are viewed together").

(1) Was the impoundment of the car proper?

Vehicle impoundment is reasonable if it is authorized either by statute or the police's discretionary community-caretaking function, which requires proof of an established police departmental routine or regulation authorizing the impound. Generalized or conclusory assertions about such regulations are inadequate to make that showing. Id. Wilford v. State, 50 N.E.3d 371 (Ind. 2016). In Fair v. State (above), the Indiana Supreme Court established a strict two-pronged standard for proving the impound was reasonable: 1) Consistent with objective standards of sound policing, an officer must believe the vehicle poses a threat of harm to the community or is itself imperiled; and 2) The decision to impound adhered to "established departmental routine or regulation."

Brown v. State, 653 N.E.2d 77 (Ind. 1995) (under Article 1, § 11 of Ind. Constitution, police decisions to conduct warrantless seizure and inventory search of vehicle are judged by reasonableness test, considering totality of circumstances; police actions in this case were unreasonable because: 1) there was no shortage of time or emergency; 2) there was little likelihood that car would be moved; and 3) police were not engaged in valid community care-taking function).

United States v. Duguay, 93 F.3d 346 (7th Cir. 1996) (where there is someone who can remove car, impoundment is not necessary; impounding a car to protect police department from liability in case car was vandalized or stolen was unreasonable).

United States v. Cooley, 119 F.Supp.2d 824 (N.D. Ind. 2000) (impoundment was unreasonable where police had no proper caretaker reason to impound vehicle and had many other less invasive options, such as granting acquaintance of D permission to drive vehicle to a secure area).

Smith v. State, 130 N.E.3d 1181 (Ind.Ct.App. 2019) (State failed to establish that the police officer's decision to impound D's vehicle adhered to established departmental routine or regulation when the officer testified merely in conclusory terms as to the department's policy and failed to specifically describe how the impoundment decision adhered to the department's procedure).

South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976) (in absence of probable cause to believe vehicle was involved in a crime, it may only be impounded consistent with police "caretaking" role).

State v. Gonzalez, 337 P.3d 129 (Ore.App. 2014) (impoundment of defendant's car in his own driveway was unreasonable).

Taylor v. State, 842 N.E.2d 327 (Ind. 2006) (it is not true that every vehicle parked illegally must be impounded, especially where vehicle poses no potential hazard to public safety).

Jones v. State, 856 N.E.2d 758 (Ind.Ct.App. 2006) (unlike the car in Taylor (above), a car parked on the paved shoulder of a highway can be properly towed); see also Farris v. State, 144 N.E.3d 814 (Ind.Ct.App. 2020).

Woodford v. State, 752 N.E.2d 1278 (Ind. 2001) (inventory search was reasonable due to officer's suspicion that vehicle was stolen; search was conducted within bounds of standard police regulations).

Peete v. State, 678 N.E.2d 415 (Ind.Ct.App. 1997) (under circumstances, impounding vehicle was proper exercise of community caretaking function and was carried out pursuant to police standard operating procedures).

Ratliff v. State, 770 N.E.2d 807 (Ind. 2002) (because D was arrested and his vehicle was abandoned in middle of parking lot creating a traffic hazard, it was consistent with State police operating procedures to secure truck and inventory its contents); see also Stephens v. State, 735 N.E.2d 278 (Ind.Ct.App. 2000); and Moore v. State, 637 N.E.2d 816 (Ind.Ct.App. 1994) (vehicle would have been left unattended on public highway).

Hester v. State, 551 N.E.2d 1187 (Ind.Ct.App. 1990) (a vehicle may be impounded if it is found to be "improperly registered"); see also Goliday v. State, 708 N.E.2d 4 (Ind. 1999).

(2) Did the police follow a standard operating procedure when performing the inventory search?

Unless an inventory search is conducted as matter of routine department policy, there is a risk that it is being used as a mere pretext to avoid the warrant requirement. Rabadi v. State, 541 N.E.2d 271 (Ind. 1989). The police department policy must "sufficiently limit the discretion" of officers in the field. Fair v. State, 627 N.E.2d 427, 435 (Ind. 1993).

Florida v. Wells, 495 U.S. 1, 4 (1990) (The rule that the standardized criteria must exist as a precondition to a valid inventory search is designed to ensure that it is not a pretext "for general rummaging in order to discover incriminating evidence.").

Although a search at an impound lot by trained officers is preferred, a search at the site of an arrest or traffic stop may be proper if it follows normal inventory procedure. Faust v. State, 804 N.E.2d 1242 (Ind.Ct.App. 2004). Failure to follow police policy does not necessarily establish that the inventory was a pretext. Jackson v. State, 890 N.E.2d 11 (Ind.Ct.App. 2008).

Bartruff v. State, 706 N.E.2d 225 (Ind.Ct.App. 1999) (warrantless inventory of vehicle's contents was neither necessary nor consistent with established police procedures; search of vehicle at scene was mere pretext concealing investigatory

police motive; both location of search and primary responsibilities of officer conducting search may be considered indicia of pretext which draw into question whether search was conducted in good faith); see also State v. Tucker, 588 N.E.2d 579 (Ind.Ct.App. 1992); and Friend v. State, 858 N.E.2d 646 (Ind.Ct.App. 2006).

Stevens v. State, 701 N.E.2d 277 (Ind.Ct.App. 1998) (vehicle search was not authorized under inventory exception because there was no established police policy allowing it).

Edwards v. State, 762 N.E.2d 128 (Ind.Ct.App. 2002), *affirmed on reh'g*, 768 N.E.2d 506 (while impoundment of D's truck was proper, State failed to show that search at scene conducted pursuant to impoundment was reasonable; record showed no police department policy regarding inventory searches or valid reasons for search).

Berry v. State, 967 N.E.2d 87 (Ind.Ct.App. 2012) (even though it was consistent with community caretaking function to tow D's car because it was interfering with business where it was parked, State presented no evidence regarding the police department's standard operating procedure for impounding vehicles or that the officer's decision to impound the vehicle was consistent with those procedures).

Sams v. State, 71 N.E.3d 372, 380-81 (Ind.Ct.App. 2017) (written policy conflicted with both itself and with unwritten policy, which afforded officers excessive discretion; inventory search invalid where officer searched only for valuable items but the official policy required an inventory of all items found in the vehicle; "without further definition by standardized criteria, a policy 'to inventory for valuables' gives officers unconstitutionally broad discretion. There is nothing in the record of what standardized criteria GPD officers use to decide what is 'valuable' under the policy.").

Sansbury v. State, 96 N.E.3d 587 (Ind.Ct.App. 2017) (officers deviated from inventory search protocol because they did not create a list of property seized during search, and one officer's statement showed the search was actually a pretext for a general investigatory search to gather contraband).

Lyles v. State, 834 N.E.2d 1035 (Ind.Ct.App. 2005) (Court rejected claim that inventory search was pretextual, even though officer failed to make a written record pursuant to sheriff department's standard procedures; search was legitimately suspended when officer discovered guns reported to be stolen and he turned custody of vehicle over to sheriff's department of another county).

Faust v. State, 804 N.E.2d 1242 (Ind.Ct.App. 2004) (it is preferable that inventory searches be performed in the impound lot by officers trained and experienced in performing such searches; however, where evidence supported reasonableness of search and that department procedures were followed, search at site of traffic stop before D was taken into custody was proper).

Widduck v. State, 861 N.E.2d 1267 (Ind.Ct.App. 2007) (although inventory searches conducted at the impound lot are "greatly preferred" to searches conducted at scene by arresting officer, record in this case was devoid of any indicia of pretext or subterfuge for general rummaging; court acknowledged this case was "a close call" but could not conclude that officer's subsequent decision to allow driver to leave with vehicle renders initial inventory search unreasonable).

Whitley v. State, 47 N.E.3d 640 (Ind.Ct.App. 2015) (as long as the impoundment is under the community caretaking function and "is not a mere subterfuge for investigation, the coexistence of investigatory and caretaking motives is permissible").

Terry v. State, 602 N.E.2d 535 (Ind.Ct.App. 1992) (where routine inventory search of D's car had already been done in Ohio, interests protected by inventory exception were already satisfied by time Indiana police officers subsequently searched car two days later; second search was improper investigatory search, not true inventory search).

Fair v. State, 627 N.E.2d 427 (Ind. 1993) (fact that suspicion arises after search is properly initiated and in progress does not make search pretextual); see also Moore v. State, 637 N.E.2d 816 (Ind.Ct.App. 1994).

The State must present more than mere conclusory testimony of a police officer that the search was conducted as routine inventory. Wilford v. State, 50 N.E.3d 371 (Ind. 2016); Stephens v. State, 735 N.E.2d 278 (Ind.Ct.App. 2000).

Wilford v. State, 50 N.E.3d 371 (Ind. 2016) (State presented no evidence of particulars of impoundment procedures, but only the officer's bare assertion that such a policy existed and that his actions were consistent with the policy; without the "particulars" required by Fair (above), Court could not evaluate whether this impoundment was a reasonable exercise of community-caretaking function and not merely a pretext for investigatory search); see also Anderson v. State, 64 N.E.3d 903 (Ind.Ct.App. 2016) and Smith v. State, 130 N.E.3d 1181 (Ind.Ct.App. 2019).

Rabadi v. State, 541 N.E.2d 271 (Ind. 1989) (State failed to meet its burden to show that search was routine inventory search; interests justifying inventory search exception clearly were not protected by this search and officer's testimony that it was conducted according to routine police policy was insufficient).

Gonser v. State, 843 N.E.2d 947 (Ind.Ct.App. 2006) (because State failed to present any evidence regarding police department's policy to inventory impounded vehicles at suppression hearing, it failed to meet its burden to show that decision to impound D's vehicle was in keeping with established departmental routine or regulation).

Rhodes v. State, 50 N.E.3d 378 (Ind.Ct.App. 2016) (officer's testimony was insufficient to prove the inventory search he performed on D's car at scene of arrest for driving while suspended complied with official police policy).

But see:

Lewis v. State, 755 N.E.2d 1116 (Ind.Ct.App. 2001) (while better practice would have been for State to have tendered into evidence actual State Police policy and procedure concerning vehicle impoundments, inventory search in this case was reasonable under State and Federal Constitutions).

Faust v. State, 804 N.E.2d 1242 (Ind.Ct.App. 2004) (sufficient testimony as to department's procedures made search a valid inventory search, despite search taking place at site of traffic stop and testimony coming only from investigating officer).

Possible argument: Although an inventory search may have been performed pursuant to the police department's standard operating procedures, the procedures may be unconstitutional. For example, a standard operating procedure which requires vehicle inventory searches to be performed at the scene of the crime or accident rather than at the police station may illustrate an indicia of pretext. Discretion per se is not prohibited, but free flowing, "uncanalized discretion" is. Florida v. Wells, 495 U.S. 1, 4 (1990). Any discretion the policy affords must be "exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." Id.

(3) Did the police follow a standard operating procedure when searching closed containers found in the car?

Where no standardized policy exists governing the opening of closed containers encountered during an inventory search, such search cannot be justified under the inventory exception to the warrant requirement. Florida v. Wells, 495 U.S. 1, 110 S.Ct. 1632 (1990).

Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738 (1987) (inventory search of closed container in impounded car did not violate Fourth Amendment, even though less intrusive measures might be available to achieve purposes of inventory, so long as it was conducted under standing police regulations requiring such opening and was not in bad faith effort to obtain incriminating evidence; fact auto was taken to secured lighted facility or that owner could have made other arrangements does not make search unreasonable).

State v. Lucas, 859 N.E.2d 1244 (Ind.Ct.App. 2007) (warrantless inventory search of locked metal box was unreasonable under Article 1, § 11 where officers had control of box and could have easily obtained a warrant; there was no clear sheriff department policy or procedure to mandate opening of locked container as part of inventory search).

Combs v. State, 878 N.E.2d 1285 (Ind.Ct.App. 2008) (search of D's purse which she possessed outside the car exceeded scope of inventory search; there was no policy that required search of driver's purse as part of inventory).

Peete v. State, 678 N.E.2d 415 (Ind.Ct.App. 1997) (officer's actions in opening closed film canister were reasonable and remained within scope of lawful inventory search).

Abran v. State, 825 N.E.2d 384 (Ind.Ct.App. 2005) (arresting conservation officer followed Indiana Department of Natural Resource's written standard of procedure for inventory searches and an "unwritten" procedure to open all unlocked closed containers to inventory the contents).

b. Jails

An inventory search as part of a routine administrative procedure incident to booking and jailing a person is a well-defined exception to the warrant requirement. Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605 (1983); Bastin v. State, 510 N.E.2d 229 (Ind.Ct.App. 1987).

Spindler v. State, 555 N.E.2d 1319 (Ind.Ct.App. 1990) (containers in possession of arrested person may be opened and searched when person is booked at a jail if inventory is conducted in accordance with standardized procedures).

Collins v. State, 549 N.E.2d 89 (Ind.Ct.App. 1990) (where D was either under arrest or in lawful custody when he arrived at jail, search of D's jacket at jail was permissible inventory search; jacket was placed in care and possession of matron pursuant to established procedure).

Chambers v. State, 422 N.E.2d 1198 (Ind.Ct.App. 1981) (search of D's wallet after arrest was proper because it was part of his person).

5. Emergency aid doctrine

The emergency aid doctrine allows police to act without obtaining a warrant when they reasonably believe a person needs immediate help. Mincey v. Arizona, 437 U.S. 385, 392 (1978). An officer may act without a warrant if he has "an objectively reasonable basis for believing that medical assistance [is] needed, or persons [are] in danger." Michigan v. Fisher, 558 U.S. 45, 49 (2009).

Randall v. State, 101 N.E.3d 831 (Ind.Ct.App. 2018) (warrantless search was justified after deputy found D in parked car slumped over his steering wheel, later acted erratically and showed signs of physical distress).

Cruz-Salazar v. State, 63 N.E.3d 1055 (Ind. 2016) (officer had objectively reasonable basis for warrantless entry into D's truck, where he found D asleep with engine running for 30 minutes in early hours of cold morning and did not respond to officer's flashlight or taps on window).

Caniglia v. Strom, 141 S. Ct. 1596 (2021) ("community caretaking" exception cannot justify warrantless home entry and search; Kavanaugh, J., concurring to note that the court's decision does not affect police officers' ability to take "reasonable steps to assist those who are inside a home and in need of aid" that are protected under a separate "exigent circumstances" doctrine, such as when an elderly person has fallen or to prevent a potential suicide.).

6. Exigent circumstances

a. Justifications

A warrantless intrusion of a home may be justified by:

(1) hot pursuit of a fleeing felon,
(2) imminent destruction of evidence,
(3) need to prevent a suspect's escape, or
(4) risk of danger to police or other persons inside and outside the house.

In the absence of hot pursuit, there must be probable cause to believe one or more of the other factors justifying entry were present. In addition, in assessing the risk of danger, the police should consider the gravity of the crime and the likelihood that the suspect is armed. Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684 (1990).

Kirk v. Louisiana, 536 U.S. 635, 122 S.Ct. 2458 (2002) (exigent circumstances are always required to enter a house when officers have neither arrest warrant nor search

warrant, regardless of existence of probable cause). See also Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371 (1980).

Brigham City, Utah v. Stuart, 547 U.S. 398, 126 S.Ct. 1943 (2006) (objective facts control in determining whether entry into a home is justified based on a developing emergency situation; where a warrant and consent are lacking, police officers will not be impeded if injury to a person is imminent; subjective motivations of police officers is irrelevant).

Cudworth v. State, 818 N.E.2d 133 (Ind.Ct.App. 2004) (warrantless entry was not justified by officer's subjective belief that he was being lied to by persons ordered out of house; objective evidence that a violent crime had or was about to occur was necessary).

Sloane v. State, 686 N.E.2d 1287 (Ind.Ct.App. 1997) (search of D's residence and seizure of items therein by firemen was proper, where fireman entered residence to conduct search and rescue in attempt to locate any extension of fires and/or possible victims; if reasonable privacy interests remain in fire-damaged property, any official entry requires warrant unless consent is given or exigent circumstances exist).

Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942 (1978) (burning building creates a clear exigency to permit warrantless entry; once in the building, and for a reasonable time afterwards, firefighters may seize evidence of arson that is in plain view and investigate the cause of a fire).

(1) Was the search or seizure justified by fresh pursuit?

A police officer in continuous pursuit of a perpetrator who has committed a felony or who reasonably is suspected of having committed a felony may follow the fleeing suspect into a private place, or the suspect's home if he chooses to flee there and effect the arrest without a warrant. United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406 (1976); State v. Blake, 468 N.E.2d 548 (Ind.Ct.App. 1984). Such pursuit shall not necessarily imply instant pursuit, but pursuit without unreasonable delay. Ind. Code 35-33-3-5 ("fresh pursuit" defined). Indiana has adopted the Uniform Act on Fresh Pursuit. See Ind. Code § 35-33-3-1.

Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091 (1984) (in context of home entry, application of exigent circumstances exception to arrest warrant requirement should rarely be sanctioned when there is probable cause to believe that only minor offense has been committed; "hot pursuit" doctrine did not apply here since there was no immediate or continuous pursuit of individual from scene of crime); cf. Stanton v. Sims, 134 S.Ct. 3 (2013).

Lange v. California, 141 S.Ct. 2011, 2024 (2021) (the flight of a suspected misdemeanant does not always justify a warrantless entry into a home; an officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled).

Adkisson v. State, 728 N.E.2d 175 (Ind.Ct.App. 2000) (police may not cause a suspect to come into public view, i.e., threshold of home, and then invoke Santana, *supra*, to enter home without arrest warrant).

Harper v. State, 3 N.E.3d 1080 (Ind.Ct.App. 2014) (officers' use of "ruse" to enter D's home to arrest her is equivalent of the Adkisson's officer's decision to place his foot in doorway to prevent her from closing door; thus, the subsequent search was unconstitutional).

Ingram v. Columbus, Ohio, 185 F.3d 579 (6th Cir. 1999) (police officers who are justified in making warrantless entry pursuant to "hot pursuit" exception to warrant requirement may not be justified in not complying with Fourth Amendment's "knock and announce" requirement).

Frye v. State, 757 N.E.2d 684 (Ind.Ct.App. 2001) (after executing investigatory stop, it was proper for officers to enter house due to D's flight from them into residence and officers' justifiable fear of destruction of evidence).

Whitt v. State, 91 N.E.3d 1082 (Ind. Ct. App. 2018) (Indiana officers had authority to stop defendant in Kentucky where officers knew that a shooting had just occurred, the shooter was heading to Kentucky in a "gray" SUV, and within minutes, the officers spotted a dark-colored SUV accelerating across the only bridge in the area to Kentucky; the SUV was only a mile from the shooting scene and was the only car on the bridge at the time).

State v. Blake, 468 N.E.2d 548 (Ind.Ct.App. 1984) (where D fled from police when police attempted to pull him over for speeding, officers were justified in following D into his home). See also Miller v. State, 634 N.E.2d 57, 62 (Ind.Ct.App. 1994); and State v. Straub, 749 N.E.2d 593 (Ind.App. 2001).

Sapen v. State, 869 N.E.2d 1273 (Ind.Ct.App. 2007) (because officer did not order D to stop but let him go back in his garage to retrieve his vehicle registration, officer was not in "hot pursuit" that might have justified illegal warrantless entry into home).

Hamlet v. State, 490 N.E.2d 715 (Ind. 1986) (exigent circumstances justified ordering suspects out of home after armed robbery had been committed 7-8 blocks away and police and others could be harmed if Ds attempted to escape).

(2) Was the search or seizure required to prevent the loss of evidence?

Under the exigent circumstances, exception, a warrantless search is justified if the State shows by clear and convincing evidence that the police had an objective and reasonable fear that evidence was about to be destroyed. Esquerdo v. State, 640 N.E.2d 1023 (Ind. 1994). Any warrantless home entry based on exigent circumstances must, of course, be supported by a genuine exigency. Kentucky v. King, 131 S.Ct. 1849 (2011).

Harless v. State, 577 N.E.2d 245 (Ind.Ct.App. 1991) (where evidence did not show anyone in home posed danger justifying protective sweep, and there were no facts which made officers certain that evidence was being destroyed, warrantless search of home was improper; fact that narcotics are involved, standing alone, is not enough to invoke exigent circumstances).

Ware v. State, 782 N.E.2d 478 (Ind.Ct.App. 2003) (there was no danger of imminent destruction of evidence, where officer smelled burning marijuana when D opened door, D shut door, was gone three minutes before he returned, and officer hear him "walking around" apartment).

Willis v. State, 780 N.E.2d 423 (Ind.Ct.App. 2002) (fact that D repeatedly closed door on officers when they asked to enter hotel room and his failure to consent to search cannot be considered exigent circumstance).

Hawkins v. State, 626 N.E.2d 436 (Ind. 1993) (where police did not hear running until after they kicked in the door, there was no exigency supporting their entry).

Sapen v. State, 869 N.E.2d 1273 (Ind.Ct.App. 2007) (no exigent circumstances to justify entry into home where a substance of potential evidentiary value is dissipating, but suspicious officer has no warrant and has not maintained continuous pursuit); see also Missouri v. McNeely, 133 S.Ct. 1552 (2013).

Lee v. State, 967 N.E.2d 529 (Ind.Ct.App. 2012) (evidence did not support exigent circumstances to justify warrantless swab of juvenile's penis; officers did not hold an objective, reasonable belief that DNA evidence was about to be destroyed).

Jones v. State, 814 N.E.2d 298 (Ind.Ct.App. 2004) (no exigent circumstances existed to search backpack inside trunk of car because there was no indication that vehicle was in danger of disappearing while officers obtained warrant).

Short v. State, 443 N.E.2d 298 (Ind. 1982) (where identifying characteristics of stolen items are easily removable, police are justified in searching premises under exigency exception to warrant requirement).

Robles v. State, 510 N.E.2d 660 (Ind. 1987) (exigent circumstances justified warrantless search of D's bag at airport 20 minutes before his flight was to leave).

Ramirez v. State, 174 N.E.3d 181 (Ind. 2021) (exigent circumstances justified warrantless seizure of home-security-system recorder detectives reasonably believed was critical to murder investigation and in danger of being imminently destroyed).

Shorter v. State, 151 N.E.3d 296 (Ind.Ct.App. 2020) (D's statement to confidential informant that he wanted to leave town was an exigent circumstance justifying warrantless home entry and arrest).

Rook v. State, 679 N.E.2d 997 (Ind.Ct.App. 1997) (under circumstances, officer had reasonable belief that marijuana was about to be lost or destroyed and, as result, properly seized evidence).

Murphy v. State, 499 N.E.2d 1077 (Ind. 1986) (where officer saw sawed-off shotgun in car when taking D down to station for questions, fact that there was deadly weapon in car and D would be returning because he was not under arrest were exigent circumstances justifying search of car).

Price v. State, 119 N.E.3d 212 (Ind. Ct. App. 2019) (exigent circumstances justified seizure of D's cellphone where police reasonably believed that D was deleting evidence from her phone).

Birchfield v. North Dakota, 136 S.Ct. 2160 (2016) (although warrantless blood draw may be permissible in some exigent circumstances, Fourth Amendment requires a warrant to take a blood draw from an OWI arrestee); see also Missouri v. McNeely, 133 S.Ct. 1552 (2013) (dissipation of alcohol is not always an exigent circumstance justifying warrantless blood test; key concern is whether time to get warrant preserves opportunity to obtain reliable evidence).

Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019) (when police encounter an unconscious driver suspected of driving under the influence of alcohol or drugs, the exigent circumstances doctrine will "almost always" permit a blood test without a warrant; to determine whether exigency exists where a suspected drunk driver is unconscious, Court considers whether the BAC evidence is dissipating, and when some other factors creates pressing health, safety, or law enforcement needs which would take priority over an application for a warrant).

(3) Was the search justified as a cursory search for victims and/or suspects?

Police officers may make a cursory inspection of those spaces where a person may be found to secure a crime scene and ensure their safety. The protective sweep cannot be a full search but only a cursory inspection of places where a person could be found. Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093 (1990). For victims or persons in need of immediate aid, the relevant inquiry is whether the State established the circumstances as they appear at the moment of entry would lead a reasonable, experienced officer to believe someone was in the house requiring immediate assistance. Cudworth v. State, 818 N.E.2d 133 (Ind.Ct.App. 2004). When determining whether a search is to secure a crime scene, courts should consider: 1) the number of officers on the scene and their actions before the victim-or-suspect search is performed; 2) the nature of the search -- such as whether it is investigative; and 3) the timing of the search.

Vanzo v. State, 738 N.E.2d 1061 (Ind.Ct.App. 2000) (although second officer claimed she was searching for safety, fact that first officer already searched apartment, victim had been removed from scene, and another officer had been guarding door to apartment illustrated that scene was already secured; thus, second officer could not justify search based on safety for those still in apartment).

LaMunion v. State, 740 N.E.2d 576 (Ind.Ct.App. 2000) (procurement of any evidence found in plain view during initial cursory protective search of crime scene did not violate Fourth Amendment; however, over two hours later, when extensive warrantless search was started, D's home had been secured for long period of time; thus, securing-the-crime scene/exigent circumstances rationale did not justify search).

Weis v. State, 800 N.E.2d 209 (Ind.App. 2003) (police and welfare caseworkers did not act with sense of urgency and had no facts at time of warrantless entry that were different from suspicions they had over preceding three-week period when Ds failed to keep home visit appointments).

J.K. v. State, 8 N.E.3d 222 (Ind.Ct.App. 2014) (officers' entry onto D's curtilage, their nearly one-hour knock and talk and eventual residential entry were unreasonable searches under Fourth Amendment; officers saw evidence of underage drinking but had no reason to believe someone inside was injured or in danger).

Carpenter v. State, 18 N.E.3d 998 (Ind. 2014) (evidence of injured dogs fighting in back yard did not justify warrantless entry and search of D's home for injured people).

Cudworth v. State, 818 N.E.2d 133 (Ind.Ct.App. 2004) (despite anonymous 911 call that an individual was being held at gunpoint inside house, no exigent circumstances existed to search house where: 1) police had ordered everybody out of house and questioned those outside if anyone else was in house, which was answered negatively; and 2) there was no genuine showing of emergency or person in need of

immediate assistance; prior arrest of someone inside house and a month-old encounter with a person with name given as man being held at gunpoint did not corroborate anonymous 911 call).

Montgomery v. State, 904 N.E.2d 374 (Ind.Ct.App. 2009) (unlike situation in Cudworth, officers in this case obtained no information upon arrival at motel room that cast doubt on girlfriend's claims that D was in danger, thus officers acted reasonably in entering room).

Vitek v. State, 750 N.E.2d 346 (Ind. 2001) (warrantless search of residence valid where police officer was legitimately searching for missing person who was known to be disabled); see also Jones v. State, 54 N.E.3d 1033 (Ind.Ct.App. 2016) (upholding welfare check for children left unattended in middle of night).

Smock v. State, 766 N.E.2d 401 (Ind.Ct.App. 2002) (without deciding whether presence of odor of decaying flesh in and of itself is enough to trigger exigent circumstances exception, Court held that officers in this case had reasonable belief that someone inside apartment may have been in need of immediate assistance); see also Snow v. State, 118 N.E.3d 50 (Ind.Ct.App. 2019) (exigent circumstances justified warrantless entry into residence to determine if victims were in need of aid).

Benefiel v. State, 578 N.E.2d 338 (Ind. 1991) (warrantless entry into D's residence to look for two missing girls was justified where police received secondhand hearsay from confidential informant that one of girls was being held within five block area and anonymous telephone call that two girls were being held at D's residence).

(4) Was the entry and search justified for safety reasons?

A warrantless intrusion into a home or upon a curtilage may be permissible if the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. Among the exigencies that may properly excuse the warrant requirement are threats to the lives and safety of officers and others. Law enforcement may be excused from the warrant requirement because of exigent circumstances based on concern for safety as long as the State can prove that a delay to wait for a warrant would gravely endanger the lives of police officers and others. Holder v. State, 847 N.E.2d 930 (Ind. 2006); Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684 (1990).

Trotter v. State, 933 N.E.2d 572 (Ind.Ct.App. 2010) (fact that there may be an unaccounted-for shotgun on the premises created a possible unsafe situation but did not establish an exigency to justify a warrantless intrusion into a private residence).

Collins v. State, 822 N.E.2d 214 (Ind.Ct.App. 2005) (officers' observations through kitchen window of a man holding a gun corroborated tip and justified warrantless entry on basis of exigent circumstances).

Van Winkle v. State, 764 N.E.2d 258 (Ind.Ct.App. 2002) (combined knowledge of fact that manufacture of methamphetamine can be very dangerous and fact that there were still other people in residence would cause any reasonable police officer to see immediate need to enter and remove any remaining persons from residence); see also Scott v. State, 803 N.E.2d 1231 (Ind.Ct.App. 2004); and Holder v. State, 847 N.E.2d 930 (Ind. 2006).

State v. Crabb, 835 N.E.2d 1068 (Ind.Ct.App. 2005) (smell of ether emanating from apartment reported to house a small child constituted exigent circumstances justifying a warrantless search; when officers knocked on door, they confirmed that people were still inside apartment; risk of explosions and effects of ether caused officers to reasonably believe that a person inside apartment was in immediate need of aid).

Holloway v. State, 69 N.E.3d 924 (Ind.Ct.App. 2017) (exigent circumstances justified warrantless search of car because police had probable cause it contained a meth lab).

Price v. State, 119 N.E.3d 212 (Ind. Ct. App. 2019) (walkthrough of D's apartment was permissible to ensure it was secure and to attempt to find any hazardous substances D's child might have consumed to report to doctors to aid in their diagnosis).

b. Limitations on exigent circumstances

(1) Did the police create the exigent circumstances?

Where the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed. Kentucky v. King, 131 S.Ct. 1849 (2011). Simply knocking on the house door identifying self as police does not violate the Fourth Amendment and does not invalidate a warrantless search based on exigency.

Kentucky v. King, 131 S.Ct. 1849 (2011) (where police smelling marijuana and suspecting a drug dealer was inside the apartment, knocked on the apartment door, fact that the police then heard noises associated with destroying evidence justified warrantless entry).

State v. Lagrone, 985 N.E.2d 66 (Ind.Ct.App. 2013) (under King, police could not use exigent circumstances exception to justify a forced warrantless entry into D's home, based on electronic signal from parcel wire located inside the home, without having first obtained a warrant).

NOTE: Prior to Kentucky v. King, *supra*, Indiana courts have held that a warrantless search was improper where officers had probable cause to believe drugs were in a house before they knocked on the door. Any emergency present to justify the search was created by the officers' approach and was clearly foreseeable to them. State v. Williams & Grace, 615 N.E.2d 487 (Ind.Ct.App. 1993). Arguably such a search is unconstitutional under an Indiana Constitutional analysis.

(2) Was there time for the police to get a warrant?

An emergency does not exist when the place to be searched is secured and a warrant can be obtained.

Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684 (1990) (although murder was involved, police were not justified in entering house without warrant where D was not known to be murderer but suspected of being getaway driver, police had already

recovered murder weapon, no suggestion that others in house were in danger, police had house surrounded and D was "going nowhere").

Middleton v. State, 714 N.E.2d 1099 (Ind. 1999) (exigent circumstances did not justify entry into home when police had home secured while getting warrant). See also Haley v. State, 696 N.E.2d 98 (Ind.Ct.App. 1998); Cf. Johnson v. State, 32 N.E.3d 1173 (Ind.Ct.App. 2015).

Smock v. State, 766 N.E.2d 401 (Ind.Ct.App. 2002) (because officers exited apartment to wait for arrival of detectives and coroner, their subsequent seizure of evidence upon re-entry violated Fourth Amendment).

