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IN THE COURT OF APPEALS OF INDIANA

Emery Brown,
Appellant-Defendant, Cross-Appellee,

v.

Brent Eaton, Hancock County Prosecutor,
Appellee-Plaintiff, Cross-Appellant

February 10, 2021

Court of Appeals Case No. 19A-MI-1999

Appeal from the Hancock Superior Court

The Honorable Cody Coombs, Court Commissioner

Trial Court Cause No.

30D01-1705-MI-000929

May, Judge.

[1] Emery Brown appeals following a judgment ordering the forfeiture of $32,284.00 in cash seized by the Fortville Police Department ("FPD") during a

traffic stop of Brown's vehicle.[1] Eaton, in his capacity as the Hancock County Prosecutor ("State"), cross-appeals. Brown raises two issues:

> (1) whether the trial court abused its discretion in admitting Brown's pre-*Miranda* statements to the police; and
>
> (2) whether sufficient evidence supported the trial court's forfeiture order.

On cross-appeal, the State raises a third issue:

> (3) whether the trial court properly excluded evidence obtained from Brown's cell phone.

We reverse and remand.

Facts and Procedural History[2]

[2] On May 11, 2017, Officer Derrick Archor of the FPD was on patrol in his police cruiser and noticed a silver Dodge passenger car with an illegible license plate. Officer Archor followed the silver Dodge and smelled what he believed was the odor of burnt marijuana the entire time he followed the vehicle. Officer Archor then activated his lights and siren to initiate a traffic stop. Before the

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[1] *See* Ind. Code § 34-24-1-1(d) (providing for civil forfeiture of money, negotiable instruments, weapons, communications devices, or any property commonly used as consideration for a violation of Ind. Code ch. 35-48-4).

[2] We held oral argument on this matter remotely via Zoom on December 7, 2020. We appreciate counsel's flexibility in participating in an oral argument in this novel manner and commend counsel on their thorough presentation of the issues.

Dodge pulled over, Officer Archor saw what he believed was a lit cigarette fly out of the driver's side window of the vehicle.

[3] Brown was the sole occupant of the silver Dodge. Officer Archor smelled a strong order of burnt marijuana emanating from the vehicle during the traffic stop. He also observed that Brown's eyes were bloodshot and glossy. Brown told Officer Archor that he was smoking a blunt before Officer Archor pulled him over and that he threw the marijuana cigarette outside the window when he saw the police lights. Four McCordsville police officers and Deputy Nick Ernestes[3] of the Hancock Sheriff's Department also arrived at the scene of the traffic stop. Officer Archor asked Brown to exit his vehicle and conducted a pat down search. Officer Archor discovered a large amount of United States currency in Brown's left cargo pants pocket. The currency was tightly packed together with multiple rubber bands.

[4] Deputy Ernestes noticed the stack of currency and an "older" iPhone[4] sitting on the hood of Officer Archor's police cruiser. (Tr. Vol. II at 64.) Deputy Ernestes asked Brown if the currency belonged to him, and Brown initially said the currency belonged to his girlfriend. Deputy Ernestes testified that Brown told him:

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[3] The spelling of Deputy Ernestes' surname varies throughout the record. We adopt the spelling used in the transcript of the forfeiture hearing.

[4] The record does not state where the officers found the iPhone, but the parties agree Brown possessed the phone at the time of the traffic stop.

> [Brown] was transporting the currency from an abandoned house that his mother owned in Muncie to a, to his girlfriend at a location that he kept bouncing around different scenarios of how he was going to meet her uh to deliver the currency to her so they could build houses for the homeless.

(*Id*. at 65.) Brown gave varying answers when Deputy Ernestes asked him how much money was in the stack of currency. During the traffic stop, Brown's iPhone received multiple incoming calls. Deputy Ernestes counted the currency and discovered it totaled over $30,000. Officers searched Brown's vehicle, but they did not find any contraband or other suspicious items in the vehicle.

