
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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U.S. SUPREME COURT

Constitutionality of drug roadblocks:

Random roadblocks designed to catch drug criminals are an unconstitutional violation of the Fourth Amendment, a divided U.S. Supreme Court held. The justices ruled 6-3 that Indianapolis' use of drug-sniffing dogs at roadblock checkpoints created an unreasonable search because its primary purpose was to detect evidence of "ordinary criminal wrongdoing." The court said other types of roadblocks it has previously approved - those designed to stop illegal aliens or drunk drivers - are still permissible because they are closely related to the problems of policing the borders and ensuring roadway safety. Chief Justice Rehnquist and Justices Scalia and Thomas dissented. "If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life," Justice O'Connor wrote for the court. "(T)he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."

[City of Indianapolis vs. Edmond, 11/28/00]

11th U.S. CIRCUIT COURT OF APPEALS

Motion to suppress - improper investigatory stop:

A suspect's unprovoked flight coupled with his presence in a reputed high crime area provided officers with reasonable, articulable suspicion to conduct an investigatory stop, the 11th U.S. Circuit Court of Appeals said. Darren Gordon was convicted of robbery and firearms offenses in connection with a brutal attack on a gun store clerk. On appeal, Gordon contended that the trial court erred in denying his motion to suppress evidence seized by the police after they stopped him on the night of the robbery. Gordon contended that the police lacked reasonable suspicion required for an investigatory stop, because the only basis for the stop was his presence in a reputed high crime area and his alleged flight after seeing the officers. The 11th Circuit disagreed. "(T)he district court's findings that Gordon ran or walked very quickly toward the adjacent car after making eye contact with the police, and then drove off in that car in the opposite direction from the police, establish Gordon's flight, and that fact coupled with the characteristics of the area adequately justified the stop," the 11th Circuit said.

[*United States vs. Gordon*, 10/23/00]

FLORIDA SUPREME COURT

Burglary - theft of vehicle tire or hubcap:

Removing a hubcap or tires from a motor vehicle does not constitute burglary, the Florida Supreme Court held. The court resolved conflicts among several appellate courts by concluding that removing hubcaps or tires from a vehicle, by itself, does not constitute burglary. Terrell Drew appealed his conviction for

burglary and possession of burglary tools. After being observed removing lug nuts from a vehicle, Drew admitted to removing the lug nuts and the missing tires from the vehicle. However, Drew contended that these undisputed facts did not constitute a prima facie showing of guilt. The Supreme Court agreed. "[A] proper analysis of the offense of burglary must focus both on the act constituting the entry and the intent to commit an offense therein. The language of the burglary statute, as drafted by the Legislature, requires both an entry and the requisite intent to commit a crime within the conveyance. Therefore, it follows that the crime must be one that is capable of being committed within or inside the vehicle. Moreover, it naturally follows that an entry into a vehicle without the requisite intent to commit a separate crime therein is not a burglary," Justice Anstead wrote for the court. "It inherently follows from this interpretation that those acts deserving of a burglary conviction should be distinguished from those that constitute a criminal larceny, such as the removal of an antenna, hood ornament, or hubcap from a vehicle."

Senior Assistant Attorney General Robert J. Krauss and Assistant Attorney General Johnny T. Salgado represented the state on appeal.

[*Drew vs. State*, 11/9/00]

Blood-alcohol test results - implied consent:

Where the state fails to comply with the implied consent statute for DUI prosecutions by not adopting appropriate rules to provide for the preservation of blood samples, it cannot benefit from the statutory presumption of impairment when it cannot ensure that blood samples have been properly preserved, the Florida Supreme Court held. Michael Miles was involved in an automobile accident in which a passenger in another vehicle was killed. Law enforcement officers drew a sample of Miles' blood without his consent, and Miles was charged with several DUI-related offenses. Miles filed a motion to suppress the blood alcohol test results, contending that FDLE regulations governing the testing of blood samples were inadequate and that rule 11D-8.012 of the Florida

Administrative Code does not adequately provide for the proper preservation of blood samples drawn pursuant to the implied consent law. The Supreme Court held that when the state does not meet the standards of the implied consent law, it cannot reap the benefits of the presumption of impairment even if it meets the admissibility standards set by the court in 1992 in *Robertson vs. State*. "Without provisions for proper maintenance of a blood sample, the integrity of the sample is guaranteed only from the point of testing, regardless of the length of time that passes before the FDLE actually performs the testing. In the instant case, we note the testing did not occur until some fourteen days after the blood draw. Under the evidence presented in the trial court, fourteen days without refrigeration may well have impacted the integrity of the blood sample. Hence, as found by the trial court, the absence of maintenance standards renders rule 11D-8.012(3) inadequate and inconsistent with the purpose of the implied consent law as it relates to ensuring the reliability of test results. As such, the State is not entitled to the presumptions of impairment associated with the implied consent statutory scheme," the court said.

