

[CAPTION]

NOTICE OF ALIBI DEFENSE

The Defendant, by counsel, pursuant to I.C. 35-36-4-1, notifies the Prosecuting Attorney of the Defendant's intention to offer defense of alibi in this cause.

The Defendant states that on the date of the alleged offense as charged, the Defendant was at the following place: [insert location].

The Defendant requests that the Prosecutor file a specific statement in regard to the exact date, time, and location of the offense charged in this cause.

(Signature)

NOTE

Notice of Alibi must be filed no later than 20 days prior to omnibus date if a felony; or 10 days prior to omnibus date if charged with only one or more misdemeanors. A belated Notice may be filed upon a showing of good cause.

REFERENCES

CASEBANK M.5.b

I.C. 35-36-4-1 et seq. (notice of alibi defense; procedures)

CASE LAW

DEFINITION OF ALIBI

Kappos v. State, 465 N.E.2d 1092 (Ind. 1984) (the trial court defined alibi evidence as rebuttal evidence directed to that part of the State's evidence which tends to identify the Defendant as the person who committed the crime).

Wilson v. State, 536 N.E.2d 1037 (Ind.Ct.App. 1989) (the purpose of the alibi statute is not to compel exclusion of evidence or mandate re-trials for purely technical errors; trial court has the discretion to order a continuance as sole remedy for a violation of the statute).

Graham v. State, 464 N.E.2d 1 (Ind. 1984) (the Defendant's statement that he was in Indianapolis, IN was too general and did not meet requirements of the statute).

APPLICABILITY OF ALIBI STATUTE

Edwards v. State, 930 N.E.2d 48 (Ind.Ct.App. 2010) (evidence defendant was not at crime scene is not alibi evidence, but rather rebuttal evidence, thus Defendant was not required to file notice of alibi where witnesses would have testified only that Defendant was not at the scene (but not that Defendant was at another specific location)).

State v. Lee, 164 Ind.App. 391, 328 N.E.2d 745 (1975) (alibi statutes are applicable in criminal conspiracy cases).

Kappos v. State, 465 N.E.2d 1092 (Ind. 1984) (act of hiring another to commit murder does not fall within parameters of participation necessary to activate alibi statutes; court has refused to adopt rule excluding all evidence of events occurring outside time/spatial limits raised by notice of alibi).

NOTICE

Harvey v. State, 542 N.E.2d 198 (Ind. 1989) (one purpose of alibi statute is to advise the State in advance of exact place the accused claims to have been when offense was committed so that State might investigate alibi and either dismiss charges before trial, if it is discovered that wrong person is accused, or secure evidence to prove the alibi false if that is the case).

Griffin v. State, 664 N.E.2d 373 (Ind. Ct. App. 1996) (if trial court moves omnibus date, which effectively creates at least a 20-day period between initial notice of alibi filing date and subsequent omnibus date, then purposes of alibi statute are served by treating initial notice as timely filed).

Manning v. State, 557 N.E.2d 1335 (Ind. Ct. App. 1990) (the Defendant must file notice of alibi where he admits being present at crime scene for portion of time but claims that he was elsewhere during remaining portion of time).

McCallip v. State, 580 N.E.2d 278 (Ind.Ct.App. 1991) (under I.C. 35-36-4-2, if the Defendant timely files notice of alibi, the prosecutor is required to file a specific statement containing date defendant is alleged to have committed crime, and the Defendant may file second statement if dates do not match).

Jennings v. State, 514 N.E.2d 836 (Ind. 1987) (State's answer to the notice of alibi restricts State to proof that crime alleged was committed on date in the answer).

Payne v. State, 495 N.E.2d 183, 184 (Ind. 1986) (if the Defendant does not provide notice on time in accordance with statute, without showing good cause for noncompliance, such evidence shall not be admitted at trial).

Baxter v. State, 522 N.E.2d 362, 368 (Ind. 1998) (under I.C. 35-36-4-3, the State's or the Defendant's failure to file notice of alibi results in exclusion of alibi evidence).

NOTE: Defendant has right to testify to alibi under U.S. and Indiana Constitutions, Baxter v. State, infra, at 368-71.

Edwards v. State, 930 N.E.2d 48 (Ind. Ct. App. 2010) (evidence Defendant was not at crime scene is not alibi evidence. Trial court erred in excluding testimony of defense witnesses because they were purported alibi witnesses and the Defendant did not file a Notice of Alibi. Because the witnesses would have testified only that Defendant was not at the scene (but not that he was at another specific location), the witnesses were rebuttal witnesses, not alibi witnesses, and thus Defendant was not required to file a Notice of Alibi. The purpose of the alibi notice statute is to ensure that the prosecution is not surprised by alibi testimony that Defendant was somewhere else, so the statute sets a deadline for notice of alibi so prosecutor has ample time to investigate claim that the Defendant was at another specific location. Testimony that a defendant was not at crime scene requires no further investigation.)

