

Spring 2024 ILEA Legal Update

- I. Legislative Changes
 - A. Trafficking with an Inmate/Trafficking with an Inmate Outside a Facility:
 1. Adds an **unmanned aerial vehicle** (drone) as a mechanism for the trafficking
 2. Adds **chemical intoxicant** to the Level 5 felony enhancement, which is a substance that causes intoxication or a similar physical effect when introduced into the body (**not alcohol or tobacco**). This might be a chemical that is then being huffed to cause intoxication
 3. Public Safety Aerial Interference: adds **correctional officer** as a person protected from obstruction or interference using an unmanned aerial vehicle, to go along with the new addition to the trafficking statutes
 - B. Criminal Mischief:
 1. A person who recklessly, knowingly, or intentionally damages a component of an automatic building fire suppression system within a penal facility, it is now a Level 6 felony
 - C. Voyeurism: “peep” definition was amended to include “using a concealed camera with the intent of capturing an intimate image” and the areas free from cameras include where an occupant is “actually expected to disrobe”; currently in effect.
 - D. Intimate image definition has been amended to include **computer generated image**, which is “a photograph, digital image, or video of an individual created or modified by means of a computer software program, artificial intelligence, application, or other design editing tools”
 - E. Distribution of an Intimate Image: adds **computer generated image** that is “of a quality, characteristic, or condition such that it appears to depict the alleged victim”
 1. It is not enough that the image only shares some of the same characteristics as the alleged victim
 2. It is not required that the person depicted in the image actually sent the image
 - F. Dealing in Xylazine and Possession of Xylazine
 1. New statute created IC 35-48-4-18 to address possession as well as dealing in xylazine
 2. It is only enhanced by a prior conviction under the same statute
 - G. Criminal Trespass
 1. *Young v State*, 217 N.E.3d 571 (Ind. Ct. App. 2023):
 - i. Court of Appeals determined that a police officer CANNOT tell someone to leave private property and then arrest him if he refuses; it must come from an **agent** (in person, or potentially even over the phone) of the business/private property
 - ii. “Agent” is defined as an operator, manager, adult employee, or security agent **employed by** business
 - iii. Someone who requests that an officer “be on the lookout” for individuals who “don’t belong” on the property is not enough to make the officer an agent under the statute to allow the officer to command that the person leave
 2. The Legislature amended the trespass statute to add another way that a person could be arrested that involves law enforcement:
 - i. A person who knowingly or intentionally **enters an area** of property that is **locked** without permission or prior authorization, or

- Officers are conducting a knock-and-talk investigation at Nance’s home based on smelling the odor of raw and burnt marijuana while they were at the residence next door. Nance is inside of the home, standing inside, and cracks open the door. While the officers were speaking with him, he turned to look inside, and the officers could hear a noise. Officers then entered the home to secure the premises prior to obtaining a search warrant for the marijuana, to prevent destruction of evidence.
- The Court of Appeals held that entry into the home was unlawful under the Fourth Amendment as there was no valid warrant exception.
- They distinguished *US v. Santana*, 96 S.Ct. 2406 (1976) which was decided under the “hot pursuit of a fleeing felon” exigent circumstance exception.
 - a. In *Nance*, he was inside of the residence, and was never in a “public place”, unlike in *Santana* (who was initially standing on the front porch in the “visitor route” area).
 - b. Additionally, there was only reasonable suspicion that Nance was engaging in criminal activity, whereas there was probable cause to arrest *Santana*.
 - c. Nance made no movements toward imminent destruction of evidence and there was not enough evidence that the “noise” that was heard indicated someone in the process of, or getting ready to destroy the drugs, unlike *Santana* where she was running into the house with heroin in her hand.
 - d. The officers could not justify entry under the theory of “protective sweep” because that first requires probable cause to arrest a person, which then authorizes the limited protective sweep into areas where an individual may be hiding who may pose a threat to the safety of officers.

2. *Hinton v. State*, 214 N.E.3d 364 (Ind. Ct. App. 2023)

- Officers entered the backyard of the residence and picked up an item that was dropped by a resident of the residence, without a search warrant, consent, or exigent circumstance
- Curtilage (*US v Dunn*) is the area surrounding a residence that has equal protection under the Fourth Amendment and is identified using facts of each case concerning **(P-E-N-S)**: Proximity to the residence, whether it is within the same Enclosure as the residence (e.g. a fence surrounding both), Nature of the use of the area (e.g. is it being used for activities often connected to the residence), and any Substantial steps taken by the homeowner/occupant to keep it private (e.g. gate, fence, lock, signage, guard dog).
- The court held this was an unlawful intrusion upon the curtilage under the Fourth Amendment. The backyard of a residence is curtilage and is not typically part of the visitor’s route, where visitors (including police) are allowed to walk. The officer did not have a search warrant, consent, or probable cause to believe the object was evidence of a crime to argue any exigency in recovering it before it could be destroyed.