Tallahassee Bureau Chief James W. Rogers and Assistant Attorney General Stephen R. White represented the state on appeal.

[*State vs. Miles*, 11/30/00]

1ST DISTRICT COURT OF APPEALS

Requirement for hearing prior to agency action:

A driver is not entitled to a hearing prior to a state agency permanently revoking his license, the 1st DCA said. The DCA reversed a lower court order restoring the license of a man whose license had been revoked after his eighth drunk-driving conviction. The Department of Highway Safety and Motor Vehicles permanently revoked the license in 1993 but then inadvertently issued the man a new license in 1997. The next year the agency learned of the error and issued an order canceling the new license because the

driver was not entitled to it under Florida law. The driver appealed, arguing that his license had been canceled without due process because he was not given an opportunity to be heard prior to the original revocation. The trial court agreed, but the DCA reversed. "Due Process does not require that a hearing must occur *before* license deprivation," the DCA said. The court noted that upon receipt of the 1998 order canceling his license, the driver could have requested an administrative hearing to argue for reinstatement.

[*Department of Highway Safety and Motor Vehicles vs. Davis*, 11/28/00]

2nd DISTRICT COURT OF APPEALS

Anonymous tip – reasonable suspicion:

An anonymous tip that two motorists were exchanging gunfire on the highway, without more, does not give police reasonable suspicion to stop the vehicles and search the passengers, the 2nd DCA said. Osvaldo Rivera appealed his judgments for carrying a concealed firearm and possession of heroin, arguing that the trial court erred in denying his motion to suppress. Tampa police received an anonymous tip that two motorists were seen exchanging gunfire on the highway. The tip provided the tag number of one of the vehicles. Rivera contended that the information did not give police a reasonable suspicion to stop the car because the source of the information was an anonymous tip. The state argued that the case provided an exception to the anonymous tip rule because the danger alleged in the tip was so great that it justified the stop even without a showing of reliability. The DCA disagreed. "Although the motorist reported that two vehicles were exchanging gunfire, police observed nothing to corroborate that claim. There is no evidence that police observed any unusual behavior, such as tailgating or an attempt to communicate. Therefore ... the anonymous tip in this case did not provide a sufficient basis to establish reasonable suspicion to stop the car," the DCA said.

Assistant Attorney General Susan D. Dunlevy represented the state on appeal.

[*Rivera vs. State*, 11/9/00]

Possession of cocaine - illegal search of residence:

Two uniformed officers acted illegally when, responding to a phone tip, they walked into a drug suspect's home without permission and asked him to step outside, the 2nd DCA said. Alton Findley challenged his drug convictions, arguing that the trial court should have granted his motion to suppress evidence. The DCA agreed with Findley's claim that he was illegally detained and his subsequent consent to search was not freely and voluntarily given, because he did not invite the officers into his house and no one else gave permission. Findley said he acquiesced to police authority and that a reasonable man would have felt he had no choice but to comply when the officers asked him to exit his home and consent to a search of the residence. The DCA agreed. "(T)he officers' initial entry into the house without consent was illegal. The fact that the police asked rather than ordered Findley outside is irrelevant," the DCA said. "Because the State did not establish that there was an unequivocal break in the chain of illegal police conduct, Findley's consent to search was not freely and voluntarily given."

Assistant Attorney General Stephen D. Ake represented the state on appeal.

[*Findley vs. State*, 11/8/00]

Possession of marijuana - motion to suppress:

An experienced officer who detects the smell of marijuana emanating from the interior of a car as well as from the driver's clothing does not have probable cause to search the trunk of the vehicle, the 2nd DCA said. Kellen Betz appealed his conviction for felony possession of marijuana, arguing that the trial court erred in denying his motion to suppress. Two separate packages of marijuana were at issue in the case, one found when Betz was frisked and the other found in a metal box, inside a briefcase, when the trunk of Betz's car was searched. Betz was

stopped for a defective headlight, and the officer smelled a very strong odor of marijuana coming from the car window. The officer also smelled marijuana emanating from Betz's shirt. After informing Betz that he was going to search the trunk of the car, the officer patted Betz down for weapons and contraband and discovered a small bag of marijuana. Betz was placed under arrest and his car and trunk were searched. The DCA concluded that Betz's car was validly stopped and the officer had probable cause to search Betz and the interior of the car based on the smell of marijuana. However, the DCA said he trial judge should have suppressed the drugs found in the trunk, concluding that the record failed to establish either that an inventory search actually occurred or that, under the circumstances, a search complying with departmental or other regulations would have been performed. The DCA said the state did not show that the drugs would have been inevitably discovered by law enforcement through other lawful means. Thus, neither an inventory search nor an inevitable discovery theory can validate the search of the trunk, the DCA said.