[5] Brown failed a field sobriety test designed to detect impairment from marijuana, and Officer Archor placed Brown under arrest. While Officer Archor was driving Brown to the police station, Brown told Officer Archor that he had marijuana on his person. Officer Archor pulled the police cruiser over, and Brown removed approximately two grams of marijuana from between his buttocks. The State subsequently charged Brown with Level 6 felony maintaining a common nuisance,[5] Class A misdemeanor operating a vehicle

[5] Ind. Code § 35-45-1-5.

while intoxicated endangering a person,[6] Class A misdemeanor possession of marijuana,[7] and Class C misdemeanor operating a vehicle while intoxicated.[8]

[6] The Hancock County Circuit Court issued a search warrant on May 17, 2017, authorizing a search of the confiscated iPhone for "documentation of call logs, incoming and outgoing; text messages, incoming and outgoing; documentation regarding subscriber telephone number, pictures and cellular service provider[.]" (State's Ex. 3.) The State filed a civil complaint on May 19, 2017, seeking forfeiture of the money seized during Brown's traffic stop. On May 28, 2017, the FPD delivered the phone to the Fishers Police Department because the FPD did not have the software necessary to unlock the phone. After unsuccessfully trying to unlock the phone and extract data from it, the Fishers Police Department returned the phone, and the FPD sent the phone to the Federal Bureau of Investigation ("FBI"). The FBI also was unsuccessful in performing a forensic analysis of the phone, and the FBI returned the phone to the FPD.

[7] Officer Archor applied to the Hancock County Superior Court for a second search warrant to extract data from the phone on August 11, 2017, and the Hancock County Superior Court issued the second search warrant. The FPD then sent the phone to Cellebrite, a private company used by law enforcement

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[6] Ind. Code § 9-30-5-2(a) & (b).

[7] Ind. Code § 35-48-4-11.

[8] Ind. Code § 9-30-5-2(a).

agencies to access digital data. The FPD delayed sending the phone to Cellebrite for nine days after the court issued the search warrant because the FPD had trouble securing a shipping label. Cellebrite successfully unlocked the phone and downloaded data from it. This data included pictures of marijuana, text message conversations, and a web search for "cuts in cocaine." (Tr. Vol. II at 111.) On September 8, 2017, Cellebrite returned Brown's cell phone and an external hard drive containing the data retrieved from it to the FPD.

[8] On April 5, 2018, in his criminal case, Brown pled guilty pursuant to a plea agreement to Class C misdemeanor operating a vehicle while intoxicated and Class A misdemeanor possession of marijuana. The State agreed to dismiss the remaining criminal counts. The court sentenced Brown to a term of 365 days in the Hancock County Jail, with 359 days suspended to probation.

[9] The court held a bifurcated bench trial in the civil forfeiture action on February 19 and March 19, 2019. At trial, Brown objected to admission of the body cam footage of the traffic stop because the footage contained statements Brown made while in custody and prior to being informed of his *Miranda* rights.[9] Brown also objected on *Miranda* grounds to testimony from Deputy Ernestes and from Officer Archor about what Brown told Deputy Ernestes at the scene of the traffic stop. The trial court overruled Brown's objections.

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[9] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), *reh'g denied*.

[10] The State attempted to introduce into evidence a USB drive containing the data retrieved from Brown's cell phone by Cellebrite. Brown objected on the basis that the data was obtained during an unconstitutional search because the authorities did not timely execute the search warrant, and therefore, the data retrieved from his phone was inadmissible. The trial court sustained Brown's objection, stating:

> I find [Brown's] argument to be pretty persuasive in that we've got rights that we have to protect, constitutional rights we need that you weigh that against the burden of applying for a new search warrant and I think the rights over weigh the burden of applying for that search warrant in the absence of additional guidance from uh, the Court of Appeals or Indiana Supreme Court or from the legislator [sic] in un, clarifying the statute.[10]

(*Id*. at 108-109.) On May 21, 2019, the court entered judgment in favor of the State and ordered forfeiture of the $32,284.00 seized from Brown by the FPD. Brown filed a motion to correct error, which the trial court summarily denied on August 21, 2019.