Paschall v. State, 523 N.E.2d 1359 (Ind. 1988) (where officers were searching D's car after accident, officer's search of locked suitcase was not justified regardless of probable cause that locked suitcase contained narcotics; officers had suitcase and car secured and could have obtained warrant).

Bryant v. State, 660 N.E.2d 290 (Ind. 1995) (where police had probable cause to believe that burglary was in progress, police did not have to get warrant before entering home; however, search was limited to places where burglar could be found).

Van Winkle v. State, 764 N.E.2d 258 (Ind.Ct.App. 2002) (if police would have taken time to obtain warrant, people in residence could have been injured by volatile methamphetamine-manufacturing process, could have destroyed evidence, or could have attempted to inflict harm upon officers or others).

McDermott v. State, 877 N.E.2d 467 (Ind.Ct.App. 2007) (warrantless home entry was justified by D's erratic and increasingly menacing behavior).

Paul v. State, 971 N.E.2d 172 (Ind.Ct.App. 2012) (where officers observed D, whom they had probable cause to believe had just committed a vicious murder and who had threatened to commit at least two more murders, tampering with evidence while they were standing on an exposed common stairway, entry into apartment was justified for safety reasons and to prevent destruction of evidence; exigent circumstances made it impracticable for officers to obtain an arrest warrant before making the arrest).

(3) Was the crime relatively minor?

Home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed. Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091 (1984); cf. Stanton v. Sims, 134 S.Ct. 3 (2013) (Welsh did not establish a categorical rule that officers can never enter a home without a warrant to search for suspect for a minor offense; under some circumstances, hot pursuit will allow such warrantless searches).

Haley v. State, 696 N.E.2d 98 (Ind.Ct.App. 1998) (fact that officers observed occupants of tent smoking marijuana did not amount to exigent circumstances justifying warrantless search or arrest); Cf. Johnson v. State, 32 N.E.3d 1173 (Ind.Ct.App. 2015).

Ogburn v. State, 53 N.E.3d 464 (Ind.Ct.App. 2016) (while smell of burnt marijuana alone may constitute probable cause to search a vehicle, the smell here did not establish probable cause that the apartment contained evidence of drug dealing).

Hanna v. State, 726 N.E.2d 384 (Ind.Ct.App. 2000) (loud noise complaint and fact that no one would respond to officer's knocking did not justify warrantless entry into home).

Willis v. State, 780 N.E.2d 423 (Ind.Ct.App. 2002) (forced entry into hotel room was not reasonable based on fact that crime of criminal trespass, a misdemeanor, was being committed in officers' presence).

(4) Did the police use excessive force?

Grier v. State, 868 N.E.2d 443 (Ind. 2007) (application of force to a detainee's throat to prevent swallowing of suspected contraband violates state and federal constitutional prohibitions against unreasonable search and seizure).

Justice v. State, 552 N.E.2d 844 (Ind.Ct.App. 1990) (absent auto accident, dissipation of alcohol in blood does not create exigent circumstances justifying warrantless, non-consensual blood test). Cf. State v. Robbins, 549 N.E.2d 1107 (Ind.Ct.App. 1990), *disapproved on other grounds by* Abney v. State, 821 N.E.2d 375 (Ind. 2005).

7. Probation/Parole/Community Corrections searches

A probationer's home is protected by the Fourth Amendment's requirement that searches be reasonable. However, a search warrant is not required when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable. Griffin v. Wisconsin, 483 U.S. 868, 107 S.Ct. 3164 (1987). Parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment. Samson v. California, 547 U.S. 843, 126 S.Ct. 2193 (2006).

Moreover, a person who agrees to house a probationer or community corrections participant retains a limited expectation of privacy in his residence and possessions because the residence and possessions, including common areas, are subject to search to ensure compliance with probation/community corrections rules. McElroy v. State, 133 N.E.3d 201 (Ind.Ct.App. 2019).

a. Was a parolee searched?

States and the federal government are free to do away with probable cause, reasonable suspicion, and search warrants when stopping and searching parolees, because parolees, like prisoners, have a reduced expectation of privacy. Samson v. California, 547 U.S. 843, 126 S.Ct. 2193 (2006).

State v. Harper, 135 N.E.3d 962 (Ind.Ct.App. 2019) (under totality of the circumstances, parole and law enforcement officers had reasonable suspicion to believe D, who had actual knowledge of the search terms of his parole conditions, was engaged in criminal activity; thus, warrantless search of his storage unit was lawful).

NOTE: Samson does not represent a blanket approval for warrantless parolee searches by general law enforcement officers without reasonable suspicion; rather, the Court approved the constitutionality of such searches only when authorized under state law. See United States v. Freeman, 479 F.3d 743 (2007). Thus, a warrantless parolee search must comply with Ind. Code 11-13-3-7(a)(6), which permits a search of a parolee's person or property if the parole officer " has reasonable cause to believe that the parolee is violating or is in imminent danger of violating a condition to remaining on parole."

b. Did probation/community corrections conditions authorize suspicionless searches?

A condition of probation requiring the defendant to waive her Fourth Amendment search and seizure rights and authorize activities such as random drug screens and home visits is constitutional under the U.S. and Indiana Constitutions if the waiver is voluntary. Rivera v. State, 667 N.E.2d 764 (Ind.Ct.App. 1996).

Kopkey v. State, 743 N.E.2d 331 (Ind.Ct.App. 2001) (condition of in-home detention requiring D to submit to random urinalysis without reasonable suspicion is not overly broad and does not violate Fourth Amendment). **NOTE:** Kopkey was decided before and implicitly overruled by Knights v. United States, 534 U.S. 112, 122 S.Ct. 587 (2001); but see Wertz v. State, below, stating lack of suspicion may no longer be a valid objection. Further, Kopkey is, by analogy, in conflict with Steiner v. State, 763 N.E.2d 1024 (Ind.Ct.App. 2002), which held that a court cannot impose the condition of random, suspicionless urinalysis as a condition of bail.

Deckard v. State, 425 N.E.2d 256 (Ind.Ct.App. 1981) (minor could not waive Fourth Amendment rights as condition of probation without his mother or guardian also waiving rights).

(1) Was there reasonable suspicion?

Probationers and community corrections participants who have consented or been clearly informed that the conditions of their probation unambiguously authorize warrantless and suspicionless searches may thereafter be subject to such searches during the period of their probationary status. Vanderkolk v. State, 32 N.E.3d 775 (Ind. 2015). A community-corrections home-detention contract stating that the defendant "waives all rights against search and seizure" unambiguously informs the defendant that a search may be conducted without reasonable suspicion. Additional language specifying that the defendant may be searched without reasonable suspicion and waives the right against "unreasonable" search and seizure is unnecessary. State v. Ellis, 167 N.E.3d 285 (Ind. 2021); State v. Fox, 186 N.E.3d 157 (Ind.Ct.App. 2022).

Despite the language in Vanderkolk, there are multiple arguments why reasonable suspicion is still necessary even when the probationer agreed to suspicionless searches as a condition of probation. 1) The language in Vanderkolk is only persuasive, and not authoritative because it was unnecessary to the holding of the case, and thus, dicta. See Koske v. Townsend Engineering Co., 551 N.E.2d 437, 443 (Ind. 1990). 2) The Indiana Supreme Court incorrectly concluded that Samson v. California, 547 U.S. 843, 126 S.Ct. 2193 (2006) overruled United States v. Knights, 534 U.S. 112, 122 S.Ct. 587, 592 (2001) (notwithstanding probationer's waiver of Fourth Amendment rights, subsequent search must be based on reasonable suspicion). Although the Court in Sampson held that reasonable suspicion is unnecessary when a parolee agrees to suspicionless searches as a condition of parole, the Court noted parolees have fewer expectations of privacy than probationers because parole is more akin to imprisonment. 3) Even if the Vanderkolk Court is correct, a probation search which is constitutional under the Fourth Amendment may not be constitutional under Article I, Section 11 of the Indiana Constitution. State v. Schlechty, 926 N.E.2d 1 (Ind. 2010). There are Indiana cases, even before Knights, that have required reasonable suspicion for a probation search. See, e.g., Purdy v. State, 708 N.E.2d 20 (Ind.Ct.App. 1999). 4) Finally, Vanderkolk arguably applies only to probationers and community corrections participants on home detention, not to all

probationers, including those on unsupervised probation. Hodges v. State, 54 N.E.3d 1055 (Ind.Ct.App. 2016) (Vaidik, J., concurring).

Jarman v. State, 114 N.E.3d 911 (Ind.Ct.App. 2018) (D did not agree to suspicionless random searches as a condition of community corrections).

Green v. State, 719 N.E.2d 426 (Ind.Ct.App. 1999) (D's presence in area which is allegedly used to grow marijuana did not constitute reasonable suspicion to justify investigatory stop; fact that D waived Fourth Amendment protections in work release conditions did not relieve police of reasonable suspicion requirements).

Nowling v. State, 955 N.E.2d 854 (Ind.Ct.App. 2011) (fact that probationer's drug counselor claimed probationer lived in "la la land" about his addictions and probationer's status as a high-risk probationer did not constitute reasonable suspicion to search probationer's room).

State v. Schlechty, 926 N.E.2d 1 (Ind. 2010) (even if officer's subjective belief that his search of D's case was based on reasonable suspicion that D did not behave well which was a condition probation was insufficient to support search, thirteen-year-old's report regarding D constitute reasonable suspicion of a crime).

Purdy v. State, 708 N.E.2d 20 (Ind.Ct.App. 1999) (fact that officers smelled marijuana when probationer's ex-wife opened door of home provided reasonable suspicion that illegal activity was occurring in violation of probation).

Polk v. State, 739 N.E.2d 666 (Ind.Ct.App. 2000) (where police officers did not know that D was probationer, police did not have reasonable suspicion to stop D because he was in high crime neighborhood).

Anderson v. State, 961 N.E.2d 19 (Ind.Ct.App. 2012) (the taking of a buccal swab did not violate U.S. or Indiana Constitutions where the probation officer mistakenly believed D's conviction was entered as a felony rather than misdemeanor under AMS sentencing statute; the taking of the buccal swab fell under the mistake exception of I.C. 10-13-6-10(c)).

Rivera v. State, 667 N.E.2d 764 (Ind.Ct.App. 1996) (where D tested positive for cocaine while on probation and probation officer learned from detective that D was suspected of possessing cocaine in his home, there were reasonable grounds to search D's home).

(2) Was the search reasonable in means and scope?

Even if a probationer waives her Fourth Amendment rights as a condition of probation, although lack of suspicion may no longer be a valid objection, a subsequent search still must be reasonable. State v. Terrell, 40 N.E.3d 501 (Ind.Ct.App. 2015). The permissible degree of impingement upon a probationer's right to privacy is not unlimited. Griffin v. Wisconsin, 483 U.S. 868, 875, 107 S.Ct. 3164, 3169 (1987). The special needs of probation system make warrant requirement impracticable and justify replacement of standard of probable cause by "reasonable grounds." Id. at 875, at 3169-70. But a consent to search provision that permits unreasonable searches is unconstitutionally overbroad. Fitzgerald v. State, 805 N.E.2d 857 (Ind.Ct.App. 2004).

Fitzgerald v. State, 805 N.E.2d 857 (Ind.Ct.App. 2004) (a probation condition that waives the D's right against unreasonable searches is unconstitutionally overbroad; State's argument that reasonableness is inherent to the probation condition is insupportable when explicit language of order is to the contrary).

Carswell v. State, 721 N.E.2d 1255 (Ind.Ct.App. 1999) (requiring submission to warrantless searches was not unreasonable simply because "reasonable" was not within language of condition of probation; rather, reasonableness standard is implied).

Bonner v. State, 776 N.E.2d 1244 (Ind.Ct.App. 2002) (condition that permitted probation officers in conjunction with law enforcement officers to enter D's residence and conduct warrantless search at any time was not facially invalid and was reasonably related to D's rehabilitation and protection of public).

State v. Terrell, 40 N.E.3d 501 (Ind.Ct.App. 2015) ("nondestructive daytime search" of probationer's home, safe and nightstand was reasonable under federal and state constitutions).

NOTE: Examples of unreasonable searches of probationers may include: (1) a search which stems from an overly broad waiver of rights, i.e., waiver that allow searches at any time of the day or of any place the probationer is located; (2) a search where the police lack any suspicion that the probationer has engaged in a violation of probation; and (3) a search on which the police accompany the probation officer for the purposes of obtaining evidence of a crime. See Rivera v. State, 667 N.E.2d 764, 768 (Ind.Ct.App. 1996) (Staton, J., concurring); State v. Propios, 879 P.2d 1057 (Haw. 1994); and Tamez v. State, 534 S.W.2d 686 (Tex.Ct.Crim.App. 1976).

(3) What was the purpose of the search – was it a true probation search?

Regardless of the purpose of the search, a search supported by reasonable suspicion and authorized by a condition of probation may be reasonable under the Fourth Amendment. United States v. Knights, 534 U.S. 112, 122 S.Ct. 587 (2001). However, the question of what role, if any, that the subjective intentions of a police officer or probation officer plays in the determination of a reasonable probation search may be reserved for another day. Id. at 593 (Souter, J., concurring).

State v. Schlechty, 926 N.E.2d 1 (Ind. 2010) (pursuant to Knights, the fact that the search may have been more of an investigatory search rather than a probation search is no longer a consideration under the Fourth Amendment; court expressed no opinion as to whether result would be the same under Article 1, § 11).

Although United States v. Knights has limited the consideration of the purpose of a probation search in the context of the Fourth Amendment, a long line of Indiana cases have held that a court must look at the purpose of the search when determining whether the probation search is reasonable. Thus, argue that an investigatory search performed by police officers under the pretext of a probation search is unreasonable and violates Article 1, Section 11 of the Indiana Constitution. See State v. Schlechty, 926 N.E.2d 1 (Ind. 2010) (claiming probation search which was constitutional under the Fourth Amendment may or may not have been constitutional under Article I, § 11 of the Indiana Constitution); Purdy v. State, 708 N.E.2d 20 (Ind.Ct.App. 1999) (State must demonstrate that warrantless search of probationer was true probation search and not investigation search; in contrast to investigation search, a probation search should advance goals of

probation that allow probationer to demonstrate his rehabilitation while serving part of his sentence outside prison walls); see also Polk v. State, 739 N.E.2d 666 (Ind.Ct.App. 2000).

Hensley v. State, 962 N.E.2d 1284 (Ind.Ct.App. 2012) (at the point police began their own investigatory search without the probation officer, the officer's search ceased being a probationary search and was unreasonable).

Micheau v. State, 893 N.E.2d 1053 (Ind.Ct.App. 2008) (probation officer's "home visit" for safety reasons was reasonable despite presence of police where he made police get a warrant as soon as they found evidence of a crime).

Allen v. State, 743 N.E.2d 1222 (Ind.Ct.App. 2001) (probation search of D's home, conducted as result of information relayed by police to parole officer, was true "probation" search conducted pursuant to D's parole agreement; parole officer testified that his main objective in initiating and conducting search was to determine if D was in possession of firearm in violation of his parole agreement).

Bonner v. State, 776 N.E.2d 1244 (Ind.Ct.App. 2002) (during routine parole sweep to verify D's address, officer witnessed D's attempt to leave undetected out back door, which led to search of D's residence; search was true probationary search, not investigatory search, and was reasonable under Indiana Constitution). But see Fitzgerald v. State, 805 N.E.2d 857 (Ind.Ct.App. 2004) (indicating that probation and parole sweeps are unconstitutional because not based on reasonable suspicion).

8. Schools / Juveniles

a. Lower reasonableness standard

Where a search is initiated and conducted by school officials alone, or whereas here, school officials initiate a search and police involvement is minimal, the reasonableness standard is applicable. Ordinary warrant requirement will apply where "outside" police officers initiate, or are predominantly involved in, a school search of a student or student property for police investigative purposes. Myers v. State, 839 N.E.2d 1154 (Ind. 2005).

