



POLICE / PROSECUTOR UPDATE

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Search by Thermal Imaging

The U.S. Supreme Court has held that generally thermal imaging of a home is a search and can be done only pursuant to a search warrant. Specifically, the Court stated using sense-enhancing technology to obtain information regarding the interior of a home that could not otherwise have been obtained without physical intrusion constitutes a search and is presumptively unreasonable without a warrant. Thus, police engaged in an unlawful search when they used a thermal imaging device without a warrant to scan a home to determine whether heat emanating from the home was consistent with the use of high-intensity lamps employed in an indoor marijuana growing operation. Kyllo v. United States, 121 S.Ct. 2038 (2001).

New Information Before Executing Warrant

An Indiana Supreme Court case dealt with the circumstances under which the police must obtain a new search warrant if information undermining the probable cause in that warrant is discovered after the warrant has been issued but before it is executed. The Court held that when the State learns that a *material fact* establishing the probable cause underlying a search warrant is incorrect, the State is obliged to inform the issuing magistrate of the new facts and, if it fails to do so, the warrant is per se invalid. Information is "material" if it might affect either the issuance of the warrant or the scope of the warrant.

The Court then stated it was important to note that both the validity and the scope of the search must be unaffected to render the information immaterial, and that would be *extremely unusual*. Query v. State, 745 N.E.2d 769 (Ind. 2001).

Consent - Threatening to Get Warrant

The law is clear that when a person consents to a search, that consent is not valid unless it is voluntary, and voluntariness is determined by examining the totality of the circumstances. While the law is not crystal clear, it appears to be a strongly negative circumstance that the officer seeking the consent advises the person whose consent is sought that a search warrant would be *obtained*, rather than merely *sought*, if consent was not given. The Court of Appeals ruled recently that this rendered a choice illusory and invalidates a subsequent consent. The person is merely acquiescing to the officer's claim of lawful authority. State v. Barber, 739 N.E.2d 192 (Ind. App. 2000).

Warrantless Arrests in the Home

A Court of Appeals case reviewed the law regarding warrantless arrests in private places in the context of a resisting law enforcement prosecution. Absent a valid consent, the Fourth Amendment requires that, even when probable cause for a warrantless arrest exists, a police officer may only enter a defendant's home to make the arrest when exigent circumstances make it impracticable to obtain an arrest warrant first. However, although the police are generally not permitted to break the threshold of a suspect's home to make a warrantless arrest, if the police spot the suspect and identify themselves when the suspect is in public view, they may pursue him or her into the home to complete the arrest.

Also, there is a greater privilege to resist an unlawful entry into private premises than to resist an unlawful arrest in a public place. Where there is a forceful and unlawful entry into a citizen's home, the citizen has the right to reasonably resist the unlawful entry. Adkisson v. State, 728 N.E.2d 175 (Ind. App. 2000).