INDIANA CONSTITUTIONAL DEVELOPMENTS: A QUIET YEAR

JON LARAMORE*

The most noteworthy aspect of developments in Indiana constitutional law during the survey period may be the absence of truly noteworthy developments. In the eight years the *Indiana Law Review* has surveyed this subject, this year had the fewest significant decisions to report.

As in recent years, Indiana's appellate courts have continued to refine unique state constitutional doctrines in areas such as search and seizure and multiple punishments double jeopardy, but no blockbuster cases arose in those areas. Nor were there many significant cases in other areas of state constitutional jurisprudence.

I. CASES ADDRESSING STRUCTURAL PROVISIONS OF THE INDIANA CONSTITUTION

The most significant case addressing the structural provisions of the Indiana Constitution, and likely the most noteworthy state constitutional case in the public eye during the survey period, was *League of Women Voters of Indiana, Inc. v. Rokita*,[1] a case challenging Indiana's voter identification statute on state constitutional grounds.[2] Indiana's restrictive voter identification law had already withstood a federal constitutional challenge that was ultimately adjudicated in the U.S. Supreme Court.[3]

Indiana's statute requires those who vote in person at the polls on election day to present a government-issued photo identification card with an expiration date.[4] In its opinion, the Indiana Supreme Court pointed out that the plaintiffs in this case presented a facial challenge to the voter identification law and that the Indiana Supreme Court had previously expressed its wariness of such challenges.[5] The Indiana Supreme Court first rejected the plaintiffs' claim that

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* Partner, Baker & Daniels LLP, Indianapolis, Indiana. The author was formerly chief legal counsel to Indiana Governors Frank O'Bannon and Joseph E. Kernan and an adjunct faculty member at Indiana University School of Law—Indianapolis, where he taught state constitutional law.

1. 929 N.E.2d 758 (Ind. 2010).

2. The Indiana Court of Appeals had ruled that the voter identification law was unconstitutional under the equal privileges and immunities clause of the state constitution because its different treatment of mail-in absentee voters was not reasonably related to inherent differences between mail-in absentee voters and in-person voters. League of Women Voters of Ind., Inc. v. Rokita, 915 N.E.2d 151 (Ind. Ct. App. 2009), *trans. granted and opinion vacated*, 929 N.E.2d 783 (unpublished table opinion) (2010); *see also* Jon Laramore, *Indiana Constitutional Developments: Vitality for the Ex Post Facto Clause, But Not the Education Clause*, 43 IND. L. REV. 665, 686-88 (2010).

3. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008).

4. *Rokita*, 929 N.E.2d at 765.

5. *See id.* at 760-61; *see also* Price v. State, 622 N.E.2d 954, 958 (Ind. 1993) (stating that

the voter identification law violated article 2, section 2 by establishing new qualifications for voting.[6] New qualifications may be established only by constitutional amendment, not by legislation.[7] The plaintiffs also argued that the voter identification law was a new property qualification because it is difficult and expensive for some voters to obtain the required identification, which often may be acquired only upon showing a birth certificate and other verification that some persons may not have readily available.[8] In rejecting this argument, the supreme court concluded that the voter identification law did not establish new qualifications for voting; rather, the law provided an additional system for verifying voter registration.[9] "The voter qualifications established in [s]ection 2 of [a]rticle 2 relate to citizenship, age, and residency," the court wrote.[10] "Requiring qualified voters to present a specified form of identification is not in the nature of such a personal, individual characteristic or attribute but rather functions merely as an election regulation to verify the voter's identity."[11]

The court next addressed the plaintiffs' argument that the voter identification law violates article 2, section 2 because it is "not uniformly applicable to all voters."[12] The law applies only to those who vote in person at the polls on election day, not to those who vote by mail-in absentee ballots or those who live in a "state licensed care facility" that also serves as their polling place.[13] The court acknowledged these differences in application but concluded that they "do not undermine the uniformity of the photo identification requirement for in-person voting. They apply only with respect to special alternative voting accommodations in which the photo identification requirement would be impracticable, unnecessary, or of doubtful utility."[14]

The court also rejected challenges to the statute under the equal privileges and immunities clause—article 1, section 23.[15] The plaintiffs assailed the statute under this provision because it applies only to in-person voters, not to absentee mail-in voters or those who live in state licensed care facilities that are also their polling places.[16] Applying its longstanding formula, the court looked first at

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"[o]nce an Indiana constitutional challenge is properly raised, a court should focus on the actual operation of the statute at issue and refrain from speculating about hypothetical applications").

6. *Rokita*, 929 N.E.2d at 767.

7. *Id.*

8. *Id.* at 763-65, 767.

9. *Id.* at 767.

10. *Id.*

11. *Id.*

12. *Id.*

13. IND. CODE § 3-11-8-25.1(a), (e) (2010) (discussing in-person and licensed care facility voting); *id.* § 3-11-10-1.2 (discussing absentee voting).

14. *Rokita*, 929 N.E.2d at 768.

15. *Id.* at 769-72. Article 1, section 23 states: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. 1, § 23.

