



# POLICE / PROSECUTOR UPDATE

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A recent Court of Appeals case examined two areas of the law of **search and seizure**: warrantless entry into a residence and the validity of a consent to search after an illegal entry.

The facts are that a police officer went to an apartment to look for a suspect in an unrelated case. When the officer was unable to locate the suspect at that apartment, he proceeded to another apartment in the building because he thought that the resident of that apartment might be able to help him locate the suspect. As he approached this apartment, the officer smelled "burnt or burning marijuana." The officer knocked on the apartment door, and the defendant answered. The officer did not see anyone else inside the apartment. After inquiring about the suspect, the officer asked the defendant for his identification. The defendant closed the door and went to get his identification. Around three minutes later, the defendant returned with his identification. During those three minutes, the officer heard the defendant walking around the apartment. After the defendant handed the officer his identification, the officer, without the defendant's consent or a search warrant, entered the apartment in order to secure it to prevent the destruction of possible evidence. He also called for back-up, and two other officers arrived moments later. Once inside the apartment, the officer read the defendant his *Miranda* warnings and asked the defendant for his consent to search the apartment. He explained that although the defendant had the right to refuse his consent to search, if he chose to do so, the other officers would secure the apartment while he attempted to get a search warrant. The defendant then consented to the search and signed a consent to search form. The search discovered marijuana and other drugs.

The defendant sought suppression of this evidence, which was denied by the trial court. The State argued this was proper because entry into the apartment was justified by the exigent circumstance of possible destruction of evidence and also because the defendant gave a valid consent to search. It also argued that even if the entry was illegal, the consent to search was valid because "it was not the result of the entry."

The Court of Appeals first examined the exigent circumstance argument. Under this warrant exception, police must have an "objective and reasonable fear that the evidence is about to be destroyed." The court compared the facts of this case with others that found this exigent circumstance did exist and concluded that it did not here. The defendant did not yell to anyone inside the apartment that police were there. If fact, there were no other persons or any drugs in plain view. The defendant cooperated with the officer and returned to the door with his identification. Although it took three minutes for the defendant to retrieve his identification, the officer did not hear the defendant running around the apartment, did not hear any toilets flushing, and did not hear anything else indicative of the destruction of evidence. Thus, the officer did not have an objective and reasonable fear that the marijuana was about to be destroyed; the entry was illegal.

With regard to the validity of the consent, the relevant inquiry is whether the evidence obtained was the result of exploitation of the illegal entry or instead by means sufficiently distinguishable "to be purged" of the illegal entry. Some factors to be considered in this evaluation are: whether *Miranda* warnings were given; the temporal proximity of the illegal entry and the consent to search; the presence of intervening circumstances; the voluntariness of the consent, and particularly the purpose and flagrancy of the official misconduct. Here, although the officer read the defendant his *Miranda* rights, he was asked to consent to a search within minutes of the officer's illegal entry. There were no intervening circumstances between the entry and the request for consent except for the arrival of two additional police officers. Even though the defendant signed a consent to search form, the officer explained that if he did not do so, the other officers would secure the inside of the apartment while he attempted to get a search warrant. Finally, as for flagrancy of misconduct, a warrantless home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed. Considering all the facts, the court decided that the defendant's consent was a product of the illegal entry and thus invalid.

*Ware v. State*, \_\_\_ N.E.2d \_\_\_ (Ind. Ct. App. 01/31/03).