
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

FRED O. DICKINSON, EXECUTIVE DIRECTOR

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UNITED STATES SUPREME COURT

***Miranda* warnings upheld:**

As a constitutional decision, *Miranda* may not be overruled by an act of Congress, and the ruling and its progeny continue to govern the admissibility of statements made during custodial interrogation in both state and federal courts, the U.S. Supreme Court held. In a 7-2 decision, the court refused to allow its 1966 *Miranda* decision to be superseded by a federal law that allows voluntary confessions even when police fail to give *Miranda* warnings. Criminal defendant Charles Dickerson moved to suppress a statement he had made to FBI agents because he did not receive "*Miranda* warnings" before being interrogated. The trial court agreed, but an appeals court - acknowledging that Dickerson had not received *Miranda* warnings - said a 1968 federal law intending to overrule *Miranda* was satisfied because the statement was voluntary. The court also concluded that *Miranda* was not a constitutional holding, and therefore, Congress could by statute have the final say on the admissibility question. The Supreme Court disagreed. "Congress may not legislatively supersede our decisions interpreting and applying the Constitution. ... Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now," Chief Justice Rehnquist wrote for the court. "*Miranda* announced a constitutional rule that Congress may not supersede legislatively."

[*Dickerson vs. United States*, 6/26/00]

11TH U.S. CIRCUIT COURT OF APPEALS

First Amendment right to videotape police, officials

Citizens have a First Amendment right to photograph or videotape the conduct of police and other public officials on public property, subject only to reasonable time, manner and place restrictions, the 11th U.S. Circuit Court of Appeals said. The court said a lower court erred in concluding that two Cumming, Georgia, residents had no First Amendment right to videotape police actions. "The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest," the court said. However, the 11th Circuit affirmed the lower court's summary judgment in favor of the city, concluding that the couple failed to show that police officials violated that right by preventing them from videotaping police activities.

[*Smith vs. City of Cumming, et al.*, 5/31/00]

First Amendment - permit required for protest

A federal regulation requiring protesters to obtain a permit before speaking out violated the First Amendment rights of nudists objecting to clothing regulations at a Florida beach, the 11th U.S. Circuit Court of Appeals said. The court held that the regulation is unconstitutional on its face as a prior restraint of speech, and reversed the convictions of two naturists who were arrested for protesting without a permit at the Canaveral National Seashore. The court threw out the regulation, which required them to obtain a permit prior to "public expressions of views." The government argued that the permit

scheme was a valid time, place or manner restriction on speech, but the 11th Circuit disagreed. "We hold that a regulation that merely requires a permit to be issued 'without unreasonable delay' without more is unconstitutional, because it fails adequately to confine the time within which the decision maker must act. Because 36 C.F.R. § 2.51 is constitutionally invalid for that reason, the convictions of Frandsen and Morris for failing to obtain a permit under section 2.51 cannot stand," the court said.

[*United States vs. Frandsen and Morris*, 5/25/00]

Civil rights judgment - no monetary loss

A plaintiff may win a civil rights judgment stemming from police officers' conduct in arresting him even if he cannot prove he suffered any monetary loss as a result of the officers' actions, the 11th U.S. Circuit Court of Appeals held. The court reversed a trial judge's order in favor of Georgia officers in a civil rights lawsuit alleging excessive force under 42 U.S.C. §1983. The lower court cited qualified immunity in ruling for the officers on an unlawful arrest claim, and the plaintiff did not challenge that ruling on appeal. The 11th Circuit said it has held that a plaintiff whose constitutional rights are violated is entitled to nominal damages even if he suffered no compensable injury, and ruled for the first time that a §1983 plaintiff alleging excessive use of force is entitled to nominal damages even if he fails to present evidence of compensability. "Because a §1983 plaintiff alleging excessive force may receive compensatory damages for such things as physical pain and suffering and mental and emotional anguish, and because a §1983 plaintiff whose constitutional rights are violated is entitled to receive nominal damages even if he fails to produce any evidence of compensatory damages, we hold that the district court erred in granting judgment as a matter of law," the 11th Circuit said in ordering further proceedings.