Assistant Attorney General Richard M. Fishkin represented the state on appeal.
[*Betz vs. State*, 11/17/00]

Motion to suppress - unlawful search:

An officer conducting a valid initial stop and detention of a vehicle does not have probable cause to search the passenger after detecting a residual amount of marijuana in the ashtray, the 2nd DCA held. Jesus Zandate appealed the denial of his motion to suppress drugs seized during a valid traffic stop of a car in which he was a passenger. During the stop, a deputy found the residual amount of marijuana in the ashtray and then searched the driver and Zandate, discovering marijuana and cocaine in Zandate's pocket. Zandate argued that the drugs were seized pursuant to an unlawful search, and the DCA agreed. The DCA concluded that the deputy lacked probable cause to arrest Zandate for possession of marijuana because the evidence did not show that Zandate knew of the presence of the substance in the closed ashtray.

"We find it significant that the deputy's testimony did not indicate that the marijuana in the ashtray had been smoked recently," the DCA said.

Assistant Attorney General Susan D. Dunlevy represented the state on appeal.
[*Zandate vs. State*, 11/3/00]

4th DISTRICT COURT OF APPEALS

Motion to suppress physical evidence:

Drug evidence discovered in plain view by officers investigating a home invasion robbery is admissible, the 4th DCA said. Stephanie Drysdale was charged with several drug counts after officers discovered marijuana cigarettes in an ashtray and marijuana seeds on the carpet while investigating in her home after she had been robbed at gunpoint. The marijuana was suppressed after Drysdale contended that her consent was limited to allowing officers to dust for fingerprints and take pictures as part of their investigation of the home invasion. The state appealed, arguing that the marijuana evidence was found in plain view by the officers during a consensual search of Drysdale's residence. The DCA agreed with respect to the marijuana seeds found on the carpet, but not the cigarettes. "The trial court correctly found that Drysdale's consent was limited to a crime scene investigation. As a result, that consent did not extend to a narcotics officer, who was dispatched to the residence to search for drugs and was not aware that a home invasion robbery had occurred. The limited consent given by Drysdale made his entry unlawful and the plain view doctrine does not support the seizure of the marijuana cigarettes (he) found. They were properly suppressed," the DCA said. Another detective who received Drysdale's permission to enter the home, including the living room, to dust for prints and take pictures was lawfully in the living room when he saw the marijuana seeds on the floor, the DCA said.

Assistant Attorney General August A. Bonavita represented the state on appeal.
[*State vs. Drysdale*, 11/8/00]

Concealed firearm - consensual police encounter:

A driver's acknowledgment during a consensual police encounter that he has a firearm in the car does not, on its own, create a well-founded, articulable suspicion of criminal activity to justify a search of the vehicle, the 4th DCA said. An officer stopped Frank Leahy's vehicle to investigate a missing license tag, and Leahy's vehicle was not searched during the stop. After the stop had concluded and Leahy and the officer were returning to their vehicles, the officer asked Leahy whether he had any drugs or guns in the car. Leahy said he had a gun in his vehicle, and a search by the officer turned up a loaded, unholstered weapon. The officer arrested Leahy for failing to have a concealed weapons permit, and Leahy was convicted of carrying a concealed firearm. The DCA reversed the conviction. "(T)he only information available to (the officer) prior to the search of appellant's vehicle was that appellant had a firearm in the car. Without additional information, such as whether appellant had a concealed weapons permit, or whether he was a convicted felon, or any other fact which would make appellant's possession of the firearm illegal, (the officer) did not have a reasonable suspicion sufficient to justify a search of the vehicle. As such, the search was unconstitutional, and the trial court should have granted appellant's motion to suppress," the DCA said

Assistant Attorney General Lara J. Edelstein represented the state on appeal.

[*Leahy vs. State*, 11/1/00]

Anonymous tip – police corroboration:

An anonymous tip that an individual is about to conduct a drug transaction coupled with an officer's own personal knowledge that the individual is capable of violence is sufficient to justify a stop and frisk of the individual, the 4th DCA said. Jose Campuzano appealed his conviction and sentence for possession of cocaine with intent to sell. Campuzano contended that the trial court erred by denying his motion to suppress evidence seized after he

was detained and patted down by a police officer responding to an anonymous tip. Officer Dominique Fusca received an anonymous call that Campuzano would be conducting a drug transaction and would have 28 grams of cocaine in his pocket. The caller also indicated who Campuzano was going to meet as well as the year, make, model, and color of the car he would be driving. The DCA held that the stop, pat down and seizure met constitutional requirements, concluding that the anonymous tip gave descriptive details and predicted Campuzano's movements. Officer Fusca's reasonable suspicion was based not only on his interception of a potential drug buy, but also on his own personal experience that Campuzano was capable of resorting to violence to avoid detention or apprehension, the DCA said.

