

# RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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This Article will focus on recent case development regarding criminal law and procedure which have been addressed by the Indiana appellate courts since the last Survey and will discuss statutes enacted and modified by the 1997 Indiana General Assembly.

## I. 1997 INDIANA LEGISLATIVE ACTS

### *A. The Effects of Battery and the Intoxication Defenses*

The Indiana legislature created several statutes in an effort to affect the ability of counsel representing defendants from raising specialized defenses of self defense under circumstances more commonly referred to as the “battered woman’s syndrome” and intoxication.

The legislature defined the “effects of battery” as referring to “a psychological condition of an individual who has suffered repeated physical or sexual abuse inflicted by another individual who is the . . . victim of an alleged crime for which the abused individual is charged in a pending prosecution.”<sup>1</sup> Additionally, the victim must be the abused individual’s spouse or former spouse,<sup>2</sup> parent,<sup>3</sup> guardian or former guardian,<sup>4</sup> custodian or former custodian,<sup>5</sup> or cohabitant or former cohabitant.<sup>6</sup>

The legislature then set out the procedural requirements for the instances “when the defendant in a prosecution raises the issue that the defendant was at the time of the alleged crime suffering from the effects of battery as a result of the past course of conduct of the individual who is the victim of the alleged crime.”<sup>7</sup> A defendant can raise the issue in one of two ways. First, a defendant could claim that as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the crime at the time of the alleged offense.<sup>8</sup> This is the traditional “insanity” defense as described in section 35-41-3-6 of the

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1. IND. CODE § 35-41-1-3.3 (Supp. 1997).
2. *Id.* § 35-41-1-3.3(2)(A).
3. *Id.* § 35-41-1-3.3(2)(B).
4. *Id.* § 35-41-1-3.3(2)(C).
5. *Id.* § 35-41-1-3.3(2)(D).
6. *Id.* § 35-41-1-3.3(2)(E).
7. *Id.* § 35-41-3-11(6).
8. *Id.* § 35-41-3-11(b)(1).

Indiana Code. Second, a defendant could claim to have used justifiable reasonable force under Indiana's self defense statute.<sup>9</sup> If a defendant claims this, then he has the burden of producing evidence of that defense.<sup>10</sup> To establish the defense, a trier of fact must "find support for the reasonableness of the defendant's belief in the imminence of the use of unlawful force or, when deadly force is employed, the imminence of serious bodily injury to the defendant or a third person or the commission of a forcible felony."<sup>11</sup> The introduction of any expert testimony under this section is to be admitted in accordance with the Indiana Rules of Evidence.<sup>12</sup> This leaves open the issue of whether expert testimony should be considered by the trier of fact or the court.

If a defendant wants to raise the "effects of battery" as a defense, then he or she must file a written motion of that intent with the trial court not later than twenty days before the omnibus date if the defendant is charged with a felony<sup>13</sup> or ten days if the defendant is charged only with one or more misdemeanors.<sup>14</sup> "In the interest of justice and upon a showing of good cause, the court may permit the filing to be made at any time before the commencement of the trial."<sup>15</sup>

At the same time the legislature narrowed the ability of defendants to use the "effects of battery" as a defense, it created a new statutory mitigating circumstance for sentencing that involves the "effects of battery." This new mitigator occurs when the defendant's crime involves "the use of force against a person who had repeatedly inflicted physical or sexual abuse upon the convicted person and evidence shows that the convicted person suffered from the effects of battery as a result of the past course of conduct of the individual who is the victim of the crime for which the person was convicted."<sup>16</sup>

The legislature also enacted a law which states that "intoxication is *not* a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense unless the defendant meets the requirements of IC 35-41-3-5 [the newly revised intoxication statute]."<sup>17</sup> That statute says that "[i]t is a defense that the person who engaged in the prohibited conduct did so while he was intoxicated, only if the intoxication resulted from the introduction of a substance into his body: (1) without his consent; or (2) when he did not know that the substance might cause intoxication."<sup>18</sup>

It would appear on its face that these statutes are inconsistent to the extent that section 35-41-3-5 is phrased as a positive while section 35-41-2-5 is

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9. *Id.* § 35-41-3-11(b)(2).

10. *Id.*

11. *Id.*

12. *Id.* § 35-41-3-11(d).

13. *Id.* § 35-41-3-11(c)(1).

14. *Id.* § 35-41-3-11(c)(2).

15. *Id.* § 35-41-3-11(c).

16. *Id.* § 35-38-1-7.1(c)(11).

17. *Id.* § 35-41-2-5 (emphasis added).

18. *Id.* § 35-41-3-5 (emphasis added).

expressed in the negative. Reading the two statutes together, however, it is clear that the legislature meant to remove voluntary intoxication as a defense to criminal conduct while at the same time remaining consistent with the Indiana case *Terry v. State*,<sup>19</sup> and the recent U.S. Supreme Court case, *Montana v. Egeloff*.<sup>20</sup> The practical effect of this change appears to be that, in the appropriate cases, the State will now be entitled to a final instruction that it was not entitled to prior to the statute. This author would suggest that an appropriate instruction might read:

You are instructed that voluntary intoxication is not a defense in a prosecution for an offense and intoxication may not be taken into consideration in determining the existence of a mental state that is an element of the offense unless the intoxication resulted from the introduction of a substance into the defendant's body without his consent or when he did not know the substance might cause intoxication.

Time will tell whether the appellate courts in Indiana will accept the limiting nature of the legislature's modification of this defense.

#### *B. Enhancements to Previous Statutes*

In 1997, the legislature passed several statutes which enhance already existing offenses. Battery has been enhanced to a class A misdemeanor if it is committed against the employee of a penal facility or juvenile detention facility<sup>21</sup> and to a class D felony if it results in bodily injury to an employee of a penal facility or juvenile detention facility.<sup>22</sup> In addition, a battery related to domestic violence is now a class D felony if it results in bodily injury to another person, if the person who commits battery has a previous conviction which is also related to "domestic violence."<sup>23</sup> "Domestic violence" includes "conduct found by a court to be physical or sexual abuse against a party or child of a party, including conduct that is an element of an offense under IC 35-42, regardless of whether the conduct results in a criminal prosecution or occurs in the presence of a child

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19. 465 N.E.2d 1085 (Ind. 1984) (holding a statute attempting to remove the factor of voluntary intoxication, void except in limited circumstances, because it went against the principle that "[a]ny factor which serves as a denial of the existence of mens rea must be considered by a trier of fact before a guilty finding is entered.").

20. 518 U.S. 37 (1996) (holding the defendant's right to have the jury consider evidence of voluntary intoxication was not a "fundamental principle of justice," and Montana's statutory ban on consideration of such evidence does not violate the due process clause).

21. IND. CODE § 35-42-2-1(a)(1)(C) (Supp. 1997). To be a class A misdemeanor, the offense must be committed against the employee while the employee is "engaged in the execution of [his] official duty." *Id.*

22. *Id.* § 35-42-2-1(a)(2)(K). Again, to be a class D felony, the offense must be committed against the employee while the employee is "engaged in the execution of [his] official duty." *Id.*

23. *Id.* § 35-42-2-1(a)(2)(E).

of the parties.”<sup>24</sup> The term does not include negligence or defamation by one parent against the other parent or the child, or reasonable acts of self defense used to protect a parent or child from the conduct of the other parent.<sup>25</sup>

Sentencing statutes received some attention from the 1997 legislature. Causing a death while operating a motor vehicle while intoxicated under section 9-30-5-5 of the Indiana Code was added to the list of “crimes of violence”<sup>26</sup> for which sentences may be ordered served consecutively without the limitation that the aggregate sentence not exceed the presumptive sentence for the next higher grade of felony.<sup>27</sup> In addition, the crime of aggravated battery (section 35-42-2-1.5 of the Indiana Code) was added to the list of “nonsuspendible” offenses for which the minimum sentence must be executed.<sup>28</sup>

Criminal mischief was increased to a class D felony when the property damaged is a “law enforcement animal.”<sup>29</sup> A law enforcement animal is an animal “owned or used by a law enforcement agency for the principal purposes of aiding in the detection of criminal activity, the enforcement of laws, and the apprehension of offenders, and insuring the public welfare.”<sup>30</sup> In addition, it is now a class A misdemeanor for anyone who knowingly or intentionally “(1) strikes, torments, injures, or otherwise mistreats a law enforcement animal; or (2) interferes with the actions of a law enforcement animal while the animal is engaged in assisting a law enforcement officer in the performance of the officer’s duties. . . .”<sup>31</sup> The new law provides that “[i]t is a defense that the accused person: (1) engaged in a reasonable act of training, handling, or discipline; and (2) acted as an employee or agent of a law enforcement agency.”<sup>32</sup> In addition to any sentence or fine imposed by the court, those who violate this statute may also be ordered to make restitution through reimbursement of veterinary bills and replacement costs of the animal if the animal is disabled or killed.<sup>33</sup>

### *C. Sex Offenses and the Sex Offender Registry*

The legislature continued to tinker with sex-related offenses when it expanded the voyeurism statute to reach beyond “peeping” into an occupied dwelling of another person<sup>34</sup> to include peeping without the other person’s consent “into an area where an occupant of the area reasonably can be expected

24. *Id.* § 31-9-2-42.

25. *Id.*

26. *Id.* § 35-50-1-2(a)(12).

27. *Id.* § 35-50-1-2(c)(1).

28. *Id.* § 35-50-2-2(b)(4)(R).

29. *Id.* § 35-43-1-2(a)(2)(B)(v).

30. *Id.* § 35-46-3-4.5(a).

31. *Id.* § 35-46-3-11(a).

32. *Id.* § 35-46-3-11(b).

33. *Id.* § 35-46-3-11(c).