[*Slicker vs. Jackson and Fulmer*, 6/21/00]

FLORIDA SUPREME COURT

Constitutionality of statute re: driving without license

The Florida Supreme Court affirmed the constitutionality of the Florida law creating a third-degree felony when a person is convicted for the third time for driving with a canceled, suspended or revoked driver's license or driving privilege (DWLCSR). The court rejected the appeals of 12 separate drivers who claimed the law constituted an improper delegation of legislative power. The defendants alleged that, by allowing a court to withhold an adjudication of guilt, the Legislature had given the judiciary the authority to determine whether a third or subsequent offense would constitute a misdemeanor or a felony. "(I)t is clear that the Legislature intended that a 'conviction' for the purposes of (the statute) include both adjudicated DWLCSR offenses and DWLCSR offenses in which adjudication is withheld," the unanimous court held.

[*Raulerson, et al., vs. State*, 7/13/00]

Broad definition adopted for RICO enterprises

Adopting a broad definition of what constitutes a RICO enterprise, the Florida Supreme Court held that the state needs only to establish the existence of an ongoing organization that functions as a continuing unit. The justices rejected a defendant's argument for a more narrow definition requiring that the organization have an existence separate and independent from the pattern of racketeering in which it engages. The evidence used to establish the pattern of racketeering element of the Racketeering Influenced and Corrupt Organizations statute may also be the one used to establish the enterprise element, the court noted. (R)equiring proof of an ascertainable structure would practically result in many instances in the State having to rely on a codefendant or an inside informant from within the criminal organization in order to prove its case. Without such direct evidence it would become extremely difficult, if not impossible,

for the State to successfully prosecute members of a criminal enterprise under the narrow definition of enterprise," the court said.

Bureau Chief Celia Terenzio and Assistant Attorneys General James J. Carney and Marrett W. Hanna represented the state on appeal.

[*GROSS VS. STATE*, 7/14/00]

2ND DISTRICT COURT OF APPEAL

Enhanced penalties for drug sales near church

The Florida law that enhances penalties for drug crimes committed within 1,000 feet of a church is not unconstitutional and does not affect the religious freedom of the drug dealer, the 2nd DCA held. The court rejected several constitutional claims raised by Kevin Hobby, who was convicted of selling drugs within 1,000 feet of a Haines City church. Hobby argued that the statute regulated constitutionally protected religious conduct, but the DCA disagreed. "Religious freedom is not impacted in this case. The statute only impinges on the act of selling drugs in proximity to a church, which is not constitutionally protected conduct," the DCA said. "(T)he statute has the legitimate goal of deterring criminal drug activity in areas where the public, especially children and the elderly, congregate and its enhanced punishment provisions constitute reasonable and substantial means to promote that goal."

Assistant Attorney General Diana K. Bock represented the state on appeal.

[*Hobby vs. State*, 7/12/00]

Weight threshold for drug trafficking

Applying a significant drug trafficking decision by the Florida Supreme Court, the 2nd DCA concluded that trafficking in oxycodone should be determined by the total weight of pills containing the drug, not just the weight of the oxycodone itself. In affirming a conviction for trafficking in illegal drugs, the DCA acknowledged that its decision conflicts directly with an April ruling by the 5th DCA in *Travis vs. State*. Both courts were attempting to apply the Supreme Court's 1999 holding in *Hayes vs.*

State, which dealt with how to determine whether prescription tablets containing hydrocodone as well as a noncontrolled substance met the statutory threshold for trafficking. The DCA noted that hydrocodone is listed on both Schedule II and Schedule III, but oxycodone is only a Schedule II drug and therefore should be treated differently. "Various prescriptions drugs ... containing a mixture of oxycodone, which is listed only on Schedule II, and a noncontrolled substance (usually acetaminophen) are to be measured by their aggregate weight in determining whether a trafficking amount is present," the DCA said.

