CRIMINAL LAW UPDATE

Erika Oliphant, Prosecuting Attorney

Monroe County Bench & Bar Conference

February 26, 2021

Double Jeopardy

- Substantive bar to multiple convictions or punishments for the "same offense" in a single trial.
  - As opposed to procedural bar to successive prosecutions for the same offense.
- Fifth Amendment: Federal judiciary uses the "statutory elements" test established in *Blockberger v. United States*, 284 U.S. 299, 304 (1932)
  - Applies a comparative analysis of the statutory elements to determine whether two or more offenses are the "same"
  - Where the same act or transaction violates two distinct statutes, the question is whether each statute "requires proof of a fact which the other does not"

Indiana Constitution

- *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999): analytical variations of both the "statutory elements" test and the "actual evidence" test
  - "actual evidence" test: examines whether – based on the charging information, jury instructions, and arguments of counsel at trial – there's a "reasonable possibility" that the jury used the same evidence to support two or more convictions
  - Two or more offenses are the same offense if with respect to either
    - (1) the statutory elements of the challenged crimes or
    - (2) the actual evidence used to convict
  - the essential elements of one challenged offense also establish the essential elements of another challenged offense

Richardson overruled

- Expressly overruled by *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020):

"The shifting standards and inconsistent application of controlling tests create an unpredictable approach to double jeopardy, ultimately depriving our courts of clear guidance and preventing the Indiana bar – defense counsel and prosecutors alike – from effectively preparing their cases and representing their clients."

Applying the *Wadle* rule

- Two kinds of substantive double jeopardy claims:
  - (1) when a single criminal act or transaction violates a single statute but harms multiple victims
  - (2) when a single criminal act or transaction violates multiple statutes with common elements and harms one or more victims
- "In either circumstance, the dispositive question is one of statutory intent." 151 N.E.3d at 247.
- In *Wadle*, defendant was intoxicated, ran over victim twice, left the scene
  - Charged and conviction of both Level 3 LSA while committing OWI-SBI and OWI-SBI

Step 1.A.: Is multiple punishment permitted by statute?

- Look at the statutory language – Does the language of either statute clearly permit multiple punishment (either expressly or by unmistakable implication)?
  - YES → No double jeopardy (Court may convict on each charged offense)
  - NO → Apply included offenses statutes

- In *Wadle* – look at the statutory language:
  - IC 9-26-1-1.1: an operator of a motor vehicle commits the offense of LSA when he or she knowingly or intentionally leave the scene of an accident without providing the necessary information and assistance – become a level 3 felony when the operator leaves the scene of an accident "during or after the commission of the offense of operating while intoxicated causing serious bodily injury"
  - IC 9-30-5-4: occurs when a person "causes serious bodily injury to another person when operating a vehicle . . . while intoxicated"
  - Conclusion: No statutory language clearly permitting multiple convictions. Must move on to step 1.B.

Step 1.A.: Is multiple punishment permitted by statute?

- Example of a statute that permits multiple punishments:
  - IC 6-7-3-20: "The excise taxes required by this chapter are intended to be in addition to any criminal penalties under IC 35-48-4 [offenses related to controlled substances]."

Step 1.B.: Is either offense an included offense according to IC 35-31.5-2-168?

- Apply included offenses statute – IC 35-31.5-2-168 defines "included offense" – Is either offense an included offense of the other (either inherently or as charged)?
  - NO → No double jeopardy (Court may convict on each charged offense)
  - YES → Look at the facts of the two crimes to determine whether the offenses are the same
- *Wadle*
  - Both statutes involve operating a vehicle while intoxicated resulting in serious bodily injury → Level 5 felony OWI-SBI is included in the offense of Level 3 LSA
  - IC 35-31.5-2-168(3): OWI-SBI differs from LSA "only in the respect that a less serious harm or risk of harm . . . is required to establish its commission."

Step 2: Is it one continuous transaction?