T.S. v. State, 863 N.E.2d 362 (Ind.Ct.App. 2007) (the reasonableness standard applied to an Indiana Public Schools Police officer, who while working at high school, seized the child; although officer did not act in conjunction with school officials prior to initial contact with child, he intended to involve school dean, and thus, was acting as a school resource officer).

b. Searches

School official's search of a student is not subject to the warrant requirement and does not require probable cause. However, the Fourth Amendment applies to school searches, and students have a legitimate expectation of privacy in their persons and in containers carried on their persons. The legality of the search depends upon reasonableness under the circumstances, focusing on: (1) whether the search was justified at its inception, and (2) whether the search as executed was reasonably related in scope to the circumstances justifying its inception. New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985); Berry v. State, 561 N.E.2d 832 (Ind.Ct.App. 1990). Under ordinary circumstances, a student search will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student is or has violated either a law or a school rule.

D.I.R. v. State, 683 N.E.2d 251 (Ind.Ct.App. 1997) (search of D's pockets was not justified based on electronic wand search of every student and wand was already put up for evening).

D.M. v. State, 902 N.E.2d 276 (Ind.Ct.App. 2009) (search of juvenile's jacket was not justified by juvenile statement to another student that he went shopping and had a "stack" where teacher admittedly did not know what a "stack" was).

Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 129 S.Ct. 2633 (2009) (because there were no facts that drugs school official suspected child to possess posed a danger to students or that drugs were concealed in her underwear, school officials did not have sufficient suspicion to warrant extending their search of child to the point of making child pull out her underwear; however, due to the lack of clarity in the law, school official had immunity).

Oliver by Hines v. McClung, 919 F.Supp. 1206 (N. D. Ind. 1995) (strip search of 7th grade girls violated Fourth Amendment).

S.A. v. State, 654 N.E.2d 791 (Ind.Ct.App. 1995), *disapproved in part on other grounds*, 911 N.E.2d 1248 (Ind. 2009) (school security officer's warrantless search of D's book bag and school locker was reasonable; given information known at time of search, reasonable grounds existed to suspect unlawful behavior); see also R.M. v. State, 20 N.E.3d 873 (Ind.Ct.App. 2014).

In re C.S., 735 N.E.2d 273 (Ind.Ct.App. 2000) (protective patdown search of juvenile outside of classroom was permissible even though officer's actions may not have satisfied warrant and probable cause requirements in some other environment).

D.L. v. State, 878 N.E.2d 500 (Ind.Ct.App. 2007) (pat-down search of student who was in the hall during non-passing period and admittedly did not have an identification on his person was reasonable).

Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386 (1995) (random, suspicionless urine testing of public-school athletes by school district is reasonable under Fourth Amendment).

Northwestern School Corp. v. Linke, 763 N.E.2d 972 (Ind. 2002) (suspicionless random drug testing program conducted upon students engaged in certain select activities did not violate Ind. Const., Art. 1, § 11 or privileges and immunities clause).

State v. Meneese, 282 P.3d 83 (Wash. 2012) (school search exception did not apply to school resource officer's warrantless search of student's backpack for drugs, because officer was employed by the police department and had no ability to discipline students; he was seeking evidence for criminal prosecution).

The Indiana appellate courts have not considered the propriety of student locker searches, but the Indiana General Assembly has specifically authorized school officials, with assistance from law enforcement, to search student lockers. Ind. Code 20-33-8-32.

c. Terry stop-type seizures

Whereas a search in a public school must be justified upon reasonable suspicion, there is a lower standard to justify the equivalent to a Terry stop in a public school. Although reasonable suspicion may not be needed, seizure may be unreasonable without being

arbitrary, capricious, or undertaken for the purpose of harassment. T.S. v. State, 863 N.E.2d 362 (Ind.Ct.App. 2007).

For an extensive discussion on school searches and seizures, see IPDC *Juvenile Delinquency Manual*, Chapter 3.

9. Workplace/Other

Oman v. State, 737 N.E.2d 1131 (Ind. 2000) (use of drug test of government employee in criminal prosecution was reasonable under circumstances).

State v. Gunn, 735 N.E.2d 304, *aff'd and clarified at* 741 N.E.2d 787 (Ind.Ct.App. 2001) (results of administrative breath test taken by police officer who was involved in accident were inadmissible in criminal prosecution because there was no evidence of crime at time test was administered; unlike Oman, results were not obtained by valid legal process externally initiated from employment setting).

Adams v. State, 762 N.E.2d 737 (Ind. 2002) (search of D's home by revenue authorities who were seeking property to satisfy tax assessment was unconstitutional and exclusionary rule barred use of seized evidence in subsequent criminal proceedings).

O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (work-related search by government employers does not require warrant and does not violate Fourth Amendment if reasonable in its inception and is reasonably related to its justification; reasonableness depends upon reason for and object of search); see also Gossmeyer v. McDonald, 128 F.3d 481 (7th Cir. 1997).

New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636 (1987) (although Fourth Amendment protection applies to commercial premises, privacy expectation is less than expectation in home; warrantless inspection of closely-regulated industries is reasonable provided: (1) there is "substantial" government interest in regulatory scheme under which inspection is made; (2) warrantless inspection is necessary to further regulatory scheme; and (3) inspection program provides constitutionally adequate substitute for warrant re: certainty and regularity of application).

Hannoy v. State, 789 N.E.2d 977, *reh'g granted* 793 N.E.2d 1109 (Ind.Ct.App. 2003) (trial court erroneously admitted into evidence results of blood test that indicated D was intoxicated obtained after police ordered D's blood to be drawn without probable cause and without requesting his consent; "special needs" exception does not apply to warrantless, suspicionless, nonconsensual drawing of a person's blood by law enforcement as part of criminal investigation); see also Schlesinger v. State, 811 N.E.2d 964 (Ind.Ct.App. 2004).

Duncan v. State, 799 N.E.2d 538 (Ind.Ct.App. 2003) (record did not contain "clear indication" that D was intoxicated at time of fatal accident, thus police did not have probable cause necessary to compel D to submit to drawing of his blood; officer indicated in affidavit for probable cause that his sole basis for believing D was intoxicated was that he saw alcohol beverage containers in view at scene of accident, and later testified that he determined that due to D's speech and mannerisms that he was intoxicated).

Frensemeier v. State, 849 N.E.2d 157 (Ind.Ct.App. 2006) (occurrence of traffic accident, D's bloodshot eyes, statements, and odor of alcohol was sufficient to supply probable cause).

Balding v. State, 812 N.E.2d 169 (Ind.Ct.App. 2004) (compulsory collection of DNA samples from convicted offenders for inclusion in Indiana DNA database falls within "special needs"

exception to Fourth Amendment, beyond normal need for law enforcement); see also Keeney v. State, 873 N.E.2d 187 (Ind.Ct.App. 2007).

10. Airports

Travelers in public airports may be required to submit to an inspection of their persons and personal effects. The Indiana General Assembly has authorized airline companies to conduct such searches: "Any person purchasing a ticket to board any commercial or charter aircraft shall by such purchase consent to a search of his person or personal belongings by the company selling said ticket to him." Ind. Code 35-47-6-3. Failure to consent provides grounds for denial to board the aircraft. The Supreme Court has suggested support for the policy of treating passengers the same as persons and vehicles on public highways. Williams v. State, 261 Ind. 547, 307 N.E.2d 457 (1974).

11. Exceptions that do not exist

a. Crime scene exception

There is no crime (murder) scene exception to the warrant requirement. Flippo v. West Virginia, 528 U.S. 11, 120 S.Ct. 7 (1999) (per curiam).

b. Identification search

There is no "identification search" exception to the warrant requirement. State v. Webber, 694 A.2d 970 (N.H. 1997) (court rejected such exception under state constitution's prohibition against unreasonable searches).

c. Firearm exception

There is no firearm exception. The fact that a firearm is involved in the alleged crime does not lower the constitutional standards. Florida v. J.L., 529 U.S. 266, 272, 120 S.Ct. 1375 (2000).

Pinner v. State, 74 N.E.3d 226 (Ind. 2017) (given fact that possession of weapon is not *per se* illegal in Indiana, anonymous tip that a person is carrying a gun is, without more, insufficient to justify stop and frisk of that person).

d. Suspicion of criminal activity

There is no general emergency exception to the warrant requirement, nor does the mere existence of a crime constitute an exception. Hardister v. State, 849 N.E.2d 563, 571 (*citing* Mincey v. Arizona, 437 U.S. 385, 393-94 (1978) (holding the seriousness of a crime being investigated or the interests in making law enforcement more efficient do not justify dispensing with the warrant requirement or disregarding the Fourth Amendment)).

e. Children in need of services (CHINS)

Search of a private residence as part of CHINS investigation is subject to criminal search warrant requirement, regardless of whether the primary purpose of the search is civil or criminal in nature. Germaine v. State, 718 N.E.2d 1125 (Ind.Ct.App. 1999). The exclusionary rule does not apply in CHINS proceedings, however. In re J.V., 875 N.E.2d 395, 401 (Ind.App. 2007).

III. WAS ARTICLE I, SECTION 11 OF THE INDIANA CONSTITUTION VIOLATED?

Under Article 1, Section 11 of the Indiana Constitution, each case must be considered upon its own facts to decide if police behavior was reasonable under the totality of the circumstances. Brown v. State, 653 N.E.2d 77, 79 (Ind. 1995). Thus, it is possible that the Indiana Constitution may prohibit searches which the Federal Constitution does not. "The Indiana Constitution has unique vitality, even where its words parallel federal language." State v. Gerschoffer, 763 N.E.2d 960, 965 (Ind. 2002).

Analysis under Article 1, Section 11 of the Indiana Constitution often mirrors that of the Fourth Amendment. Section II, above, combines state and federal constitutional law and includes many cases that were decided under the Indiana Constitution. However, the Fourth Amendment is the minimum amount of protection a state may provide, and Indiana courts appear increasingly willing to expand Article I, Section 11 beyond the limits of the Fourth Amendment. See, e.g., State v. Bulington, 802 N.E.2d 435 (Ind. 2004); State v. Gerschoffer, 763 N.E.2d 960, 965 (Ind. 2002); Brown v. State, 653 N.E.2d 77 (Ind. 1995); State v. Hanley, 802 N.E.2d 956 (Ind.Ct.App. 2004); Shultz v. State, 742 N.E.2d 961 (Ind.Ct.App. 2001); and Tyler v. State, 639 N.E.2d 1052 (Ind.Ct.App. 1994).

> Osborne v. State, 805 N.E.2d 435, 439 (Ind.Ct.App. 2004) ("Inasmuch as we place the burden on the State to show that under the totality of the circumstances its intrusion was reasonable, the Indiana constitution provides more liberal protection against search and seizure than does the federal constitution.");
>
> Rush v. State, 881 N.E.2d 46, 52 (Ind.Ct.App. 2008) ("…we give Article 1, section 11 a liberal construction in favor of protecting individuals from unreasonable intrusions on privacy").

In analyzing a search or seizure under the Indiana Constitution, the cases in Section II, *supra*, should be used as rough guidelines for what is deemed reasonable behavior by the police, but each situation should be analyzed independently for reasonableness under the totality of the circumstances. The court's determination of reasonableness of a search or seizure under Article 1, § 11 often turns on a balance of the following non-exclusive factors: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs. Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005).

Further, if the principal value of art. I, § 11, is to "protect Hoosiers from unreasonable police activity in private areas of their lives," Brown, 653 N.E.2d at 79, the standards for its application must…"reduce the opportunities for official arbitrariness, discretion, and discrimination." State v. Bulington, 802 N.E.2d 435, 440 (Ind. 2004).

> Litchfield v. State, *supra* (Article 1, § 11 prohibits police from randomly searching and seizing trash containers unless they have articulable, individualized suspicion that trash may contain evidence of criminal conduct).
>
> Brown v. State, 653 N.E.2d 77 (Ind. 1995) (Hoosiers regard their automobiles as private and cannot easily abide their uninvited intrusion; search of a car when it could have been secured and a warrant obtained is unreasonable under Indiana Constitution).
>
> Mitchell v. State, 745 N.E.2d 775, 788 (Ind. 2001) (under Article 1, § 11 of the Indiana Constitution, police must use investigative methods that are reasonable in scope, duration, and relation to the stop).
>
> Baldwin v. Reagan, 715 N.E.2d 332 (Ind. 1999) (applying Indiana constitutional analysis, officer may not stop a motorist for a possible seat belt violation unless he reasonably suspects driver or passenger is not wearing a seatbelt).

Hoop v. State, 909 N.E.2d 463 (Ind.Ct.App. 2009) (Indiana Constitution requires reasonable suspicion to conduct dog sniff of private residence).

State v. Bulington, 802 N.E.2d 435 (Ind. 2004) (though Fourth Amendment claim was debatable, stopping D's truck solely based on purchase of multiple packs of methamphetamine precursor was unreasonable under Art. I, section 11).

Osborne v. State, 805 N.E.2d 435 (Ind.Ct.App. 2004) (where the actions of the police are outrageously dangerous, such as encouraging a person to violate home detention and to exceed the speed limit while intoxicated, the police behavior is *per se* unreasonable and any stop or seizure violates article I, § 11); cf., State v. McCaa, 963 N.E.2d 24 (Ind.Ct.App. 2012) (officer's order of possibly impaired driver whose truck was blocking traffic during rainstorm to drive two miles down the road to a gas station was not outrageously dangerous).

Shultz v. State, 742 N.E.2d 961 (Ind.Ct.App. 2001) (it was unreasonable under Indiana Constitution for police to tour property to see if anyone was home after no one responded to their knocking on door).

Duran v. State, 930 N.E.2d 10 (Ind. 2010) (officers' actions of busting in door with guns drawn in the middle of the night and searching home were unreasonable under the Indiana Constitution; the officers' mistaken belief that an individual upon whom they intended to serve an arrest warrant was in the home did not justify the search; the degree of intrusion of officer's actions was of the highest order).

Conn v. State, 89 N.E.3d 1093, 1095 (Ind.Ct.App. 2017) ("For purposes of privacy interests protected by Article 1, Section 11 of the Indiana Constitution, closed doors matter; high fences matter; roped-off drives matter; closed drapes matter; and in this case, a closed and locked gate matters.").

State v. Hanley, 802 N.E.2d 956 (Ind.Ct.App. 2004) (where trial court suppresses evidence under Indiana Constitution, but State's appeal brief failed to make "separate legal analysis" under Indiana Constitution, State waives state constitutional argument because by merely arguing Fourth Amendment law it has failed to carry burden of greater state constitutional protection).

Yanez v. State, 963 N.E.2d 530 (Ind.Ct.App. 2012) (although degree of intrusion on D's activities was minimal, that factor is not sufficient to convert an otherwise unconstitutional stop into a constitutional one).

Mundy v. State, 21 N.E.3d 114 (Ind.Ct.App. 2014) (detectives' intrusion onto private property despite clear signs of "no trespassing" was unreasonable under Art. 1, § 11).

Null v. State, 690 N.E.2d 758 (Ind.Ct.App. 1998) (despite more liberal protection of Indiana Constitution, warrantless search of home that has been severely damaged by fire is not unreasonable).

IV. SHOULD THE ILLEGALLY SEIZED EVIDENCE BE EXCLUDED?

The "exclusionary rule" provides that under certain circumstances, courts will exclude evidence obtained in violation of the United States Constitution and Indiana Constitution. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961) (Fourth Amendment); Hawkins v. State, 626 N.E.2d 436 (Ind. 1993); Callender v. State, 193 Ind. 91, 138 N.E. 817 (1922) (Indiana Constitution, Art. 1, §11). The exclusionary rule is designed "to prevent, not to repair." Brown v. Illinois, 422 U.S. 590, 600, 95 S.Ct. 2254 (1975). Because its purpose is to deter police misconduct, "application of the rule does not serve this deterrent function where the police action, although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights." United States v. Fazio, 914 F.2d 950, 958 (7th Cir. 1990).