34. *Id.* § 35-45-4-5(a)(1).

to disrobe<sup>35</sup> which includes restrooms,<sup>36</sup> baths,<sup>37</sup> showers,<sup>38</sup> and dressing rooms.<sup>39</sup>

Public indecency is now a class D felony “if the person commits the offense by appearing in the state of nudity with the intent to arouse the sexual desires of the person or another person in or on a public place where a child less than sixteen (16) years of age is present.”<sup>40</sup>

The State’s sex offense registry was changed by adding a list of the sex crimes for which a person must be listed on the state sex offender registry, which is maintained by the Indiana Criminal Justice Institute. The legislature removed the limitation of listing rape, criminal deviate conduct, incest, and sexual battery only when the victim was under eighteen. These crimes are now listed regardless of the victim’s age.<sup>41</sup> The amendment also makes it clear that the registry is to include anyone convicted of an offense specified in the statute without regard to the date of the crime or conviction.<sup>42</sup>

#### *D. Abortion*

The 1997 legislature criminalized partial-birth abortion. “Partial birth abortion” is “an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.”<sup>43</sup> The amendment to Indiana’s abortion law provides that “a person may not knowingly or intentionally perform a partial birth abortion unless a physician reasonably believes that: (1) performing the partial birth abortion is necessary to save the mother’s life; and (2) no other medical procedure is sufficient to save the mother’s life.”<sup>44</sup> The legislature excused patients from criminal liability when it added language which states “a woman upon whom a partial birth abortion is performed may not be prosecuted for violating or conspiring to violate [the new partial birth abortion prohibition].”<sup>45</sup>

#### *E. Operating While Intoxicated*

The legislature made a significant change in the definition for prima facie evidence of intoxication and for liability under intoxicated driving laws when it amended the operating while intoxicated statute. The statute now reads that:

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35. *Id.* § 35-45-4-5(a)(2).

36. *Id.* § 35-45-4-5(a)(2)(A).

37. *Id.* § 35-45-4-5(a)(2)(B).

38. *Id.* § 35-45-4-5(a)(2)(C).

39. *Id.* § 35-45-4-5(a)(2)(D).

40. *Id.* § 35-45-4-1(a).

41. *Id.* § 5-2-6-3(b)(1)(A),(B),(I),(J).

42. *Id.* § 5-2-6-3(b).

43. *Id.* § 16-18-2-267.5.

44. *Id.* § 16-34-2-1(b).

45. *Id.* § 16-34-2-7(d).

(a) A person who operates a vehicle with at least ten-hundredths percent (0.10%) of alcohol *by weight in grams* in:

(1) *one hundred (100) milliliters* of the person's blood; or

(2) *two hundred ten (210) liters* of the person's breath;

commits a Class C misdemeanor.

(b) A person who operates a vehicle with a controlled substance listed in schedule I or II of IC 35-48-2 *or its metabolite* in the person's *body* commits a Class C misdemeanor.<sup>46</sup>

These changes were made as a result of several cases, including *Godar v. State*<sup>47</sup> and *Estes v. State*.<sup>48</sup> In those cases, the appellate courts found that, as a matter of law, evidence is insufficient to support a conviction for operating vehicle while intoxicated with at least .10% by weight of alcohol in blood where there is no evidence in the record showing that the breath test equipment measured blood alcohol content by weight.<sup>49</sup> In *Estes*, a positive urine test for marijuana at the time of arrest was insufficient to prove that the defendant had marijuana in his blood, and did not support the defendant's conviction for operating a vehicle with a controlled substance in his blood.<sup>50</sup>

This definitional change was also made in the statutes covering operation of a vehicle while intoxicated causing serious bodily injury<sup>51</sup> and operating a vehicle causing death.<sup>52</sup> In addition, several other provisions of section 9-13 of the Indiana Code were changed, including: prima facie evidence of intoxication;<sup>53</sup> relevant evidence of intoxication,<sup>54</sup> driving under the influence by persons under 21 years of age;<sup>55</sup> chemical tests admissible as evidence of blood alcohol content;<sup>56</sup> open container infractions;<sup>57</sup> prima facie evidence of intoxication for motorboat violations;<sup>58</sup> relevant evidence for motorboat operation;<sup>59</sup> and operation of a motorboat while intoxicated.<sup>60</sup>

It is interesting to note that the change from "controlled substance in the blood" to "controlled substance . . . or its metabolite in the *body*"<sup>61</sup> was not made

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46. *Id.* § 9-30-5-1 (emphasis added).

47. 643 N.E.2d 12 (Ind. Ct. App. 1994).

48. 656 N.E.2d 528 (Ind. Ct. App. 1995).

49. *Godar*, 643 N.E.2d at 14.

50. *Estes*, 656 N.E.2d at 529.

51. IND. CODE § 9-30-5-4 (Supp. 1997).

52. *Id.* § 9-30-5-5.

53. *Id.* § 9-13-2-131.

54. *Id.* § 9-13-2-151.

55. *Id.* § 9-30-5-8.5.

56. *Id.* § 9-30-6-15.

57. *Id.* § 9-30-15-3.

58. *Id.* § 14-15-8-5.

59. *Id.* § 14-15-8-6.

60. *Id.* § 14-15-8-8.

61. *Id.* § 9-30-5-1 (emphasis added).

in the operating a vehicle causing a death statute. Thus, the statute still provides liability for causing a death by operating a vehicle “with a controlled substance listed in schedule I or II of IC 35-48-2 or its metabolite in the person’s *blood*.”<sup>62</sup>

The change in the intoxicated driving statutes also necessitated a change in the habitual offender statute. The legislature altered the statute by providing that habitual violator status includes violations under the old formulation, “alcohol in the blood,” *before July 1, 1997*, as well as violations under the new statute, which calls for a percent of “alcohol by weight in grams in: (A) one hundred (100) milliliters of the blood; or (B) two hundred ten (210) liters of the breath” after *June 30, 1997*.<sup>63</sup>

### F. Community Corrections

Community Corrections continues to be an area capturing the legislature’s attention as a result of increased jail and prison populations throughout the state. The scope of community corrections programs was modified to include “[p]ersons ordered to participate in community corrections programs as a condition of probation.”<sup>64</sup> In addition, day reporting programs were added to the list of types of community corrections programs that can be provided.<sup>65</sup> Under new legislation, the Department of Corrections is now responsible for providing an approved training curriculum for community corrections field officers.<sup>66</sup> Finally, the D felony alternative to a full presentence report for those D felons committed to the Department of Corrections is now required when a D felon is sentenced to a community corrections program as a direct placement for those given non-suspendible sentences.<sup>67</sup>

## II. CASE DEVELOPMENTS

### A. Search and Seizure

The Indiana Supreme Court examined the application of the “good faith” exception to the exclusionary rule in *Figert v. State*.<sup>68</sup> Based upon information contained in an affidavit for probable cause, the trial court issued a search warrant for “the three residences at 20831 Upas Road” to look for cocaine and “any and all property related to narcotics trafficking” in the homes and in the “vehicles within the curtilage.”<sup>69</sup> The warrant was sought as part of an undercover investigation where controlled purchases of cocaine were made from men conducting drug sales from two of the three manufactured homes. The

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62. *Id.* § 9-30-5-5(a)(2) (emphasis added).

63. *Id.* § 9-30-10-4(a)(5)-(6),(b)(2)-(3).

64. *Id.* § 11-12-1-2(4).

65. *Id.* § 11-12-1-2.5(a)(9).

66. *Id.* § 11-12-2-5(a)(10).

67. *Id.* §§ 35-38-2.6-1, -2, -6.

68. 686 N.E.2d 827 (Ind. 1997).

69. *Id.* at 829 (quoting the police officer’s probable cause affidavit).

homes were in a “U” shape, and Figert and a co-defendant named Green lived in the third home. The probable cause affidavit did not allege that any drug sales were observed from the third home or that it was a base of operations for drug trafficking or that Figert or Green sold drugs. The only detail in the affidavit regarding the third home, Figert, or Green was that “there were currently a large number of unidentified individuals living and frequenting the three trailers.”<sup>70</sup> The search of the home uncovered incriminating evidence against Figert and Green as well as the discovery of evidence in Green’s car. They were charged and presented an interlocutory appeal of the denial of their motion to suppress by means of certified questions.<sup>71</sup> The questions were:

- (1) “Whether the finding of probable cause for the issuance of a search warrant for all dwellings on the premises . . . was proper when the information used to formulate probable cause and the issuance of a search warrant was based on the activities of two residences that did not involve the [defendants’] residence;” and (2) “Whether the Court’s finding that ‘the totality of the circumstances makes the entire premises suspect’ and thus ‘[a] substantial basis existed for a finding of probable cause to search all dwellings located at the farm’ was correct.”<sup>72</sup>

The court of appeals, in a 2-1 decision, found that there was no probable cause for the issuance of the warrant, but the majority determined that the “good faith” exception applied and affirmed the trial court.<sup>73</sup> Judge Staton agreed with the majority that there was no probable cause but dissented on the issue of the “good faith” exception.<sup>74</sup>

On appeal to the Indiana Supreme Court, the first issue was whether the information contained in the affidavit supported the finding of no probable cause. The reviewing court must determine whether the magistrate had a “substantial basis” to make a finding of probable cause.<sup>75</sup> In making that decision, the supreme court maintained the principle that “a search of multiple units at a single address must be supported by probable cause to search each unit and is no different from a search of two or more separate houses.”<sup>76</sup> Here, the supreme court agreed with the court of appeals that probable cause did not exist to support the search:

“[T]he reasonable inferences drawn from the totality of the evidence,” at most show that drugs were being sold from the first two homes by persons who lived in those homes or used them as a base of operations for drug trafficking. “Unidentified individuals,” who may or may not

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70. *Id.* (quoting the police officer’s probable cause affidavit).

71. *Id.*

72. *Id.*

73. *Figert v. State*, 683 N.E.2d 1314, 1320-21 (Ind. Ct. App. 1997).

74. *Id.* at 1321-22.

75. *Figert*, 686 N.E.2d at 830.

76. *Id.*

have been involved in the drug sales, were “frequenting the three trailers.” This all occurred in the general vicinity of the three homes, but does not support the conclusion that the third home or Figert and Green were necessarily involved. In short, the probable cause affidavit does not allege facts that would establish a fair probability that evidence of crime would be found in Figert’s and Green’s home.<sup>77</sup>

The court rejected the State’s argument that this was a “collective dwelling” which might allow an exception, because there was insufficient showing of collective control or occupation.<sup>78</sup> The court stated:

The probable cause affidavit alleged that different persons lived in the first two homes and that the officer bought drugs from both occupants on separate occasions. The affidavit did not allege any connection between any of the controlled drug buys and the third home. Significantly, an effort was made to conceal the illegal activities from some of the occupants of the first two homes. Thus, the facts cut against the view that the Farm was a collective drug-dealing operation and indicate that some of the occupants may not have been aware of illegal activity. If the officer who sought the warrant had information tending to show involvement by the third home in the drug sales, that information should have been offered when the warrant was issued.<sup>79</sup>

The court said that warrants, as used in this case, to search three separate residences occupied by three different people should be viewed with disfavor and the better practice would be to seek separate warrants for each residence.<sup>80</sup>

Having found that probable cause did not exist for the search, the court then examined the court of appeals’ decision that the search was permissible under a “good faith” exception. The court reviewed the rule as set out in *United States v. Leon*,<sup>81</sup> which says that when the police rely in objective good faith on a warrant later found to be defective, the Fourth Amendment does not require exclusion of the seized evidence.<sup>82</sup> But where the warrant is “based on an affidavit ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,’” exclusion is the appropriate remedy.<sup>83</sup>

The issue is whether the officer’s reliance on the warrant is objectively reasonable notwithstanding the issuance of the warrant by a magistrate.<sup>84</sup> “The good faith exception necessarily assumes that police reliance on a warrant can

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77. *Id.* (citation omitted).