Assistant Attorney General Tonja R. Vickers represented the state on appeal.

[*Eagle vs. State*, 7/7/00]

Motion to suppress

A search warrant that fails to establish that stolen property would be found at the defendant's residence or a storage building is devoid of probable cause, the 2nd DCA said. Daniel King pled no contest to burglary and firearms offenses but appealed the denial of his motion to suppress evidence uncovered through the search warrant, which was based on an anonymous phone call. The state argued that even if the search warrant application did not establish probable cause, the seized evidence should be admissible under the good faith exception to the warrant requirement. The DCA disagreed, holding that there was not a substantial basis to conclude that probable cause existed to believe that the stolen property would be found at the places to be searched. "In light of the fact that the search warrant application in this case provided no basis whatsoever for concluding that the stolen property would be found at King's residence or storage building, we cannot say that the officers executing the warrant acted in good faith in doing so," the DCA said.

Assistant Attorney General John M. Klawikofsky represented the state on appeal.

[*King vs. State*, 6/21/00]

3RD DISTRICT COURT OF APPEAL

Reasonable suspicion to conduct traffic stop

An officer's bare suspicion or hunch that three young African-American males driving in a certain area in a late model car must have stolen the vehicle is not enough to provide reasonable suspicion to justify a stop, the 3rd DCA said. A juvenile defendant appealed his adjudication of delinquency. The officer acknowledged that the driver was not violating any traffic laws and a tag check revealed that the vehicle had not been reported stolen. The officer said there was nothing about the vehicle that would have indicated it was stolen, and the defendant contended that the officer lacked reasonable suspicion to support a stop. The DCA agreed. "(T)he officer's observations were insufficient to provide him with a reasonable suspicion to justify a stop; he operated merely on a hunch, a bare suspicion," the DCA said in reversing the adjudication.

Assistant Attorney General Kristine Keaton represented the state on appeal
[*G.D. vs. State*, 5/31/00]

Motion to suppress - impermissible promise

A police detective's statement to a defendant that his cases "could be" consolidated does not rise to the level of an impermissible promise in return for a confession, the 3rd DCA said. The trial court granted Eddie Bobo's motion to suppress his confession to multiple burglaries, and the state appealed. Bobo contended that the police detective made impermissible promises to him in exchange for a confession. At the evidentiary hearing, the detective testified he told Bobo that if he confessed to the various burglaries, the cases "could be" consolidated, but did not say they "would be" consolidated and did not explain what "consolidated" meant. "While it may be hair-splitting, the detective testified he told the defendant that the defendant's cases 'could be,' not 'would be,' consolidated in one group. The detective elsewhere testified that this was explained as being a 'possibility.' This does not rise to the

level of being an impermissible promise in return for a confession," the DCA said.

Assistant Attorney General Howard K. Blumberg represented the state on appeal.
[*State vs. Bobo*, 6/7/00]

Armed robbery with a firearm - starter pistol

To get an armed robbery conviction based on use of a starter pistol, the state must present evidence that the gun is capable of expelling an object, the 3rd DCA said. DeAngelo Evans appealed his convictions for armed robbery with a firearm, arguing that the trial court should have granted his motion for acquittal because the state failed to prove that he used a firearm during the alleged robbery. The DCA noted that the state did not present any evidence that the starter gun expelled a projectile when it was test-fired or pistol could readily be converted to expel a projectile. "The only evidence that the State presented on the issue of whether the starter pistol was a 'firearm' as defined by section 790.011(6) was that when the police officer test-fired the starter pistol, it made a loud 'pop' sound. The only inference that can be drawn from this testimony was that the starter pistol did exactly what it was designed to do, make a loud noise. Because the State's evidence was legally insufficient to establish that the starter pistol was a 'firearm,' we reverse," the DCA said.