16. *Rokita*, 929 N.E.2d at 770.

whether any disparate treatment was reasonably related to inherent characteristics distinguishing the disparately treated classes, then at whether the preferential treatment was uniformly applicable to all those similarly situated.[17] The court concluded that there are sufficient inherent differences between in-person voters and absentee voters to support different treatment.[18] Because absentee voters do not appear before any official who can check their identification, the court determined that no voter identification requirement would serve any purpose.[19] The court also did not find that the exception for those living in care facilities created a problem under section 23 because it was at most "a minor and insubstantial disparity."[20] But the court took pains to explain that it was rejecting only the plaintiffs' facial challenge and that any individual who was actually burdened by the voter identification statute still had the right to assert an individual, as-applied claim.[21]

Justice Boehm dissented. He characterized the majority's decision as weighing the problems some voters have in obtaining voter identification against the "perceived benefits in the integrity of the election."[22] He characterized the issue not in terms of what is the proper balance but as "who gets to resolve that issue under the Indiana Constitution."[23] He noted the well-established principle that voter qualifications cannot be prescribed by the general assembly, but only by the constitution itself, and concluded, "I think both precedent and the language of the Indiana Constitution dictate that the voter ID requirement is an unauthorized qualification for casting a ballot."[24]

Justice Boehm went on to explain his view that a significant number of people had difficulty obtaining the identification required by the law and that courts "ordinarily give wide latitude to legislative judgment on matters of reasonable relationship in classifications created by statute. But any limitation on the right to vote surely strikes at one of the core values embodied in the Indiana Constitution."[25] He opined that because of the importance of the right to vote, the judiciary must exercise special care in preserving it, especially when one of the elected branches takes actions that impinge upon it.[26] Justice Boehm concluded that the allegations in the complaint—that many voters lacked the requisite identification and some had been prevented from voting as a result—were sufficient to withstand a motion to dismiss.[27]

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17. *Id.* (citing Collins v. Day, 644 N.E.2d 72, 77, 80 (Ind. 1994)).
18. *Id.* at 770-71.
19. *Id.* at 771.
20. *Id.* at 771-72.
21. *Id.* at 769.
22. *Id.* at 773 (Boehm, J., dissenting).
23. *Id.*
24. *Id.* at 774.
25. *Id.* at 775.
26. *See id.*
27. *Id.* at 776.

In *Wilkes v. State*,[28] a capital case also focused on a structural provision, the Indiana Supreme Court looked at a separation of powers issue. Wilkes argued that the statutorily mandated use of special verdict forms in capital cases violated separation of powers because it conflicted with Indiana Trial Rule 49, which eliminated special verdicts.[29] He also argued that the statutory mandate violated separation of powers by intruding on the judicial sphere.[30] The supreme court rejected the claims, holding that the document required by statute is "qualitatively different from the special verdicts to which Trial Rule 49 refers"[31]—the statutorily required form does not ask for preliminary or subsidiary findings but solicits the jury's findings as to the ultimate facts to be resolved in a capital case.[32] Moreover, those findings are required by the Sixth Amendment in cases addressing the death penalty.[33]

II. DECISIONS ADDRESSING INDIVIDUAL RIGHTS PROVISIONS OF THE INDIANA CONSTITUTION

A. The Ex Post Facto Clause

Indiana's appellate courts continued their recent trend of applying the ex post facto clause in article 1, section 24, most often in the context of laws applying penalties to persons convicted of sex offenses.[34] The Indiana Supreme Court addressed this clause in *Hevner v. State*,[35] a case involving a person convicted of possessing child pornography. At the time of Hevner's offense, the statute had required individuals to register as sex offenders only after they had committed a second offense; after Hevner committed his crime, but before he was sentenced, the statute was amended so that all sex offenders had to register after their first offense.[36] Hevner's sentencing court ordered him to register and declared him to be "subject to the [r]ules for [s]ex [o]ffenders" in the county where he was convicted.[37]

The supreme court applied the analysis it first unveiled in *Wallace v. State* in 2009 and found that the factors implicated by that test led to the conclusion that the additional registration requirement applied to Hevner was punitive in effect and therefore violated the ex post facto clause of the Indiana

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28. 917 N.E.2d 675 (Ind. 2009), *reh'g denied*.

29. *Id.* at 686-87.

30. *See id.* at 687.

31. *Id.*

32. *Id*.

33. *Id*.

34. *See* Laramore, *supra* note 2, at 665-73.

35. 919 N.E.2d 109 (Ind. 2010).

36. *Compare* IND. CODE § 5-2-12-4(a)(13) (2005), *with* IND. CODE § 11-8-8-4.5(a)(13) (2007). The law is currently codified at IND. CODE § 11-8-8-4.5(a)(13) (2010).

37. *Hevner*, 919 N.E.2d at 110 (citation omitted).

Constitution.[38] The supreme court vacated the portion of Hevner's sentence requiring him to register as a sex offender; it left certain other conditions in place as reasonable conditions of probation.[39]

In *Greer v. Buss*,[40] the Indiana Court of Appeals addressed a claim that the Indiana Department of Correction had unconstitutionally imposed a policy requiring persons convicted of certain sex and violent offenses to register for an additional ten-year period once their initial ten-year period on the sex and violent offender registry had expired.[41] The policy apparently required any person convicted of any offense whatsoever after the person's initial ten-year registration period had expired to register for a second ten-year period.[42]

The court of appeals reversed the trial court's dismissal of the action and directed the entry of declaratory relief in plaintiffs' favor.[43] Also relying on *Wallace*, the court of appeals ruled that the department's policy violated the ex post facto clause of the Indiana Constitution by imposing a punishment that had not been in effect when the plaintiffs committed the offenses of which they were convicted.[44] The court of appeals rejected the plaintiffs' claim that the trial court should have certified a class of plaintiffs, but the declaratory relief ordered against the Indiana Department of Correction effectively provided classwide relief.[45]

Brogan v. State[46] also grew out of the *Wallace* line of cases. Brogan filed a motion arguing that under *Wallace*, he was not required to register as a sex offender because the applicable statute did not require registration at the time he committed his crime.[47] He filed the motion in the court where he was convicted, and that court determined that it lacked jurisdiction.[48] The court of appeals affirmed the dismissal for lack of jurisdiction, pointing to a statute that permitted Brogan to file in the county where he resided.[49]

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38. *Id.* at 111-13 (citing Wallace v. State, 905 N.E.2d 371, 378-84 (Ind. 2009), *reh'g denied*).