Assistant Attorney General Michael J. Neimand represented the state on appeal.

[*Campuzano vs. State*, 11/8/00]

Warrantless search of motel room:

Exigent circumstances did not justify the warrantless search of a suspect's motel room despite the fact that he ran to the bathroom, flushed the toilet, and started the shower when an officer knocked on the door and identified himself, the 4th DCA said. Antonio Rebello was convicted of possession of cocaine and appealed the denial of his motion to suppress. At the suppression hearing, the state presented evidence that police received information that Rebello was supplying cocaine from a motel room. Officers went to the room and knocked on the door, and Rebello opened the latched door two or three inches. When one officer identified himself, Rebello ran to the bathroom, flushed the toilet, and started the shower. The officer then kicked the door open and discovered Rebello kneeling over the toilet with his hand inside the bowl. The officer found cocaine in the base of the toilet. Rebello argued that as a matter of law there were no exigent circumstances justifying the warrantless search of the hotel room. The DCA agreed, citing its 1996 decision in *Levine vs. State* in concluding that even when they have probable cause, police

officers may not enter a dwelling without a warrant absent consent or exigent circumstances. Police may not create exigent circumstances by their own conduct (i.e., identifying themselves as police officers), the DCA added.

Assistant Attorney General Jan E. Vair represented the state on appeal.
[*Rebello vs. State*, 11/22/00]

Felony DUI:

Multiple prior DUI convictions arising from one episode do not qualify as predicate offenses under the felony DUI statute, the 4th DCA said. Juan Lainez was charged with felony DUI, pursuant to section 316.193 F.S., based on five prior DUI convictions arising from a single episode involving a single traffic accident. Lainez argued that since all of his prior DUI convictions arose out of one episode rather than separate events, they should not qualify as predicate offenses for a charge of Felony Driving Under the Influence. The DCA agreed, relying on its 1994 decision in *Jackson vs. State*. The court said DUI laws contemplate an overall scheme that increases the penalties based on the number of times the defendant drives under the influence, not based on the "happenstance consequence" of one episode of driving under the influence.

Assistant Attorney General Claudine M. LaFrance represented the state on appeal.
[*State vs. Lainez*, 11/22/00]

5TH DISTRICT COURT OF APPEALS

Canine alert - possession of cannabis:

A canine alert gives an officer probable cause to search a vehicle regardless of who owns the vehicle or how close or far the owner is from the vehicle, the 5th DCA said. Michael Hill was charged with drug possession and resisting an officer without violence. The trial judge suppressed marijuana found in Hill's vehicle after his arrest and the state appealed, arguing that the search and seizure of Hill's vehicle was valid based on all the facts of the case. The state specifically argued that Hill's statement to an

onlooker about his car not being at the scene was sufficient to tip off the investigating deputies that his car may, in fact, have been at the scene. The state also argued that Hill's prior involvement in what appeared to be a narcotics sale gave rise to a reasonable assumption that his car would contain narcotics. Hill contended that the deputies never saw him in or near his car, and that there was no probable cause to search his car without a warrant. The DCA disagreed. "The points that apparently concerned the trial judge, officer safety and the possibility of destruction of the evidence, do not support his finding that a warrant should have been secured because of the automobile exception in conjunction with the canine alert. ... (T)he canine alert gave probable cause to search the automobile irrespective of its ownership or the proximity of the owner," the DCA said.

Assistant Attorney General Carmen F. Corrente represented the state on appeal.
[*State vs. Hill*, 11/3/00]

FLORIDA ATTORNEY GENERAL

Law Enforcement Officers' Bill of Rights:

In response to a request from the Orlando Chief of Police, the Attorney General issued an advisory opinion (2000-64, 11/13/00) stating in sum: "1) Section 112.533(2)(a), Florida Statutes, as amended, which provides that the officer who is the subject of a complaint may review all statements, regardless of form, made by the complainant and witnesses immediately prior to the beginning of the investigative interview, does not prescribe the order in which interviews during the investigation must be conducted. Thus, a policy whereby the officer is interviewed first would not violate this subsection; 2) Section 112.533, Florida Statutes, applies to the receipt and processing of all complaints by any person, whether within or outside the agency."

Confidentiality of investigative files:

In response to a request from State Attorney for the Eleventh Judicial Circuit, the Attorney General issued an advisory opinion (2000-66,

11/17/00) stating in sum: "The confidentiality provisions of section 112.533, Florida Statutes, do not exempt an inactive criminal investigative file from inspection and copying pursuant to section 119.07, Florida Statutes, while an active internal affairs investigation is pending concerning the same complaint."

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