



# POLICE / PROSECUTOR UPDATE

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This month we will look at a case involving the concept of staleness of probable cause in the context of the lapse of time between the issuance of a search warrant and its execution.

The facts reveal that within 72 hours prior to May 27, 1999, a police officer and a confidential informant went to the defendant's residence to make a controlled buy of drugs. The C.I. entered the house and observed cocaine. The defendant stated that the substance was cocaine and that it was for sale. The C.I. purchased cocaine, exited the home, and gave the cocaine to the officer. In an affidavit seeking a search warrant, the officer detailed the C.I.'s observations and cocaine purchase and alleged that cocaine "is being kept, used and sold from" the defendant's residence.

On May 27 at 1:30 p.m., the court issued the warrant to search the defendant's residence. It was executed on June 4 at 6:32 a.m. The police recovered cocaine and other drugs, along with cash and various other items. The defendant filed a motion to suppress, contending the police relied on a stale search warrant to search his home. The State responded that the warrant was not stale at the time of its execution because it fell within the 10-day time frame permitted by IC 35-33-5-7(b) to execute a warrant.

It is first important to note that the fact that a particular search does not violate the 10-day time limit of the statute has no bearing at all on a constitutional challenge based on staleness of probable cause when the search is conducted. Police simply cannot rely on the statute in any and all cases (the court did note, though, that the statute would still apply to invalidate a search warrant after more than 10 days had passed from its issuance, *regardless* whether probable cause still existed).

"Probable cause" is a fair probability that contraband or evidence of a crime will be found in the location to be searched. Probable cause must exist *at the time* that a search warrant is executed. A delay in executing a search warrant may render the probable cause finding stale. Therefore, an officer who obtains a search warrant must execute it promptly or must reevaluate all

of the facts and circumstances again when executing the warrant at a later time to determine if probable cause still exists at that time. If the facts and circumstances indicate that probable cause does not continue to exist from the time that a warrant is issued to the time that it is finally executed, then the warrant is invalid and cannot be executed. Important factors to consider in determining whether probable cause has dissipated, rendering the warrant fatally stale, include the lapse of time since the warrant was issued, the nature of the criminal activity, and the kind of property subject to the search.

With regard to items that are easily concealed or moved, probable cause of their presence at a given place on a given day cannot be based on the fact they were present at that place at some time in the past. On the other hand, when an activity is of a protracted and continuous nature, the passage of time becomes less significant. Here, the warrant was based on a single, isolated drug transaction. The State presented no evidence that the police conducted surveillance of the defendant's residence between the time the warrant was issued and when it was executed. There was no evidence regarding any increase or decrease in traffic to and from the residence nor any evidence indicating ongoing drug activity. Thus, the court concluded that the State had failed to demonstrate that continuing criminal activity was suspected and corroborated. As such, probable cause dissipated in the eight days that elapsed between the time of the warrant's issuance and its execution.

In conclusion, in drug cases where a search warrant is issued based upon a single controlled buy, the warrant should be executed immediately. However, where police surveillance or undercover work indicates an ongoing criminal enterprise, the passage of time between the issuance and execution of the warrant is of somewhat less importance. But to be safe, the warrant should still be executed as promptly as practicable.

Huffines v. State, 739 N.E.2d 1093 (Ind. Ct. App. 2000).