LATE FILING/ GOOD CAUSE

Hartman v. State, 176 Ind.App. 375, 376 N.E.2d 100 (1978) (where there is “good cause” for the Defendant’s failure to meet statutory requirements for alibi notice, admission or exclusion of such evidence is matter of trial court’s discretion).

Garrison v. State, 575 N.E.2d 700 (Ind.Ct.App. 1991) (the trial court’s ruling on an extension request is the most deferential of the abuse of discretion standards; the trial court’s ruling will only be interfered with if it is indisputably against the logic and effect of the facts or the reasonable, probable deductions drawn there from and, further, the opposing party is prejudiced).

Harrison v. State, 644 N.E.2d 1243 (Ind. 1995) (superseded by statute as stated in Belvedere v. State, 875 N.E.2d 352 (Ind.Ct.App. 2007)) (deadlines imposed in alibi statute cannot be enforced so as to deny the Defendant due process rights if the Defendant proffers an acceptable reason for violating the statutes time requirements).

Baxter v. State, 522 N.E.2d 362 (Ind. 1988) (being in jail, being in hospital, becoming separated from wife, and fact that defense counsel was out of town for one week did not constitute good cause required to allow tardy notice of alibi).

Payne v. State, 495 N.E.2d 183 (Ind. 1986) (State's filing notice that it would call one of the Defendant's accomplices as a witness did not provide good cause to allow the Defendant to have alibi witness testify despite untimely filing of notice of alibi defense; State's naming of accomplice as witness did not in any respect change material allegations of charge).

Harvey v. State, 621 N.E.2d 362 (Ind.Ct.App. 1993) (rejecting the Defendant's good cause argument based on State's late production of tape recording of drug buy; after hearing tape, the Defendant claimed his voice was not on tape and attempted to show he was out of state on date of buy; the Court noted information specifically charged date of offense as on or about April 8, 1992, and found that the Defendant was aware of critical date since filing of information; the Defendant's lack of diligence in pursuing alibi until after receiving tape was not reasonable, and therefore did not constitute good cause).

STATE'S RESPONSE

Garrison v. State, 575 N.E.2d 700 (Ind.Ct.App. 1991) (State need not respond to the Defendant's alibi notice if it intends to present at trial date and place listed in indictment and information as date and place of crime committed).

Dew v. State, 416 N.E.2d 1245 (Ind. 1981) (trial court committed reversible error in allowing State, over the Defendant's objection, to introduce evidence in conflict with the Defendant's notice of alibi when State had failed to file answer and demonstrated no good cause for its failure).

Tolbert v. State, 459 N.E.2d 1189 (Ind. 1984) (despite mandatory language of alibi statute, reversal is not required for State's failure to give timely response to notice of alibi where the Defendant has not been misled in preparation or maintenance of his defense and is not likely to be placed in double jeopardy; here, the Defendant knew specific time and place of crime through deposition of victim).

Gibbs v. State, 471 N.E.2d 20 (Ind.Ct.App. 1984) (where State fails to respond to the Defendant's notice of alibi defense, I.C. 35-36-4-3 provides that trial court must exclude evidence offered by the State which varies from date/place of crime alleged in indictment/information; here, trial court properly allowed State to introduce evidence consistent with charging papers).

Thurston v. State, 472 N.E.2d 198 (Ind. 1985) (where proof showed weekly meetings and repeated sexual acts between victim and the Defendant and where 10 year-old victim was unable to recall specific date when acts occurred, State's response narrowing time period to three-month period satisfied alibi statute).

Sisson v. State, 985 N.E.2d 1 (Ind. Ct. App. 2012) (State need not respond where Defendant does not request narrowed time-frame, and date of offense is hotly disputed at trial).

EXCLUSION OF EVIDENCE

Campbell v. State, 622 N.E.2d 495 (Ind. 1993), *overruled on other grounds* 717 N.E.2d 32 (despite untimely filing of notice of alibi, exclusion of the Defendant's own alibi testimony under I.C. 35-36-4-1 is unconstitutional infringement on right of accused to testify guaranteed by Art. I, § 13 of Ind. Const., which provides in part that: "[i]n all criminal prosecutions, the accused shall have the right to be heard

by himself & counsel"; depriving the Defendant of the opportunity to testify as to his whereabouts at time of crimes cut at heart of jury determination of crucial matters of credibility of victim and her identification of the Defendant, and prejudiced the Defendant's substantial rights).

Palmer v. State, 654 N.E.2d 844 (Ind.Ct.App. 1995) (exclusion of the Defendant's alibi evidence was harmless error where record did not indicate means through which the Defendant would have offered testimony).