78. *Id.* at 830-31.

79. *Id.* at 831.

80. *Id.*

81. 468 U.S. 897 (1984).

82. *Figert*, 686 N.E.2d at 831. This is because “suppression would not further the exclusionary rule’s objective of deterring police misconduct . . .” *Id.*

83. *Id.* (quoting *Leon*, 468 U.S. at 923).

84. *Id.* at 832.

be objectively reasonable despite the lack of probable cause,"<sup>85</sup> and yet the good faith exception cannot be "so broadly construed as to obliterate the exclusionary rule."<sup>86</sup>

The court of appeals found that "the officers executing the warrant . . . could reasonably believe that probable cause to search a conclave consisting of the three trailers and accumulated junk cars located at a particular address had been established through the indicia presented by [the officer's] personal experiences and observations."<sup>87</sup> The supreme court disagreed and stated:

Probable cause clearly existed with respect to the first two homes, and the totality of the circumstances established some suspicion or possibility of a joint drug-dealing enterprise at the Farm. But this is not enough. The affidavit did not allege any facts linking the third home to the surrounding criminal activity. The lack of any nexus is a critical point in assessing the reasonableness of the officer's reliance on the warrant.<sup>88</sup>

The court determined that the police officer should have been aware that there are specific legislative requirements for the form and content of probable cause affidavits and that compliance with the most basic of these statutes has "bred familiarity with so basic a requirement as a particularized showing of probable cause."<sup>89</sup> Here, there was no technically flawed hearsay in the affidavit that linked Figert's and Green's home to the drug-dealing that would make reliance on the warrant objectively reasonable.<sup>90</sup>

In *United States v. Leon*, the Court noted that the rationale for the good faith exception is designed to "deter police misconduct rather than to punish the errors of judges and magistrates."<sup>91</sup> The affidavit in *Figert*, however, contained nothing but conclusory statements that the officer had probable cause and was therefore insufficient as a matter of law to authorize a search.<sup>92</sup> The court further said that "[i]f probable cause could be so easily imputed from one dwelling to another through overbroad application of the *Leon* exception, nothing would prevent searches of residences merely because of the fortuity of their proximity to illegal conduct. This would reduce the Fourth Amendment to an 'empty promise.'<sup>93</sup> The court remanded the case and ordered the trial court to grant Figert's motion to suppress in its entirety and Green's motion to suppress regarding the search of the home.<sup>94</sup>

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85. *Id.*

86. *Id.* (quoting *Dolliver v. State*, 598 N.E.2d 525, 529 (Ind. 1992)).

87. *Id.* (quoting *Figert v. State*, 683 N.E.2d 1314, 1320-21 (Ind. Ct. App. 1997)).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 833 (quoting *United States v. Leon*, 468 U.S. 897, 916 (1984)).

92. *Id.*

93. *Id.* (citing *Mapp v. Ohio*, 367 U.S. 643, 660 (1961)).

94. *Id.*

In another recent case, *Lloyd v. State*, the Indiana Court of Appeals dealt with a challenge to the validity of a search.<sup>95</sup> In that case, a Morgan County magistrate issued a search warrant based upon information provided by a deputy sheriff. Lloyd was subsequently charged with two class D felonies as a result of the search, and he appealed the trial court's denial of his motion to suppress.<sup>96</sup>

The first challenge to the validity of the search claimed that the deputy sheriff failed to establish probable cause as required by the Indiana and U.S. Constitution, because the information in the warrant was based largely on the hearsay statement of a third person, Virginia Buckley.<sup>97</sup> The deputy attempted undercover drug purchases from Buckley over a period of two weeks. During the first attempt, the deputy saw Buckley enter Lloyd's Bloomington apartment for the purpose of buying the drugs. This attempt was unsuccessful, but approximately ten days later, Buckley sold marijuana to the deputy and claimed she could get more from "her source in Bloomington."<sup>98</sup>

Judge Baker, writing for the majority, reviewed the standard for issuing a search warrant and stated that, as long as the magistrate had a substantial basis for concluding that probable cause existed, the magistrate's decision would be affirmed.<sup>99</sup> The court continued that both the Indiana legislature and the Supreme Court have set out requirements for when hearsay may be used to establish probable cause.<sup>100</sup>

Indiana has set out by statute its requirement that an affiant who is attempting to establish probable cause based on hearsay must show that his sworn testimony or affidavit: "(1) contain[s] reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or (2) contain[s] information that establishes that the totality of the circumstances corroborates the hearsay."<sup>101</sup> The federal standard was set out in *Illinois v. Gates*, which allows hearsay in determining probable cause if the totality of the circumstances corroborates the hearsay.<sup>102</sup> Since the deputy did not comply with the Indiana statute by showing that Buckley was credible, that her information was reliable, or that he (the deputy) had firsthand knowledge of the fact that Lloyd had drugs in the apartment, the deputy had to show that the totality of circumstances corroborated the hearsay in order for the warrant to be valid.<sup>103</sup> The court concluded that the totality of the circumstances did not corroborate Buckley's hearsay statement because she never specifically identified Lloyd as her source, nor did she ever

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95. 677 N.E.2d 71 (Ind. Ct. App. 1997).

96. *Id.* at 73.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (quoting IND. CODE § 35-33-5-2(b)(1)-(2) (1993)).

102. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983)).

103. *Id.* at 74.

successfully obtain drugs from Lloyd.<sup>104</sup> Thus, the magistrate erred in issuing the warrant to search Lloyd's apartment.<sup>105</sup>

Having found that the trial court erred, the appellate court took the next step to determine if the State could show that an exception to the warrant requirement existed where the officer conducting the search relied in good faith upon a properly issued, but subsequently invalidated warrant.<sup>106</sup> Lloyd claimed that the good faith exception did not apply because the warrant was "so lacking in indicia of probable cause that Deputy Sanders could not have formed an objectively reasonable belief in the validity of the warrant."<sup>107</sup>

To support his argument, Lloyd relied upon two Indiana cases: *Everroad v. State*<sup>108</sup> and *Bradley v. State*.<sup>109</sup> In *Everroad*, a magistrate issued a search warrant for the defendant's home to find stolen property. The probable cause was based on lengthy hearsay statements which did not meet the tests because the officer offering the hearsay statements did not disclose his source nor establish that the source was credible.<sup>110</sup> The good faith exception did not apply as the warrant was lacking indicia of probable cause such that no officer could reasonably rely on the warrant's validity.<sup>111</sup>

In *Bradley*, the magistrate issued a search warrant which allowed the police to look for stolen property at the defendant's address based on an anonymous informant's description of a motel robbery.<sup>112</sup> The informant named Bradley as the person who committed the crime and said he had a history of arrests. Upon review, the supreme court said that the affidavit presented did not show that the informant was reliable or credible and the totality of the circumstances did not corroborate the informant's statements.<sup>113</sup> The good faith exception did not apply since the affiant misinformed the court that his informant was reliable and the warrant was otherwise lacking in indicia of probable cause.<sup>114</sup>

Judge Baker found the facts in *Lloyd* distinguishable from *Everroad* and *Bradley* because Deputy Sanders had firsthand knowledge which, "when viewed in conjunction with Buckley's hearsay statement that she 'could run back to Bloomington' where 'her source still had some marijuana,' caused Deputy Sanders to harbor an objective belief in the validity of the warrant."<sup>115</sup> Judge Baker concluded by stating that "(a)lthough, in retrospect, this court has determined that the magistrate erred, we cannot say that Deputy Sanders could

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 75.

108. 590 N.E.2d 567 (Ind. 1992).

109. 609 N.E.2d 420 (Ind. 1993).

110. *Lloyd*, 677 N.E.2d at 75 (citing *Everroad*, 590 N.E.2d at 571).

111. *Id.*

112. *Id.* (citing *Bradley*, 609 N.E.2d at 421-22).

113. *Id.* (citing *Bradley*, 609 N.E.2d at 422-23).

114. *Id.* (citing *Bradley*, 609 N.E.2d at 424).

115. *Id.*

not have held an objective good faith belief in the validity of the warrant."<sup>116</sup>

Judge Najam wrote in his dissent that the affidavit was so lacking in indicia of probable cause that a belief in the validity of the warrant was unreasonable.<sup>117</sup> He believed the majority incorrectly assumed that Buckley previously attempted to obtain marijuana from Lloyd when no reliable evidence supported that characterization.<sup>118</sup> The deputy merely acted on a "hunch" that Lloyd was the source rather than any firsthand or personal knowledge of probable criminal activity.<sup>119</sup> Judge Najam relied on *Everroad* for the proposition that "the good faith exception should not be allowed to save an otherwise invalid warrant based upon a chain of inferences connected only by unreliable hearsay."<sup>120</sup> Judge Najam would have, therefore, granted the motion to suppress.

On a different note, the Indiana Court of Appeals determined that a patdown search of a passenger of a car at a sobriety checkpoint was not justified in *Banks v. State*.<sup>121</sup> Banks appealed his conviction for "carrying a handgun without a license," a class C felony, and raised the issue of whether the evidence seized from him during a patdown search was properly admitted at trial.<sup>122</sup>

Banks was a passenger in a vehicle that passed through a sobriety checkpoint. A police officer questioned the driver who could produce neither the vehicle registration nor his driver's license. The driver did not know the name of the owner of the car. When the officer smelled alcohol on the driver's breath and saw an open, partially empty alcoholic beverage on the front seat, he asked the driver to move his car to the area set aside for further investigation. Once the driver told the police they were under twenty-one, the occupants were ordered to get out of the car. As Banks and the front seat passenger got out, the officer noticed that they showed signs of intoxication, and he saw a gun in plain view on the front passenger side floorboard. Subsequently, *another* officer found a gun during a patdown of Banks. Banks filed a motion to suppress which was denied.<sup>123</sup>

In *Maryland v. Wilson*, the Supreme Court held that police officers who make lawful traffic stops may order passengers to get out of the car until the stop is completed.<sup>124</sup> Although a warrant or probable cause is usually required to make a traffic stop, an exception exists for sobriety checkpoints.<sup>125</sup> Thus, if the

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116. *Id.* at 76.