39. *Id.* at 113. In a similar case, *Blakemore v. State*, 925 N.E.2d 759 (Ind. Ct. App. 2010), the Indiana Court of Appeals vacated the requirement that Blakemore register as a sex offender because no such requirement appeared in the relevant statute at the time he committed his crime. *Id.* at 763. The State argued that Blakemore waived this argument because he pled guilty, but the court of appeals "decline[d] to hold Blakemore 'agreed' to requirements the Code did not impose when he entered into that agreement." *Id.* at 762.

40. 918 N.E.2d 607 (Ind. Ct. App. 2009).

41. *Id.* at 610.

42. *See id.* at 611.

43. *Id.* at 619.

44. *Id.* at 617.

45. *Id.* at 618-19.

46. 925 N.E.2d 1285 (Ind. Ct. App. 2010).

47. *Id.* at 1287.

48. *Id.*

49. *Id.* at 1291 & n.10.

B. Open Courts

Henderson v. Henderson[50] was an appeal from a marriage dissolution. At the final hearing, the trial judge asked if the provisional order could be the framework for the final judgment, and the mother agreed that it could.[51] The father, by contrast, said that he wanted custody of the children.[52] The trial court heard no evidence and directed the mother's counsel to prepare an order tracking the provisional order.[53] The court of appeals concluded that the trial court's conduct violated the open courts clause of article 1, section 12.[54] In the appellate court's view, the trial court deprived the husband of his right to present his case by failing to take evidence before deciding a disputed issue.[55] The court of appeals vacated the dissolution decree and remanded the case for a new hearing.[56]

C. Bail

The Indiana Court of Appeals analyzed issues arising under the bail clause of the Indiana Constitution in two cases. In *Reeves v. State*,[57] the defendant was accused of defrauding several churches in a Ponzi scheme.[58] The trial court set bail at $1,500,000 (with no ten percent cash bail) on the ten charged counts of securities fraud and made no findings on the nine statutorily prescribed considerations.[59] The court of appeals concluded that this amount was excessive bail prohibited by article 1, section 16, basing its decision on the trial court's lack of findings to support the number and the fact that the number was ten times the amount recommended by local rule.[60] The court of appeals was critical of the trial court's failure to make findings, stating that it made review difficult.[61]

In *Rohr v. State*,[62] the trial court denied bail altogether on a charge of murdering a child by engaging in frequent corporal punishment.[63] Rohr had been convicted of the murder, but the conviction was reversed due to the wrongful

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50. 919 N.E.2d 1207 (Ind. Ct. App. 2010).

51. *Id.* at 1210.

52. *Id.*

53. *Id.*

54. *Id.* at 1213. Article 1, section 12 states, in relevant part: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." IND. CONST. art. 1, § 12.

55. *Henderson*, 919 N.E.2d at 1213.

56. *Id.*

57. 923 N.E.2d 418 (Ind. Ct. App.), *on subsequent appeal*, 938 N.E.2d 10 (Ind. 2010).

58. *Id.* at 419.

59. *Id.* at 420-21.

60. *Id.* at 421-22.

61. *See id.*

62. 917 N.E.2d 1277 (Ind. Ct. App. 2009).

63. *Id.* at 1277-78.

exclusion of certain testimony, and the case was set for retrial.[64] Article 1, section 17 states, "Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong."[65] The trial judge had expressed strong skepticism regarding Rohr's bail evidence, which consisted of the victim's mother's statements exculpating Rohr; in fact, she indicated that the victim's mother (also charged with the murder) had changed her story several times already in testimony.[66] Also, the Indiana Supreme Court in the prior appeal had found sufficient evidence that Rohr committed the murder.[67] The court of appeals concluded that the trial court did not abuse its discretion in denying bail.[68]

D. Venue

The Indiana Court of Appeals addressed the constitutional provision guaranteeing venue in the county where a crime allegedly was committed in *Neff v. State*.[69] Neff was convicted of child solicitation for communicating online to set up a sexual liaison with someone purporting to be a twelve-year-old girl.[70] Neff used a computer in Madison County and set up the liaison to occur in Hamilton County.[71] Neff was arrested in Hamilton County at the site of the meeting he had set up.[72] He appealed, arguing that he committed no illegal act in Hamilton County. Because he had sent all online communications while in Madison County, Neff argued that his conviction violated the provision of article 1, section 13 stating that an accused has a right to a trial "in the county in which the offense shall have been committed."[73] The court of appeals reversed the conviction because the crime was completed when Neff sent the email solicitation from his Madison County computer.[74]

The court of appeals went on to rule, however, that Neff could be tried again because there was no double jeopardy bar to retrial.[75] Venue was not an element of Neff's crime, so the reversal did not indicate the State's failure to prove an element.[76] Moreover, believing that there should be incentives for defendants to raise improper venue before trial, the court held that not allowing retrial in these

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64. *Id.* at 1278.
65. IND. CONST. art. 1, § 17.
66. *Rohr*, 917 N.E.2d at 1278.
67. Rohr v. State, 866 N.E.2d 242, 249 (Ind. 2007).
68. *Rohr*, 917 N.E.2d at 1282.
69. 915 N.E.2d 1026 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 792 (Ind. 2010).
70. *Id.* at 1029-30.
71. *Id.* at 1029.
72. *Id.* at 1030.
73. *Id.* at 1032; *see* IND. CONST. art. 1, § 13.
74. *Neff*, 915 N.E.2d at 1034.
75. *Id.* at 1036-37.
76. *Id.*

circumstances would encourage defendants to back-pocket the venue issue and provide incentives for multiple trials.[77]