B. Reasonable Suspicion

1. Stop and Frisk: *K.W. v. State*, 216 N.E.3d 505 (Ind. Ct. App. 2023):

- Officers were looking for suspect Steven Rodes, a “heavy set black male wearing a black shirt or black hoodies and black jeans or black sweatpants” who left the victim’s house on foot.

- Officers canvassing observed KW sitting in a nearby public area, who was a heavy-set black male, wearing a black hoodie and black sweatpants with white stripes. The officer asked him for ID and had him stand after KW stated he had a weapon (frisk).
 - Court concluded there was reasonable suspicion to believe KW was the suspect they were looking for based on body size, clothing, race, and location near the victim's home.
 - Frisk was justified: the suspect was alleged to have a warrant and to have committed invasion of privacy and domestic battery, all of which is reasonable to conclude he was dangerous.
2. Frisk: *Hutson v State*, 215 N.E.3d 357 (Ind. Ct. App. 2023):
- Hutson was walking along an interstate, in violation of statutes under Title 9, with a handgun tucked in his waistband. When the trooper asked him about the gun, he grew nervous and asked if he was going to jail.
 - The trooper frisked him, removing the gun, prior to placing him in the patrol car to transport him off the interstate.
 - The court held that it was reasonable in this case for the officer to place Hutson into the patrol car to move him from the interstate (based on the statute he was violating) and to remove the firearm prior to placing him in the patrol car for officer safety.
3. Medical Aid Exception for Investigative Frisk: *Fritz v. State*, 223 N.E.3d 265 (Ind. Ct. App. 2023):
- Officers found Fritz lying on the ground in a parking lot and he was slow in his responses. The officer called for medics and then performed a frisk of Fritz "to make sure that medics would not be harmed when they administered treatment." A meth pipe was found.
 - The court held this was reasonable under a "medical aid exception" stating that the frisk was a limited intrusion looking for weapons and it was reasonable to ensure the safety of the officer and medics while they provided medical aid to Fritz.

C. Distinctive Uniform

1. *Cassity v State*, 222 N.E.3d 1007 (Ind. Ct. App. 2023)
- An undercover officer conducted a traffic stop in an unmarked vehicle, wearing jeans, sweatshirt, "POLICE" vest with a badge on the shoulder, and was carrying a firearm, taser, bodycam, police radio, and notepad/pen.
 - IC 9-30-2-2 requires that an officer either 1) wear a **distinctive uniform** and badge of authority, or 2) drive a clearly marked police vehicle for a traffic stop under Title 9.
 - The court held that the "POLICE" vest in this case was not sufficient as a "distinctive uniform" under the statute, which is the **specific** design, color, and patches **officially adopted** by the department, meaning undercover officers must use a uniformed officer or an undercover driving a marked police vehicle to conduct a stop for an infraction.

D. Controlling Passengers on a Traffic Stop

1. *Budimir v. State*, 218 N.E.3d 596 (Ind. Ct. App. 2023):
- Officers may control the movements of all occupants of a vehicle during a traffic stop, but after there has been a determination that a passenger of the vehicle is free to go, another

officer may not stop the person without additional reasonable suspicion or probable cause that the person is engaging in criminal activity.

- In this case, the initial officer had released Budimir from the stop, but officer 2 stopped Budimir from leaving. The court examined this under the *Litchfield* reasonableness test and found that there was an unreasonable seizure/intrusion on the passenger's ordinary activities without any suspicion of criminal activity.

E. Knowing and **Voluntary** Consent

1. *Williams v State*, 204 N.E.3d 279 (Ind. Ct. App. 2023):

- Consent must be knowing and voluntarily given; in this case, the officers went to Williams' motel room and told him that his "cousin" K.W. had a medical emergency, but would be fine, and asked if they could enter the room to discuss the situation with Williams.
- Williams argued that the lie/ruse invalidated his consent to come into the room, because he could not make a fair decision to waive his Fourth Amendment right while he was worried about the medical emergency of K.W.
- The court held that this ruse was not too extreme as to invalidate the consent. This consent was upheld. In addition, the officers properly seized the cell phones that they had probable cause to believe were used in the commission of the crime without a warrant, and **properly** obtained a search warrant **later prior to reviewing the contents**.
- Sometimes an officer's lie will go too far and will be too extreme that a person could not reasonably make a fair decision to waive his rights; such as lying about having a signed search warrant to enter, telling the occupant that there is a gas leak and you must check out the location, or searching for a missing child in the area.

F. Nexus to Cell Phone for Search Warrant:

1. *Banks v. State*, 231 N.E.3d 853 (Ind. Ct. App. 2024):

- Officers obtained a search warrant to search a phone of a co-conspirator in a robbery/felony murder case to search for "all data relevant to and evidence of the murder and robbery."
- The court held that this language was specific enough under the totality of the circumstances included in the search warrant, but it is important that officers state in the affidavit for cell phones why they have probable cause to believe a phone was used or will contain evidence of the crime being investigated, and not just a general "all people use phones and therefore the phone should contain evidence" statement.