



# POLICE / PROSECUTOR UPDATE

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This month we will look at a police/citizen encounter which amounted to a seizure without probable cause or reasonable suspicion, which invalidated a subsequently obtained search warrant.

A state trooper and a town marshal flew over the defendant's residence and observed a marijuana plant growing in a cornfield across the road. The marijuana plant was growing seven rows in from the county road, and there was a distinct path from the marijuana plant to the county road. The path met the road directly across from the defendant's driveway. The trooper and marshal seized the plant and then went to the defendant's mobile home to investigate. His wife said he had just left the residence. The trooper had the marshal stay at the front door of the residence while he went to the back. There, he saw the defendant walking nearby.

The trooper identified himself and explained that he was investigating the marijuana plant found in the field. He smelled a strong odor of an alcoholic beverage from the defendant. He asked the defendant if he had ever been in trouble with the law, and the defendant said he was on probation for OWI. The trooper advised the defendant of his *Miranda* rights and asked for permission to search his residence. The defendant responded he would like the trooper to get a warrant.

The trooper asked the defendant to sit on a nearby swing. When the defendant appeared nervous and put his hands in his pockets, the trooper asked him to put the contents of his pockets on the hood of a vehicle. The defendant pulled a "one-hitter" from his pocket and admitted it was used to smoke marijuana. While the trooper called the probation department to confirm the defendant's probationary status, the defendant grabbed the one-hitter and threw it into the woods. The trooper then arrested the defendant and retrieved the one-hitter.

Shortly before he was placed into the police car, the defendant admitted he had more paraphernalia in his residence. The trooper then spoke with the defendant's wife and advised her of her *Miranda* rights. She said there was paraphernalia in the residence but wanted the trooper to get a search warrant before entering. He did get the warrant based on the proximity of the marijuana plant to the residence and the admissions of the defendant and his wife.

The law is that **facts obtained through an illegal procedure violating constitutional rights cannot form the basis of probable cause required for issuance of a search warrant.** The trial court granted the defendant's motion to suppress and the Indiana Court of Appeals agreed.

The Fourth Amendment did not prohibit the trooper from walking to the front door of the residence and knocking to ask about the marijuana plant. However, the State failed to justify the trooper's actions after knocking on the front door.

When a police officer has, by means of physical force or show of authority, in some way restrained the liberty of a citizen, a "seizure" has occurred. Here, the trooper's conduct would have communicated to a reasonable person that the person was not free to decline the officer's requests or otherwise terminate the encounter. Thus, the trooper's questioning about whether the defendant had ever been in trouble with the law and his requests, after the defendant had declined to give him permission to search the residence, that the defendant sit on a swing and empty his pockets - violated the defendant's right against unreasonable search and seizure and could not form the basis for probable cause required for issuance of the search warrant.

State v. Felker, 819 N.E.2d 870 (Ind. App. 2004).

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