POLICE / PROSECUTOR UPDATE

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A recent Indiana Court of Appeals case dealt with an illegal **Terry search**. (the stop itself may have been improper as well)

The relevant facts indicate that a police officer responded to a call at an apartment complex, a known high crime area. Upon arrival, he observed Baker walking toward a blue Impala. The officer knew Baker had outstanding warrants for his arrest. Baker fled behind the apartments and the officer pursued on foot, telling a second officer that the Impala needed to be stopped and barred from the apartment complex.

The second officer quickly spotted and stopped the car and advised the occupant to show his hands. The officer returned to assist the second officer and recognized the occupant of the car as the defendant, whom the officer had previously arrested. Both officers testified that the defendant failed to comply with their initial requests to show his hands and that he was "fidgeting around" in the car. The first officer testified that he continuously called for the defendant to "stop moving." The officers approached the car together and asked the defendant to step out of the car. He did not comply until the first officer opened the driver-side door and directed him to step out. Once the defendant was out of the car, the officer conducted a pat-down search of the defendant's person and found crack cocaine and marijuana.

The Court of Appeals stated that "assuming without deciding" that the initial stop of the defendant's car was reasonable, the officers were NOT permitted to order the defendant from the car and conduct a Terry pat-down search. The purpose of a Terry search is not to discover evidence of a crime, but to allow an officer to pursue his investigation without fear of violence. Here, the officers could see the defendant's hands and the interior of the car, and even when he exited the car, they testified that they did not fear for their safety and did not have weapons drawn. The officer testified that he knew the defendant from prior drug arrests, but there was no evidence that the defendant was armed on those prior occasions, resisted arrest, or otherwise presented concerns for officer safety.

But creating perhaps the most significant concern about the legality of the search was that the officer testified that he had previously told the defendant that he was going to search him every time he saw him. In conclusion, the circumstances presented did not warrant a pat-down search. Therefore, the seizure of the defendant's person and his possessions was illegal. Howard v. State, ___ N.E.2d ___ (Ind. Ct. App. 2007).

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With regard to **search (and arrest) warrants**, IC 35-33-5-2(a) plainly states, "no warrant for search or arrest shall be issued *until there is filed with the judge an affidavit. . . .*" Many years ago, our Supreme Court stated that, "merely exhibiting an affidavit to the judge, or executing it before him, is not a 'filing' of the affidavit with the judge." **Filing of the affidavit** is with the Clerk of the Court. The statute requires that the affidavit must be on file not only before a search warrant is executed but before it is issued. Some courts have found "substantial compliance" with the statute when the affidavit is filed a little late. But even these courts "urged law enforcement officers to comply with the requirements of IC 35-33-5-2(a)." Now a Court of Appeals case has said that the language of the statue could not be more clear. It held that failure to comply with the *timely* filing requirement means that the warrant was not supported by "oath or affirmation," and any evidence seized under the warrant is subject to suppression. State v. Rucker, ___ N.E.2d 1240 (Ind. Ct. App. 2007).