E. Jury as the Judge of the Law and the Facts in Criminal Cases

In *Sample v. State*,[78] the Indiana Supreme Court vacated a habitual offender enhancement based on a violation of article 1, section 19's directive that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts."[79] After being convicted of attempted murder and other charges, the jury heard evidence that Sample's sentence should be enhanced because he was a habitual offender—that is, he had two prior unrelated felony convictions before the current conviction.[80] The trial court had instructed the jury that it "must" find Sample to be a habitual offender if the State proved beyond a reasonable doubt the existence of the two prior unrelated convictions.[81] The supreme court found the instruction unconstitutional because it "prevented the jury from making an independent and separate decision on habitual offender status"[82] (and the jury was not otherwise instructed on its role as the judge of the law).[83] Article 1, section 19 gives the jury independent authority to determine "'whether the defendant is a habitual offender' even if the State has proven" the prior offenses beyond a reasonable doubt.[84] The supreme court remanded the case for a new habitual offender proceeding.[85]

F. Right to Trial by Jury

A tenant subject to eviction proceedings asserted her right to trial by jury in *Bishop v. Housing Authority of South Bend*.[86] Her landlord sought to evict her because of criminal acts of one of the children in her household.[87] When she did not move out, the landlord sued, and Bishop sought a jury trial.[88] The trial court

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77. *See id.* at 1036.

78. 932 N.E.2d 1230 (Ind. 2010).

79. *Id.* at 1233-34; *see* IND. CONST. art. 1, § 19.

80. *Sample*, 932 N.E.2d at 1231-32.

81. *Id.* at 1231-32 & n.1.

82. *Id.* at 1232 (quoting Parker v. State, 898 N.E.2d 737, 742 (Ind. 1998)).

83. *Id.* at 1232-33.

84. *Id.* at 1232 (quoting *Parker*, 698 N.E.2d at 742).

85. *Id.* at 1234. In *Beattie v. State*, 924 N.E.2d 643 (Ind. 2010), the Indiana Supreme Court reiterated its longstanding position that inconsistent verdicts are insulated from appellate review. *Id.* at 644. As one of the reasons supporting this doctrine, the supreme court cited article 1, section 19 and stated that rather than showing a misunderstanding by the jury, inconsistent verdicts "more likely [show] that the jury chose to exercise lenity, refusing to find the defendant guilty of one or more additionally charged offenses, even if such charges were adequately proven by the evidence." *Id.* at 648.

86. 920 N.E.2d 772, 778 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 819 (Ind. 2010).

87. *Id.* at 776.

88. *Id.*

denied her claim for a jury on the determination of immediate possession[89] and ordered immediate possession to the landlord based on evidence at a hearing, finding it "more likely than not" (the statutory standard) that the lease had been violated.[90] The court of appeals affirmed, finding no violation of article 1, section 20, which provides the right to jury trial.[91] The court of appeals concluded that although the statute permits a jury trial on the ultimate issue, the trial court's denial of a jury on the preliminary determination of possession did not violate the Indiana Constitution.[92] In the court's opinion, "[t]he statutory [preliminary] hearing manifests the inherent power of trial courts to intercede at an early stage—to make a preliminary decision before what could thereafter be a lengthy judicial process."[93]

In *Cutter v. Classic Fire & Marine Insurance Co.*,[94] the court of appeals concluded that a statutory procedure to determine claims in the estate of an insolvent insurer without any jury trial did not violate article 1, section 20.[95] The court of appeals ruled that the claims at issue were entirely equitable, as claims in receivership were equitable before June 18, 1852 (the date the Indiana Constitution fixes for determining whether a right to jury trial is available).[96]

G. Free Expression in the Context of Criminal Acts

The Indiana Court of Appeals addressed two cases raising the free expression clause—article 1, section 9—in the context of prosecutions for disorderly conduct.[97] The applicable doctrine arose in *Price v. State*.[98] In this 1993 case, the Indiana Supreme Court reversed a disorderly conduct conviction, finding that the defendant engaged in protected conduct—in the form of complaints about law enforcement conduct—and that he did so in a way that did not disturb others more than fleetingly.[99]

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89. *See* IND. CODE §§ 32-30-3-1 through -5 (2010).

90. *Bishop*, 920 N.E.2d at 777-78.

91. *Id.* at 779-80. Article 1, section 20 states that "[i]n all civil cases, the right of trial by jury shall remain inviolate." IND. CONST. art. 1, § 20. This provision has been held to protect the right to a jury trial on any claim that was triable to a jury on June 18, 1852. *See* IND. TRIAL R. 38(A).

92. *Bishop*, 920 N.E.2d at 779-80.

93. *Id.* at 779.

94. 926 N.E.2d 1067 (Ind. Ct. App. 2010). The author of this article was counsel for the liquidator in this insurance liquidation case.

95. *Id.* at 1085.

96. *Id.* at 1084-85.

97. Article 1, section 9 states: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." IND. CONST. art. 1, § 9.

98. 622 N.E.2d 954 (Ind. 1993).

99. *Id.* at 964.