117. *Id.* at 77 (Najam, J., dissenting).

118. *Id.*

119. *Id.*

120. *Id.* at 78 (citing *Everroad*, 590 N.E.2d at 570-71).

121. 681 N.E.2d 235, 239 (Ind. Ct. App. 1997).

122. *Id.* at 236.

123. *Id.* at 239.

124. *Id.* at 237 (citing *Maryland v. Wilson*, 117 S. Ct. 882, 886 (1997)).

125. *Id.* This is the case provided that the sobriety roadblock plan satisfies the three-prong balancing test in *Brown v. Texas*, 443 U.S. 47 (1979). The three-part test weighs "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* at 51; *see also* *Snyder v.*

sobriety checkpoint is properly conducted, both the driver and passengers may be asked to exit the vehicle during these stops.

The issue then turns on whether the police have the authority to conduct patdown searches of drivers and passengers who are lawfully stopped at a sobriety checkpoint. Indiana applies the "Terry" exception<sup>126</sup> which says that "a police officer 'justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' is entitled to conduct a limited patdown search of the suspect's outer clothing to search for a weapon."<sup>127</sup> The standard is whether a reasonably prudent person in the same circumstances would be warranted in believing that the officer's safety would be in danger.<sup>128</sup> In addition, due weight must be given to the specific reasonable inferences which he is entitled to draw from the facts in light of his experiences.<sup>129</sup> The patdown search of Bank's failed to meet this test. Even if the officers believed the car was stolen and that the passengers were underage drinkers, these beliefs do not necessarily support the inference that a person is armed and presently dangerous.<sup>130</sup>

The court then discussed the 'inevitable discovery' exception to the exclusionary rule first set out by the Supreme Court in 1984.<sup>131</sup> The Supreme Court held that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense."<sup>132</sup> In *Banks*, had there been no premature patdown of Banks, the original officer would have seen the other gun in plain view on the floorboard and it would then have been reasonable to believe that the passengers might presently be armed and dangerous, thus justifying a patdown search.<sup>133</sup> The trial court was therefore within its discretion to admit the weapon under the inevitable discovery exception.<sup>134</sup>

In *D.I.R. v. State*, the court of appeals rendered a decision in another patdown case, but in a school setting.<sup>135</sup> D.I.R. was a sixteen year old student attending

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State, 538 N.E.2d 961 (Ind. Ct. App. 1989) (discussing the constitutional validity of sobriety checkpoints); *State v. Garcia*, 500 N.E.2d 158, 163 (Ind. 1986) (upholding sobriety checkpoints based on a weighing of the three-prong *Brown* test).

126. *Banks*, 681 N.E.2d at 237 (citing *Wilson v. State*, 670 N.E.2d 27, 29 (Ind. Ct. App. 1996)).

127. *Jackson v. State*, 669 N.E.2d 744, 747 (Ind. Ct. App. 1996) (quoting *Terry v. State*, 392 U.S. 1, 24 (1968)).

128. *Id.*

129. *Terry*, 392 U.S. at 27.

130. *Banks*, 681 N.E.2d at 239.

131. *Nix v. Williams*, 467 U.S. 431, 443 (1984).

132. *Id.* at 444 (footnote omitted).

133. *Banks*, 681 N.E.2d at 240.

134. *Id.*

135. 683 N.E.2d 251 (Ind. Ct. App. 1997).

an after-hours program for students dismissed from regular studies. The school had a policy that every student was subject to a search with an electronic wand metal detector to detect the presence of a Walk Man, a pager, or a weapon. On the day in question, D.I.R. arrived late to class. The wand had already been locked in the principal's office, so the security officer manually searched D.I.R.'s pockets. The officer found two marijuana cigarettes, rolling papers, and a pipe. After a denial of the motion to suppress, the trial court found D.I.R. to be a delinquent child and she appealed.<sup>136</sup>

D.I.R. claimed that the search violated her rights under the Fourth Amendment to the U.S. Constitution and Article I, section 11 of the Indiana Constitution.<sup>137</sup> The court of appeals held that although a judicially issued search warrant is a condition precedent to a lawful search, "searches conducted by school officials in a school setting are subject to a less stringent standard."<sup>138</sup> The court cited the Supreme Court case, *New Jersey v. T.L.O.*, for the proposition that, because school officials are state actors fulfilling state objectives, the standard Fourth Amendment prohibition against unreasonable searches and seizures applies to school searches.<sup>139</sup> Deviation from strict adherence to the warrant requirements, however, is permitted to balance the privacy interests of school children against the need for teachers and administrators to maintain order in the public schools.<sup>140</sup> The standard, according to the Court, is whether under all the circumstances, the search of a student by a school official is reasonable.<sup>141</sup>

In *T.L.O.*, the Supreme Court adopted a two-prong test which was subsequently adopted in Indiana.<sup>142</sup> First, the search must be justified at its inception. This occurs when there are "reasonable grounds for suspecting that the search will turn up evidence that the student is or has violated the law or a school rule."<sup>143</sup> Second, the search must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."<sup>144</sup>

In *D.I.R.*, the Indiana Court of Appeals rejected the State's argument that *T.L.O.* and its progeny are inapplicable because those cases involved particular students and the search in *D.I.R.* involved every student.<sup>145</sup> In response to the State's characterization of the search as "improvisational," the court noted that the "improvisational nature of the search is precisely what renders it constitutionally infirm."<sup>146</sup> The intrusion of "reaching into D.I.R.'s pockets in

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136. *Id.* at 252.

137. *Id.*

138. *Id.*

139. *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985)).

140. *Id.* (citing *T.L.O.*, 469 U.S. at 341).

141. *Id.*

142. *Id.* (citing *Berry v. State*, 561 N.E.2d 832 (Ind. Ct. App. 1990)).

143. *Id.* at 253.

144. *Id.* (citing *T.L.O.*, 469 U.S. at 341-42).

145. *Id.*

146. *Id.*

light of her age, sex, and nature of the search was not justified under the circumstances."<sup>147</sup> Therefore, the trial court was reversed.<sup>148</sup>

In *State v. Scheibelhut*,<sup>149</sup> the Indiana Court of Appeals reviewed the State's appeal of the granting of a motion to suppress based on the trial court's opinion that a consent to search was deemed involuntary, and thus invalid, because the defendant was not advised of his right to withhold his consent.<sup>150</sup> Scheibelhut was driving a car which was stopped by a Kokomo police officer. Scheibelhut was cooperative and provided the officer with his license and registration. The officer decided to ask permission to search Scheibelhut's person and his car because there had been several incidents of vandalism in the area by means of a pellet gun. Scheibelhut agreed and got out of his car. The officer patted him down and asked him whether he had a pellet gun in his car. Scheibelhut said that he did and it was under the seat. In addition to the gun, the officer found marijuana. Scheibelhut was charged with possession of marijuana.<sup>151</sup>

The trial court granted the motion to suppress solely on the basis that the officer did not tell Scheibelhut that he could refuse to be searched.<sup>152</sup> The appellate court reviewed the standard for consent searches by noting that the State has the burden of proving that the consent was freely and voluntarily given.<sup>153</sup> The court wrote:

The voluntariness of a consent to search is a question of fact to be determined from the totality of the circumstances. A consent to search is valid except where it is procured by fraud, duress, fear, intimidation, or where it is merely a submission to the supremacy of the law. 'Though consent may constitute a waiver of Fourth Amendment rights, to be valid a waiver must be an intelligent relinquishment of a known right or privilege. Such a waiver cannot be conclusively presumed from a verbal expression of assent. The Court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld.'<sup>154</sup>

In *Scheibelhut*, the trial court determined that the officer's failure to advise Scheibelhut that he could refuse to consent to the search rendered the consent involuntary. The court of appeals noted, however, that knowledge of the right to refuse is but one of the factors the court must use to determine

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147. *Id.*

148. *Id.*

149. *Id.* at 822.

150. *Id.*

151. *Id.*

152. *Id.* at 822-23.

153. *Id.* (citing *Thurman v. State*, 602 N.E.2d 548 (Ind. Ct. App.1992)).

154. *Id.* at 823 (citations omitted) (quoting *United States v. Payne*, 429 F.2d 169, 171 (9th Cir. 1970)).

voluntariness.<sup>155</sup> The trial court erred, because it did not consider the totality of the circumstances, but merely focused on the lack of consent.<sup>156</sup> The court of appeals remanded the case with instructions to reevaluate Scheibelhut's motion to suppress considering such factors as:

- 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 Officer Galloway made any express or implied claims of authority to search the vehicle without consent;
- 5) whether Officer Galloway was engaged in any illegal action prior to the request;
- 6) whether the defendant previously was cooperative; and
- 7) whether Officer Galloway was deceptive as to his true identity or the purpose of his search.<sup>157</sup>

### B. Intimidation

The court of appeals rendered two decisions in the last term dealing with the offense of intimidation. In *Ajabu v. State*,<sup>158</sup> Mmoja Ajabu was charged with intimidation for having made threats against Steve Nation (the Hamilton County prosecutor) and Debra Meyer (the mother of two slain children) in the highly publicized Carmel murder case in which Mmoja's son, Kofi, was charged. Mmoja made these threats to several television reporters outside the courtroom at a death penalty hearing. He said: "And I want to serve notice as a father that if my son is killed for something that he did not do, then there will be other death sentences carried out."<sup>159</sup> Mmoja made the same statement to a newspaper reporter and said that he was referring to the prosecutor and the mother of the two murder victims. The day after the hearing, Mmoja appeared on a radio talk show and said "I didn't make the rules. Steve Nation made the rules. I'm just playing the game. I'm saying that if he [Kofi] is killed for something he did not do, then I'm going to respond in kind."<sup>160</sup>

Mmoja was then interviewed by a television reporter who asked him what he meant when he said "other death sentences would be carried out." He responded, "I meant exactly what I said," and "if they're going to kill my son for something he did not do, then I'm going to kill somebody for something they did not do. They should have stopped Steve Nation from killing my son."<sup>161</sup> The reports of the threats were carried by the Indianapolis media and were broadcast over the area in Hamilton County where Nation and Meyer lived. The broadcasts

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155. *Id.*

156. *Id.*

157. *Id.* at 824 (footnote omitted).