- Were Defendant's actions "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction"? *Walker v. State*, 932 N.E.2d 733, 735 (Ind. Ct. App. 2010).
  - NO → No double jeopardy (Court may convict on each charged offense)
  - YES → The prosecutor may charge the offenses as alternative sanctions only.
    - Judgment may not be entered against Defendant on included offenses pursuant to IC 35-38-1-6.
- *Wadle*
  - No clear legislative guidance as to when one offense begins (OWI-SBI) and the other (LSA) ends
  - The prosecutor made no temporal distinction in either the charging instrument or the jury instructions

Wadle holding

- Wadle's multiple convictions violate the statutory prohibition against substantive double jeopardy.
- "[T]he separate statutory offenses – Level 5 OWI-SBI and Level 3 LSA – present alternative (rather than cumulative) sanctions on which to charge Wadle." 151 N.E.3d at 255.
- "When the defendant is found guilty of both the included offense and the greater offense, the trial court may not enter judgment and sentence for the included offense." *Id.* at 255-56.
- Vacated conviction for Level 5 OWI-SBI

Powell

- *Powell v. State*, 151 N.E.3d 256 (Ind. 2020) decided the same day as *Wadle*
- Deals with a single criminal act or transaction that violates a single statute but harms multiple victims
- Powell fired five or six shots in rapid succession at a vehicle occupied by three people → the jury found Powell guilty of two counts of attempted murder (two victims, one of whom was injured)
  - Appellate court concluded that both convictions violated double jeopardy and vacated one attempted-murder conviction (as to the injured victim)
- The question: whether the same act may be twice punished as two counts of the same offense.

Step 1.A.: Does the statute indicate a unit of prosecution?

- Review the text of the statute itself. Does the statute, whether expressly or by judicial construction, indicate a unit of prosecution?
  - YES → Follow the legislature's guidance
  - NO → Proceed to the second step
- *Powell*
  - IC 35-41-5-1; IC 35-42-1-1: A person commits the offense of attempted murder when he or she, acting with the requisite culpability, "engages in conduct that constitutes a substantial step toward" the "intentional kill of another human being."
  - No express unit of prosecution → turn to other language in the statute to decipher its meaning

Step 1.A.: Does the statute indicate a unit of prosecution?

- Example of statute that indicates a unit of prosecution:
  - IC 35-43-1-1: Under our arson statute, a person who knowingly or intentionally damages property by fire or by explosive means "commits a separate offense for each person who suffers a bodily injury or serious bodily injury."
  - IC 25-34.1-8-12: Each transaction by a real estate appraiser who practices without a license or certification constitutes a separate offense.

Step 1.B.: Is the statute conduct-based or result-based?

- Conduct-based statute: an offense defined by certain actions or behavior and the presence of attendant circumstances
  - E.g., operating a vehicle while intoxicated
  - Crimes defined by conduct permit only a single conviction (double jeopardy)
- Result-based statute: an offense defined by the defendant's actions and the results or consequences of those actions.
  - E.g., murder, manslaughter, battery and reckless homicide
  - Crimes defined by consequence permit multiple convictions when multiple consequences flow from a single criminal act (no double jeopardy).

Step 1.B.: Is the statute conduct-based or result-based?

- *Powell*
  - Despite the lack of a specific result or consequence, the statute clearly contemplates a victim by use of the direct object "another human being."
  - Ambiguous (alternatively conduct or result based) → Rule of lenity: "Unless the facts show that Powell's multiple gunshots amounted to distinguishable offenses, we conclude that the statute permits the prosecution for only a single criminal offense." 151N.E.3d at 268.

Step 2: Is it one continuous transaction?

- Determine whether the facts – as presented in the charging instrument and as adduced at trial – indicate a single offense or whether they indicate distinguishable offenses.
  - Are defendant's actions "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitution a single transaction"?
    - NO → No double jeopardy
    - YES → Court may impose only a single conviction
- *Powell*
  - "singleness of purpose" → "So long as there's sufficient evidence he possessed the requisite *mens rea* to kill both victims by firing his weapon multiple times, both convictions may stand."
    - Powell directly engaged with both of his victims

Powell holding

- "[W]hile our attempted-murder statute contains no clear unit of prosecution, the multiple shots Powell fired – despite their proximity in space and time – amount to two chargeable offenses based on his dual purpose of intent to kill both Travis and Davyn."

Dying Declaration

- *Hackner v. State*, 2021 Ind. App. LEXIS 6 (Ind. Ct. App. 2021): Murder victim, moaning on the floor after having sustained gunshot wounds, was asked by police if "Deshay" shot him; officer testified that murder victim nodded his head in response, and that he took that to mean "yes"
- Hackner objected to admission of this evidence
- Standard of review on appeal: abuse of discretion

Dying Declaration

- Indiana Rule of Evidence 804(b)(2): hearsay exception for dying declaration
  - A statement made by the declarant, "while believing the declarant's death to be imminent, made about its cause or circumstances" is admissible
- To determine declarant's belief that death was imminent:
  - The trial court may consider the general statements, conduct, manner, symptoms, and condition of the declarant, which flow as reasonable and natural results from the extent and character of the wound or state of the illness

