



# POLICE / PROSECUTOR UPDATE

Issue No. 151

June 2004

**Investigatory stops by police** are a recurring theme of the PPU because they represent an important area of the law. Recently, the Indiana Court of Appeals gave us a good discussion of the issue in *Shirley v. State*, 803 N.E.2d 251 (Ind. Ct. App. 2004).

In the early morning, a police officer saw the defendant riding a bicycle erratically. He was weaving between the northbound and southbound lanes of the street and fell off the bicycle two or three times. Concerned that the defendant might be having a health problem or was impaired, the officer asked him as he rode closer if he was all right. The defendant said he was. Noticing that the defendant had a strong odor of an alcoholic beverage on his breath, glassy eyes, slurred speech, and swayed as he spoke, the officer suspected intoxication and asked for identification. The defendant complied. Upon relaying the information to a control operator, the officer learned that the defendant had an outstanding warrant. The officer placed the defendant under arrest pursuant to the warrant. A search incident to arrest discovered an unlabeled pill bottle containing pills for which the defendant had no prescription. The officer described the pills to the control operator and learned they were a Schedule II controlled substance. The defendant contended that the officer had no reasonable suspicion to stop him and that the evidence should be suppressed.

Not every encounter between a police officer and a citizen amounts to a seizure requiring objective justification. To characterize every street encounter between a citizen and the police as a seizure would not enhance any constitutional interest of the citizen and would impose unrealistic restrictions on a wide variety of legitimate law enforcement practices. So long as an individual engaged by the police remains free to leave, the encounter is consensual, and there has been no intrusion upon the person's liberty that would require some particularized and objective justification. Examples of circumstances under which a reasonable person would have believed he

was not free to leave include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request is compelled.

To withstand constitutional scrutiny, an investigatory stop requires the presence of a reasonable suspicion based on articulable facts which would permit a prudent person to believe that criminal activity has or was about to occur. In the case at hand, up to the point that the officer noticed signs of intoxication by the defendant, the encounter was consensual. At the point the officer requested identification, the casual encounter became a stop. This was justified as the officer had reasonable suspicion of criminal activity - public intoxication.

\* \* \* \* \*

When the State relies on **consent to justify a warrantless search**, it must prove the consent was freely and voluntarily given. This in turn is determined from the totality of the circumstances. When the consenter is detained, "totality of the circumstances" includes, but is not limited to, the following: (1) whether the defendant was advised of his *Miranda* rights prior to the request to search; (2) the defendant's education and intelligence; (3) whether the defendant was advised of his right not to consent; (4) whether the defendant has had previous encounters with law enforcement; (5) whether the officer claimed authority to search without consent; (6) whether the officer was engaged in any illegal action prior to the request; (7) whether the defendant was cooperative previously; and (8) whether the officer was deceptive as to his true identity or the purpose of the search. *Meyers v. State*, 790 N.E.2d 169 (Ind. Ct. App. 2003).