Discussion and Decision

1. Brown's Statements to Police

[11] Forfeiture actions are civil in nature, and they are tried in accordance with the Indiana Trial Rules. *Mesa v. State*, 5 N.E.3d 488, 494 (Ind. Ct. App. 2014), *reh'g*

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[10] Ind. Code § 35-33-5-7 (2011).

denied, *trans. denied*. Decisions regarding the admission or exclusion of evidence are generally left to the sound discretion of the trial court, and we review such decisions for an abuse of discretion. *Brightpoint, Inc. v. Pedersen*, 930 N.E.2d 34, 38 (Ind. Ct. App. 2010), *trans. denied*. An abuse of discretion occurs if the ruling is clearly against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Hicks v. State*, 5 N.E.3d 424, 427 (Ind. Ct. App. 2014), *reh'g denied*, *trans. denied*.

[12] Brown argues the trial court abused its discretion by admitting his statements from the traffic stop into evidence because his Fifth Amendment right against self-incrimination was violated when officers questioned him regarding the large amount of cash found on his person without first advising him of his *Miranda* rights. Police are required to advise a suspect of his rights pursuant to *Miranda* before subjecting him to custodial interrogation. *Id*. at 428-29. However, officers do not need to advise a person who is not in custody of his rights prior to asking him questions. *Id*. at 429.

> In determining whether a person was in custody or deprived of freedom such that Miranda warnings are required, our ultimate inquiry is whether there is a formal arrest or a restraint of the freedom of movement of the degree associated with a formal arrest. We make this determination by examining whether a reasonable person in similar circumstances would believe he is not free to leave. We examine all the circumstances surrounding an interrogation, and are concerned with objective circumstances, not upon the subjective views of the interrogating officers or the suspect. If the police, by means of physical force or show of authority in some way restrained the liberty of the suspect, we will conclude the suspect was seized and in custody.

Id. (internal citation omitted). However, custody alone does not trigger the requirement to issue *Miranda* warnings. *B.A. v. State*, 100 N.E.3d 225, 233 (Ind. 2018). "'Interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Id*. (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S. Ct. 1682 (1980)).

[13] The State asserts two reasons why Brown's argument should fail. Initially, the State argues *Miranda*'s requirements should not apply to the admission of evidence in a forfeiture proceeding because forfeiture proceedings are civil in nature and the Fifth Amendment of the United States Constitution is meant to protect citizens in criminal prosecutions. However, the State's argument is misplaced for two reasons.

[14] One, while forfeiture proceedings are civil in nature, there is a punitive aspect to such proceedings because the State uses them to confiscate property associated with criminal activity. *State v. Timbs*, 134 N.E.3d 12, 24 (Ind. 2019). Second, the police may not profit from unconstitutional conduct, and both our Indiana Supreme Court and the United States Supreme Court have sanctioned applying the exclusionary rule to bar evidence in forfeiture proceedings. *See Membres v. State*, 889 N.E.2d 265, 269 (Ind. 2008) ("We agree with the trial court and the Court of Appeals that if the search or seizure of Membres's property was unlawful, the turnover order must be reversed."), *reh'g denied*; *see also One 1958*

Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965) (holding the constitutional exclusionary rule applies to forfeiture proceedings).

[15] The State's second argument is that Deputy Ernestes was not required to read Brown his *Miranda* rights before questioning him because, for *Miranda* purposes, a person subjected to a routine traffic stop is not "in custody." *State v. Brown*, 70 N.E.3d 331, 337 (Ind. 2017) (holding brief detention at sobriety checkpoint was not custodial for *Miranda* purposes). Brown, on the other hand, argues he was in custody, and therefore, the officers were required to read him his *Miranda* rights before questioning him.