Hudson v. Michigan, 547 U.S. 1096, 126 S.Ct. 2159 (2006) (exclusionary rule does not apply to a violation of the "knock and announce" rule).

A. WAS THE SEIZED EVIDENCE THE FRUIT OF AN ILLEGAL SEARCH OR SEIZURE?

1. Fruit of poisonous tree doctrine

When applied, the "fruit of the poisonous tree" doctrine operates to bar not only evidence directly obtained, but also evidence derivatively gained as a result of information learned or leads obtained during an unlawful search or seizure. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963). To invoke the "fruit of poisonous tree" doctrine, the defendant must show that the challenged evidence was obtained by the State in violation of the defendant's Fourth Amendment rights. New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640 (1990).

Cain v. State, 594 N.E.2d 835, (Ind.Ct.App. 1992), *reh'g granted on other grounds*, 599 N.E.2d 625 (evidence obtained as direct result of search conducted after illegal arrest is excluded under fruit of poisonous tree doctrine).

United States v. Patane, 542 U.S. 630, 124 S.Ct. 2620 (2004) (under Fourth Amendment, failure to give Miranda warnings before interrogating a suspect in custody does not require suppression of any physical evidence obtained as a result of the suspect's unwarned but voluntary statements); see also Hirshey v. State, 852 N.E.2d 1008 (Ind.Ct.App. 2006); But see Commonwealth v. Martin, 444 Mass. 213, 827 N.E.2d 198 (2005); and State v. Knapp, 700 N.W.2d 899 (Wisc. 2005) (fruit of poisonous tree doctrine applied under state constitution, where physical evidence was obtained as a direct result of an intentional Miranda violation).

Clark v. State, 994 N.E.2d 252 (Ind. 2013) (police lacked reasonable suspicion to detain D, so confession and contraband found in D's bag and car was inadmissible as fruit of the poisonous tree).

Clark v. State, 6 N.E.3d 992 (Ind.Ct.App. 2014) (even assuming unlawful pat-down search of D, seizure of marijuana from his coat pocket was not fruit of unconstitutional search because it was found in plain view and not as a result of the pat-down search).

State v. Farber, 677 N.E.2d 1111 (Ind.Ct.App. 1997) (evidence obtained as a result of conversation which violated spousal privilege was not suppressed because there was no Fourth Amendment violation in obtaining conversation).

Brown v. State, 52 N.E.3d 945 (Ind.Ct.App. 2016) (ethical violation by D's attorney in unrelated case did not require suppression of evidence, absent violation of attorney-client privilege statute).

2. Causal connection between illegal police conduct and procurement of evidence

The U.S. Supreme Court has refused to adopt a "but for" rule, making inadmissible any and all evidence which comes to light through an illegal stop or arrest. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963). Evidence may be purged of the primary taint if the causal connection between the illegal police conduct and the procurement of evidence is so attenuated as to dissipate the taint of the illegal action. United States v. Green, 111 F.3d 515, 521 (7th Cir. 1997); Sanchez v. State, 803 N.E.2d 215 (Ind.Ct.App. 2004).

Three factors are to be considered in determining whether a causal chain is sufficiently attenuated: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the

presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. Utah v. Strieff, 136 S.Ct. 2056 (2016); Sanchez v. State, 803 N.E.2d 215 (Ind.Ct.App. 2004) (*citing* United States v. Green, 111 F.3d 515 (7th Cir. 1997)).

Utah v. Strieff, 136 S.Ct. 2056 (2016) (an officer's lack of reasonable suspicion to stop a pedestrian does not taint evidence gained in a search conducted after the officer discovered that person has a valid arrest warrant; in absence of flagrant police misconduct, arresting officer's discovery of an outstanding arrest warrant severed the causal chain between the illegal stop and drugs seized incident to arrest).

Quinn v. State, 792 N.E.2d 597 (Ind.Ct.App. 2003) (where police stopped D's car without reasonable suspicion, but with purpose of executing a lawful outstanding arrest warrant, trial court properly denied D's motion to suppress evidence of methamphetamine found during search, because intervening lawful arrest was sufficient to remove taint of any police illegality).

Sanchez v. State, 803 N.E.2d 215 (Ind.Ct.App. 2004) (distinguishing Quinn, Court concluded that causal chain between commencement of illegality and seizure of evidence was not sufficiently attenuated to purge primary taint; officer's actions in this case were flagrant and intended to exploit D's illegal arrest).

Jefferson v. State, 780 N.E.2d 398 (Ind.Ct.App. 2002) (where officer properly spoke with D to request she move illegally parked car, then fifteen minutes later again stopped D without reasonable suspicion when she was legally parked and surrounded by group of men, requested identification and discovered outstanding warrant, second stop was not sufficiently attenuated from legal first stop; because the police lacked reasonable suspicion for second stop, suppression of evidence was required).

Shirley v. State, 803 N.E.2d 251 (Ind.Ct.App. 2004) (distinguishing Quinn, Court concluded that where officer did not know of outstanding arrest warrant prior to stop, taint of possibly illegal stop was not removed, and propriety of stop must still be reviewed for reasonableness).

Clark v. State, 994 N.E.2d 252 (Ind. 2013) (because only three minutes elapsed between the illegal detention and confession, there was no intervening event to remove taint of the initial illegal detention from the confession).

United States v. Ceccolini, 435 U.S. 268, 280, 98 S.Ct. 1054 (1978) (attenuation doctrine permits the admission of a witness' testimony at trial where the identity of the witness was discovered during an unlawful search).

United States v. Green, 111 F.3d 515 (7th Cir. 1997) (where initial stop was permissible, there was no evidence of bad faith on part of police, and police did not exploit stop to search vehicle, fruits of search were admissible when search was result of an illegal stop but occurred only after the police learned of arrest warrant on passenger in car).

Sowell v. State, 784 N.E.2d 980 (Ind.Ct.App. 2003) (D's possession of handgun and resisting law enforcement both occurred after he stepped from car that had been stopped, therefore the illegal activity was separate from the stop of the car and the exclusionary rule would not apply even if stop was illegal); see also Cole v. State, 878 N.E.2d 882 (Ind.Ct.App. 2007).

Jackson v. State, 996 N.E.2d 378 (Ind.Ct.App. 2013) (police had independent evidence of D's illegal drug activities to purge taint of warrantless attachment of GPS device to D's car).

The attenuation exception to the fruit of the poisonous tree doctrine applies to claims challenging the reasonableness of a search or seizure under Art. 1, § 11 of the Indiana Constitution. Wright v. State, 108 N.E.3d 307 (Ind. 2018). The exception "strikes the right balance" between the competing interests of deterring police misconduct and punishing guilty criminals. The attenuation inquiry under Art 1, Sec 11 begins, but is not limited to, consideration of: (1) the timeline between the illegality and acquisition of the derivative evidence; (2) intervening circumstances occurring over that timeline; and (3) the initial police misconduct. Courts should also consider other circumstances that strengthen or weaken attenuation.

Wright v. State, 108 N.E.3d 307 (Ind. 2018) (D's incriminating statements to FBI agents two days after he invalidly consented to search of his computer was sufficiently independent and attenuated from the illegal search).

3. "New-crime" exception to exclusionary rule

Notwithstanding a strong causal connection in fact between an illegal search or seizure by law enforcement and a defendant's response, if the defendant's response is itself a new and distinct crime, then evidence of the new crime is admissible notwithstanding the prior illegality. The purpose of the exclusionary rule - to deter police misconduct - is not advanced by suppressing evidence of a new crime committed by the defendant after an illegal search or seizure. The "new crime" exception does not apply to the crime of resisting law enforcement by fleeing. C.P. v. State, 39 N.E.3d 1174, 1182, n.6 (Ind.Ct.App. 2015) (*citing* Gaddie v. State, 10 N.E.3d 1249 (Ind. 2014)).

C.P. v. State, 39 N.E.3d 1174 (Ind.Ct.App. 2015) (D was illegally seized when off-duty uniformed police officer working security at church festival twice put his hand on D's shoulder to steer him off church property; however, despite illegal seizure, evidence that D responded by shoving the officer was not suppressed because it was a new and distinct crime of battery); see also K.C. v. State, 84 N.E.3d 646 (Ind.Ct.App. 2017).

State v. Owens, 992 N.E.2d 939 (Ind.Ct.App. 2013) (trial court properly suppressed all evidence related to marijuana D attempted to ingest and cocaine found on his person during illegal stop, as his actions did not cause discovery of the drugs; however, trial court need not suppress evidence related to D's flight from and battery of police officers regardless of whether D conceded that this evidence is admissible).

State v. Howell, 782 N.E.2d 1066 (Ind.Ct.App. 2003) (illegality of initial traffic stop did not prevent State from pursuing charges of resisting law enforcement, reckless driving, and operating as habitual traffic violator against D); see also Ronco v. State, 840 N.E.2d 368 (Ind.Ct.App. 2006), *sum aff'd*, 862 N.E.2d 257 (Ind. 2007); Cole v. State, 878 N.E.2d 882 (Ind.Ct.App. 2007) and State v. Serrano, 136 N.E.3d 249 (Ind.Ct.App. 2019).

4. Admissibility of statements made after illegal arrest

Statements made following an illegal arrest are inadmissible unless the original taint is removed. Miranda warnings alone are not sufficient. Factors important in determining whether a voluntary statement purged the taint of the illegally seized person or evidence are the time lapse between the arrest/admission, the presence of intervening circumstances and the purpose of the official misconduct. Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975).

Brown v. Illinois, *supra* (indirect fruits of illegal search or arrest must be suppressed when they bear sufficiently close relationship to underlying illegality).

Kaupp v. Texas, 538 U.S. 626, 123 S.Ct. 1843 (2003) (giving of Miranda warnings did not break causal connection between D's unlawful detention and confession that he ultimately gave).

Cox v. State, 696 N.E.2d 853 (Ind. 1998) (voluntary statement made to police at station will not be suppressed due to illegal entry into D's home to make arrest as long as police had probable cause to arrest D).

Taylor v. State, 464 N.E.2d 1333 (Ind.Ct.App. 1984) (where only 45 seconds elapsed from police arriving at scene and holding D at gunpoint, statement made to police did not purge taint of illegal arrest).

New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990) (where D is unlawfully arrested in his home without warrant but with probable cause, exclusionary rule does not bar use at trial of D's statement made outside home).

Timmons v. State, 734 N.E.2d 1084 (Ind.Ct.App. 2000) (although D's statement made outside home was independent of unlawful warrantless arrest in his home, police observation of D's intoxicated demeanor outside of home after illegal entry into home was fruit of illegal entry).

Dennis v. State, 736 N.E.2d 300 (Ind.Ct.App. 2000) (even assuming police did not have probable cause to arrest D for public intoxication because he was not in public place, D's threatening remarks to officers were separate from illegal arrest and were not fruit of illegal arrest).

Foster v. State, 950 N.E.2d 760 (Ind.Ct.App. 2011) (there was very little lapsed time between arrest and D's statements in the police car, and there is little doubt that D's statements came from the exploitation of the unlawful arrest; giving of Miranda warnings did not constitute an intervening circumstance); see also Joseph v. State, 975 N.E.2d 420 (Ind.Ct.App. 2012).

5. Admissibility of statements made after illegal stop

Turner v. State, 862 N.E.2d 695 (Ind.Ct.App. 2007) (D's agreement to talk with officers after being illegally stopped was not an intervening circumstance sufficient to remove the taint of illegal stop; subsequent videotaped statement at police station, along with evidence gathered at scene of illegal stop, should have been suppressed).

B. WOULD THE EVIDENCE HAVE BEEN DISCOVERED DESPITE THE ILLEGAL SEARCH AND SEIZURE?

Where evidence seized as a result of the unlawful search has an "independent source," it may be admitted because "exclusion of such evidence would put the police in a worse position than they would have been absent any error or violation." Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529 (1988) (quoting Nix v. Williams, 467 U.S. 431, 443, 104 S.Ct. 2501 (1984)). The inevitable discovery exception has not been adopted as a matter of Indiana Constitutional law. Shultz v. State, 742 N.E.2d 961 (Ind.Ct.App. 2001).

Shultz v. State, *supra* (although inevitable discovery doctrine applied, trial court should have suppressed evidence under Indiana Constitution because warrantless searches of D's property were unreasonable; court implicitly held that there is no inevitable discovery doctrine under Indiana Constitution).

Ammons v. State, 770 N.E.2d 927 (Ind.Ct.App. 2002) (because inevitable discovery doctrine is not applicable under Article 1, § 11 of Indiana Constitution, cocaine recovered from D's person was inadmissible); see also Gyamfi v. State, 15 N.E.3d 1131 (Ind.Ct.App. 2014).

Bartruff v. State, 706 N.E.2d 225 (Ind.Ct.App. 1999) (rejecting inevitable discovery rule, Court noted that under established police procedure, D and his passenger were permitted to take custody of their property within vehicle, and thus seized handgun would not necessarily have remained in vehicle until it reached police storage area; further, record did not reveal that attempt by D to remove handgun from vehicle would necessarily have disclosed its existence to officer).

Timmons v. State, 734 N.E.2d 1084 (Ind.Ct.App. 2000) (although D's statement made outside home was independent of unlawful warrantless arrest in his home under New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640 (1990), police observation of D's intoxicated demeanor outside of home after illegal entry into home was fruit of illegal entry).

United States v. Dice, 200 F.3d 978 (6th Cir. 2000) (independent source doctrine applies only in cases where there is second, properly conducted search, not where valid warrant is illegally executed in single search).

LaMunion v. State, 740 N.E.2d 576 (Ind.Ct.App. 2000) (seized evidence was not derivative evidence but was itself product of illegal warrantless search; taint of illegal search could not be removed, even though judge issued warrant two hours after search).

Perkins v. State, 695 N.E.2d 612 (Ind.Ct.App. 1998) (seizure of evidence pursuant to unlawful search could not be justified by subsequent search incident to arrest because State failed to prove that justification for arrest existed at time of unlawful search and was not product of unlawful search).

Ransom v. State, 741 N.E.2d 419 (Ind.Ct.App. 2000) (given short passage of time between unlawful stop and search and causal connection between stop and search, Court could not say that D's consent to search purged taint of officer's unlawful stop).

Esquerdo v. State, 640 N.E.2d 1023 (Ind. 1994) (court never expressly rejects State's assertion that search warrant affidavit contained "sufficient independent probable cause," but nonetheless rules for D on basis the tainted information included in affidavit was relied upon by magistrate, as indicated by fact search warrant issued authorized search for both cocaine and marijuana though no information re: marijuana prior to illegal entry).

Clark v. State, 994 N.E.2d 252 (Ind. 2013) (where police illegally seized D, obtained contraband from his bag three minutes later and found other contraband in his car in a relatively short period of time, nothing in record showed contraband was obtained through means independent from the illegal detention, or that it would have been inevitably discovered).

N.S. v. State, 25 N.E.3d 198 (Ind.Ct.App. 2015) (even though accomplice testified he knew N.S. possessed drugs and a gun before officer illegally searched N.S.'s backpack, police had no source independent of illegal search to learn about the contraband and seek accomplice's statement about the contraband).

Ogburn v. State, 53 N.E.3d 464 (Ind.Ct.App. 2016) (State failed to carry its burden of showing that it would have conducted a canine sniff on every vehicle in parking lot if they had not earlier unlawfully searched apartment and discovered key fob).

Banks v. State, 681 N.E.2d 235 (Ind.Ct.App. 1997) (although pat down search of passenger during roadblock stop was not justified, evidence of handgun seized pursuant to pat down was

admissible under inevitable discovery doctrine); see also Winborn v. State, 100 N.E.3d 710 (Ind.Ct.App. 2018).