Dying Declaration

- Hackner's argument was that the victim's nod was too ambiguous to be considered a nonverbal dying declaration
- Court found that this is not an issue of admissibility – It's a witness credibility issue, which is a question for the finder of fact
  - Goes to weight, not admissibility
  - Holding: No abuse of discretion

Right Against Self-Incrimination

- *Seo v. State*, 148 N.E.3d 952 (Ind. 2020): Seo was placed under arrest, and her iPhone was seized
  - Detective got a search warrant for the phone, but police could not get into the phone with Seo's assistance
  - Detective got a second search warrant to compel Seo to unlock her iPhone
  - Seo refused, and the trial court held her in contempt
  - Seo argued that forcing her to unlock her iPhone would violate her Fifth Amendment right against self-incrimination
  - Trial court stayed its contempt order pending appeal
  - Alleged constitutional violation → de novo review

Right Against Self-Incrimination

- To be protected under the Fifth Amendment, the compelled, incriminating evidence must be testimonial
  - An accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.
  - Physical acts can have a testimonial aspect.
    - When the State compels a suspect to produce physical evidence, the act is testimonial if it implicitly conveys information.
  - "Foregone conclusion exception": Whether the testimonial communications implicit in producing the evidence provide the State with something it does not already know.

Right Against Self-Incrimination

- Holding: The compelled production of an unlocked smartphone is testimonial and entitled to Fifth Amendment protection.
  - State could not show that the foregone conclusion exception applied in Seo's case.
- "Broad spectrum of communication": (1) the suspect knows the password; (2) the files on the device exist; and (3) the suspect possesses those files.

Right Against Self-Incrimination

- "Act of production doctrine": producing documents in response to a subpoena can be testimonial if the act concedes the existence, possession, or authenticity of the documents ultimate produced
- If the government can show that it already knows that the files/documents exist, are in the suspect's possession, and are authentic, then the foregone conclusion exception applies.
  - The contents of the documents do not implicate the Fifth Amendment – the government did not compel their creation

Right Against Self-Incrimination

- Three concerns about extending the foregone conclusion exception to the compelled production of an unlocked smartphone:
  - (1) Such an expansion fails to account for the unique ubiquity and capacity of smartphones;
  - (2) It may prove unworkable in this context; and
  - (3) It runs counter to U.S. Supreme Court precedent.

Erika Oliphant

Monroe County Prosecuting Attorney

eoliphant@co.Monroe.in.us

812-349-2670

2020 Civil Caselaw Update

Kendra G. Gjerdingen
Mallor Grodner LLP

511 S. Woodscrest Drive
Bloomington, IN 47401
(812) 332-5000

101 W. Ohio Street, Suite 1600
Indianapolis, IN 46204
(317) 453-2000

www.lawmg.com

Matters of First Impression in Civil Cases

MALLOR | GRODNER
Attorneys

***Henderson v. New Wineskin Ministries Corporation*, 160 N.E.3d 582 (Ind Ct. App. 2020)**

I.C. § 34-31-7-2 limits duty of nonprofit religious organization to persons who enter their premises with permission

--to warn of hidden dangers

--to refrain from intentionally harming them

Held: "Premises" as used in the statute includes parking lots.

Kluger v. J.J.P. Enterprises, Inc., 159 N.E.3d 82 (Ind. Ct. App. 2020), *reh'g denied*

Home Improvement Contracts Act (HICA) has a $150 contract-price threshold for application of the act.

Satisfied despite contractor failing to invoice homeowners for its work, because the project had "slipped through the cracks."

Held: Contractor's responsibilities under HICA not excused merely because it inadvertently failed to bill the homeowners for the work.

Court also noted contractor had already violated HICA when it commenced work without providing a contract price that had been agreed to by homeowners before it began work on the project.

In re C.G., 157 N.E.3d 543 (Ind. Ct. App. 2020)

Court of Appeals upheld application of the limited new rule created by the Indiana Supreme Court, in *Pfenning v. Lineman*, 947 N.E.2d 392, 403-04 (Ind. 2011), that "a sports participant breaches no duty as a matter of law by engaging in conduct 'ordinary . . . in the sport."

Held: coach was a sports participant engaged in conduct ordinary to the sport of basketball.

McGowen v. Montes,
152 N.E.3d 654 (Ind. Ct. App. 2020)

Held: Stopping and asking if a person who has been involved in an accident needs help is "emergency care" under the Good Samaritan Law.