[16] In *Furnish v. State*, an officer discovered a large amount of money in the defendant's boot while conducting a search incident to arrest. 779 N.E.2d 576, 577 (Ind. Ct. App. 2002), *trans. denied*. The officer asked the defendant where he obtained the money without first advising the defendant of his rights pursuant to *Miranda*, and the defendant admitted he stole the money from a liquor store. *Id*. We held the defendant's response to the officer's question was not admissible because the defendant was handcuffed and in custody at the time and the officer's question was investigatory. *Id*. By the time Deputy Ernestes questioned Brown about the source of the cash and his intentions with it, Brown had been pulled over, had admitted to smoking a marijuana cigarette and throwing it out the window, and had been subjected to a pat down search. He was surrounded by officers in full uniform with their police cruiser lights flashing. Thus, a reasonable person in Brown's circumstances would have believed he was in custody at the time Deputy Ernestes asked about the money,

and the questions were investigatory because they were likely to incriminate Brown. Therefore, the statements should not have been admitted. *See Payne v. State*, 854 N.E.2d 7, 14 (Ind. Ct. App. 2006) (holding pre-*Miranda* statements were inadmissible in criminal trial).

2. Sufficiency of the Evidence

[17] Having determined that the trial court improperly admitted Brown's pre-*Miranda* statements regarding the origin of the large amount of cash Brown possessed, we next determine whether the State nonetheless put forth sufficient evidence to support the trial court's forfeiture order. We apply the same standard of review regarding a sufficiency of the evidence challenge in a forfeiture case as we do in any other civil case. *$100 v. State*, 822 N.E.2d 1001, 1006 (Ind. Ct. App. 2005), *trans. denied*. We consider the evidence in the light most favorable to the verdict and draw all reasonable inferences therefrom. *Id*. We do not reweigh the evidence or reassess witness credibility. *Id*. "A judgment will be reversed only if the evidence leads to but one conclusion and the trial court reached the opposite conclusion." *Johnson v. Blue Chip Casino, LLC,* 110 N.E.3d 375, 378 (Ind. Ct. App. 2018), *trans. denied*.

[18] The possession of large amounts of cash is not in and of itself illegal. *See Lewis v. Putnam Cty. Sheriff's Dep't*, 125 N.E.3d 655, 659 (Ind. Ct. App. 2019) (rejecting State's argument that "there must have been a crime committed in the context of the possession of this much cash"). Nonetheless, money may be subject to forfeiture if it is "(A) furnished or intended to be furnished by any

person in exchange for an act that is in violation of a criminal statute; (B) used to facilitate any violation of a criminal statute; or (C) traceable as proceeds of the violation of a criminal statute." Ind. Code § 34-24-1-1(a)(2) (2015) (amended 2017, 2018, 2019, and 2020).[11] Our Indiana Supreme Court has explained that "a conviction on the underlying criminal activity is not a prerequisite for forfeiture" because the State's burden of proof in a civil forfeiture proceeding is lower than its burden in a criminal action. *Katner v. State*, 655 N.E.2d 345, 348 (Ind. 1995). However, even with the lesser standard of proof, the State must still demonstrate a nexus between the seized property and underlying criminal activity. *Id*. at 349. The forfeiture statute goes on to say:

> (d) Money . . . found near or on a person who is committing, attempting to commit, or conspiring to commit any of the following offenses shall be admitted into evidence in an action under this chapter as prima facie evidence that the money . . . has been used to facilitate the violation of a criminal statute or is the proceeds of the violation of a criminal statute:
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> > (1) IC 35-48-4-1 (dealing in or manufacturing cocaine or a narcotic drug).
> >
> > (2) IC 35-48-4-1.1 (dealing in methamphetamine).

[11] The portions quoted in this paragraph are substantially similar to the language in the current version of the statute.

