



POLICE / PROSECUTOR UPDATE

Issue No. 157

December 2004

The Indiana Court of Appeals has made it clear that to convict a person for the offense of **Visiting a Common Nuisance**, I.C. 35-48-4-13(a), the State has the burden of proving that the place the defendant visited was used *on more than one occasion* for the unlawful use of a controlled substance.

The fact that the legislature amended I.C. 35-48-4-13(b) (maintaining a common nuisance) to add the language "used one (1) or more times" does not affect subsection (a). As the court stated, "Indiana case law discussing visiting a common nuisance and requiring proof that the place visited be used on more than one occasion for the unlawful use of a controlled substance was not affected by the legislature's amendment." The "on more than one occasion" requirement must still be proved beyond a reasonable doubt to convict a defendant under I.C. 35-48-4-13(a).

Zuniga v. State, 815 N.E.2d 197 (Ind. App. 2004).

* * * * *

A recent Court of Appeals case addressed the appropriateness of a police officer, during a routine **traffic stop**, asking the driver a general, open-ended question about "anything" being in the vehicle, rather than specifically asking about weapons.

A police officer observed a vehicle traveling on a city street without a license plate light and initiated a traffic stop of the vehicle, driven by the defendant. The officer asked the defendant for his license and registration, and the defendant provided them. The officer then walked back to his patrol car to check the documents. While he was sitting in his car waiting for the check to be completed, the officer noticed the defendant "fumbling with something," which aroused the officer's suspicion.

The officer walked up to the vehicle and observed that the defendant was holding a VHS video cassette box. He asked the defendant, "**Do you have anything in the vehicle I need to know about?**"

The defendant responded that there was a gun under the driver's seat. The officer told the defendant to exit the vehicle. He asked the defendant if he had a permit for the gun, and the defendant answered that he did not. The officer asked if the gun was his, and the defendant said that it was his mother's boyfriend's gun and that he knew the handgun was under the seat when he borrowed the car. The officer retrieved the gun, which was loaded. The VHS box that the defendant had been "fumbling" with contained additional bullets. The defendant was convicted of Possession of a Firearm by a Serious Violent Felon.

The Indiana Supreme Court has held that, for the sole purpose of officer safety, it is proper to make a weapons inquiry during a routine traffic stop. The defendant attempted to distinguish his case because the officer did not specifically mention weapons but instead asked generally if there was *anything* in the car that the officer should know about. The Court of Appeals declined to create "magic words" concerning a police request about weapons to a detained motorist. Further, although it would have been preferable for the officer to ask specifically about the presence of weapons, the result was the same as if he had: the defendant divulged there was a handgun under the driver's seat.

Finally, the court stressed that its analysis applies only to situations in which a *weapon* was found, rather than other non-weapon types of contraband. Therefore, officers should remember to ask specifically about weapons.

Jarrell v. State, ___ N.E.2d ___ (Ind. App., 11/23/04).