Clark v. Mattar, 148 N.E.3d 988 (Ind. 2020)

Supreme Court addressed issue of "reluctant juror" in context of challenge for bias under Jury Rule 17(a)(8).

Prospective juror

--stated on his jury questionnaire that he did not want to serve and

--during voir dire stated repeatedly and emphatically he could not render a decision about noneconomic damages

Held: trial court's decision to deny for-cause challenge was illogical, and because Plaintiff was forced to exhaust her last peremptory on this perspective juror, a new trial was appropriate.

***Blackford v. Welborn Clinic,* 150 N.E.3d 687 (Ind. Ct. App. 2020)**

Held: 5-year nonclaim limitation imposed by the Indiana Trust Act tolled due to fraudulent concealment of material medical information.

***Walters v. Corder,* 146 N.E.3d 965 (Ind. Ct. App. 2020)**

Held: Father's biological children retained their status as beneficiaries under trusts established by their great-grandmother even though they were adopted by their stepfather, because the adoption occurred after the settlor's death.

***In re Paternity of M.S.*, 146 N.E.3d 951 (Ind. Ct. App. 2020)**

Held: 6-month period relevant to establishing de factor custodianship not tolled after child custody proceeding had been commenced and concluded.

Estabrook v. Mazak Corporation,
140 N.E.3d 830 (Ind. 2020)

Held: I.C. § 34-20-3-1(b) is a statute of repose that cannot be extended by the manufacturer's post-delivery repair, refurbishment, or reconstruction.

***In re M.S.*,**
140 N.E. 3d 279
(Ind. 2020)

Held: Because trial rules trump statutes on matter of procedure, Trial Rule 53.5 allows extension of the 120-day deadline in I.C. § 31-34-11-1(b) where there is good cause for a continuance and trial court has discretion to grant continuance without the risk of mandatory dismissal for failure to complete factfinding hearing within 120 days.

Schmidt v. Allstate Property and Casualty Insurance Company,
141 N.E. 3d 1251 (Ind. Ct. App. 2020)

Held: Driver's underinsured motorist insurance carrier owes duty of good faith and fair dealing to injured passenger of the insured even if not the policyholder.

MALLOR | GRODNER
Attorneys

_S.H. v. D.W._, 139 N.E. 3d 214 (Ind. 2020)

Held: "Entering one protective order does not, by itself, justify entering a second order—or renewing or extending the first order. . . . [T]he circumstances leading to entry of a prior order generally cannot be the sole basis for entering a new order or renewing or extending the previous one."

Selected Civil Cases

***Hartman v. BigInch Fabricators & Construction Holding Co.*, 148 N.E.3d 1017 (Ind. Ct. App. 2020)**

Discussion of distinction between divorce and other business litigation valuation principles.

- In divorce cases, lack of control and marketability discounts may be applied and trial courts have broad discretion when determining the value of marital property.

Rejection of discounts in a range of compulsory transactions expanded.

- Lack of control and marketability discounts do not apply to compelled return of ownership interests to a controlling party where there is a ready-made market.

MALLOR | GRODNER
Attorneys

River Ridge Development Authority v. Outfront Media, LLC et al.,
146 N.E.3d 906 (Ind. 2020)

"The guardrails of zealous advocacy must leave ample room for a party to make its case. But when a party veers off course by intentionally introducing groundless arguments, harassing other parties, or acting in bad faith, courts can punish the behavior."

MALLOR | GRODNER
Attorneys

Selected Family Law Cases

MALLOR | GRODNER
Attorneys

***In re K.R., J.T.R., J.L.R., & E.R.,* 154 N.E.3d 818 (Ind. 2020)**

Supreme Court addressed the conflict between panels of the Court of Appeals about whether drug test reports fit the records of a regularly conducted activity exception to the hearsay rule pursuant to Indiana Rules of Evidence 803(6) and determined they do.

In re the Support of J.O., 141 N.E.3d 1246 (Ind. Ct. App. 2020)

Father signed a paternity affidavit even though he suspected he was not the child's biological father. Nineteen months later a child support action was initiated by the prosecutor's office and Father tried to rescind the paternity affidavit. Court of Appeals noted prior decisions that recognized where setting aside paternity would leave a child fatherless, the child would be "a *filius nullius*." The paternity statute was created to avoid such an outcome, Father was child's legal father with all attendant legal consequences, and it was too late to find otherwise.

In re J.G., 149 N.E.3d 1192 (Ind. Ct. App. 2020)

I.C. § 31-14-7-1(1) explicitly provides that a husband's marriage only creates a rebuttable presumption of paternity.