> (3) IC 35-48-4-2 (dealing in a schedule I, II, or III controlled substance).
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> (4) IC 35-48-4-3 (dealing in a schedule IV controlled substance).
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> (5) IC 35-48-4-4 (dealing in a schedule V controlled substance) as a Level 4 felony.
>
> (6) IC 35-48-4-6 (possession of cocaine or a narcotic drug) as a Level 3, Level 4, or Level 5 felony.
>
> (7) IC 35-48-4-6.1 (possession of methamphetamine) as a Level 3, Level 4, or Level 5 felony.
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> (8) IC 35-48-4-10 (dealing in marijuana, hash oil, hashish, or salvia) as a Level 5 felony.
>
> (9) IC 35-48-4-10.5 (dealing in a synthetic drug or synthetic drug lookalike substance) as a Level 5 or Level 6 felony (or as a Class C felony or Class D felony under IC 35-48-4-10 before its amendment in 2013).

Ind. Code § 34-24-1-1(d) (2015). This subsection creates a rebuttable presumption that money was used to facilitate illegal activity if the money was "found at the same time the person is committing, attempting to commit, or conspiring to commit any of the specifically enumerated drug offenses." *Lipscomb v. State*, 857 N.E.2d 424, 428 (Ind. Ct. App. 2006).

[19] The State contends "that the money in Brown's possession was either a proceed of the sale of an illegal drug or was intended to be furnished for the sale of an

illegal drug[.]" (Appellee's Br. at 47.) However, Brown was not convicted of any of the offenses listed in Indiana Code section 34-24-1-1(d), and therefore, the State was not entitled to the presumption that the money was used to facilitate drug dealing. *See Gonzalez v. State*, 74 N.E.3d 1228, 1231 (Ind. Ct. App. 2017) (holding presumption did not apply when defendant was not convicted of any of the enumerated offenses in Indiana Code section 34-24-1-1(d)).

[20] At the evidentiary hearing, the State did not put forth sufficient evidence to show that drug dealing activity occurred, much less activity sufficient to yield or require over $32,000. The State demonstrated Brown possessed a small quantity of drugs and a large amount of cash at the time of the traffic stop. Officers did not recover any drugs or drug dealing paraphernalia from Brown's vehicle. Officer Archor testified that he smelled the odor of burnt marijuana emanating from the vehicle and Deputy Ernestes testified he smelled both raw and burnt marijuana, but the smell of marijuana, without more, is insufficient to demonstrate drug dealing. *See Edmond v. State*, 951 N.E.2d 585, 591 (Ind. Ct. App. 2011) (noting "[b]ecause the odor of burnt marijuana might linger in a vehicle for a period of time, that odor does not necessarily indicate illegal activity by a current occupant"). The State did not present evidence regarding the quantity of illegal drugs allegedly being trafficked, the number of drug transactions the money allegedly facilitated, the identity of any drug purchasers or suppliers, or the location where any transaction occurred or was intended to occur. Therefore, we hold the State failed to put forth sufficient evidence to

sustain the forfeiture order because it did not establish a nexus between the currency and illegal activity.[12] *See Gonzalez*, 74 N.E.3d at 1232 (holding evidence was insufficient to prove nexus between $810 and possession of marijuana).

3. Cell Phone Data

A. Timeliness of the Execution of the Search Warrant

[21] Notwithstanding our previous holdings, we must address the State's issue on cross-appeal regarding exclusion of the cell phone data from evidence to determine whether remand for a second forfeiture evidentiary hearing is necessary. The State argues that the trial court erred in excluding the cell phone data because the court misinterpreted Indiana Code section 35-33-5-7(b)'s requirement that a search warrant be executed within ten days after being issued. Thus, the State's argument requires us to analyze Indiana Code section 35-33-5-7. As our Indiana Supreme Court has explained:

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[12] In so holding, we have not reached the Eighth Amendment concerns implicated by the forfeiture. In a legal dispute that began as a civil forfeiture proceeding in Grant County, Indiana, the Supreme Court of the United States held the Eighth Amendment's prohibition against excessive fines was incorporated by the Fourteenth Amendment and applies to the states. *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019). On remand, our Indiana Supreme Court held that Indiana's forfeiture statute was at least partly punitive and therefore a "fine" for Eighth Amendment purposes, and the Court remanded Timbs' case back to the trial court to determine if the forfeiture of a vehicle worth more than $40,000 was grossly disproportional to the gravity of Timbs' underlying offense. *State v. Timbs*, 134 N.E.3d 12, 40 (Ind. 2019). Consequently, without knowing the quantity of drugs Brown trafficked, the number of drug transactions that occurred, or the temporal proximity between the transactions and the traffic stop, we cannot determine whether the large forfeiture was proportional to the level of criminal activity. However, the parties did not raise an Eighth Amendment issue in their briefs, and we need not decide the issue as we reverse the trial court's forfeiture order on other grounds. *See Girl Scouts of S. Illinois v. Vincennes Indiana Girls, Inc.*, 988 N.E.2d 250, 254 (Ind. 2013) ("we generally avoid addressing constitutional questions if a case can be resolved on other grounds").

> The first step in statutory interpretation is determining if the legislature has spoken clearly and unambiguously on the point in question. If a statute is clear and unambiguous on its face, no room exists for judicial construction. However, if a statute contains ambiguity that allows for more than one interpretation, it opens itself up to judicial construction to effect the legislative intent. If possible, every word must be given effect and meaning, and no part should be held to be meaningless if it can be reconciled with the rest of the ordinance.

Siwinski v. Town of Ogden Dunes, 949 N.E.2d 825, 828 (Ind. 2011) (internal citations omitted). We will interpret each word in a statute according to its plain and ordinary meaning unless the legislature defines the word otherwise. *Montgomery v. State*, 878 N.E.2d 262, 266 (Ind. Ct. App. 2007). "When the legislature amends a statute, we presume that it intended to change the law unless it clearly appears that the amendment was made only to express the original intention of the legislature more clearly." *Knutson v. State*, 103 N.E.3d 700, 702 (Ind. Ct. App. 2018). "In amending an act, the legislature is presumed to have in mind the history of the act and the decisions of the courts on the subject matter of the legislation being construed." *Stith v. State*, 766 N.E.2d 1266, 1268 (Ind. Ct. App. 2002).

[22] Effective July 1, 2020, the legislature amended Indiana Code section 35-33-5-7 to read, in relevant part:

> (b) Except as provided in subsection (f), a search warrant must be:

> (1) executed not more than ten (10) days after the date of issuance; and
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> (2) returned to the court without unnecessary delay after the execution.
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> * * * * *
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> (f) Notwithstanding section 4 of this chapter,[13] a warrant authorizing a search, testing, or other analysis of an item, tangible or intangible, is deemed executed when the item is seized by a law enforcement officer. A return of a warrant authorizing a search, testing, or other analysis of an item is sufficient if the return contains a statement indicating the item was seized by a law enforcement officer.

Ind. Code § 35-33-5-7 (2020). The State asserts that the amendment to include subsection (f) was a remedial measure intended to clarify the meaning of "executed" in the statute, and therefore, we should apply subsection (f) retroactively. *See N.G. v. State*, 148 N.E.3d 971, 975 (Ind. 2020) (holding amendment to statute clarifying when an offender's waiting period began prior to seeking expungement was remedial and applied retroactively). Brown, on the other hand, argues the plain language of the statute required the officers to complete their search of the cell phone within ten days after the warrant was issued, and officers waited beyond that timeframe to extract data from the

[13] Section 4 requires the officer who executed a search warrant to make a return to the court or judge who issued the warrant indicating the date and time the warrant was served and the items seized. Ind. Code § 35-33-5-4.

phone. He maintains the 2020 amendment that added subsection (f) constituted a change in the law, which cannot be applied retroactively. *See Johnson v. State*, 36 N.E.3d 1130, 1137 (Ind. Ct. App. 2015) (holding amendment to statute regarding trial court's authority to modify a defendant's sentence constituted a substantive change in the law and could not be applied retroactively), *trans. denied*.