C. IF THE SEARCH WARRANT IS INVALID, WOULD A REASONABLY PRUDENT POLICE OFFICER HAVE RELIED ON IT?

The exclusionary rule does not require the suppression of evidence obtained in reliance on a defective search warrant if the police relied on the warrant in objective good faith. Jackson v. State, 908 N.E.2d 1140 (Ind. 2009). The good faith exception to the exclusionary rule permits admission of evidence seized pursuant to a properly issued, but subsequently invalidated search warrant. Ind. Code 35-37-4-5; Herring v. U.S., 555 U.S. 135, 129 S.Ct. 695 (2009); United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The good faith exception does not apply where the deficiencies in the affidavit were caused by the police officer rather than the trial court. Davis v. United States, 131 S.Ct. 2419, 2428 (2011); Herron v. State, 44 N.E.3d 833 (Ind.Ct.App. 2015).

The good faith exception rests upon the affidavit or sworn testimony presented before the warrant has been issued. After a warrant has been issued, the State cannot backfill with previously undisclosed hearsay evidence to show good faith in the execution of a defective warrant. Brown v. State, 905 N.E.2d 439, 447 (Ind.Ct.App. 2009).

The good faith exception does not apply to warrantless searches. State v. Pitchford, 60 N.E.3d 1100 (Ind.Ct.App. 2016). If good faith is not argued by the State in a memorandum in opposition to the defendant's motion to suppress or at suppression hearing, it is waived and cannot be advanced on appeal. Merritt v. State, 803 N.E.2d 257 (Ind.Ct.App. 2004); but see Snow v. State, 137 N.E.3d 965, 969 (Ind.Ct.App. 2019) (holding that to establish reversible error on appeal, D must demonstrate *both* the lack of probable cause *and* the inapplicability of the good faith exception) (emphasis in original).

1. Herring Rule

When police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search rather than systematic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply. Herring v. U.S., 555 U.S. 135, 129 S.Ct. 695 (2009). Herring seems to broaden the good faith exception to the exclusionary rule originally set forth in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984), and possibly adopted in Indiana in Blalock v. State, 483 N.E.2d 439 (Ind. 1985).

Herring v. U.S., *supra* (evidence should not be excluded where officer arrested and searched D based on a warrant which he was told was valid, but later discovered was recalled five months earlier; the recall had not been entered into the data bank by the sheriff's department and there was no electronic connection between the sheriff's department and the County Clerk's office; the court noted that if police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the ground work for future false arrests, exclusion would certainly be justified).

Hayworth v. State, 904 N.E.2d 684 (Ind.Ct.App. 2009) (officer's admissions at suppression hearing (i.e., that informant had *not* told him that she had seen D manufacture or use methamphetamine) was sufficiently deliberate that exclusion of evidence will meaningfully deter the misconduct and officer's conduct is sufficiently culpable that such deterrence is worth the price paid by our justice system; citing Herring).

Shotts v. State, 925 N.E.2d 719 (Ind. 2010) (Indiana police officers acting on Alabama warrant and NCIC check to determine if warrant was valid acted in good faith when they arrested and searched the D; discussing Herring at length, Court noted that nothing the Indiana officers did was culpable at all, much less rising to the level of culpable behavior that exclusionary rule seeks to deter).

2. Leon Rule

Because the Supreme Court did not address the effect Herring had on Leon, cases decided under Leon can still be relied upon as precedent. The Leon good faith exception will not apply if: 1) the warrant is based on false information knowingly or recklessly supplied by law enforcement; 2) the warrant is facially deficient; 3) the issuing magistrate is not detached and neutral; or 4) the affidavit or sworn testimony upon which probable cause rests is so lacking in indicia of probable cause as to render official belief in the existence of the warrant unreasonable. Doss v. State, 649 N.E.2d 1045 (Ind.Ct.App. 1995).

Jackson v. State, 908 N.E.2d 1140 (Ind. 2009) (assuming without deciding that probable cause did not exist, officer's testimony was not so bare bones and lacking in indicia of probable cause as to make reliance upon resulting warrant objectively unreasonable).

Heuring v. State, 140 N.E.3d 270 (Ind. 2020) (noting that the exclusionary rule is also meant to deter "reckless" conduct by police and search here was based on nothing more than a hunch that a crime had been committed and was reckless).

Lloyd v. State, 677 N.E.2d 71 (Ind.Ct.App. 1997) (officer who reasonably inferred that informant's "source" was same woman from whom he had unsuccessfully attempted to make controlled buy week earlier was acting in good faith).

State v. Johnson, 669 N.E.2d 411 (Ind.Ct.App. 1996) (although warrant was based on hearsay, totality of circumstances corroborated informant's information, and officer's belief in validity of warrant was reasonable).

Blalock v. State, 483 N.E.2d 439 (Ind. 1985) (where officers received prosecutor's approval for flying over house to observe plants, good faith saved search warrant, which was based on officer's observance, rather than identification, of plants).

Frasier v. State, 794 N.E.2d 449 (Ind.Ct.App. 2003) (although it was difficult, if not impossible, to tell age of much of the information in probable cause affidavit and it was unclear whether informants were truly anonymous or citizen informants, evidence which D sought to suppress was admissible under "good faith" exception to exclusionary rule).

Matter of M.R.D, 482 N.E.2d 306 (Ind.Ct.App. 1985) (although affidavit, based on hearsay of concerned mother whose minor daughter was attending party with alcoholic beverages, lacked probable cause and did not comply with Ind. Code 35-33-5-2 (requiring evidence of source's credibility and factual basis), officer was justified in his good faith reliance on warrant).

Best v. State, 821 N.E.2d 419 (Ind.Ct.App. 2005) (although search warrant was invalid because informant's information lacked reliability and information corroborated by police could be ascertained by anyone driving by property, evidence was admissible under good faith exception); see also Snover v. State, 837 N.E.2d 260 (Ind.Ct.App. 2005).

Caudle v. State, 754 N.E.2d 33 (Ind.Ct.App. 2001) (evidence seized during search based on stale probable cause was properly admitted under good faith exception because warrant was executed within ten days of issuance pursuant to Ind. Code 35-33-5-7).

Illinois v. Krull, 480 U.S. 340, 107 S.Ct. 1160 (1987) (when officer acts in objectively reasonable reliance upon statute later found unconstitutional, exclusionary rule does not apply unless legislature wholly abandoned its responsibility to enact constitutional laws or reasonable officer should have known statute was unconstitutional).

United States v. Evans, 469 F.Supp.2d 893, 900 (D.Mont. 2007) (an officer cannot rely on an unsigned warrant because such reliance is not "objectively reasonable").

a. Did the officer include false or misleading information in the affidavit in order to obtain the warrant?

The defendant has the burden to show that the relevant matter as expressed in the affidavits was untrue. Everroad v. State, 442 N.E.2d 994 (Ind. 1982). Allegations of negligence or innocent mistake are insufficient. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978). Later information casting doubt on facts shown at the probable cause hearing will not, absent State participation in false evidence, invalidate a search. Snyder v. State, 460 N.E.2d 522 (Ind.Ct.App. 1984). But the good faith exception will not reward the creation of a misleading impression to avoid revealing the clear absence of probable cause.

Jaggers v. State, 687 N.E.2d 180 (Ind. 1997) (officer who personally visited marijuana plots just few hours earlier testified that plots were near D's residence, but actually plots were at least two to six miles away from home; because this was misleading statement, good faith exception could not save warrant).

Simpson v. United States, 944 F.Supp. 1396 (S.D.Ind. 1996) (because police provided judge with information that they should have known was wrong, warrant and search of D's apartment were invalid; additionally, because police were not candid with judge, and because their failure to provide relevant and accurate information was at least in reckless disregard of truth, good faith exception did not apply).

Snyder v. State, 460 N.E.2d 522 (Ind.Ct.App. 1984) (recantation by informants did not invalidate search warrant); see also Bradley v. State, 4 N.E.3d 831 (Ind.Ct.App. 2014).

Mason v. State, 532 N.E.2d 1169 (Ind. 1989) (false affidavit generally renders search warrant invalid and fruits of any search made pursuant to it are generally suppressible).

Stephenson v. State, 796 N.E.2d 811 (Ind.Ct.App. 2003) (probable cause affidavit contained several false and misleading statements by investigating officer, who suggested he had personal knowledge and witnessed drug purchase but did not indicate that informant simply told him these facts).

State v. Vance, 119 N.E.3d 626 (Ind.Ct.App. 2019) (good faith exception could not resurrect search warrant because State's omissions surrounding "controlled" drug buys created a misleading impression for issuing the warrant).

Hayworth v. State, 904 N.E.2d 684 (Ind.Ct.App. 2009) (officer's admissions at suppression hearing (i.e., that informant had *not* told him that she had seen D manufacture or use methamphetamine) was sufficiently deliberate that exclusion of evidence will meaningfully deter the misconduct and officer's conduct is sufficiently

culpable that such deterrence is worth the price paid by our justice system. Herring v. United States, 129 S.Ct. 695 (2009)).

Jones v. State, 783 N.E.2d 1132 (Ind. 2003) (warrant is not invalid simply because it contains slightly inaccurate material that is immaterial to warrant's validity).

Cutter v. State, 646 N.E.2d 704 (Ind.Ct.App. 1995) (although D offered several alleged inaccuracies and omissions in officer's memory, inaccuracies as alleged were relatively minor and would not have affected determination of probable cause; moreover, even assuming officer's testimony could be characterized as inaccurate, D did not demonstrate that officer intentionally or recklessly misrepresented truth); see also Darring v. State, 101 N.E.3d 263 (Ind.Ct.App. 2018).

Murphy v. State, 453 N.E.2d 219 (Ind. 1983) (D failed to prove errors in affidavit were perjured, made in reckless disregard or otherwise rendered affidavit insufficient to establish probable cause); see also Keeylen v. State, 14 N.E.3d 865 (Ind.Ct.App. 2014), *aff'd on reh'g*, 21 N.E.3d 840.

Williams v. State, 528 N.E.2d 496 (Ind.Ct.App. 1988) (although affidavit stated informant had provided numerous tips leading to arrests when they had led to only two arrests in one case and informant was found reliable despite fact that he gave erroneous date of burglary, statements were not misleading, just exaggerations; good faith exception applied).

McGrew v. State, 673 N.E.2d 787, *sum aff'd*, 682 N.E.2d 1289 (Ind. 1997) (good faith exception applied where D failed to make required showing that investigator offered testimony with reckless disregard to truth and that knowledge of misrepresentation would have affected determination of probable cause).

Wendt v. State, 876 N.E.2d 788 (Ind.Ct.App. 2007) (where officer provided correct, but incomplete information concerning reliability of informant, officer was not acting with reckless disregard and good faith exception applied).

NOTE: Where an officer claims that an informant is reliable but fails to include any deals or understandings that the informant has made with the State in return for the information, the statement as to the reliability of the informant is misleading. Newby v. State, 701 N.E.2d 593 (Ind.Ct.App. 1998).

b. Was the judge impartial and detached when issuing the warrant?

The good faith exception does not apply where the issuing judge was not operating as a neutral magistrate. Leon, 468 U.S. at 923.

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319 (1979) (town Justice's presence and participation in search did not ensure that no items would be seized absent probable cause to believe that they were obscene; nor did his presence provide immediate adversarial hearing on issue; Justice was not acting as neutral and detached judicial officer).

Green v. State, 676 N.E.2d 755 (Ind.Ct.App. 1997) (fact that judge was shown photographs relating to matter before issuing warrant did not result in judge being partial).

c. Was the warrant so lacking in probable cause that a reasonably prudent officer would not have relied on it?

A police officer's personal opinion as to the credibility and reliability of an informant is irrelevant and suppression remains appropriate where the officer could not have harbored an objectively reasonable belief in the existence of probable cause. Doss v. State, 649 N.E.2d 1045 (Ind.Ct.App. 1995). If courts were to apply the good faith exception and hold it is objectively reasonable for officers to rely on a warrant supported by an affidavit wholly lacking probable cause, officers would have no incentive to discover and attest to facts amounting to probable cause in future affidavits. Rice v. State, 916 N.E.2d 296 (Ind.Ct.App. 2009). The defendant's right to seek review of the probable cause determination would be empty, and the exclusionary rule would have no meaning. Id.

Doss v. State, *supra* (where there was no information within affidavit to shed light on credibility or reliability of informant's allegations, good faith exception could not save warrant).

Heuring v. State, 140 N.E.3d 270 (Ind. 2020) (affidavits based on missing GPS tracking device were so lacking in indicia of probable cause that good-faith exception to exclusionary rule did not apply).

Newby v. State, 701 N.E.2d 593 (Ind.Ct.App. 1998) (good faith exception could not save invalid warrant where not enough facts were given to enable neutral magistrate to make impartial determination of probable cause).

Hirshey v. State, 852 N.E.2d 1008 (Ind.Ct.App. 2006) (where there was no indicia of reliability of informant upon which the police relied in probable cause affidavit, good faith exception could not apply).

Jaggers v. State, 687 N.E.2d 180 (Ind. 1997) (where no corroboration or reliability supporting hearsay establishing evidence of crime could be found in home which was to be searched, good faith could not save warrant); see also State v. Mason, 829 N.E.2d 1010 (Ind.Ct.App. 2005).

Rice v. State, 916 N.E.2d 296 (Ind.Ct.App. 2009) (where officer should have known that his affidavit lacked a logical connection between D and a stolen motorcycle helmet found in a garage which was allegedly rented to the D and another, good faith did not apply and search resulting from warrant was unconstitutional).

Everroad v. State, 590 N.E.2d 567 (Ind. 1992) (suppression of evidence seized pursuant to unsupported hearsay search warrant was appropriate if warrant was so lacking in indications of probable cause as to render official belief in its existence entirely unreasonable); see also Cartwright v. State, 26 N.E.2d 663 (Ind.Ct.App. 2015).

Figert v. State, 686 N.E.2d 827 (Ind. 1997) (because warrant was issued based solely on officer's opinion, officer's reliance could not be deemed objectively reasonable under Leon; if probable cause could be so easily imputed from one dwelling to another through overbroad application of good faith exception, nothing would prevent searches of residences merely because of fortuity of their proximity to illegal conduct).

Stabenow v. State, 495 N.E.2d 197 (Ind.Ct.App. 1986) (where affidavit provided no facts indicating that evidence of controlled substance violation would be found in car for which search warrant was obtained, officer could not claim reasonable reliance on it and evidence must be suppressed).

Timmons v. State, 734 N.E.2d 1084 (Ind.Ct.App. 2000) (reasonable and prudent officer would not have relied on telephonic arrest warrant in which judge issued without complying with at least three statutory procedures).

State v. Davis, 770 N.E.2d 338 (Ind.Ct.App. 2002) (good-faith exception did not apply where telephonic search warrant was neither "properly issued" as required by Ind. Code 35-37-4-5, nor was it free from obvious defects; erroneous procedure followed in this case was not deliberate, but because warrant conversation between officer and judge was not recorded, search warrant failed to comply with virtually all statutory requirements); see also State v. Brown, 840 N.E.2d 411 (Ind.Ct.App. 2006) (warrant unsupported by sworn testimony was not properly issued; good faith inapplicable).

Volz v. State, 773 N.E.2d 894 (Ind.Ct.App. 2002) (because of incomplete recording, neither validity of warrant nor officer's reasonable belief that warrant was valid is capable of independent verification through judicial review; thus, good faith exception did not apply); but see Creekmore v. State, 800 N.E.2d 230 (Ind.Ct.App. 2003 (good faith exception allowed police to rely on addendum to search warrant which was not recorded).

Hensley v. State, 778 N.E.2d 484 (Ind.Ct.App. 2002) (where nothing in affidavit linked D's alleged purchase of drugs to premises described in warrant, no reasonable officer could have relied on this search warrant in good faith).

d. Was a mistake made by someone other than the judge in issuing the warrant?

The good faith exception applies when the police rely on a mistake made by a court employee.

Arizona v. Evans, 514 U.S. 1, 115 S.Ct. 1185 (1995) (where court employee failed to contact sheriff to tell him to remove warrant for D, arrest which resulted in finding of marijuana was upheld).