158. 677 N.E.2d 1035 (Ind. Ct. App. 1997).

159. *Id.* at 1037.

160. *Id.* at 1038.

161. *Id.*

occurred on several occasions over a three day period, and included television and newspaper reports, as well as excerpts from Mmoja's statements.

Mmoja was charged by the grand jury on two counts of intimidation. First, he was charged with communicating a threat to Nation with the intent that Nation engage in conduct against his will.<sup>162</sup> The count was charged as a class D felony because the threat was meant to intimidate Nation in his capacity as a law enforcement officer, causing him not to carry out his duties. Second, Mmoja was charged with communicating a threat to Meyer with the intent to place her in fear of retaliation for her prior lawful act of expressing her support for Nation's decision to seek the death penalty.<sup>163</sup> This count also was charged as a class D felony because the threat was to commit a forcible felony.

Mmoja moved to dismiss the grand jury indictment, alleging that the evidence was insufficient as a matter of law to sustain the two convictions for intimidation.<sup>164</sup> Mmoja's argument was that since the statements were made through the news media and neither Nation nor Meyer was present when the statements were made, they were not communicated directly to another person in the manner required by the statute.<sup>165</sup> However, Judge Najam held that "[t]he text of the intimidation statute does not limit the phrase 'communicates a threat to another person' to only those threats made directly to or in the presence of the threatened party."<sup>166</sup>

The court distinguished *Bolen v. State*,<sup>167</sup> in which the defendant told a police officer that he was going "to get" and "to kill" the county prosecutor, although the prosecutor was not present at the time.<sup>168</sup> The court reasoned that Mmoja's statements were spoken in front of microphones and television cameras and thus were communicated to the public, including Nation and Meyer.<sup>169</sup> The court found that the threats were "not idle or private comments but messages which he repeatedly and emphatically sought to convey through the news media" and, as such, the evidence supported the conclusion that Mmoja knew or had good reason to believe the threats would reach Nation and Meyer.<sup>170</sup>

In *Gaddis v. State*,<sup>171</sup> Duane Gaddis was convicted at trial of intimidation. While driving on Interstate 465, Carver observed a car driven by Gaddis approach his car and he felt Gaddis was following too closely. Traffic was heavy, but Gaddis moved across to the far right lane. Carver then moved to the center lane at which time both men exchanged hand gestures and spoke toward each other. Neither could hear what the other was saying. During this time,

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162. *Id.* at 1041.

163. *Id.* at 1042.

164. *Id.*

165. *Id.*

166. *Id.*

167. 430 N.E.2d 398 (Ind. Ct. App. 1982).

168. *Id.* at 401.

169. *Ajabu*, 677 N.E.2d at 1042.

170. *Id.* at 1043.

171. 680 N.E.2d 860 (Ind. Ct. App. 1997).

Gaddis removed a handgun from his glove compartment, displayed it in the window at a 45 degree angle and placed it near the console. Carver then backed off and called the police on his cellular phone. An Indiana State Police officer investigated and after hearing Carver's version of the story, went to the Gaddis home. He spoke with Gaddis, who admitted he took out the gun but denied openly displaying it. Gaddis had a valid gun permit.

A charging information was filed against Gaddis for intimidation. It read that Gaddis "did communicate to Donald Carver a threat, that is: an expression by words or actions, of an intent to harm Donald Carver, with the intent that Donald Carver be placed in fear of retaliation for a prior lawful act, that is: for Donald Carver having occupied a high speed lane of traffic on Interstate 465 . . ."<sup>172</sup>

Writing for the court, Judge Najam found that the trial court had "misconstrued" the meaning of "threat" as defined by the legislature in that a threat requires that the defendant express an intention to unlawfully injure the person threatened.<sup>173</sup> In this case, Gaddis only raised his handgun for Carver to see. While Carver may have been frightened, he was not threatened as there was no evidence of intent to injure.<sup>174</sup> The court reversed the conviction and concluded by stating that "the intimidation statute should not be construed to criminalize the mere display of a weapon when the person charged has a constitutional right to carry it."<sup>175</sup>

### C. Expert Testimony

During the survey period, the appellate courts considered the admissibility of expert testimony in two different contexts. The supreme court considered the admissibility of evidence of automatism, while the court of appeals, in two different cases, considered the admissibility of evidence of Battered Women's Syndrome (BWS).

In *McClain v. State*,<sup>176</sup> the supreme court held that evidence of automatism bore on the voluntariness of conduct and was not a subclass of the insanity defense. Automatism is defined as "the existence in any person of behavior of which he is unaware and over which he has no conscious control."<sup>177</sup> Two days prior to an altercation with police officers for which he was charged, McClain had flown from Japan to Indianapolis. He had not slept on the flight. Moreover, he claimed to have slept only three hours during the forty-eight hours prior to his arrest.

McClain first interposed an insanity defense, asserting that sleep deprivation

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172. *Id.* at 861.

173. *Id.*

174. *Id.*

175. *Id.* at 862.

176. 678 N.E.2d 104 (Ind. 1997).

177. *Id.* at 106 (quoting Donald Blair, *The Medicolegal Aspects of Automatism*, 17 MED. SCI. L. 167 (1977)).

prevented him from forming the intent necessary to commit the crimes charged.<sup>178</sup> He later withdrew this defense after further research and his conclusion that evidence of automatism did not need to be presented as an insanity defense.<sup>179</sup> Based on the withdrawal of the insanity defense, the trial court granted the State's motion in limine excluding "any expert testimony regarding sleep disorders and/or dissociative states."<sup>180</sup> An interlocutory appeal of that ruling ensued, and the court of appeals affirmed the trial court.<sup>181</sup> On transfer, the supreme court reversed.<sup>182</sup>

After noting that other jurisdictions are split between recognizing insanity and automatism as separate defenses on the one hand and classifying automatism as a species of the insanity defense on the other, the supreme court compared the Indiana statutes related to voluntary conduct and the insanity defense.<sup>183</sup> The supreme court held that automatism is not a species of the insanity defense for four primary reasons.<sup>184</sup> First, while automatistic behavior could be caused by insanity, it "need not be the result of a disease or defect of the mind."<sup>185</sup> Second, the Indiana General Assembly placed the voluntary act requirement in a different statute from the insanity defense, thus evidencing a legislative intent to view them separately.<sup>186</sup> Third, a sane but automatistic defendant should not be forced to plead insanity (and face the possibility of commitment) or present no defense at all.<sup>187</sup> Finally, unlike insanity cases, there is no need to appoint independent psychiatrists at public expense in automatism cases.<sup>188</sup>

Instead, the supreme court held that evidence of automatism bears on the voluntariness of a defendant's actions.<sup>189</sup> "Accordingly, at trial McClain can call expert witnesses and otherwise present evidence of sleep deprivation and automatism. . . . The State is entitled to call its own experts and challenge McClain's evidence. . . ." <sup>190</sup> The State is required to prove all material elements of a charge beyond a reasonable doubt, and the voluntariness of the defendant's conduct is one such element.<sup>191</sup>

The court of appeals considered the admissibility of evidence of Battered Women's Syndrome (BWS) in two different contexts, finding it admissible in

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178. *Id.* at 105.

179. *Id.*

180. *Id.*

181. *McClain v. State*, 670 N.E.2d 911 (Ind. Ct. App. 1996).

182. *McClain*, 678 N.E.2d at 107.

183. *Id.*

184. *Id.*

185. *Id.* at 108 (quoting *State v. Caddell*, 215 S.E.2d 348, 360 (N.C. 1975)).

186. *Id.*

187. *Id.* at 109.

188. *Id.*

189. *Id.* at 107.

190. *Id.*

191. *Id.* On remand, McClain was convicted after a three-day jury trial.

both. In *Barrett v. State*,<sup>192</sup> the court of appeals held that BWS evidence was admissible to show that a defendant did not have the requisite intent to commit the crime of neglect of a dependent.<sup>193</sup> In *Carnahan v. State*,<sup>194</sup> the court of appeals found that BWS was admissible to show why a defendant's wife had recanted her allegations of abuse at trial.<sup>195</sup>

In *Barrett*, the defendant, Alice Barrett, had been beaten by her father as a child and had spent most of her adult life in a series of relationships with abusive men. The last of these men was not only abusive toward her, but also beat her four-year-old daughter. Her boyfriend sometimes watched the child while Barrett was at work. Upon returning from work one morning, Barrett found her daughter dead. She was charged with neglect of a dependent, which is defined by statute as: "(a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally; (1) places the dependent in a situation that may endanger his life or health; . . ." <sup>196</sup>

Prior to trial, the court granted the State's motion in limine, which excluded evidence of BWS as either a defense or as evidence of Barrett's intent, character, or state of mind.<sup>197</sup> After finding no Indiana precedent allowing BWS as a defense to the crime of neglect of a dependent, the trial judge stated that the "defense is not available in a case in which the victim of the crime is not the perpetrator of the abuse, but instead the alleged perpetrator of abuse is a third-party."<sup>198</sup>

On appeal, Barrett argued that evidence of BWS was relevant to show that she did not knowingly or intentionally neglect her child. She also argued that the BWS evidence was necessary to respond to the prosecutor's case by explaining why she stayed with the man charged with killing her child.<sup>199</sup> The court accepted both of these arguments, finding that a defendant who is accused of knowingly or intentionally committing a crime is entitled to present evidence in her own defense to negate that mental state.<sup>200</sup>

In *Carnahan*, the court of appeals upheld the admissibility of BWS evidence offered by the State to show why a defendant's wife had recanted her allegations of abuse at trial.<sup>201</sup> Paul Carnahan was charged with battery after his wife Carla filed a report with the police indicating that her husband had punched her in the stomach and struck her in the face. When called by the State to testify at trial, however, Carla recanted and testified that her husband had never hit her.

The State then called an expert on domestic violence who offered an

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192. 675 N.E.2d 1112 (Ind. Ct. App. 1997).

193. *Id.* at 1118.

194. 681 N.E.2d 1164 (Ind. Ct. App. 1997).

195. *Id.* at 1168.

196. *Barrett*, 675 N.E.2d at 1116 (quoting IND. CODE § 35-46-1-1 (1993)).

197. *Id.* at 1115.

198. *Id.*

199. *Id.*

200. *Id.* at 1117.

