



POLICE / PROSECUTOR UPDATE

Issue No. 142

September 2003

It has been the law that when a third party has retained an attorney for a custodial defendant, *unbeknownst to the defendant*, that attorney's contacting the police without the defendant's knowledge has no 6th Amendment consequences. The Indiana Supreme Court has modified this rule by adopting the "**duty to inform**" doctrine. In this case, the defendant's wife and brother retained an attorney for the defendant without the defendant's knowledge. The attorney went to the county jail and attempted to speak with the defendant but was repeatedly denied access. The defendant was not informed of the lawyer's presence and didn't ask for an attorney.

Other states recognizing a duty to inform have relied on a factual distinction: whether the attorney seeking access to his client is present at the police station where the suspect is being held, or whether the attorney is simply calling the station. The Indiana Supreme Court then adopted an affirmative duty to inform: law enforcement officials have a duty to inform a custodial defendant immediately when an attorney hired by the suspect's family to represent him is present at the station seeking access to him.

Malinski v. State, 794 N.E.2d 1071 (Ind. 2003).

The second case involves a "**knock and talk**" investigation. Briefly, the facts are that the police had information that the defendant was dealing drugs from a specific room at a motel. Four officers went to the motel room and knocked on the door. All officers were in civilian clothing but were wearing side-arms and had handcuffs and badges. When the defendant answered the door, the lead detective introduced himself and showed the defendant his badge and identification. He stated that he "received a complaint of some drug activity down here. Can we come in and talk to you about it?" The defendant said yes.

Once inside, the detective asked if there were any weapons or drugs in the room. When told no, the detective asked if he could look around for weapons and drugs. The defendant said "no problem." The detective told the defendant he did

not have to give permission, but the defendant told him he could "look around." No weapons were found, but drugs were discovered.

A "knock and talk" investigation involves officers knocking on the door of a house, identifying themselves as officers, asking to talk to the occupant about a criminal complaint, and eventually requesting permission to search the house. If successful, it allows police officers who lack probable cause to gain access to a house and conduct a search. The Indiana Court of Appeals said this procedure might more aptly be named "knock and enter" because it is usually the officers' goal not merely to talk but to conduct a warrantless search of the premises. While not per se unlawful, the procedure "pushes the envelope" and can easily be misused.

There are basically two issues in these situations: the knock and entry, and the consent to search. On the first issue, the general rule is that, absent a clear expression by the owner to the contrary, police officers, in the course of their official business, are permitted to approach one's dwelling and seek permission to question an occupant. However, an unlawful seizure occurs when, taking into account all of the circumstances, the police conduct would communicate to a reasonable person that he was not at liberty to ignore the police presence and go about his business. The court said the "better" practice would be for the police to identify themselves and advise the occupant of his right to deny entry. But the "best" practice would be for the police to obtain written consent prior to entering a residence.

With regard to the consent to search in these situations, courts consider the number of officers present, the age, maturity, intelligence, and experience of the consenting party, the officers' conduct and other circumstances under which the consent was given, and the duration, location, and time of the encounter.

Hayes v. State, 794 N.E.2d 492 (Ind. Ct. App. 2003).