[23] We generally do not construe statutes or amendments to statutes to apply retroactively. *N.G.*, 148 N.E.3d at 973. However, there is an exception to this rule when the language of the amendment to a statute is a remedial measure and strong and compelling reasons support retroactive application of the statute. *Id*. New statutory language is remedial if it is "enacted to cure a defect or mischief in the prior law." *Id*. The addition of subsection (f) appears calculated to cure an ambiguity and clarify the original intent of the forfeiture statute. If we apply the trial court's interpretation of the "executed" language in the 2011 statute by analogy to a situation in which police secure a warrant to search an office building and seize thousands of pages of business records, then the officers would have to continuously reapply for search warrants until they finished reviewing all the documents. This would be an absurd result. *See ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1199-1200 (Ind. 2016) (declining to hold a private university's police department was a "public agency" for purposes of Indiana's Access to Public Records Act because doing so would lead to absurd results).

[24] We also find out-of-state authority from Idaho persuasive. An Idaho statute and an Idaho rule of criminal procedure imposed a requirement that police officers execute a search warrant within fourteen days after a magistrate issues the warrant. *Wolf v. State*, 266 P.3d 1169, 1174 (Idaho Ct. App. 2011). Officers seized the defendant's computer soon after the magistrate issued the warrant, but the officers took over fourteen days to extract data from the computer. *Id.* at 1175. In a petition for postconviction relief, the Court of Appeals of Idaho held that a motion to suppress the extracted data would not have been successful. *Id.* Although a forensic report indicated that a search of the defendant's computer was not completed until months after it was seized, the court held that probable cause to search the hard drive did not dissipate while the computer sat in the police evidence locker. *Id.* Like in *Wolf*, whatever evidence of criminal activity existed on Brown's phone at the time officers seized the phone was still present when the officers extracted the data from the phone because Brown did not have access to the phone while it was in police custody and there is no indication the data in the phone changed after it was seized.

[25] For the reasons stated above, we conclude amendment of the statute to include subsection (f) was a remedial measure intended to clarify that a search warrant is considered "executed" for purposes of Indiana Code section 35-33-5-7 when officers seize the items described in the search warrant. We will "construe a remedial statute in a way that effectuates the evident purpose for which it was enacted. And when that purpose is served by retroactivity, strong and

compelling reasons exist." *N.G.*, 148 N.E.3d at 974 (internal citation and quotation marks omitted). Here, retroactivity serves the purpose of efficiency because it eliminates the need for law enforcement to continue reapplying for search warrants while analyzing large troves of evidence. Officers also cannot always anticipate the difficulty involved in de-encrypting an electronic device until after the device is seized. Subsection (f) ensures officers they only need to secure one search warrant for seizing the electronic device. Therefore, we hold the trial court erred in excluding the cell phone data at trial on the basis that officers did not timely execute the search warrant.[14]

B. Constitutionality of the Execution of the Search Warrant

[26] At trial, in addition to arguing the cell phone search did not comply with Indiana Code section 35-33-5-7, Brown asserted the cell phone search was unconstitutional under Article I, Section 11 of the Indiana Constitution. Officers must not only execute a search warrant within the time constraints of Indiana Code section 35-33-5-7, but they must also constitutionally execute the search warrant. *Watkins v. State*, 85 N.E.3d 597, 599-600 (Ind. 2017). Both Article I, Section 11 of the Indiana Constitution[15] and the Fourth Amendment

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[14] At oral argument, Brown stated that had the trial court not excluded the cell phone data on the basis that the FPD untimely executed the search warrant, he would have also objected under Indiana Rules of Evidence 403, 401, and 404. However, we do not opine on whether objections pursuant to those Rules would have required exclusion of some or all of the cell phone data because the objections were not raised before the trial court. *See Jackson v. State*, 728 N.E.2d 147, 155 n.6 (Ind. 2000) (declining to address other arguments raised by the defendant after ordering case remanded back to the trial court).

