



POLICE / PROSECUTOR UPDATE

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The court of appeals has decided an interesting **search incident to arrest** case that presented a question not addressed before by an Indiana court. It also contained a good review of the law on this search and seizure issue.

A deputy sheriff observed the defendant driving his car in an erratic manner. He caught up to the defendant after the defendant had parked in front of a residence and had exited his car. When the deputy approached the defendant to request identification, he noticed a strong odor of marijuana coming from the defendant's person and observed that his eyes were bloodshot and that there was a bulge in his pants pocket. The deputy conducted field sobriety tests on the defendant, which he failed. He then read the defendant an implied consent form which advised him that there was probable cause to believe that he had operated a vehicle while intoxicated and informed him that his refusal to submit to a chemical test would result in the suspension of his driving privileges. The defendant refused the chemical test, explaining that he had smoked marijuana earlier that night.

The deputy then conducted a patdown search of the defendant's person, finding a baggie of marijuana in his pants pocket. The deputy issued a citation for the defendant's refusal to submit to a chemical test but did not arrest him for possession of marijuana until three weeks later, after he had consulted the prosecutor's office.

The issue obviously was the legality of the search which recovered the marijuana. The State argued it was legal as a search incident to arrest. Therefore, the new question to be answered was whether a search incident to arrest is valid where the defendant's arrest is postponed for a time following the search.

It is well-settled law that a search is incident to an arrest when it "is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." The U.S. Supreme Court has explained the rationale underlying the rule that the search must be contemporaneous in time and place to the arrest. The rule allowing a contemporaneous search is justified by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime - things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. *But these justifications are absent where a search is remote in time or place from the arrest.*

However, this rationale does not contemplate the circumstance where a search is justified by the need to prevent the destruction of evidence of a crime but *the actual arrest* is delayed. The court of appeals concluded that the search incident to arrest exception, which typically applies when a search and arrest are contemporaneous, also applies where law enforcement conducts a search but merely delays an otherwise valid arrest until after consultation with a prosecutor.

The *critical issue* is not *when* the arrest occurs but *whether* there was probable cause to arrest at the time of the search. As long as probable cause exists to make the arrest, the fact that a suspect was not formally placed under arrest at the time of the search incident to it will not invalidate the search.

VanPelt v. State, 760 N.E.2d 218 (Ind. Ct. App. 2001).

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