MALLOR | GRODNER
Attorneys

***In re B.Y.*,**
159 N.E.3d 575
(Ind. 2020)

Finding of contempt not a substitute for determining best interest.

***In re Adoption of C.A.H.*,**
136 N.E.3d 1126 (Ind. 2020)

A parent's implied consent to the adoption of a child may not be based solely on the parent's failure to appear at a single hearing.

W.M. v. H.T., 157 N.E.3d 1231 (Ind. Ct. App. 2020)

Findings required by the adoption statute to support dispensing with Father's consent to an adoption.

Story v. Story, 148 N.E.3d 1155 (Ind. Ct. App. 2020)

Mediated settlement agreement provided wife would receive 50% of husband's approved vested monthly benefits from the military reserve annuity retirement and entitled to receive her military reserve survivor pension (SVP).

Reservists who leave the military prior to reaching retirement age must wait to receive their military retired pay. Premiums for the SVP were to be deducted from husband's military retired pay. Because SVP started before husband would receive his military retired pay, premiums for survivor coverage during the pre-retirement period "accrue" and would be due when husband started receiving his military retirement pay. That coverage could cost as much as $100,000.00 during husband's life.

Wife filed a request for the trial court's intervention and it ordered that each party should pay one-half of the premium and wife was entitled to receive a portion of husband's post-retirement divided asset, or SVP, as well as the pre-retirement RC-SVP. Court of Appeals affirmed, after determining husband's survivor coverage to wife was effective during husband's pre-retirement period, and that coverage continued until husband's death and provided survivor benefit coverage for wife whether husband dies before or after his retirement age.

Ferrill v. Ferrill, 143 N.E.3d 350 (Ind. Ct. App. 2020)

In exchange for leaving active duty before qualifying for military pension, Husband received Voluntary Separation Incentive ("VSI") payments. Eight years later, dissolution settlement agreement provided Husband would keep his military retirement pension and would pay to wife the sum of $11,000.00 annually from his VSI account.

Husband subsequently returned to active duty. Once he accumulated the 20 years of active duty service required to receive the full amount of the military pension, he was no longer eligible to receive the VSI payments and was required to repay all the VSI monies he had received. Husband stopped making the annual payments of $11,000 and Wife filed a petition for contempt. The trial court found husband in contempt and stated the future payments husband was to pay wife.

Court of Appeals held because the settlement agreement stated that husband's military retirement pension was "his sole and separate property," the trial court erred in ordering husband to pay any of those pension monies to wife and abused its discretion by finding husband in contempt.

Bringle v. Bringle, 150 N.E.3d 106 (Ind. Ct. App. 2020)

Footnote in the business valuation which indicated "shareholder debt" should be included in the marital balance sheet reflected routine accounting practice but did not end trial court's responsibility as to the division of marital property.

The receivable was an obligation that husband owed to a company owned only by him and, hence, to himself. Husband could not be both a debtor and a creditor with respect to the same debt. Because husband was both the debtor and creditor, the liability was inherently unenforceable.

The "shareholder debt" was a contingent liability too speculative and uncertain to be repaid.

***Jones v. Gruca,* 150 N.E.3d 632 (Ind. Ct. App. 2020)**

Requiring the involvement of a parenting coordinator as a prerequisite for future filings did not constitute the trial court improperly delegating its judicial power.

MALLOR | GRODNER
Attorneys

Anselm v. Anselm, 146 N.E.3d 1042 (Ind. Ct. App. 2020)

Trial court erred by ordering Father to pay uninsured medical expenses twice--through the prepayment when he paid his child support obligation (the 6% rule amount) and the actual, full payment when the uninsured healthcare expenses were incurred.

Eldredge v. Ruch, 149 N.E.3d 1200 (Ind. Ct. App. 2020)

Income withholding order may be issued to enforce an educational support order.

Hill v. Cox, 153 N.E.283 (Ind. Ct. App. 2020)

Amount of lump sum social security disability benefits received by child in excess of Father's then-existing child support arrearages must be credited toward any then-existing arrearage on child's medical debt.

Amount of periodic social security disability benefits received by child in excess of Father's child support arrearage must also be credited toward any then-existing arrearage for child's medical debt.

In re L.H., 146 N.E.3d 352 (Ind. Ct. App. 2020)

DCS's failure to place child with Father and requiring Father to complete the ICPC process, which was not required for natural parents, was a procedural error that resulted in the improper termination of Father's parental rights to child.