



POLICE / PROSECUTOR UPDATE

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The most frequently discussed legal topic in the PPU is search and seizure. This is so because the topics chosen for discussion are generally determined by recent legal developments, and quite a few court decisions involve search and seizure issues. This trend continues. Several search and seizure cases were decided by the Court of Appeals in the past few weeks, and the decisions went against the State. We will examine some of these cases in the next couple of issues. While we may believe they were wrongly decided, they represent the state of the law unless and until the Supreme Court decides otherwise.

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The first case involves the use of excessive force by police in the form of a choke hold. While the court reversed the defendant's conviction because of lack of probable cause to search, it nevertheless chose to also address the excessive force question. The facts relevant to a discussion of choke holds show that the defendant (whose vehicle had been stopped in a "high narcotics area" and who was on probation for narcotics possession) was believed by the police officer to have drugs in his mouth. When the defendant began a "chewing motion" after being asked to open his mouth and lift his tongue, the officer began to choke him so he couldn't swallow. This struggle continued for several minutes, during which the defendant was twice maced with CS spray. The defendant eventually spit out a plastic baggie which contained rock cocaine.

With regard to the choke hold, there is a three-part balancing test for determining the reasonableness of a body search procedure. The reasonableness of force used is measured against: (1) the extent to which the procedure used may threaten the safety or health of the individual; (2) the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity; and (3) the community's interest in fairly and accurately determining guilt or innocence. The court held that the application of force to a person's throat is a dangerous and sensitive action. Safer alternatives existed to recover the evidence. The defendant could have been taken into custody and the contents of the baggie recovered after they had passed through his system (To the contention that it would be dangerous for the defendant to swallow the cocaine, the Court of Appeals was unmoved, stating, "other courts which have considered this issue have found that this practice does not usually result in adverse affects [*sic*] to one's health."). Even though most jurisdictions have upheld the use of choke holds in some form or another, our Court of Appeals disagreed. It held that the violation of the

defendant's bodily integrity and the health and safety dangers involved were greater than the need to preserve evidence.

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In 1997 the U.S. Supreme Court held that, when making a traffic stop, a police officer may order passengers, as well as the driver, to get out of the car pending completion of the stop. The issue in the second case we will look at briefly is whether an officer who has stopped a vehicle for a traffic infraction may order a passenger who walks away from the vehicle to return and remain at the vehicle. The Court of Appeals held that this is a *Terry v. Ohio* investigatory detention and is not permissible absent specific and articulable facts known to the officer justifying a reasonable suspicion that the passenger had been engaging in or was about to engage in criminal activity. The officer testified (and a dissenting judge agreed) that he believed that he was being placed at a "tactical disadvantage" and that his "safety" as well as the integrity of his investigation were being compromised because allowing either the driver or a passenger to leave the scene would have risked losing sight of a possible source of danger. However, the court's majority held that the Fourth Amendment is satisfied only if the facts known to the officer are such that a person of "reasonable caution" would believe that the "action taken was appropriate." Here, the officer testified that when he ordered the defendant to return to the scene, he had no reason to believe that the defendant posed a threat or danger to him.

The court noted that this case is different from a situation in which a police officer orders a driver or passenger to exit a car and, during the course of the stop, the driver or the passenger attempts to flee the scene, makes a furtive movement, or somehow threatens the officer's safety. Then the officer may have an articulable suspicion of criminal activity justifying detention of either the driver or the passenger, or both.

Conwell v. State, ___ N.E.2d ___ (Ind. Ct. App. 08/09/99).

Walls v. State, ___ N.E.2d ___ (Ind. Ct. App. 08/20/99).

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