[15] Article I, Section 11 provides:

to the United States Constitution require a finding of probable cause before the court will issue a search warrant. *Mehring v. State*, 884 N.E.2d 371, 376 (Ind. Ct. App. 2008), *reh'g denied*, *trans. denied*. "In deciding whether to issue a search warrant, the issuing magistrate's task is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place." *Id*. at 376-77. The police may not use a search warrant to engage in a "fishing expedition." *Hester v. State*, 551 N.E.2d 1187, 1190 (Ind. Ct. App. 1990). A search warrant must describe with some specificity the locations to be searched and the items to be seized. *Id*. A search warrant may not give "unbridled discretion to the executing officers." *Id*.

[27] We review the constitutionality of a search warrant's execution by looking at the totality-of-the-circumstances. *Watkins*, 85 N.E.3d at 600. We assess the reasonableness of a search or seizure by balancing: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005). Regarding the first *Litchfield* factor, "a valid warrant means

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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause; supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

that police had probable cause to believe that [the location described in the warrant] contained evidence of a crime." *Watkins*, 85 N.E.3d at 601.

[28] Brown does not argue the search warrants were issued without probable cause, and two separate judges found sufficient probable cause to issue warrants allowing officers to search the cell phone. Therefore, the first *Litchfield* factor weighs in favor of the State. Searching the data of a modern cell phone is intrusive. *See Carter v. State*, 105 N.E.3d 1121, 1125 (Ind. Ct. App. 2018) ("the search was intrusive in nature, as it involved searching a personal cell phone—a device that often contains highly personal information"), *trans. denied*. However, officers have a significant need to faithfully execute search warrants and combat drug trafficking. *See Hardin v. State*, 148 N.E.3d 932, 947 (Ind. 2020) (holding law enforcement officers have a broad need to combat drug trafficking and at least a moderate need to immediately search a suspect's car when the suspect drove into his garage while officers were searching the suspect's home pursuant to a valid warrant). Thus, on balance, we hold the police did not unreasonably execute the search warrant. *See Watkins*, 85 N.E.3d at 602 (holding search warrant was not executed unreasonably under the totality of the circumstances). Consequently, we remand this matter for a new evidentiary hearing because the trial court erred in excluding the cell phone

data.[16] *See Chapman v. State*, 141 N.E.3d 881, 887 (Ind. Ct. App. 2020) (remanding case for new trial due to erroneous admission of evidence).

Conclusion

[29] The State failed to put forth sufficient evidence at trial to establish a nexus between the cash confiscated from Brown and a drug dealing operation, and thus, we reverse the trial court's judgment in favor of the State. However, we remand the matter for a new evidentiary hearing because the trial court erroneously excluded the data retrieved from Brown's cell phone on the basis that officers did not timely execute the search warrant. During that new hearing, the trial court should exclude Brown's pre-*Miranda* statements from evidence.

[30] Reversed and remanded.

Robb, J., and Vaidik, J., concur.

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[16] Brown also asserts that exclusion of the cell phone data was required "under the fruits of [the] poisonous tree doctrine in that the search warrant was the product of a *Miranda* violation." (Appellant's Reply Br. at 11.) However, the fruit of the poisonous tree doctrine is not applicable in this instance. While the Fifth Amendment prohibits the State from using a defendant's unwarned, custodial statements against him in a criminal trial, it does not prohibit the State from using the physical fruits of unwarned but voluntary statements against the defendant. *United States v. Patane*, 542 U. S. 630, 637-38, 124 S. Ct. 2620, 2626-27 (2004).