People v. Boyer, 713 N.E.2d 655 (Ill.Ct.App. 1999) (exclusionary rule applies to exclude evidence seized during arrest on warrant that would have been recalled but for error in prosecutor's office; unlike mistake of court clerk, mistake of prosecutor is mistake of law enforcement officer).

3. Indiana Constitution

The Indiana Supreme Court has not addressed the effect of Herring v. U.S., 129 S.Ct. 695 (2009) on the reasonableness analysis under Article I, Section 11 of the Indiana Constitution. Shotts v. State, 925 N.E.2d 719 (Ind. 2010). However, the Indiana Court of Appeals has refused, under the Indiana Constitution, to apply Herring, *supra*. Rice v. State, 916 N.E.2d 296 (Ind.Ct.App. 2009). Indiana has adopted the Leon good faith exception under the Indiana Constitution. Id.; Hopkins v. State, 582 N.E.2d 345 (Ind. 1991).

PRACTICE POINTER: Argue that the Indiana Constitution requires exclusion of evidence obtained as a product of police error, whether negligent, reckless, or intentional. Relying on Article I, Sections 11 and 14 of the Indiana Constitution, the Indiana Supreme Court adopted the exclusionary rule long before the Fourth Amendment exclusionary rule was applied to the States in Mapp v. Ohio, 367 U.S.643, 81 S.Ct. 1684 (1961). Membres v. State, 889 N.E.2d 265, 274 (Ind. 2008) (citing to Callender v. State, 193 Ind. 91, 96-97, 138 N.E. 817, 818-19 (1923)). Since Callender, the Indiana Supreme Court has recognized at least three purposes of the exclusionary rule. Membres, 889 N.E.2d at 273 (deter police); Id. at 273, 277 (protect the privacy of all citizens); Id. at 275, 277 (protect the integrity of the judicial system). Continuing to apply the exclusionary rule to constitutional violations based on police negligence will deter future police negligence, protect the privacy of all citizens whether innocent or guilty of a crime, and protect the integrity of the judicial system. "[Indiana] nevertheless exclude[s] [illegally seized evidence] because we consider it necessary to protect the privacy of all citizens from excessive intrusion by law enforcement. In other words, we accept the obstacle to the truth-seeking function in order to preserve a higher value." Id. at 273.

Moreover, notwithstanding Hopkins (cited above), it can be argued that there is no good faith exception at all under the Indiana Constitution. See Callender v. State, 193 Ind. 91, 96, 138 N.E. 817, 818 (1922); Moran v. State, 644 N.E.2d 536 (Ind. 1994); but see Membres v. State, 889 N.E.2d 265 (Ind. 2008) (although not explicitly recognizing good faith doctrine, court held that new rule of State criminal procedure relating to trash searches was to apply only prospectively). See the April and July 2005 issues of the *Indiana Defender* for a discussion of why the good faith exception to the exclusionary rule should be rejected under the Indiana Constitution. State v. Canelo, 653 A.2d 1097 (N.H. 1995) (New Hampshire rejects good faith as incompatible with and detrimental to right of privacy and prohibition against search warrant without probable cause, contained within state Constitution).

D. WERE THE OFFICERS RELYING ON STATE LAW THAT HAD BEEN CHANGED SINCE THE SEARCH?

A new rule of state criminal procedure that does not affect the reliability of the fact-finding process need not be applied retroactively. Membres v. State, 889 N.E.2d 265 (Ind. 2008). See also Davis v. United States, 131 S.Ct. 2419 (2011) (when police reasonably rely on then-existing precedent to conduct a search, contraband will not be suppressed if Supreme Court later rules that the search was unconstitutional).

Membres v. State, 889 N.E.2d 265 (Ind. 2008) (rule announced in Litchfield v. State, 824 N.E.2d 356 (Ind. 2005), requiring for the first-time reasonable suspicion for warrantless trash searches, only applies to searches that occurred after its enactment).

Bowles v. State, 891 N.E.2d 130 (Ind. 2008) (although the Court in Membres held that D who raised a claim substantially similar to Litchfield prior to Litchfield should get the benefit of Litchfield, D's claim that his trash search violated Article I, § 11 was not substantially similar to Litchfield's claim because it was based on the officer entering his private property and not the lack of reasonable suspicion; held, trash search reasonable under Moran; Sullivan and Rucker, JJ., dissenting).

Hoop v. State, 909 N.E.2d 463 (Ind.Ct.App. 2009) (although Court finds support for its holding that a dog sniff of a home requires reasonable suspicion in Litchfield, neither Litchfield nor previous opinions assessing the reasonableness of dog sniffs under Article I, § 11 clearly foreshadow this result; thus, officers reasonably relied on magistrate's conclusion that the dog sniff was in accordance with the law); see also Blakenship v. State, 5 N.E.3d 779 (Ind.Ct.App. 2014).

E. IS THE ILLEGALLY SEIZED EVIDENCE BEING USED FOR PURPOSES OTHER THAN TO CONVICT THE DEFENDANT?

1. Is the evidence being used in a proceeding other than trial?

One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700, 85 S.Ct. 1246 (1965) (exclusionary rule applies to civil forfeiture proceedings because such proceedings are "quasi-criminal" in nature).

Ind. Dept. of Revenue v. Adams, 762 N.E.2d 728 (Ind. 2002) (exclusionary rule does not apply in proceeding to assess controlled substance excise tax).

Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 118 S.Ct. 2014 (1998) (exclusionary rule does not prohibit use in state parole revocation proceeding of evidence seized in violation of parolee's Fourth Amendment rights).

Plue v. State, 721 N.E.2d 308 (Ind.Ct.App. 1999) (evidence seized illegally will be excluded in probation revocation hearing only if it was seized as part of continuing plan of police harassment or in particularly offensive manner); But see Polk v. State, 739 N.E.2d 666 (Ind.Ct.App. 2000) (disagreeing with Plue, Court implicitly held that exclusionary rule applies in probation revocation proceedings).

In re J.V., 875 N.E.2d 395, 401 (Ind.App. 2007) (exclusionary rule does not apply in CHINS proceedings).

2. Is the evidence being used to impeach the Defendant?

James v. Illinois, 493 U.S. 307, 110 S.Ct. 648 (1990) (illegally obtained evidence may be used to impeach only D, and not all defense witnesses; expanding rule to permit impeachment of all defense witnesses with D's excluded statement would create intolerable chill on D's right to present witnesses and would not prevent perjury more than threat of subsequent perjury prosecution).

V. SUPPRESSION- PROCEDURAL ISSUES

A motion to suppress challenges specific evidence believed to be inadmissible at trial by reason of having been obtained illegally. Grimm v. State, 268 Ind. 145, 374 N.E.2d 501, 503 (1978).

A. SUPPRESSION MOTION

1. Waiver for failure to object to evidence at trial

When a motion to suppress has been overruled and evidence sought to be suppressed is offered at trial, no error will be preserved unless there is an objection at the time the evidence is presented. Wagner v. State, 474 N.E.2d 476 (Ind. 1985).

Pemberton v. State, 560 N.E.2d 524 (Ind. 1990) (ineffective assistance of counsel found where defense counsel filed motion to suppress, but failed to object to testimony at trial, and where this prejudiced the D).

Redden v. State, 850 N.E.2d 451 (Ind.Ct.App. 2006) (D objected to admission of physical evidence but did not object to officer's testimony he saw marijuana and smelled an odor

common to methamphetamine production when he came to D's door; search issues related to that testimony were waived; however, regardless of waiver, court considered issues).

2. Written Motion for Reconsideration

The trial court's decision on pretrial motion to suppress is not a final judgment and is subject to reconsideration.

Cooper v. State, 171 Ind.App. 350, 357 N.E.2d 260 (1976) (where record showed court was unable to determine with certainty from face of suppression order alone what evidence had been suppressed, it was proper for trial judge, who had not ruled on motion to suppress, to reconsider evidence and circumstances surroundings its seizure following oral motion by State to reconsider motion to suppress).

Parker v. State, 697 N.E.2d 1265 (Ind.Ct.App. 1998) (court of appeals properly reconsidered denial of suppression motion which court had upheld on interlocutory appeal; law of case doctrine did not bar consideration of search and seizure issue previously decided on interlocutory appeal because officer's testimony was different at trial than it was at suppression hearing).

It is unclear whether one court's ruling on a suppression issue can bind the same parties in another court.

Jennings v. State, 714 N.E.2d 730 (Ind.Ct.App. 1999) (where suppression issue is the same issue for both co-defendants in different courts, a grant of a Motion to Suppress in one court is binding on the other court under the doctrine of collateral estoppel. but see Reid v. State, 719 N.E.2d 451 (Ind.Ct.App. 1999) (disagreeing with Jennings, *supra*)

Perez-Grahovac v. State, 894 N.E.2d 578 (Ind.Ct.App. 2008) (where D failed to introduce hearing on Co-d's motion to suppress in another court who granted the motion without findings of facts or conclusions of law, D failed to prove that trial court was collaterally estopped from denying his motion to suppress).

Gasaway v. State, 249 Ind. 241, 231 N.E.2d 513 (1967) (decision of one trial court denying pre-trial motion to suppress was not binding upon subsequent trial court to which case was assigned; collateral estoppel was not argued).

B. SUPPRESSION HEARING

Motions to suppress often require resolution of factual issues in a separate pre-trial hearing, and are more successfully brought without a jury waiting in the wings. Direct appeal of the denial of a motion to suppress is only proper when the defendant files an interlocutory appeal. Clark v. State, 994 N.E.2d 252, 259 (Ind. 2013).

1. Not required to preserve issue

Defendant is not required to challenge a search or seizure prior to an officer/witness's testimony at trial. Rich v. State, 864 N.E.2d 1130 (Ind.Ct.App. 2007). An objection is timely as long as it is made before the challenged answer is given. Id. Moreover, a defendant does not waive or abandon his right to object on appeal to the introduction of narcotics by later admitting at trial that he possessed it. Hendricks v. State, 897 N.E.2d 1208 (Ind.Ct.App. 2008).

2. Burden of Proof

In moving to suppress evidence, it is the duty of the moving party to show by a preponderance of the evidence that he/she was personally aggrieved by the alleged search and seizure because it invaded his/her subjective expectation of privacy which society is prepared to recognize as reasonable. United States v. Rascon, 922 F.2d 584 (10th Cir. N.M. 1990).

a. Standing

Lee v. State, 545 N.E.2d 1085, 1091 (Ind. 1989) (D bears burden of showing legitimate expectation of privacy, which is the ultimate question in "standing").

b. Searches

(1) Pursuant to search warrant

Once the State has obtained a magistrate's determination of probable cause, a presumption of validity obtains. Brock v. State, 540 N.E.2d 1236, 1239 (Ind. 1989); Watt v. State, 412 N.E.2d 90, 95 (Ind.Ct.App. 1980). The burden is upon the defendant to overturn the presumption, and the reviewing court, be it a trial or appellate court, will pay substantial deference to the magistrate Brooks v. State, 526 N.E.2d 1027s determination of probable cause. Stephenson v. State, 796 N.E.2d 811 (Ind.Ct.App. 2003).

(2) Warrantless searches

The burden of proof is on the State to prove that a warrantless search or seizure falls within one of the exceptions to the warrant requirement. Middleton v. State, 714 N.E.2d 1099, 1101 (Ind. 1999); Watt v. State, 412 N.E.2d 90, 95 (Ind.Ct.App. 1980).

> Yanez v. State, 963 N.E.2d 530 (Ind.Ct.App. 2012) (State presented no evidence as to why D was stopped or what occurred between him and federal agent when he was stopped, thus it failed to meet its burden of proving that D's initial encounter with agent was consensual).

c. Warrantless arrests

The burden is on the State to establish probable cause for a suspect's warrantless arrest. Cheeks v. State, 155 Ind.App. 277, 292 N.E.2d 852 (1973).

Where a confession is challenged as involuntary, or the product of an illegal arrest, the burden is on the prosecution to show the statement was not so. The Federal Constitution does not require the State to prove voluntariness beyond a reasonable doubt, but only by a preponderance of the evidence. Smith v. State, 689 N.E.2d 1238, 1246-47 n.11 (Ind. 1997). However, under the Indiana Constitution, the State must prove the voluntariness of a confession beyond a reasonable doubt. See Magley v. State, 335 N.E.2d 811, 817 (Ind. 1975), *overruled on other grounds* 689 N.E.2d 1238 (Ind. 1997); see also IPDC Confessions Handbook, II.A.1.a. *et seq*.

d. Evidence was tainted by unlawful activity

"The State bears the burden of proving evidence is not tainted by unlawful police action." Taylor v. State, 464 N.E.2d 1333, 1335 (Ind.Ct.App. 1984).

3. Required hearing - when challenging veracity of probable cause affidavit/testimony

a. Challenging misleading or false information

The Fourth and Fourteenth Amendments require that a hearing be held to test the sufficiency of a probable cause affidavit. To mandate an evidentiary hearing:

(1) there must be allegations of deliberate falsehood or reckless disregard for truth. Defendant must point out specifically portion of affidavit claimed to be false, with statement of supporting reasons; and

(2) an offer of proof. Affidavits, sworn, or otherwise reliable, statements of witnesses should be furnished.

See Haynes v. State, 411 N.E.2d 659, 662 (Ind.Ct.App. 1980) (citing Franks v. Delaware, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 2685 (1978)).

No hearing is required when, after challenged material in affidavit is deleted, there remains sufficient content in affidavit to support finding of probable cause. Franks v. Delaware, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 2685 (1978). If an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant must be voided, and evidence or testimony gathered pursuant to it must be excluded.

b. Challenging State's failure to disclose all material facts

Extrinsic evidence is inadmissible when affidavit in support of the search warrant is attacked as not showing probable cause on its fact; however, where the D alleges that affidavit contained misstatements and omissions, State may offer evidence to rebut such allegations. Rotz v. State, 894 N.E.2d 989 (Ind.Ct.App. 2008).

(1) Facts known prior to issuance of warrant

When obtaining a search or arrest warrant, the State has the duty to present to the court the totality of the circumstances. Newby v. State, 701 N.E.2d 593 (Ind.Ct.App. 1998). A probable cause determination must be made on the "totality of the circumstances", and not just the facts that the State selects to present to the Court. Id. The "totality of the circumstances" does not allow the omission of relevant information that could affect an independent judicial determination. Id. at 603-04 (citing Jaggers v. State, 687 N.E.2d 180 (Ind. 1997)). Moreover, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. Whiteley v. Warden, 401 U.S. 560, 565 n.8, 91 S.Ct.1031, 1035 (1971).

Newby v. State, 701 N.E.2d 593 (Ind.Ct.App. 1998) (probable cause affidavit that did not include that State promised not to prosecute CI in return for his help on the case was misleading).

PRACTICE POINTER: Although there is law that the defendant must show that representations made to the magistrate were not merely based on negligence or innocent mistakes in order for the evidence to be suppressed, this law seems to be at odds with more recent cases holding that the prosecutor is responsible for all of the knowledge of the police and that the affiant has the duty to present the totality of the circumstances to the judge. Johnson v. State, 472 N.E.2d 892, 899 (Ind. 1985); but see Penley v. State, 734 N.E.2d 287 (Ind.Ct.App. 2000); and Query v. State, 745 N.E.2d 769 (Ind. 2001).

(2) Facts discovered after issuance of warrant

Where the State learns that a material fact establishing probable cause underlying a warrant is incorrect, the State must inform the issuing magistrate of the new facts, and if it fails to do so, the warrant is per se invalid. Query v. State, 745 N.E.2d 769 (Ind. 2001). Information is material if it might affect either the issuance of a warrant or the scope of a warrant. Id.

Query v. State, 745 N.E.2d 769 (Ind. 2001) (court found extremely unusual example of immaterial change where, although new information undermined crime suggested by information supplied to magistrate, it also simultaneously provided probable cause for second crime; if second search warrant had been issued, police would have been authorized to search same location for virtually identical items).

Majko v. State, 503 N.E.2d 898 (Ind. 1987), *overruled on other grounds*, Wright v. State, 658 N.E.2d 563 (Ind. 1995) (where statement used to establish probable cause is recanted after sentencing, D has right to hearing on question of probable cause for original arrest warrant).