201. *Carnahan*, 681 N.E.2d at 1168.

explanation of why Carla might change her story, explaining that battered women go through a three-part cycle of violence and they often remain with their husbands because of financial, emotional, religious, and other concerns.<sup>202</sup> On appeal, Carnahan claimed that the evidence was irrelevant or, in the alternative, that it was misleading and should have been excluded under Indiana Rule of Evidence 403.<sup>203</sup>

Noting that a trial judge is accorded discretion in ruling on the relevancy and admissibility of expert testimony, the court of appeals held that such evidence was properly admitted because it was “directly relevant to Carla’s credibility which, because she testified, was an issue at trial.”<sup>204</sup> The court of appeals also found that a proper foundation was laid for the testimony by showing that 1) the expert had the requisite knowledge, skill, education, and experience on which to base her opinion, and 2) the facts upon which the expert testified were already in evidence.<sup>205</sup> The court of appeals rejected Carnahan’s argument that the State had not established the latter of these, based on evidence that Carla had previously stayed at a battered women’s shelter, the police reports of the alleged abuse, and the police photos showing the injuries.<sup>206</sup>

#### *D. Speedy Trial*

The Indiana Supreme Court and court of appeals considered a defendant’s right to a speedy trial in two different contexts. The supreme court considered whether the protections of Indiana Criminal Rule 4 apply to the retrial of a habitual offender count. The court of appeals considered the separate issues of a defendant’s acquiescence to delay and the effect of the unavailability of defense counsel on a defendant’s right to a speedy trial.

In *Poore v. State*,<sup>207</sup> the Indiana Supreme Court held that the time limits of Indiana Criminal Rule 4 apply to retrials of habitual offender counts. In so doing, the court reversed the court of appeals.<sup>208</sup> Indiana Criminal Rule 4(B) provides that “[i]f any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion . . . .”<sup>209</sup> The court’s opinion focused on a question of first impression in Indiana—whether the retrial of a habitual offender enhancement was a “trial” in the context of Indiana

202. *Id.* at 1166.

203. *Id.* at 1167.

204. *Id.*

205. *Id.*

206. *Id.*

207. 685 N.E.2d 36 (Ind. 1997).

208. *Poore v. State*, 660 N.E.2d 591 (Ind. Ct. App. 1996). The court of appeals opinion was discussed in last year’s survey. See Gary L. Miller & Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 30 IND. L. REV. 1005, 1021-22 (1997).

209. IND. CRIM. R. 4(B)(1).

Criminal Rule 4.<sup>210</sup>

The court noted that while a habitual offender enhancement is neither a separate offense nor a separate conviction, a habitual offender proceeding has many aspects similar to a conventional "trial."<sup>211</sup> First, the same burden of proof applies, since the State must prove the existence of two prior unrelated felony convictions beyond a reasonable doubt.<sup>212</sup> Second, the Double Jeopardy Clause of the Fifth Amendment bars re prosecution of a habitual offender charge when the State fails to prove that status due to insufficient evidence.<sup>213</sup> Finally, unlike a sentencing hearing in which the Indiana Rules of Evidence do not apply, the same evidentiary protections of a trial apply to a habitual offender proceeding.<sup>214</sup>

The court also discussed some policy considerations which support extending Indiana Criminal Rule 4 protections to a habitual offender retrial. The first of these is the seriousness of the potential penalty, which can be up to an additional thirty years.<sup>215</sup> Second, an important purpose of providing a speedy trial is to minimize the anxiety and humiliation that accompany public accusation. This would apply to a habitual offender determination just as it would apply to a trial.<sup>216</sup> Finally, a speedy trial enables a defendant to make his case before exculpatory evidence vanishes or becomes stale.<sup>217</sup>

The supreme court concluded that "defendants are entitled to a reasonably prompt adjudication of this determination," which includes the seventy day time limit of Indiana Criminal Rule 4(B).<sup>218</sup> However, an important consideration not mentioned by the majority is that the State should not need seventy days to retry such a case. All the necessary documents should have been admitted into evidence at the previous trial. The State merely needs to resubmit the documents from the prior trial and re-subpoena a fingerprint expert to testify. This should take no longer than a few weeks.

The court of appeals also considered speedy trial issues in two different contexts. In *Townsend v. State*,<sup>219</sup> the defendant orally moved for a speedy trial at his initial hearing. The court set a trial date for the seventy-first day after his request—one day beyond the seventy day requirement of Indiana Criminal Rule

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210. *Poore*, 685 N.E.2d at 39.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 40.

217. *Id.* The court of appeals had concluded that the passage of time works only to the defendant's advantage by making the State's proof more difficult. However, the supreme court noted that "mistaken identity or alibi are in issue and the dimming of memories operate to the defendant's disadvantage." *Id.* In a habitual offender phase of a trial, such things are extremely unlikely. The State presents its evidence through police records, court documents, and the testimony of a fingerprint expert. The defendant almost never presents evidence.

218. *Id.* at 41.

219. 673 N.E.2d 503 (Ind. Ct. App. 1996).

4(B).<sup>220</sup> Although the defendant was in court on two separate occasions for hearings prior to his trial, he did not object to the trial setting until five days prior to the trial date.<sup>221</sup>

The court cited the Indiana Supreme Court's decision in *Wright v. State* for the proposition that "a defendant must object at the earliest opportunity when his trial is set beyond the time limitations of Crim.Rule 4. [citation omitted]. If an objection is not timely made, the defendant is deemed to have acquiesced to the later trial date."<sup>222</sup> In that case, the defendant had delayed "nearly a month" before filing an objection to the trial date, which "allowed a reasonable assumption that he abandoned his request for a speedy trial. . . ."<sup>223</sup> In contrast, Townsend waited nearly two months after the setting of his trial date to object. Because an earlier objection would have allowed the trial court to reset the trial within the proper period, the court of appeals held that the defendant had acquiesced to a trial date beyond the seventy-day limit and was therefore not entitled to discharge.<sup>224</sup>

In *Lockhart v. State*,<sup>225</sup> the court of appeals considered whether the trial court erred in setting an Indiana Criminal Rule 4(B) case beyond the seventieth day based on unavailability of defense counsel. At a pretrial conference two weeks before the scheduled jury trial, defense counsel indicated that he would likely be unable to begin Lockhart's trial as scheduled on June 6, because he was also representing another defendant charged with conspiracy to commit murder in a jury trial scheduled to begin on June 5. He requested a one-week continuance. However, because the trial judge had three other trials scheduled for that day, the case was continued to July 18. Believing that he could finish the other trial in two days, defense counsel objected to the setting and stated that he would be ready to commence Lockhart's trial on June 7. The deputy prosecutor at Lockhart's pretrial conference estimated that the conspiracy to commit murder case would take a minimum of three days to complete, so the trial judge allowed the July 18 trial setting to stand.<sup>226</sup>

On appeal, Lockhart argued that it was improper for the court to base "its determination of the likelihood of the availability of the defense counsel, solely on the speculation of two deputy prosecuting attorneys, not involved in the potentially conflicting case."<sup>227</sup> Since Lockhart did not provide a developed argument or citation to authority in support of his contention, the court of appeals held that the trial judge did not abuse his discretion in setting the trial beyond the

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220. *Id.* at 506.

221. *Id.* at 505.

222. *Id.* at 506 (quoting *Wright v. State*, 593 N.E.2d 1192, 1195 (Ind. 1992)).

223. *Id.*

224. *Id.* The court of appeals also rejected Townsend's argument that he was denied the effective assistance of counsel, since he "failed to show that his proceeding would have been different but for his trial counsel's failure to object to the trial date." *Id.* at 507.

225. 671 N.E.2d 893 (Ind. Ct. App. 1996).

226. *Id.* at 898.

227. *Id.*

seventy day period due to court congestion.<sup>228</sup>

While the court of appeals opinion does not cite *Clark v. State*, the court nonetheless applied *Clark's* deferential standard in reviewing the trial court's finding.<sup>229</sup> On appeal, the trial court's findings will be accorded "reasonable deference," and reversal will only occur if the trial court was "clearly erroneous."<sup>230</sup> A trial judge faced with a situation such as the one in *Lockhart* would be well-advised to say as little as possible and not solicit scheduling information from the prosecutor.

*Lockhart's* case had been set for June 5, and defense counsel was unavailable on that day. The judge could have simply granted *Lockhart's* continuance and set the case for trial on July 18. The period of delay would be chargeable to the defendant. If the defendant objected to this setting, the trial judge could note that the court's calendar was congested on all of the intervening days due to cases previously scheduled for trial. Trial judges cannot be expected to schedule jury trials on short notice or on every day of the week in order to meet the scheduling desires of defense counsel.

### E. Guilty Pleas

In *Rhoades v. State*,<sup>231</sup> the Indiana Supreme Court examined the circumstances under which a guilty plea may be withdrawn. *Rhoades* entered a plea of guilty to operating a motor vehicle with a controlled substance in her blood.<sup>232</sup> After the trial court refused to allow her to withdraw her plea, she appealed. The court of appeals reversed the trial court, holding that the factual basis for her plea of guilty was insufficient.<sup>233</sup> Judge Garrard dissented, stating that the trial court should take judicial notice that "when metabolites of marijuana are present in a person's urine it is because they are also present in that person's blood" and therefore a legally sufficient factual basis for the defendant's guilty plea was present.<sup>234</sup>

The defendant's argument, which was accepted by the court of appeals, was that the State could not establish a factual basis for the guilty plea since there was no test showing the presence of marijuana in the blood, as required by statute.<sup>235</sup> To support its argument, the defense cited three cases: *Estes v. State*,<sup>236</sup> *Hoornaert v. State*,<sup>237</sup> and *Moore v. State*.<sup>238</sup> However, the supreme court

228. *Id.*

229. 659 N.E.2d 548 (Ind. 1995).

230. *Id.* at 552.

231. 675 N.E.2d 698 (Ind. 1996).

232. *Id.* at 700 (Rhodes was charged with violating IND. CODE § 9-30-5-1(b) (1993)).

233. *Rhoades v. State*, 661 N.E.2d 608 (Ind. Ct. App. 1996).

234. *Id.* at 612 (Garrard, J., dissenting).

235. *Id.*

236. 656 N.E.2d 528 (Ind. Ct. App. 1995).

237. 652 N.E.2d 874 (Ind. Ct. App. 1995).

