



# POLICE / PROSECUTOR UPDATE

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The Court of Appeals recently issued an opinion which provides an opportunity to examine the doctrine of staleness of probable cause in search and seizure law.

Based upon an anonymous tip, police officers searched the trash at the defendant's residence on two occasions, February 10 and February 17. On both occasions, the officers found numerous plant stems and miscellaneous personal papers containing the defendant's name. The plant fragments found on the 10th were sent to the State Police Lab for testing. The test results revealed the plants were marijuana. Regarding the stems found on the 17th, an officer testified that in his opinion they were marijuana. On February 25 (the opinion gave no reason for the eight day delay), police sought and received a search warrant authorizing a search of the defendant's residence for "marijuana and/or paraphernalia and/or sales records pertaining to illegal drug activity." On February 28 the warrant was executed. The police seized live marijuana plants, timers, lights, a CO<sub>2</sub> tank, fertilizer, a brass pipe, marijuana seeds, and other drug paraphernalia. The defendant sought to suppress this evidence, arguing that the eight-day period between when police last found the marijuana fragments and when they sought the search warrant rendered their information too stale to support a probable cause finding. The Court disagreed.

The law requires that the information given to a judge in an application for a search warrant must be timely. Probable cause must be found to exist *at the time* the warrant issues. The facts to support the warrant must be so close in time to the issuance of the warrant to justify a finding of probable cause. However, there is no firm rule as

to how much time may elapse between the obtaining of the facts upon which the warrant is based and the issuance of the warrant.

The character of the criminal activity under investigation is a very important consideration. Where an affidavit recites only an isolated crime, the time between the occurrence and the issuance of the warrant will probably be crucial. For example, when dealing with a substance like drugs, our Supreme Court has held that the purchase of drugs at a residence on one day is not probable cause that drugs will be in the same residence eight days later. On the other hand, where the affidavit or testimony recites criminal activity of a protracted or continuous nature, time is of less significance. Here, the Court stated that the quantity and size of the fragments of marijuana plants suggested "habituating and continuing use of marijuana at the residence." It also suggested that there was ongoing marijuana cultivation at the residence. Both activities would constitute crimes of a "protracted and continuing nature." Therefore, the judge reasonably found probable cause to exist in this case. (The court also noted that the officers here did not seek a search warrant only for marijuana but also for drug paraphernalia and sales records pertaining to illegal drug activity).

The defendant also argued that even if probable cause existed when the search warrant was issued, it had vanished when the warrant was executed three days later. However, because of the continuing marijuana cultivation operation at the residence, the Court of Appeals held that the initial probable cause continued to exist despite the three-day delay.

Breitweiser v. State, \_\_\_ N.E.2d \_\_\_ (Ind. App. 01/22/99).