Assistant Attorney General Paulette Taylor represented the state on appeal.
[*Evans vs. State*, 6/14/00]

4th DISTRICT COURT OF APPEAL

Parental authority to search minor's room

A non-resident father's consent to search his minor son's room, after he was informed by police that his son was selling drugs and weapons, overrides the son's objection to the search by virtue of his parental authority, the 4th DCA said. The state appealed a trial courts order granting the son's motion to suppress. The juvenile was arrested after officers observed him selling cannabis. During the arrest, the boy's father drove up and, after being informed of his

son's illegal activities, consented to a search of the son's bedroom. The youth objected, arguing that his father did not live with him and his mother and had no authority to be in the home. However, the court noted that the father owned the home and had a key, which he used to let the officers in, and the boy's mother was home at the time did not object to the search. Reversing the suppression order, the DCA concluded that the non-resident father, by virtue of his ownership and authority to enter the home, could consent to a search of the home. The court said the search of the boy's bedroom over his objection was valid based on the father's consent.

Assistant Attorney General Jan E. Vair represented the state on appeal.

[*State vs. S.B.*, 5/31/00]

Motion to suppress - anonymous tip

Police had probable cause to search a house after one trash pull revealed evidence consistent with an anonymous tip that cocaine was being sold in small clear plastic baggies tied with green twisties, the 4th DCA said. Lavinia Baker appealed the denial of her motion to suppress after she was convicted of possessing cocaine and drug paraphernalia. Baker contended that one trash pull revealing contraband, performed based on an anonymous tip, was not probable cause for a search of her home. Baker relied on *Raulerson vs. State*, in which the 4th DCA held that there was no probable cause based on one trash pull made pursuant to an anonymous tip. The DCA said Baker's case is distinguishable from *Raulerson*, in part because of the specific nature of the information provided by the anonymous tip. "(T)he items found in the trash pull, clear baggies and green twisty ties, were consistent with specific information from the caller that this was how appellant was packaging cocaine for sale. There was, accordingly, probable cause," the DCA said.

Assistant Attorney General Frank J. Ingrassia represented the state on appeal.

[*Baker vs. State*, 5/31/00]

Investigatory stop

An investigatory stop based solely on an unconfirmed allegation from an anonymous tipster is unlawful, the 4th DCA held. Barry Solino appealed his conviction and sentence for escape, arguing that the trial court should have granted his motion to suppress the traffic stop that led to escape charges against him. Solino was stopped by Deputy Jacobs after another driver told the deputy he saw a bottle being thrown out of Solino's car. Solino contended that the deputy had no founded suspicion to make a stop, and the DCA agreed. "(T)he driver of the white SUV was nothing more than an anonymous tipster who could not be identified or located and whose information was not corroborated. Thus, there was not sufficient basis to establish a reasonable suspicion for Deputy Jacobs to make an investigatory stop. Since the investigatory stop was unlawful, the information obtained by Deputy Jacobs that led to the arrest was 'fruit of the poisonous tree' and should have been suppressed," the DCA held.

Assistant Attorney General David M. Schultz represented the state on appeal.

[*Solino vs. State*, 6/21/00]

Obstruction of officer

A person whose speech identifies an undercover police officer and frustrates the officer's attempt to make a drug buy is not guilty of obstructing the officer in the lawful performance of a legal duty, the 4th DCA held. The court ruled in favor of a defendant identified only as J.V., who was charged with obstructing an officer after he yelled out to a drug suspect "don't sell anything to that man ... he's a cop." The DCA cited several cases in which people who were not a part of the criminal activity warned others away from undercover officers and had their convictions reversed. Under such circumstances, the DCA said, the person does not commit a crime by warning others.

Assistant Attorney General James J. Carney represented the state on appeal.