238. 645 N.E.2d 6 (Ind. Ct. App. 1994).

distinguished those cases, which were appeals from convictions from operating a vehicle with a controlled substance in the blood, and *Rhoades*, which was the appeal of a guilty plea.<sup>239</sup> The standard of review is substantially different.<sup>240</sup>

The applicable standard for reviewing a sufficient factual basis to support a guilty plea is less stringent.<sup>241</sup> The standard is that appellate courts will review the trial court's determination regarding a factual basis for a guilty plea for abuse of discretion only.<sup>242</sup> The court recognized the test for establishing a factual basis to support a guilty plea is whether there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty but that a trial court may not enter judgment for conviction unless the evidence shows guilt beyond a reasonable doubt.<sup>243</sup> "Reasonably concluding" guilt is not the same as concluding guilt beyond a reasonable doubt."<sup>244</sup>

The trial court was given "ample" evidence of the defendant's guilt, including that "Rhoades was involved in an automobile accident; there was a pipe on her front seat that smelled of burned marijuana; and her urine contained marijuana metabolites."<sup>245</sup> From this evidence, the trial court could reasonably conclude the defendant's guilt and therefore did not abuse its discretion. In addition, the supreme court disagreed with the court of appeals' conclusion that section 9-30-5-1(b) of the Indiana Code requires a blood test. Rather, the statute "merely makes it a crime to operate a vehicle with a controlled substance in that person's blood. It does not provide for a particular means of proving such."<sup>246</sup> However, the court rejected Judge Garrard's opinion that judicial notice is an acceptable method for proving that if a controlled substance is present in the urine, then it must be present in the blood.<sup>247</sup>

The supreme court also considered two very different issues related to guilty pleas in a pair of death penalty cases. In *Smith v. State*,<sup>248</sup> the supreme court considered whether a defendant could enter into a negotiated plea agreement for the death sentence. In *State v. VanCleave*,<sup>249</sup> the court considered the proper standard for vacating a guilty plea on the basis of ineffective assistance of counsel.

In *Smith*, amicus curiae challenged, over the defendant's objection, the imposition of the death sentence as part of a negotiated plea agreement. Robert Smith was an inmate at the Wabash Valley Correctional Institution when he and another inmate stabbed a fellow inmate to death. Soon after being charged,

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239. *Rhoades*, 675 N.E.2d at 701.

240. *Id.*

241. *Id.*

242. *Id.* at 702.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. 686 N.E.2d 1264 (Ind. 1997).

249. 674 N.E.2d 1293 (Ind. 1996).

Smith sent a letter to the editor of the local paper in which he wrote that it would be a waste of taxpayer money to take him to trial to give him an additional fifty to sixty years. He stated that he desired to plead guilty to the death sentence.<sup>250</sup>

A "Negotiated Plea Agreement" was filed in which Smith would plead guilty to the murder in exchange for the State's recommending the death penalty and dismissing the conspiracy charge.<sup>251</sup> At the plea hearing, the trial judge questioned Smith about his mental capacity and his understanding of the rights he would be waiving by pleading guilty. At the same hearing, Smith admitted to intentionally stabbing and killing a human being while incarcerated, which is one of the statutory aggravators for the death sentence.<sup>252</sup>

Shortly before the sentencing hearing, Smith's counsel requested the appointment of psychiatrists and the scheduling of a competency hearing. At a hearing on the motion, Smith maintained that he was competent and explained why he was seeking the death sentence: "I don't have a future, you know. I mean, if I don't get the death sentence, I still don't have a future. What I've got is a slow death. I'm asking the court to give me justice, give me—let me die . . ."<sup>253</sup> At Smith's competency hearing, both court-appointed doctors testified that they believed Smith understood the proceedings and was competent to stand trial.<sup>254</sup> The plea agreement was later accepted, and the defendant was sentenced to death.<sup>255</sup>

On appeal, amicus argued that the death penalty<sup>256</sup> and plea agreement statutes,<sup>257</sup> when read together, "do not permit negotiated plea agreements for the death penalty."<sup>258</sup> The supreme court, however, found that the trial court's procedure was a "proper harmonizing of the two statutes."<sup>259</sup> The trial court had determined on two different occasions that Smith had the capacity to enter into the agreement and that he knowingly and voluntarily waived his rights. The state showed incontrovertible evidence of guilt, and Smith confessed to the crime in open court. At a subsequent hearing, the State showed beyond a reasonable doubt the existence of a statutory aggravating factor, and after finding that it outweighed any mitigating evidence, the trial judge accepted the plea agreement and sentenced Smith to death.

In *Van Cleave*, the supreme court considered the proper standard under which a guilty plea may be vacated on grounds of ineffective assistance of counsel.<sup>260</sup> Gregory Van Cleave pleaded guilty in 1983 to felony murder, and the

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250. *Smith*, 686 N.E.2d at 1266.

251. *Id.* at 1267.

252. *See* IND. CODE § 35-50-2-9 (1993 & Supp. 1997).

253. *Smith*, 686 N.E.2d at 1268.

254. *Id.*

255. *Id.* at 1269.

256. *See* IND. CODE § 35-50-2-9 (1993 & Supp. 1997).

257. *See id.* § 35-35-3-3.

258. *Smith*, 686 N.E.2d at 1270.

259. *Id.* at 1271.

260. 674 N.E.2d at 1293.

plea agreement allowed the sentencing judge to choose between sixty years in prison or the death penalty. The death penalty was imposed; however, it was later set aside via a petition for post-conviction relief granted on the grounds of ineffective assistance of counsel.<sup>261</sup> The post-conviction court based its ruling on Van Cleave's showing "that his lawyer's performance was deficient and, but for counsel's errors, Van Cleave would not have pleaded guilty."<sup>262</sup>

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must show: 1) the lawyer's performance fell below an "objective standard of reasonableness," and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>263</sup> In considering the second tier of the analysis (the "prejudice" prong), the supreme court considered whether it was sufficient to set aside a conviction if the postconviction court concluded that there was a reasonable probability the defendant must would not have pleaded guilty but for counsel's deficient performance, or whether the defendant must establish a reasonable probability that the ultimate result—i.e. the conviction—would have been different.<sup>264</sup>

After discussing Supreme Court precedent on ineffective assistance of counsel issues and policy considerations, the court held that a defendant must show a reasonable probability that the outcome—the ultimate conviction—would have been different.<sup>265</sup> The court noted that the prejudice requirement derives from the significant state interest in finality of judgments.<sup>266</sup> Moreover, proof of a crime can be difficult to establish years later because "witnesses die or move elsewhere, evidence becomes stale, and memories fade."<sup>267</sup>

The Indiana Supreme Court concluded that the state had presented "powerful evidence of Van Cleaver's culpability for felony murder at his sentencing hearing."<sup>268</sup> Because the mitigating evidence which his lawyer failed to uncover did not establish a reasonable probability of acquittal, Van Cleave's right to effective assistance of counsel was not sufficiently violated to warrant the setting aside of his guilty plea.<sup>269</sup>

#### *F. Jury Deliberations*

The supreme court and court of appeals decided a number of cases which dealt with a variety of issues related to jury deliberations. Four of the cases will be discussed below.

261. *Id.* at 1295.

262. *Id.*

263. *Id.* at 1296 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)).

264. *Id.*

265. *Id.* at 1306.

266. *Id.* at 1300.

267. *Id.* at 1301.

268. *Id.* at 1306.

269. *Id.*

In *Hagenmeyer v. State*,<sup>270</sup> the court of appeals held that it was reversible error to allow jurors to listen to tapes of the victim's testimony without the defendant present.<sup>271</sup> After the jury had begun its deliberations, the foreman informed the trial court that the jury wanted to review tapes of the victim's testimony because the members could not remember the testimony.<sup>272</sup> Even though defense counsel informed the court that he and the defendant had a right to be present during the replaying of the evidence and desired to be present, the trial court allowed the jury to listen to the testimony with only the bailiff and court reporter present.<sup>273</sup>

"A defendant has the right to be present during all stages of the trial requiring the presence of the jury."<sup>274</sup> Any waiver of this right "must be express and given by the defendant personally."<sup>275</sup> Not only did Hagenmeyer not waive this right, he objected to the procedure. Because the bailiff and court reporter have no obligation to protect a defendant's interest and their presence is not a substitute for a defendant's own presence, the court of appeals reversed the conviction.<sup>276</sup>

In *Anglin v. State*,<sup>277</sup> the court of appeals held that the trial court failed to follow the proper procedure in responding to notes from the jury during deliberations, but there was no prejudice to the defendant.<sup>278</sup> The court responded to two separate notes from the jury by sending a written response to the jury room without first returning the defendant and his counsel into the courtroom.<sup>279</sup> The proper procedure, however, "is for the judge to notify the parties so they may be present in court before the judge communicates with the jury, and the judge should inform the parties of his proposed response."<sup>280</sup>

Anglin's case was further complicated because the two notes concerned similar evidence,<sup>281</sup> thus raising the concern that there was jury disagreement or confusion about the evidence.<sup>282</sup> "[W]hen a jury requests that it be given the opportunity to rehear testimony or see exhibits for a second time, the jury is expressing disagreement or confusion about that evidence, sufficient to trigger application of I.C. 34-1-21-6, unless the circumstances surrounding the request

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270. 683 N.E.2d 629 (Ind. Ct. App. 1997).

271. *Id.* at 630.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. 680 N.E.2d 883 (Ind. Ct. App. 1997).

278. *Id.* at 886.

279. *Id.* at 884.

280. *Id.* at 885 (quoting *Madden v. State*, 656 N.E.2d 524, 526 (Ind. Ct. App. 1995)).

281. The first note read: "What is the definition of a Commitment paper." The second note stated: "Would like to see the evidence presented by the State—12 & 13 referring to 'Commitment' paper." *Id.* at 884.

282. *Id.* at 885.

indicate otherwise.”<sup>283</sup>

The two requests made by the jury in *Anglin* were not for the same piece of evidence or the same portion of testimony, thus the trial judge was not required to return the jury to open court and provide them with the requested information. In other cases, however, a trial judge’s response to the first jury request will likely have a significant impact on any subsequent requests. Therefore, judges often write very short and direct responses to jury requests.<sup>284</sup>

In *Isaacs v. State*,<sup>285</sup> the supreme court considered whether it was juror misconduct for a juror to relate her experiences as a rape victim to other jurors deliberating on a verdict in a rape case. The day after a jury convicted Terry Isaacs of raping a woman at knifepoint, an alternate juror called the trial judge to report that a juror, who during voir dire stated that she had been a victim of rape, related to other jurors during deliberations that her rapist had also held a knife to her neck and that it did not leave any visible marks.<sup>286</sup> This comment was made while jurors were discussing whether the defendant had used a knife when he raped the victim.