In *Dallaly v. State*,[100] the defendant was walking along a road, and police stopped him when they believed they saw him take something from his mouth and throw it on the ground.[101] He resisted providing identification, became "animated," and shouted curses at the police.[102] When he attempted to leave the scene, he was arrested.[103] Dallaly argued that his disorderly conduct conviction should be reversed because he was engaging in protected free speech; he claimed that his comments were "clearly directed at the . . . legality and appropriateness of the police action."[104] The court of appeals concluded that although his speech began as political, "the bulk of Dallaly's speech was . . . an abuse of the right to free speech."[105] His "loud yelling, obstructed . . . the police" and "created a traffic hazard," constituting "more than a mere fleeting annoyance."[106] Because, on balance, his speech was not primarily political, his conviction was affirmed.[107]

Barnes v. State[108]—the other free expression case—arose from a domestic disturbance, and police officers threatened to arrest Barnes unless he stopped yelling at them.[109] When Barnes re-entered his home, he told the police they could not enter.[110] Barnes shoved an officer who attempted to push his way into the home, and Barnes was subsequently tasered, requiring hospitalization.[111] He argued that his disorderly conduct conviction should be reversed because he was engaging in political speech.[112] The officers involved testified that after Barnes proved his identity, he yelled at them to leave because they were not needed.[113] The court of appeals concluded that his speech was therefore political.[114] The court of appeals also concluded that Barnes's loud speech was "[relatively] brief in duration," and if it disturbed anyone, the disturbance was brief.[115] The court of appeals reversed his conviction, concluding "the State failed to prove that Barnes's political expression rose to the level of disorderly conduct."[116]

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100. 916 N.E.2d 945 (Ind. Ct. App. 2009).

101. *Id.* at 948. It turned out to be an apple core. *Id.*

102. *Id.* at 948-49.

103. *Id.* at 949.

104. *Id.* at 951.

105. *Id.* at 954.

106. *Id.*

107. *Id.*

108. 925 N.E.2d 420 (Ind. Ct. App. 2010), *trans. granted, opinion vacated*, IND. R. APP. P. 58.

109. *Id.* at 423.

110. *Id.*

111. *Id.*

112. *Id.* at 426.

113. *Id.* at 427.

114. *Id.* at 427-28.

115. *Id.* at 428-29.

116. *Id.* at 429-30. The court also vacated his conviction for battery on a law enforcement officer (arising from shoving the officer who pushed his way into the house), ordering a new trial. *Id.* at 426. The court of appeals concluded that the trial court erred in not instructing the jury on

H. Double Jeopardy Clause

The Indiana Court of Appeals continued to develop the doctrines emanating from Indiana's double jeopardy clause in article 1, section 14, especially as that provision relates to "multiple punishments" double jeopardy—situations in which several convictions result from one action or brief series of actions.[117] Not only does Indiana apply the same elements test (the federal *Blockburger* test)[118] to evaluate double jeopardy in this context, but it also applies Indiana's own "same evidence" test.[119] This test determines whether each of defendant's convicted crimes is proved with at least one evidentiary element that proves no other crime for which he is convicted.[120]

In *Calvert v. State*,[121] the Indiana Court of Appeals vacated one conviction on double jeopardy grounds.[122] Calvert was convicted of possession of a firearm as a serious violent felon (a Class B felony) and possession of a sawed-off shotgun (a Class D felony).[123] The court of appeals ruled that each of the convictions was "established by proof of one and the same act: his constructive possession of the sawed-off shotgun in the vehicle he was driving."[124] Indiana's "same evidence" test was violated because precisely the same evidence supported both convictions and because the single fact proving the D felony conviction also was used to prove the B felony conviction.[125] The court of appeals therefore vacated the lesser conviction.[126]

In *Baugh v. State*,[127] the court of appeals addressed double jeopardy in the context of the continuing crime doctrine. Baugh, age twenty-six, had sexual

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Barnes's statutory right to reasonably resist the unlawful entry of police into his home. *Id.* at 424-26.

117. *See, e.g.*, Guyton v. State, 771 N.E.2d 1141, 1148-49 (Ind. 2002) (Boehm, J., concurring) (discussing multiple punishments prong of double jeopardy analysis); *see* IND. CONST. art. 1, § 14.

118. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).

119. *See* Richardson v. State, 717 N.E.2d 32, 48 (Ind. 1999).

120. *See Blockburger*, 284 U.S. at 304; *Richardson*, 717 N.E.2d at 48.

121. 930 N.E.2d 633 (Ind. Ct. App. 2010).

122. *Id.* at 642-43.

123. *Id.* at 638. Calvert was also convicted of attempted robbery, a Class B felony. *Id.*

124. *Id.* at 642.

125. *Id.*

126. Judge Kirsch dissented, arguing that the court "misconstrue[d] the actual evidence test set forth by our [s]upreme [c]ourt in *Richardson v. State*." *Id.* at 645 (Kirsch, J., dissenting) (citation omitted). He argued that Calvert committed one crime by possessing a firearm—any firearm, not specifically a sawed-off shotgun—as a serious violent felon, and that he committed another crime by possessing a sawed-off shotgun, which is a firearm that is specifically banned from possession. *Id*. at 645-46. He also argued that the facts of this case showed no violation of the same evidence (or, as he put it, "actual evidence") test. *Id.* at 646.