[*J.V. vs. State*, 7/19/00]

5th DISTRICT COURT OF APPEAL

Union eligibility for sheriff's staff

Attempting to interpret a six-month-old Florida Supreme Court opinion that could radically alter the collective bargaining rights of certain public employees, the 5th DCA allowed a hearing to determine whether certain employees are managerial and thus ineligible for union protection. The court also asked for further guidance from the Supreme Court, certifying the question of whether sheriff's deputies are categorically excluded from having collective bargaining rights under Chapter 447, F.S., in the wake of the court's January ruling in *Service Employees International vs. Public Employees Relations Commission*. In that case the justices appeared to eliminate the distinction between appointed positions - such as deputy sheriffs or deputy clerks - and regular employees. Instead, the court said the relevant question in determining bargaining unit eligibility is whether the individual is a managerial employee or not. Admitting it was "in a quandary," the court agreed to allow further proceedings for PERC to determine whether certain Brevard County Sheriff's Office employees are eligible for union protection or whether, as the sheriff contends, they should be excluded from the proposed bargaining unit because they are managerial or confidential. "It appears PERC has the power and discretion to determine that some law enforcement officers are managerial, and some are not - based on their jobs and other criteria in the statute. Therefore, some may be entitled to collective bargaining rights under the statute. This determination can only be made after it becomes clear what the actual job descriptions, duties and responsibilities are for the persons in the proposed bargaining unit," the DCA said.

[*Williams vs. Coastal Florida Police Benevolent Association, Inc.*, 6/30/00]

Refusal to take blood alcohol test

When a defendant refuses to take a blood alcohol test designed to determine whether he is intoxicated, his refusal should not be suppressed

because the implied consent law requires that it be admitted, the 5th DCA said. Philip Kline was arrested for DUI and refused to take a blood alcohol test. Kline alleged that the testing machine did not fully comport with administrative rules and therefore a refusal to take the test was inadmissible. The DCA disagreed, concluding that the trial court misinterpreted the implied consent law. "Some of the confusion in the law seems to have arisen because the lower courts have misinterpreted cases where a defendant questioned the breath test's validity after taking the test, with cases where a defendant questioned the test's validity after refusing to take the test," the DCA said.

State Attorney Lawson Lamar and Assistant State Attorney Jason B. Fiesta represented the state on appeal.

[*State vs. Kline*, 6/23/00]

Intent to sell drugs - amount of cocaine

The fact that a defendant was arrested in an apartment with 16 rocks of cocaine is not sufficient, by itself, to establish that he intended to sell the cocaine, the 5th DCA held. The court reversed Reshard Smith's conviction of possession with intent to sell and ordered that the conviction be reduced to possession only. The DCA noted that the arresting officers were only able to testify that it was their personal practice to arrest suspects for intent to sell when the suspect had more than one cocaine rock. "(T)he only circumstantial evidence used to convict Smith of the intent to sell was simply the number of rocks found on Smith and in the apartment where he was pursued," the DCA said. "There was no evidence presented in the instant case that Smith possessed the cocaine for anything other than his own use."

Assistant Attorney General Allison Leigh Morris represented the state on appeal.

[*Smith vs. State*, 7/14/00]

ATTORNEY GENERAL'S OPINION

Municipal ordinance requiring gun locks

In response to a request from state Senator John

Grant, the Attorney General issued an advisory opinion (2000-42, 7/11/00) stating in sum: "This office must presume the validity of a duly enacted ordinance until a court declares otherwise. Section 790.33, Florida Statutes, however, should be construed in view of the statute's purpose which is to preempt local regulations that interfere with an individual's right to bear arms. A requirement that gun owners secure their firearms with a gun lock would not appear to interfere with that right, nor does the existence of statutes requiring that firearms be secured necessarily preclude a municipality from adopting a more stringent standard."

Opinion # 2000-42

Dual office holding - police chief on pension board

In response to a request from the Board of Trustees of the City of Naples Police Officers' Pension and Retirement System, the Attorney General issued an advisory opinion (2000-38, 6/27/00) stating in sum: "A police officer who was elected by his peers to serve as an *ex officio* member of the board of trustees of the city's police pension plan created pursuant to Chapter 185, Florida Statutes, may continue to serve as an *ex officio* member of the board after being appointed to the position of police chief."

Opinion # 2000-38

Approved by: Enoch J. Whitney
General Counsel

Edited by: Keith Tomkiel
Hearing Officer

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