POLICE / PROSECUTOR UPDATE

Issue No. 104 July 2000

Early on a winter morning, a police officer on routine patrol observed a vehicle being driven erratically. Believing the driver might be intoxicated, the officer stopped the vehicle (which was driven by the defendant). The vehicle contained the defendant and a passenger. The officer requested the defendant's driver's license. At that point the officer smelled the distinct odor of burnt marijuana coming from the vehicle. The officer asked the defendant to step from the vehicle. Because it was very cold and the officer was going to allow the defendant to sit in the patrol car for questioning, the officer performed a pat-down search of the defendant. The officer felt what he believed was a pocketknife. It turned out to be a small metal pipe with marijuana residue in the bowl. The defendant was handcuffed and placed in the patrol car. The vehicle was then searched for contraband because of the odor of marijuana and the marijuana pipe discovered in the pat down. During the search, the marijuana was found. The defendant was then formally arrested.

The defendant moved to suppress all evidence because the search of his person and vehicle was without probable cause, without a warrant, and without consent. The trial court denied the motion because the smell of marijuana supplied probable cause to believe that marijuana was in the vehicle. As stated in the March, 1999, issue of the PPU, no Indiana case has expressly determined that the smell of marijuana *alone* would constitute probable cause for arrest or search. However, the Court of Appeals in this case noted that a majority of courts in other jurisdictions that have addressed the issue have found that it does. The Court referred to a number of out-of-state cases which held that the unmistakable odor of marijuana coming from the passenger compartment of a vehicle, standing alone, would give rise to probable cause to arrest and to search a vehicle. Thus, our Court of Appeals held that when the officer smelled the distinctive odor of burnt marijuana coming from the car, he was warranted in believing that the defendant had committed a criminal act and had probable cause to arrest him. The search of the vehicle was proper as incident to the defendant's arrest.

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Last month the U.S. Supreme Court upheld its decision in *Miranda v. Arizona*, which governs the admissibility of statements made during custodial interrogation. It has been quite a while since we looked at a *Miranda* case, so this might be a good opportunity to review the law.

Miranda warnings are based upon the Fifth Amendment Self-Incrimination Clause and were designed to protect an individual from being compelled to testify against himself. However, the procedural safeguards of *Miranda* apply only when an individual is subjected to custodial interrogation. Therefore, police officers are not required to give a defendant *Miranda* warnings *unless* the defendant is *both* in custody and subject to interrogation.

In order to be "in custody" for purposes of *Miranda*, a person need not be placed under formal arrest. Instead, this determination is based upon whether the individual's freedom has been deprived in a significant way or if a reasonable person in the accused's circumstances would believe that he is not free to leave. The ultimate inquiry regarding custody is whether there was a formal arrest or a restraint on freedom of movement to a degree associated with a formal arrest. A police officer's views concerning the nature of an interrogation, or his belief concerning the potential culpability of the individual being questioned, may be a factor that bears upon whether the individual is in custody *only* if the officer's views or beliefs are somehow manifested to the person under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave.

In a recent case, the defendant was suspected of child molesting. A detective went to defendant's place of employment, identified himself as detective, and explained to defendant that a criminal allegation had been made against him. He asked if the defendant would come to the Sheriff's Department to talk about it. The defendant agreed and immediately drove himself to the Sheriff's Department. The detective led him through the lobby to a small interview room in a secured area of the Sheriff's Department. The defendant had to be "buzzed through" to enter or exit the area. Although his manner was genial, the detective told the defendant that he believed the defendant was culpable and suggested the State had access to physical evidence that would prove it. The defendant eventually confessed. The Court of Appeals stated that the defendant's interrogation under these circumstances constituted a significant deprivation of freedom sufficient to require *Miranda* warnings. The Court did not buy the State's argument that the defendant would have felt free to leave because the detective told him he would not be arrested that day and the defendant did in fact leave after the interview. A law enforcement officer cannot circumvent the *Miranda* rule by telling a defendant during an interrogation that he will not be placed under arrest at that time. To be safe, if there is any question whether an interrogation is in a custodial setting, the *Miranda* warnings should be given.

Sebastian v. State, 726 N.E.2d 827 (Ind. App. 2000).
State v. Aynes, 715 N.E.2d 945 (Ind. App. 1999).

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