127. 926 N.E.2d 497 (Ind. Ct. App.), *summarily aff'd in relevant part, vacated in part*, 933 N.E.2d 1277 (Ind. 2010).

relations on multiple occasions with a fourteen-year-old girl over a period of several months.[128] He was convicted of two counts of sexual misconduct with a minor.[129] He argued that the two convictions violated double jeopardy because his actions constituted a continuous crime, and he could not be punished twice for one continuous crime.[130] The court of appeals rejected the argument, finding that his actions took place on separate occasions over a period of months, not in a compressed time and place amounting to a single crime.[131]

Complex rules regarding acquittal and conviction of lesser included offenses influenced the court of appeals's application of double jeopardy principles in *Hoover v. State*.[132] Hoover was charged with murder, felony murder, and felony robbery (which was the predicate offense for felony murder).[133] He was acquitted of murder and convicted of robbery, and the jury hung on the felony murder charge.[134] Hoover argued that Indiana double jeopardy principles precluded his retrial on felony murder, and the court of appeals agreed.[135] The court concluded that the murder acquittal did not bar retrial on felony murder because the acquittal could have been based on a conclusion that Hoover lacked mens rea for murder; thus, retrial would not require proof of a fact necessarily found in Hoover's favor as part of the murder acquittal.[136] But Hoover also was convicted of robbery, and when felony murder results from a killing in the course of a robbery, robbery is a lesser included offense of felony murder.[137]

The court of appeals affirmed the trial court on the robbery conviction but remanded the case to "dismiss the felony-murder count with prejudice."[138] The Federal Constitution does not preclude retrial in these circumstances.[139] A defendant convicted of a lesser included offense cannot be retried on the greater offense without violating double jeopardy principles under Indiana law. But double jeopardy principles in Indiana's statutes bar retrial: Indiana Code section 35-41-4-3 bars a prosecution if there was a former prosecution based on the same facts for the same offense resulting in conviction of a lesser included offense.[140] The court explained, "By its plain language, the statute bars any retrial on a greater offense when the defendant has been convicted of the lesser-included, even where a first jury considered but deadlocked on the greater charge."[141]

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128. *Id.* at 499.
129. *Id.*
130. *Id.* at 502.
131. *Id.* at 502-03.
132. 918 N.E.2d 724 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 795 (Ind. 2010).
133. *Id.* at 728-29.
134. *Id.* at 729.
135. *Id.* at 733, 736.
136. *Id.* at 734.
137. *Id.*
138. *Id.* at 736.
139. *Id.* at 734-35.
140. *Id.* at 735; *see* IND. CODE § 35-41-4-3(a)(1) (2010).
141. *Hoover*, 918 N.E.2d at 736.

I. Search and Seizure

Indiana's appellate courts also continued to refine Indiana's distinct search and seizure analysis under article 1, section 9. The development of this doctrine has been case-by-case, in true common law fashion. Indiana's analysis turns on the reasonableness of law enforcement conduct and mandates balancing the following factors: the degree the search or seizure disrupts the suspect's normal activities; the degree of suspicion or knowledge that a crime was committed; and the extent of law enforcement needs.[142]

The court of appeals also addressed two questions of first impression under article 1, section 11 during the survey period. It held that the federal doctrine of attenuation does not apply to suppression analysis under the Indiana Constitution.[143] It also held that Indiana's unique *Pirtle* rule—requiring officers to tell those in custody that they have a right to counsel before consenting to a search—does not apply when the officer asks for consent to do a pat-down type search.[144]

The Indiana Supreme Court applied section 9 in three cases, often performing a Fourth Amendment analysis as well. In *Shotts v. State*,[145] the defendant was arrested for an outstanding warrant from Alabama. Officers found an unlicensed handgun when they arrested him, leading to additional charges.[146] The arrest was based on information in a national criminal database.[147] The defendant argued that there was no probable cause to arrest him because the Alabama warrant was based on a facially deficient affidavit.[148] The Indiana Supreme Court rejected the defendant's Fourth Amendment claim because the law enforcement officers' actions were within the good faith exception.[149] In its Indiana constitutional analysis, the supreme court also found that the officers acted on a reasonable belief that there was probable cause to arrest the defendant, and the degree of intrusion was justified by the interests at stake.[150]

In *Duran v. State*,[151] the supreme court addressed the police's forceful entry into a defendant's home when it was based solely on uncorroborated information from an anonymous source. Police officers did not locate the suspect; rather, they found wholly unrelated evidence belonging to the defendant.[152] The

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142. Litchfield v. State, 824 N.E.2d 356, 359, 361 (Ind. 2005), *on appeal after remand*, 849 N.E.2d 170 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 589 (Ind. 2006).

143. Trotter v. State, 933 N.E.2d 572, 582-83 (Ind. Ct. App. 2010).

144. Wilkerson v. State, 933 N.E.2d 891, 894 (Ind. Ct. App. 2010).

145. 925 N.E.2d 719 (Ind. 2010).

146. *Id*. at 721-22.

147. *Id.* at 721.

148. *Id.* at 722.

149. *Id.* at 724-26.

150. *Id.* at 726-27.

151. 930 N.E.2d 10 (Ind. 2010).

152. *Id.* at 12-14.

supreme court's account of the officers' attempt to find a suspect portrayed police as clueless—the officers broke down the door of the wrong apartment after someone they happened to encounter on the street said the suspect might be in that apartment.[153] The police did not find the suspect, but they found cocaine and arrested Duran for possession.[154] The supreme court concluded that the search violated both the Fourth Amendment and article 1, section 11 of the Indiana Constitution.[155] On the state claims, the supreme court concluded that the police could not reasonably have believed that the suspect they sought was in the location they broke into because they relied on a blind tip from an anonymous informant.[156] The degree of intrusion was high; it involved breaking into a person's home with drawn weapons.[157] The court thus concluded that the search was unreasonable under the Indiana Constitution and required that the evidence be suppressed.[158]

The Indiana Supreme Court also conducted a fact-sensitive analysis in *State v. Hobbs*,[159] where the State appealed a trial court's grant of a motion to suppress. Here, the officers had a warrant to arrest Hobbs, and they did so at his workplace.[160] When Hobbs did not consent to the search of his car, the officers called in a drug-sniffing dog that indicated that illegal drugs were present.[161] The police then searched the car without a warrant and found a quantity of marijuana.[162] The supreme court held that the search was valid under the Fourth Amendment.[163] Applying the Indiana Constitution, the supreme court concluded that the search was reasonable.[164] Once the dog indicated the presence of drugs, the officers had a high degree of confidence that a crime had been committed, and they had to address the situation before Hobbs's car could be moved.[165] The search was minimally intrusive because Hobbs was already under arrest for a different crime and was not disturbed by the search.[166] The court was unanimous on the Indiana constitutional issue[167], but two justices dissented on the Fourth Amendment issue.[168]