The supreme court compared the case to *Saperito v. State*, in which a juror related to other jurors during deliberations that he had viewed the crime scene and that a diagram of the scene accurately described the area.<sup>287</sup> That court determined that the juror had testified regarding evidence not in the record, but held that any error was harmless.<sup>288</sup>

Unlike in *Saperito*, the juror in *Isaacs* merely informed her fellow jurors of her own experiences as a rape victim—and did not offer additional evidence.<sup>289</sup> This was not error, as jurors had been instructed to use their own “knowledge, experience and common sense gained from day to day living.”<sup>290</sup>

In *Bradford v. State*,<sup>291</sup> the supreme court considered the issues of juror experiments and allowing jurors to separate overnight during deliberations. Glenn Bradford was convicted of the murder of an Evansville woman whose stabbed body was found in her residence after firefighters extinguished a fire there. During the course of the trial, the trial judge allowed the jurors to be taken to the scene of the crime to view the interior of the house. During deliberations, the jurors asked to revisit the house and to fill an empty gas can with water to determine how fast it could be emptied. The trial judge allowed another “jury

283. *Id.*

284. For example, the jury sends out a note asking, “Can we have a transcript of witness John Jones’ testimony?” An acceptable response would be, “I cannot provide you with a transcript of the testimony. Please rely on your memories.” A subsequent jury inquiry for the same transcript would be unlikely after the jury receives such a response.

285. 673 N.E.2d 757 (Ind. 1996).

286. *Id.* at 761.

287. 490 N.E.2d 274 (Ind. 1986).

288. *Id.* at 278.

289. *Isaacs*, 673 N.E.2d at 761.

290. *Id.*

291. 675 N.E.2d 296 (Ind. 1996).

view” of the house, but denied the request to conduct the gas can experiment by noting “[t]hat is not evidence. You cannot conduct your own experiments and make up your own evidence . . . .”<sup>292</sup>

After the trial, three jurors signed affidavits for the defense which stated that the jury conducted experiments by walking through the motions of emptying a gas can and by timing the amount of time it took to crawl through the house.<sup>293</sup> Two other jurors signed affidavits for the State stating that the jury had followed the trial judge’s order and not conducted any experiments.<sup>294</sup> The supreme court held that the jury’s activities were not improper, since anything they had done during the “jury view” was already in evidence through the testimony of the detective who had conducted experiments prior to trial and testified about those experiments at trial.<sup>295</sup>

The supreme court also considered the propriety of allowing the jurors to separate and go to their respective homes overnight during deliberations. The Indiana Code requires that the jury be kept together once deliberations begin,<sup>296</sup> and the supreme court has taken this requirement very seriously in the past. In this case, however, after the trial judge stated that he intended to allow jurors go to their homes for the evening, defense counsel did not object.<sup>297</sup> As the supreme court has previously held, a defendant cannot raise such an issue for the first time on appeal.<sup>298</sup>

### G. Sentencing

The appellate courts considered a variety of issues relating to sentencing. The following issues will be discussed below: 1) whether the enhancement of a drug offense for being within 1,000 feet of school property is proper when the defendant was riding in a motor vehicle at the time of arrest; 2) whether a trial court can reattach a habitual offender enhancement to another conviction after the conviction to which it was originally attached was set aside on appeal; and 3) whether a defendant’s probation can be revoked for failure to pay restitution when the basis for failure to pay was that the defendant was indigent because of his incarceration.

In *Polk v. State*,<sup>299</sup> a defendant convicted of possessing cocaine within 1,000 feet of school property, a class A felony, argued that the enhancement should be restricted based on his status as a mere passenger in a car at the time of his arrest. Possession of cocaine is normally a class D felony.<sup>300</sup> Polk argued that the

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292. *Id.* at 304.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 304-05 (citing IND. CODE § 35-37-2-6(a)(1) (1993)).

297. *Id.* at 305.

298. *Id.* (citing *Pruitt v. State*, 622 N.E.2d 469 (Ind. 1993)).

299. 683 N.E.2d 567 (Ind. 1997).

300. *Id.* at 569.

legislature did not intend for the enhancement to apply in such circumstances, as it would not advance the underlying legislative objective of protecting school children from the effects of drugs, but would produce “absurd and unintended results.”<sup>301</sup> Moreover, he argued that upholding his conviction would enable the police to determine the class of felony for possession of cocaine by initiating a traffic stop near school property and that the enhancement does not reasonably inform average people that they will be subject to such severe penalties for possessing cocaine while stopped for a traffic offense near a school.<sup>302</sup>

Citing the recent case of *Walker v. State*,<sup>303</sup> the supreme court noted that the school-zone element of the offense of *dealing* cocaine was a “strict-liability enhancement requiring no proof that the defendant knew he was dealing cocaine within 1000 feet of a school.”<sup>304</sup> In *Polk*, however, the defendant did not argue intent, but rather that the statute should not be literally applied to the facts of his particular case.<sup>305</sup>

Because the goal of a drug-free school zone is a legitimate legislative objective, the supreme court rejected Polk’s claim that his Fourteenth Amendment right to due process of law and equal protection were violated by his conviction.<sup>306</sup> Moreover, the court held that the enhancement provided clear notice of what conduct is prohibited and is rationally related to protecting the welfare of children.<sup>307</sup>

In *Greer v. State*,<sup>308</sup> the supreme court held that a trial court could reattach a habitual offender attachment to a different count if the count to which it was originally attached was later set aside. In 1988, William Greer was convicted of attempted murder, class A felony robbery, and of being a habitual offender.<sup>309</sup> He was sentenced to eighty years for attempted murder (fifty years for the offense, enhanced by thirty years for being a habitual offender) and fifty years for robbery.<sup>310</sup> In his first direct appeal, the supreme court reversed the attempted murder conviction, and the State decided not to retry that count.<sup>311</sup> At the resentencing hearing, the trial court attached the habitual enhancement to the robbery count and sentenced the defendant to eighty years.<sup>312</sup>

Noting that a jury finding of habitual offender status is not linked to any

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301. *Id.*

302. *Id.* at 569-70.

303. 668 N.E.2d 243 (Ind. 1996). This case was discussed in last year’s Survey as well. See Miller & Schumm, *supra* note 208, at 1026-28.

304. *Polk*, 683 N.E.2d at 570.

305. *Id.*

306. *Id.* at 573.

307. *Id.*

308. 680 N.E.2d 526 (Ind. 1997).

309. *Id.* at 526.

310. *Id.*

311. *Id.*

312. *Id.* at 526-27.

particular conviction, the supreme court upheld the resentencing.<sup>313</sup> Just as the trial judge was free to attach the habitual offender enhancement to *any* felony count at the original sentencing, he possesses that same discretion when one of the counts is reversed on appeal.

In *Barnes v. State*,<sup>314</sup> the court of appeals held that the trial court did not err in revoking a defendant's probation for failure to make restitution payments.<sup>315</sup> In such cases, a court must find that a probationer has "willfully refused to make restitution or has failed to make sufficient bona fide efforts to pay" in order to revoke his probation.<sup>316</sup>

At Barnes' revocation hearing, the trial court inquired into the reasons for his failure to pay and learned that Barnes had been incarcerated on two other charges for all but a few months of the probationary period.<sup>317</sup> Because "Barnes voluntarily engaged in a course of conduct which made him unable to comply with the financial conditions of his probation," the court affirmed the revocation of his probation.<sup>318</sup>

#### H. Proportionality

In *State v. Moss-Dwyer*,<sup>319</sup> the Indiana Supreme Court was asked to determine whether a trial court impermissibly infringed on the legislature when it held that the crime of giving false information in an application for a handgun permit as a class C felony was unconstitutional on its face because it violated the proportionality requirement, Article I, Section 16.1 of the Indiana Constitution. Since the issue was purely a matter of law, the supreme court reviewed the matter *de novo*.<sup>320</sup>

The State charged Moss-Dwyer with giving false information in applying for a license to carry a handgun because she listed her former marital residence as her current address on the application.<sup>321</sup> In order to determine whether the offense was constitutionally proportional to the penalty, the trial court compared the penalty for giving false information to obtain a handgun license with the penalty for carrying a handgun without a license. The court distinguished *Conner v. State*<sup>322</sup> when it found that the penalty for giving false information was not disproportionate to the crime.<sup>323</sup>

In *Connor*, the defendant was convicted of distributing a substance

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313. *Id.* at 527.

314. 676 N.E.2d 764 (Ind. Ct. App. 1997).

315. *Id.* at 765.

316. *Id.*

317. *Id.*

318. *Id.*

319. 686 N.E.2d 109 (Ind. 1997).

320. *Id.* at 110.

321. *Id.*

322. 626 N.E.2d 803 (Ind. 1993).

323. *Moss-Dwyer*, 686 N.E.2d at 112.

represented to be marijuana, which carried a more severe penalty than the defendant would have received had he distributed real marijuana.<sup>324</sup> The supreme court found this decision to violate Indiana's proportionality provision.<sup>325</sup>

In *Moss-Dwyer*, the supreme court found that although Article I, Section 16 of the Indiana Constitution requires that "[a]ll penalties shall be proportioned to the nature of the offense," the separation of powers doctrine requires the court "to take a highly restrained approach when reviewing legislative prescriptions of punishments."<sup>326</sup> The court distinguished *Conner* in several ways. First, in *Conner*, there was found to be a clear legislative pattern of treating marijuana offenses more leniently than other offenses relating to controlled substances. Punishing fake marijuana offenses more harshly than real marijuana offenses was, therefore, clearly disproportionate.<sup>327</sup> The court found no such pattern in the handgun permit statutory scheme.<sup>328</sup> Second, the court found that the crime for which Moss-Dwyer was convicted was deemed similar to other crimes involving misinformation or deceiving public officials including perjury, bribery, and obstruction of justice.<sup>329</sup> Thus, "[t]he classification of giving false information on an application for a handgun permit as a class C felony does not appear so disproportionate as to justify striking down a legislative determination of the appropriate penalty."<sup>330</sup>

In reversing the trial court, the supreme court rejected the defendant's claim that it was improper for a person to face a greater penalty for choosing to abide by the law and apply for a permit rather than carry a handgun without a license. The Indiana General Assembly "rightfully may penalize the wrongful act of giving misinformation on the permit application more severely than the separate wrongful act of carrying a handgun without having applied for a permit at all."<sup>331</sup>

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324. *Connor*, 626 N.E.2d at 805.

325. *Id.* at 806.

326. *Moss-Dwyer*, 686 N.E.2d at 111.

327. *Id.* at 112.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 113.