



POLICE / PROSECUTOR UPDATE

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Department of Toxicology regulations require that an **OWI** suspect given a breath test must not smoke within 20 minutes prior to the time a breath sample is taken. In a recent case, a deputy sheriff put the defendant in the back seat of his patrol car to transport him to the test site. While transporting the defendant, the deputy smoked a cigarette. They arrived at the test site within 10 minutes, and the deputy administered the test. The defendant challenged the test result because he had **ingested second-hand cigarette smoke** within 20 minutes prior to the breath sample being taken.

The Court of Appeals held that the regulation specifically spells out prohibited activities: eating, drinking, smoking, and placing foreign substances in the mouth. The regulation does not prohibit exposure to second-hand smoke. In the court's view, because certain activities are specifically mentioned in the regulation, had second-hand smoke exposure been intended to be a prohibited activity, it would have been mentioned as well. Thus, exposure to second-hand smoke is not the equivalent of actually smoking and is not prohibited. However, the court concluded by stating, "we note that it would be a better practice for law enforcement officers transporting suspects for chemical breath tests to refrain from smoking." Keys v. State, ___ N.E.2d ___ (Ind. App. 07/19/04).

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Trash searches are becoming a complicated area of the law with some Court of Appeals cases going one direction and other cases going another direction. Under Indiana constitutional principles, searches must be "reasonable under the totality of the circumstances. This standard necessarily requires a fact-specific determination in each case.

A recent Court of Appeals case examined Indiana case law on trash searches and found three general principles. First, a police officer's warrantless seizure of garbage is generally held to be reasonable under the totality of the circumstances if the garbage has been left in the place where the regular trash service would routinely collect it, particularly if the officer seizes it in a manner consistent with the regular trash collection service. (for example, early in the morning and without attracting the attention of neighbors). Second, while Indiana courts generally frown on the practice of trespassing onto private property in order to seize garbage, other cases reject entry onto private property as a bright-line rule, looking instead to the totality of the circumstances to determine reasonableness. Finally, in the absence of exigent circumstances, a police officer would be well advised to obtain a warrant before snatching the garbage of an Indiana citizen. State v. Neanover, ___ N.E.2d ___ (Ind. App. 07/20/04).

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To obtain a **blood sample** for a toxicology blood test, law enforcement officers must have (1) a warrant, (2) probable cause, or (3) consent. To obtain a blood sample based on probable cause, the law enforcement officer must have probable cause that a driver's blood will contain evidence of alcohol or illegal substances. In fact, police may not compel an individual to submit to a blood draw without a clear indication of intoxication. However, IC 9-30-6-6 is a constitutional, legally recognized protocol for law enforcement to obtain blood test results where the test was performed in the normal course of a person's medical treatment. Schlesinger v. State, ___ N.E.2d ___ (Ind. App. 07/19/04).