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153. *Id.* at 17.
154. *Id.* at 14.
155. *Id.* at 14-19.
156. *Id.* at 17-18.
157. *Id.* at 18-19.
158. *Id.* at 19.
159. 933 N.E.2d 1281 (Ind. 2010).
160. *Id.* at 1284.
161. *Id.*
162. *Id.*
163. *Id.* at 1286-87.
164. *Id.* at 1287.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 1287-88 (Sullivan, J., dissenting) (opining that the facts of the case "should render the automobile exception unavailable").

In *Lindsey v. State*,[169] the court addressed a vehicle search. An officer saw Lindsey enter a store, brandish a weapon, and run out of the store shortly thereafter.[170] The police subsequently arrested him.[171] One officer approached the car Lindsey had run toward after emerging from the store.[172] The car had tinted windows obstructing the officer from seeing inside, and its door was ajar.[173] The officer opened the door to ensure no one else was inside and saw a police scanner, a holster, and a plastic bag.[174] The officer obtained a warrant before further searching the car.[175] The court of appeals concluded that the search—consisting of opening the car door wider and looking inside—was not unreasonable.[176] In this situation, the police had a high degree of certainty that Lindsey had violated the law, law enforcement's need to locate any possible accomplice was high, and the degree of intrusion was minimal because the car door was already partly open.[177]

The court of appeals addressed the good faith exception in *Rice v. State*,[178] in which police officers sought Rice on a warrant for receiving stolen property. When the police executed a search warrant, they found none of the listed stolen property, but they did find one different item they later learned had been reported stolen.[179] When an officer arrested Rice for possessing that stolen item, he found drugs in her purse.[180] She sought to suppress the evidence, arguing that there had been no probable cause to arrest her. The court of appeals agreed that there was no probable cause for the arrest because nothing connected Rice to the stolen item seen at the house she rented.[181] The court then considered whether the drugs found in her purse—otherwise excluded—were admissible under the good faith exception to the exclusionary rule.[182] Ultimately, the court concluded that although the arresting officer acted in good faith, the officer who obtained the arrest warrant failed to demonstrate in his affidavit any connection between the allegedly stolen item and Rice.[183] Thus, the affidavit was facially deficient and could not serve as the good faith basis for an arrest.[184] The court of appeals

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169. 916 N.E.2d 230 (Ind. Ct. App. 2009), *trans denied*, 929 N.E.2d 783 (Ind. 2010).

170. *Id.* at 233-34.

171. *Id.* at 234.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 241. The court of appeals also found the search valid under the Fourth Amendment. *Id.* at 240.

177. *Id.*

178. 916 N.E.2d 296 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 792 (Ind. 2010).

179. *Id.* at 298.

180. *Id.* at 299.

181. *Id.* at 304.

182. *Id.*

183. *Id.*

184. *Id.* at 304-06.

therefore declined to apply the good faith exception and excluded the evidence of drugs.[185]

Harper v. State[186] addressed a search incident to a traffic stop. Before officers could stop the car they were following, the car pulled up to a motel, and Harper and a companion left the car and walked toward a motel room.[187] Officers asked for permission to search a bag Harper was carrying. Harper gave permission, and the officers found drugs inside the bag.[188] The court of appeals found the officers' conduct unreasonable under the Indiana Constitution.[189] The officers had a reason to stop the car (a burned-out license plate light), but Harper and his companion were cooperative and provided no justification for officers to be suspicious or search them.[190] Because Harper consented to the search, however, he waived any objection to its constitutionality.[191]

Search and seizure involving a juvenile was the subject of *W.H. v. State*.[192] The juvenile was standing on a street corner in downtown Indianapolis with companions during a high-traffic period—the Indiana Black Expo.[193] Uniformed officers stationed where they could observe the crowd saw W.H. reveal what they believed to be a gun in his waistband.[194] Other officers approached W.H. to try to remove him from the crowd for questioning, and when he tried to resist, they physically apprehended him and found a gun in his waistband.[195] Balancing the *Litchfield* factors, the court of appeals found the seizure of W.H. to be reasonable.[196] Specifically, W.H. was in a crowd at a densely populated convention in the heat of the summer.[197] The officers had a legitimate concern that he was carrying a firearm, and he resisted when they tried to separate him from the crowd.[198] Finally, the stop was brief and unintrusive until W.H. tried to resist, and law enforcement's need to maintain a safe environment was very strong.[199]

Chest v. State[200] involved a defendant who refused to provide identification

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185. *Id.* at 305-06.

186. 922 N.E.2d 75 (Ind. Ct. App.), *trans. denied sub nom.* Porch v. State, 929 N.E.2d 796 (Ind. 2010).

187. *Id*. at 77-78.

188. *Id.* at 78.

189. *Id.* at 81.

190. *Id.*

191. *Id.* at 81-82.

192. 928 N.E.2d 288 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 826 (Ind. 2010).

193. *Id.* at 290.

194. *Id.*

195. *Id.* at 290-91.

196. *Id.* at 296-97. The court of appeals also found that the search did not violate the Fourth Amendment. *Id.* at 294-96.

197. *Id.* at 297.