4. Testimony at Hearing

a. Defendant's testimony

(1) Inadmissible in trial

When defendant testifies on question of "standing" at suppression hearing, government may not use defendant's testimony against him on question of guilt or innocence. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968); See also Livingston v. State, 542 N.E.2d 192 (Ind. 1989). However, if the defendant testifies at trial, cases have suggested that his or her statements at the suppression hearing may be used for impeachment. United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547 (1980); Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556 (1980).

(2) Limited scope of cross

By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case. Ind. Evid. Rule 104(d).

b. Application of Evidence Rules

The Evidence Rules do not apply to the issuance of criminal summonses, arrest warrants or search warrants. However, "this exception to the applicability of the Evidence Rules does not extend to all '[p]roceedings relating to' the issuance of search warrants. The rules of evidence have been held to apply in hearings on motions to suppress evidence seized without a warrant." Miller, 12 *Indiana Practice* 13, § 101.306 (3d. Ed. 2007); but see Lindsey v.

State, 485 N.E.2d 102 (Ind. 1985) (pre-evidence rules, court held that "rules regarding cross-examination of witnesses are more relaxed at suppression hearing because there is no jury present which could be influenced by improper questioning or responses).

Johnson v. State, 472 N.E.2d 892, 902 (Ind. 1985) (in hearing to suppress and dismiss, statements were not inadmissible hearsay where police officer testified to information supplied to him by fellow officer; held, testimony was to show basis for information in probable cause affidavit, not for showing truth of fellow officer's statements).

Lewis v. State, 904 N.E.2d 290 (Ind.Ct.App. 2009) (officer's testimony that computer showed an active warrant was not hearsay because it was admitted showing the officer's course of action; even if it were hearsay, pursuant to Evidence Rule 104(a), hearsay can be considered when ruling on the admissibility of evidence and Crawford v. Washington, 541 U.S. 36 (2004) does not apply to suppression hearings).

c. Sixth Amendment right to confront and cross-examine

McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056 (1967) (by upholding Illinois law that State need not disclose CI for suppression hearing, court sanctions a relaxed right of confrontation under federal constitutional law at suppression hearings; however, no case sets a clear-cut line, leaving room for due process arguments as to what showing of reliability should be required and to what extent hearsay should be permitted).

C. RULING ON OBJECTION TO EVIDENCE AT TRIAL

A trial court ruling on an objection to evidence at trial must make its determination based upon the testimony and evidence presented at trial but may reflect upon the foundational evidence from the motion to suppress hearing when it is not in conflict with the evidence at the trial and should consider evidence from the pretrial motion to suppress hearing which is favorable to the defendant only if it does not conflict with trial evidence. Clark v. State, 994 N.E.2d 252, 259 n.9 (Ind. 2013).

D. APPEAL

1. Standard of Review

Appellate Courts should conduct a de novo review of trial court's determinations of reasonable suspicion to make stops and probable cause to make warrantless searches or arrests, after reviewing findings of historical fact for clear error and giving due weight to inferences. Ornelas v. U.S., 517 U.S. 690, 116 S.Ct. 1657 (1996). An officer's subjective belief regarding whether probable cause existed has no legal effect. K.K. v. State, 40 N.E.3d 488, 491 (Ind. Ct. App. 2015).

The appellate court will consider conflicting evidence most favorable to trial court's ruling, but unlike other sufficiency matters, the court must also consider undisputed evidence favorable to the defendant. Robinson v. State, 5 N.E.3d 362 (Ind. 2014). Probable cause is a fluid concept incapable of precise definition and must be decided based on the facts of each case. Casady v. State, 934 N.E.2d 1181, 1188 (Ind.Ct.App. 2010).

State v. Keck, 4 N.E.3d 1180 (Ind. 2014) (reiterating that appellate courts are not in business of reweighing evidence when it comes to suppression issues; "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.")

a. Search warrant

"The duty of the reviewing court is to determine whether the magistrate had a 'substantial basis' for concluding that probable cause existed. Substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination for probable cause. 'Reviewing court' for these purposes includes both the trial court ruling on a motion to suppress and an appellate court reviewing the decision." Jaggers v. State, 687 N.E.2d 180, 181-82 (Ind. 1997).

b. Warrantless intrusion

Unlike typical sufficiency of the evidence case where only the evidence favorable to the judgment is considered, the court must also consider the uncontested evidence favorable to the defendant. Overstreet v. State, 724 N.E.2d 661, 663 (Ind.Ct.App. 2000).

Cudworth v. State, 818 N.E.2d 133, 140 (Ind.Ct.App. 2004) (where witness was questioned by the officers, told them that there was not a man inside the house being held at gunpoint, that no one was still inside the house, and that she had not seen anyone with a gun inside the house, the State did not present evidence disputing the testimony; therefore, the court of appeals must consider it in reviewing the trial court's ruling on the motion to suppress; there was no reason to disbelieve the witness).

State v. Carlson, 762 N.E.2d 121 (Ind.Ct.App. 2002) (officers did not have probable cause to search D's vehicle where evidence regarding odor of marijuana was conflicting).

Parker v. State, 697 N.E.2d 1265 (Ind.Ct.App. 1998) (where officer's testimony at trial was different than it was a suppression hearing and no longer supported search of pocket in pat down, court of appeals reversed denial of suppression based on trial testimony).

Esquerdo v. State, 640 N.E.2d 1023, 1029 (Ind. 1994) (probable cause to search premises is established when a sufficient basis of fact exists to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime).

c. Probable cause for warrantless arrest

Probable cause adequate to support a warrantless arrest exists when, at the time of the arrest, the officer has knowledge of facts and circumstances that would warrant a person of reasonable caution to believe that the suspect committed a criminal act. Griffith v. State, 788 N.E.2d 835, 840 (Ind. 2003). The amount of evidence necessary to meet the probable cause for a warrantless arrest is determined on a case-by-case basis. The level of proof necessary to establish probable cause is less than that necessary to establish guilt beyond a reasonable doubt.

Lamagna v. State, 776 N.E.2d 955, 958 (Ind. Ct. App. 2002) (probable cause requires only a fair probability of criminal activity, not a *prima facie* showing, and may be established by evidence that would not be admissible at trial).

PRACTICE POINTER: At a statement's suppression hearing, a psychologist or expert in reading could testify as to the client's reading level as it would indicate the client's ability to understand his rights, or a psychologist could testify as to the degree to which the client is susceptible to authoritarian figures. [See Expert Explains Interplay between IQ, Police Coercion, 2 BNA CrimPracMan 84.] In a case in which the client's word is pitted against that of the police officers as to the circumstances of a confession, Vince Aprile suggests a polygraph examination limited strictly to the circumstances of the statements, not addressing questions regarding the crime or the truth of the statements. The argument that polygraphs are not admissible at trials because they are too persuasive ought not to apply to judge-conducted hearings.

d. Video evidence

An appellate court's decision to rely on video evidence to reverse a trial court's findings does not constitute impermissible reweighing of the evidence if the video indisputably contradicts the trial court. A video indisputably contradicts the trial court's findings when no reasonable person can view the video and come to a different conclusion. When determining whether the video evidence is undisputable, a court should assess the video quality, including whether the video is grainy or otherwise obscured, the lighting, the angle, the audio and whether the video is a complete depiction of the events at issue, among other things. In cases where the video evidence is not clear or complete or subject to different interpretations, Court defers to the trial court's interpretation. Love v. State, 73 N.E.3d 693 (Ind. 2017).

2. Waiver

a. Defendant

A defendant, on appeal, cannot raise a suppression issue different than the suppression issue raised at trial.

Hester v. State, 551 N.E.2d 1187, 1189 (Ind.Ct.App. 1990) (at suppression hearing D objected to issuance of search warrant because it was insufficiently specific but did not challenge issuing court's finding of probable cause; issue whether probable cause supported issuance of search warrant not raised prior to appeal, was therefore waived).

Negash v. State, 113 N.E.3d 1281, 1290 (Ind.Ct.App. 2018) (holding defendant waived state constitutional claim because "[i]t is well-settled in Indiana that a defendant may not argue one ground for objection at trial and then raise new grounds on appeal").

Snow v. State, 137 N.E.3d 965, 969-70 (Ind.Ct.App. 2019) (suggesting that D must raise and rebut the State's good-faith argument on appeal even when—as in this case—the good faith exception was not the basis for admitting the evidence in trial court; here, D waived issue of insufficient evidence to support probable cause because he addressed the good faith exception to the exclusionary rule in his reply brief but not in his appellant's brief).

b. State

When the State is a party to a state court proceeding, it, like all parties, must comply with the rules then governing, and its actions, like those of all parties, are subject to scrutiny under principles of waiver and estoppel. State v. Peters, 921 N.E.2d 861 (Ind.Ct.App. 2010). An argument raised for the first time on appeal is waived and will not be considered by appellate court. Smith v. State, 130 N.E.3d 1181 (Ind.Ct.App. 2019).

State v. Peters, 921 N.E.2d 861 (Ind.Ct.App. 2010) (where trial court based its holding granting D's motion to suppress on Article I, § 11, the State waived its argument on appeal by not addressing Article I, § 11; State also waived argument of probable cause because State raised issue for first time on appeal).

Webb v. State, 714 N.E.2d 787, 789 (Ind. Ct. App. 1999) (rejecting the State's argument that a stop was justified because "the State has imputed to [o]fficer…a new theory for the stop despite [officer's] own testimony as to why he stopped Webb.").

State v. Nesius, 548 N.E.2d 1201, 1203 (Ind. Ct. App. 1990) ("We do not believe the trial court erred by refusing to allow the State to supply—after the fact - a possible justification for the investigative stop not contemplated by the police officer at the time of the stop.")

Smith v. State, 130 N.E.3d 1181 (Ind.Ct.App. 2019) (where State solely argued at trial that the search was a valid inventory search, the State waived argument that it was a search pursuant to a lawful arrest notwithstanding officer's testimony that he believed he searched pursuant to a lawful arrest; Tavitas, J., concurring, disagrees that State waived argument); cf. Satterfield v. State, 33 N.E.3d 344, 352 (Ind. 2015) (Court may affirm a trial court's ruling on the admissibility of evidence "on any theory supported by the evidence").

3. Fundamental error

An erroneous ruling on a motion to exclude improperly seized evidence is not per se fundamental error, but, where there is a claim of fabrication of evidence, willful malfeasance on the part of the investigating officers or that the evidence is not what it appears to be, a fair trial may be impossible, making the admission of the evidence fundamental error. Brown v. State, 929 N.E.2d 204 (Ind. 2010).

Maymon v. State, 6 N.E.3d 488 (Ind.Ct.App. 2014) (error, if any, in admitting evidence leading up to and through completion of traffic stop was not fundamental because D did not contend officer fabricated evidence, or, at trial, dispute authenticity of evidence or truthfulness of officer's testimony).

4. State may appeal if suppression order precludes prosecution

Ind. Code 35-38-4-2(5) authorizes appeals from orders suppressing evidence when effect is to preclude further prosecution. State v. Owings, 622 N.E.2d 948 (Ind. 1993).

State v. Pease, 531 N.E.2d 1207, 1209 (Ind.Ct.App. 1988) (State acquired its evidence as consequence of illegal search alleged in D's motion to suppress. When trial court ordered that fruits of search of D's person were to be excluded, State lost its ability to prosecute and dismissed information. Unaware of any principled basis for distinguishing between final orders and interlocutory orders deemed final when both have the effect of precluding further prosecution. Ind. Code 35-38-4-2(5) permits the State to appeal the suppression order at issue here).

State v. Holtsclaw, 977 N.E.2d 348 (Ind. 2012) (Indiana Appellate Rule 9, which tolls the 30-day dealine for filing notice of appeal when a party files a motion to correct error, applies to the State in a criminal case).

5. Effect of guilty plea

A guilty plea waives a suppression issue for appeal, even where a plea agreement maintains that such an appeal is permitted. Alvey v. State, 911 N.E.2d 1248 (Ind. 2009). Thus, a defendant who pleads guilty due to a promise he could preserve his right to appeal a suppression issue has involuntarily entered into the plea. Lineberry v. State, 747 N.E.2d 1151 (Ind.Ct.App. 2001).

Naked City, Inc. v. State, 460 N.E.2d 151, 156 (Ind.Ct.App. 1984) (D waived argument that tape was seized illegally by pleading guilty).

But see Haring v. Prosise, 462 U.S. 306, 103 S.Ct. 2368 (1983) (guilty plea does not constitute admission or waiver of constitutionality of search).

6. Harmless error

The "harmless error" rule most likely applies to erroneous rulings on suppression motions, but error must be harmless beyond a reasonable doubt. Esquerdo v. State, 640 N.E.2d 1023 (Ind. 1994); Hewell v. State, 471 N.E.2d 1235 (Ind.Ct.App. 1984); T.R. 61.

Nowling v. State, 955 N.E.2d 854 (Ind.Ct.App. 2011) (error in admitting drugs found in D's room was harmless where State admitted into evidence D's admission under oath during probation revocation hearing that he possessed the drugs).

Moreover, a violation of Rule of Procedure in obtaining a warrant or a wiretap will not result in suppression if defendant does not show how the State's failure affected his substantial rights or the warrant was deficient in any other way. State v. Haldeman, 919 N.E.2d 539 (Ind. 2010).

State v. Haldeman, 919 N.E.2d 539 (Ind. 2010) (although since-repealed Crim. Rule 25 (repealed) required prosecutor to file a petition for review of a warrant for a wiretap with the Court of Appeals within 10 days of issuance of the warrant, D failed to show how the prosecutor's failure to do so affected his substantial rights or that the warrant was deficient in any other way).

E. CIVIL LIABILITY

1. Search

A person whose rights are violated by an illegal search may have action against the officer. 42 U.S.C.A. §1983 (federal cause of action for deprivations of constitutional rights).

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999 (1971) (federal cause of action for violations by federal officers).

Hanlon v. Berger, 526 U.S. 808, 119 S. Ct. 1706 (1999) (defense of qualified immunity).

The action may be filed against the officer and his or her employer. See Ind. Code 34-13-3-1 *et seq.*

Hupp v. Hill, 576 N.E.2d 1320 (Ind.Ct.App. 1991) (tort action for issuance and execution of search warrant).

Williams v. State, 444 N.E.2d 888, 891 (Ind.Ct.App. 1983) (dictum; state and city of Indianapolis could be liable in tort action because police officers who recovered stolen vehicle failed to return it to lawful owner within time prescribed by statute).

2. Arrest

A person arrested illegally may have action against arresting officer for false arrest, false imprisonment, or assault and battery. Roddel v. Town of Floro, 580 N.E.2d 255, 259 (Ind.Ct.App. 1991). To succeed in a claim of false arrest, the plaintiff must establish absence of probable cause for the arrest; a false imprisonment claim requires proof of unlawful restraint of one's freedom of movement against his will. Id.

Brower v. County of Inyo, 489 U.S. 593, 109 S.Ct. 1378 (1989) (motorist who was fleeing police seized under Fourth Amendment when he ran into truck set up as roadblock for purpose of stopping him and was killed. Court split 5-4 on whether intent of police required. Remanded for determination if seizure "unreasonable," in view of location of truck on a curve and cruise headlights blinding driver, so as to form basis of §1983 action).

County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708 (1998) (officer held not to violate substantive due process guarantee of Fourteenth Amendment by causing death through deliberate or reckless indifference to life in high-speed automobile chase aimed at apprehending suspect).

Gomez v. Adams, 462 N.E.2d 212 (Ind.Ct.App. 1984) (false arrest, false imprisonment, assault and battery).

An action may be filed against the officer and his or her employer. See Ind. Code 34-13-3-1 *et seq.*; Garrett v. City of Bloomington, 478 N.E.2d 89 (Ind.Ct.App. 1985).

TABLE OF AUTHORITIES

Indiana Cases

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Other Jurisdictions