Washington v. State, 840 N.E.2d 873 (Ind.Ct.App. 2006) (trial court erred by excluding Defendant's belated notice of alibi witnesses; however, error was harmless; belated filing of notice alibi defense appeared to be due to negligence rather than purposeful or willful misconduct; although State was prejudiced, prejudice was not severe; calling it a "close call," court held Defendant's rights under Compulsory Process Clause were violated by exclusion of the witnesses).

Griffin v. State, 664 N.E.2d 373 (Ind. Ct. App. 1996) (erroneous exclusion of alibi witnesses affected the Defendant's substantial rights and required a new trial; where, as here, the Defendant has testified regarding alibi, but all other alibi evidence has been erroneously excluded, excluded alibi evidence is not merely cumulative, but lends substantial credibility to the Defendant's testimony).

Kellems v. State, 651 N.E.2d 326 (Ind. Ct. App. 1995) (trial court abused its discretion by excluding deposition testimony of the Defendant's unavailable alibi witnesses; admission of deposition testimony did not so prejudice State as to outweigh the Defendant's right to present witnesses essential to his defense; truth or falsity of witness's testimony was matter for jury).

VARIANCE

Mayes v. State, 467 N.E.2d 1189 (Ind. 1984) (no error by allowing into evidence testimony by State's witness contradicting the Defendant's alibi notice because: 1) there was no substantial variation between time and place charged in information and that declared in alibi notice; 2) the Defendant did not request more specific statement as to time and place of commission of crimes; and 3) there was no variation in time and place declared in information and evidence presented at trial).

Smith v. State, 439 N.E.2d 634 (Ind. 1982) (a variance by the State during offering of proof or argument as to time crime occurred from that alleged by State in response to the Defendant's notice of alibi must be of such substantial nature as to mislead accused in preparing or maintaining his defense in order to constitute reversible error).

Sangslan v. State, 715 N.E.2d 875 (Ind. Ct. App. 1999) (although filing of notice of alibi makes time of offense critical or "of the essence," mere filing of alibi defense does not impose greater burden of proof on State than would be otherwise required absent such filing; therefore, time does not become element of offense that State must prove beyond reasonable doubt; here, any variance in time frame alleged in information and State's proof at trial did not circumvent or nullify the Defendant's opportunity to assert his alibi defense to jury).

INSTRUCTIONS

Jennings v. State, 514 N.E.2d 836 (Ind. 1987) (despite the Defendant's alibi defense, trial court instructed jury that if it found crimes charged were committed by the Defendant, the State was not required to prove commission on particular date; this instruction overriding alibi defense was reversible error because it misled jury on law of the case).

Stewart v. State, 521 N.E.2d 675 (Ind. 1988) (the Defendant who files alibi notice is not entitled to instruction listing time of offense as element of crime where the State at trial restricts its proof to time frame alleged in information or within answer to notice of alibi).

USE OF ALIBI EVIDENCE

McKinstry v. State, 660 N.E.2d 1052 (Ind. Ct. App. 1996) (depending upon circumstances of utterance, the Defendant's false alibi statements may be found relevant and admissible as part of State's case in chief; here, the Defendant made a false alibi statements to police officers at time when attention was focused upon the Defendant as a suspect; this evidence was admissible to establish the Defendant's consciousness of guilt).

Randall v. State, 455 N.E.2d 916 (Ind. 1983) (trial court did not err in permitting reference to the Defendant's notice of alibi during his cross-examination and in admitting notice of alibi into evidence).

Holderfield v. State, 578 N.E.2d 661 (Ind. 1991) (admission of the Defendant's notices of alibi to impeach alibi witness presented at trial, did not violate his right against self-incrimination, nor did admission impermissibly call attention to the fact the Defendant did not testify).

Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1987) (although alibi statutes do not explicitly impose upon parties affirmative obligation to disclose alibi and rebuttal witnesses, the State's knowing failure to disclose identity of alibi rebuttal witness violated due process; trial court's discovery order requiring the Defendant to list all his witnesses should have triggered corresponding and reciprocal obligation by State to list all its potential witnesses, despite the Defendant's failure to specifically request disclosure of specific rebuttal witnesses).

Dearman v. State, 315 N.E.2d 405 (Ind.Ct.App. 1974) (no error in refusing to issue process to secure testimony of unwilling alibi witness where evidence showed alleged alibi witness was unwilling to testify on the Defendant's behalf).

ETHICS AND PERJURED ALIBI TESTIMONY

In re Murray, 362 N.E.2d 128 (Ind. 1977) (ethical rules were violated where defense counsel knowingly guided witnesses through false testimony in support of fabricated alibi).