198. *Id.*

199. *Id.*

200. 922 N.E.2d 621 (Ind. Ct. App. 2009).

when he was pulled over for a traffic violation.[201] He was arrested, and officers then searched his car to look for identification.[202] They found his wallet "next to a loaded handgun," and he was convicted of several charges including illegal possession of a handgun.[203] His sole claim on appeal was that the search violated the Indiana Constitution, and the court of appeals agreed.[204] Although Chest had committed a crime, there was no reason for police to believe that evidence of that crime was in his car, so they lacked a reason to search.[205] The degree of intrusion involved in the search was low, and the lack of law enforcement need was even lower; thus, on balance, the search was not reasonable.[206] The court therefore reversed the handgun conviction and remanded "with instructions for the trial court to vacate the conviction and sentence."[207]

The defendant in *Trotter v. State*[208] claimed that evidence gathered in a "warrantless entry into a private residence" should be suppressed.[209] In this case, a police officer responded to a complaint of shots being fired near a residential neighborhood and found a man sitting by a campfire outside a home with weapons visible.[210] The man reported that his companion was inside a nearby home using the bathroom.[211] Police entered the building without knocking and encountered Trotter pointing a rifle at them.[212] He was subdued by a SWAT team and charged with firearm-related felonies.[213] Trotter moved to suppress the weapons found in the search, arguing that there was no probable cause for police to enter the building without a warrant. The court of appeals found the search unreasonable under the Indiana Constitution.[214] Balancing the *Litchfield* factors, the court of appeals found that the police had no reason to believe any law had been violated, and the degree of intrusiveness of the search was "immense" because it involved entering a structure connected to a private residence.[215] Moreover, law enforcement need was low because there was no reason to believe a crime had been committed or anyone was in danger.[216]

On an issue of first impression, the court of appeals also rejected the State's

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201. *Id.* at 622-23.
202. *Id.* at 623.
203. *Id.*
204. *Id.* at 626.
205. *Id.* at 624-25.
206. *Id.* at 624-26.
207. *Id.* at 626.
208. 933 N.E.2d 572 (Ind. Ct. App. 2010).
209. *Id.* at 576-77.
210. *Id.* at 577.
211. *Id.*
212. *Id.* at 577-78.
213. *Id.* at 578.
214. *Id.* at 580-81. The court also invalidated the search under the Fourth Amendment. *Id.* at 579-81.
215. *Id.* at 580-81.
216. *Id.*

argument that the doctrine of attenuation should have allowed the evidence to be admitted because Trotter's act of pointing a firearm "dissipated any taint of the unconstitutional entry."[217] The doctrine of attenuation is federal in origin, and the court of appeals ruled in *Trotter* that "the attenuation doctrine has no application under the Indiana Constitution."[218] The purpose of the attenuation doctrine is to allow evidence to be admitted when illegal police conduct is so attenuated from subsequent discovery of incriminating evidence that the deterrent purposes of the exclusionary rule would not be served.[219] The court concluded that the doctrine should not apply in Indiana constitutional analysis because of Indiana's unique commitment to individual rights and because the *Litchfield* analysis focuses on the totality of circumstances to determine whether law enforcement conduct was reasonable.[220] The court of appeals ruled that the evidence should be suppressed.[221]

Wilkerson v. State[222] concerned the application of Indiana's unique *Pirtle* rule requiring advisement that an individual in custody has a right to consult with counsel before consenting to a search.[223] Police stopped Wilkerson to speak to him about his window tint—which they deemed too dark—after they had been warned that he was suspected of transporting drugs.[224] Wilkerson agreed to be patted down for weapons, and during that action, police felt a baggy in his crotch, which later was found to contain drugs.[225] The court of appeals rejected Wilkerson's argument that because his windows were not so dark as to prevent individuals from being identified within the car, there was no probable cause for the stop.[226] The court of appeals also ruled as a matter of first impression that *Pirtle* did not apply to pat-downs of the sort conducted on Wilkerson because the pat-down took little time, was narrow in scope, and was non-invasive.[227]

J. Sentencing

Finally, Indiana's appellate courts continued during the survey period to review and occasionally revise criminal sentences using their power under article 7, sections 4 and 6. The most noteworthy case in this category this year was the first case in which an appellate court increased a criminal sentence of which a

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217. *Id.* at 581.

218. *Id.* at 583.

219. *Id.* at 581 (quoting Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring)). Indiana applied its own version of the exclusionary rule decades before it was enforced as a matter of federal constitutional law. Callender v. State, 138 N.E. 817, 818-19 (1923).

220. *Trotter*, 933 N.E.2d at 582.

221. *Id.* at 584.

222. 933 N.E.2d 891 (Ind. Ct. App. 2010).

223. *See generally* Pirtle v. State, 323 N.E.2d 634 (Ind. 1975).

224. *Wilkerson*, 933 N.E.2d at 892-93.

225. *Id.* at 893.

226. *Id.*

227. *Id.* at 894.

defendant had sought review, a possibility the Indiana Supreme Court introduced in *McCullough v. State*[228] in 2009. The court of appeals increased a criminal sentence on appeal, but the Indiana Supreme Court vacated the decision on transfer and declined to increase the sentence in its own decision.[229] Professor Schumm fully addresses these Indiana cases in his article on developments in criminal procedure.[230]

228. 900 N.E.2d 745, 749-50 (Ind. 2009).

229. Akard v. State, 924 N.E.2d 202 (Ind. Ct. App.), *reh'g granted for limited purpose of clarification*, 928 N.E.2d 623 (Ind. Ct. App.), *vacated*, 940 N.E.2d 823 (Ind.) (table), *opinion on transfer*, 937 N.E.2d 811 (Ind. 2010).

230. Joel Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 44 IND. L. REV. 1135 (2011).