
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

FRED O. DICKINSON, EXECUTIVE DIRECTOR

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11TH U.S. CIRCUIT COURT OF APPEALS

Warrantless searches of bus passengers:

Two bus passengers' consent to search their luggage and themselves was involuntary and unconstitutional where three agents boarded the bus and showed their authority by holding up badges and questioning passengers individually, the 11th U.S. Circuit Court of Appeals said. Christopher Drayton and Clifton Brown Jr. were convicted on cocaine charges. They appealed, contending that the trial court erred in denying their motions to suppress the cocaine because their consent was not sufficiently free of coercion to serve as a valid basis for a search. The 11th Circuit agreed. "Although there was no general show of authority at the front of the bus in this case, there was a specific show of authority passenger-by-passenger. Officer Lang approached the defendants with his badge held up in his hand, leaned over with his face 12-18 inches from Drayton's, and told the defendants that he was conducting a bus interdiction, looking for drugs and illegal weapons. We do not believe that a passenger-specific show of authority is any less coercive than a general bus-wide one," the 11th Circuit said.

[*U.S. vs. Drayton*, 10/24/00]

FLORIDA SUPREME COURT

Attempted second-degree murder:

The crime of attempted second-degree murder does exist in Florida, the Florida Supreme Court held. By a narrow 4-3 margin, the justices rejected the appeal of Darnell Brown, who was convicted of attempted second-degree murder and argued on appeal that this crime is a nonexistent offense. The majority disagreed, citing the court's 1999 holding in Brady vs. State. Justice Harding dissented, joined by

Justices Anstead and Pariente. "(B)ecause almost every jurisdiction that has considered this issue has concluded that there is no crime for attempted depraved-mind murder, I believe this Court should follow suit. This does not mean that the defendant in the present case has not committed a crime; the defendant would still be guilty of aggravated battery, a second-degree felony. But I do not agree with the majority that the defendant can be found guilty of attempted second-degree murder because it seems that such a crime is logically impossible," Justice Harding wrote.

Assistant Attorneys General Belle S. Schumann and Wesley Heidt represented the state on appeal.

[*Brown vs. State*, 10/05/00]

1ST DISTRICT COURT OF APPEAL

Motion to suppress:

Whether an officer has a founded suspicion of criminal activity justifying a seizure must be determined by the totality of the circumstances, the 1st DCA said. The state appealed a trial court's order granting Robert Gandy's motion to suppress cocaine retrieved from his vehicle during an investigatory stop in conjunction with a drug surveillance operation. Gandy contended, and the trial court agreed, that the officers lacked reasonable suspicion to conduct an investigatory stop. The state appealed, arguing that the trial court's conclusion of law that the officers lacked reasonable suspicion for the investigatory stop was inconsistent with the findings of fact. The DCA agreed and reversed, concluding that the totality of the facts and circumstances combined to provide the officers

with reasonable suspicion to ask Gandy and his passenger to exit their vehicle.

Assistant Attorney General Bart Schneider represented the state on appeal.

[*State vs. Gandy*, 9/25/00]

2ND DISTRICT COURT OF APPEALS

Motion to suppress - possession of narcotics:

A narcotics-sniffing dog's alert to the driver's door and seat of a suspected stolen vehicle gave an officer probable cause to search the vehicle but not the driver, the 2nd DCA said. Neil Bryant pleaded no contest to cocaine possession, but appealed the denial of his motion to suppress physical evidence against him. While Bryant was driving his friend's vehicle, he began a consensual encounter with a sheriff's deputy. Bryant informed the deputy that the vehicle had been borrowed from a friend, but the deputy suspected that it may have been stolen and began an investigatory detention. While Bryant was standing outside the vehicle, a narcotics-sniffing dog alerted to the driver's door and seat, but the deputy did not find any drugs inside the car. Believing that the dog had responded to a residual narcotics odor, the deputy began searching Bryant and reached into Bryant's front pockets, both of which contained cocaine. Bryant contended that the search of his person was illegal and the DCA agreed, reversing the conviction and sentence. "Bryant's mere recent proximity to a car seat on which someone at some time might have left a residual odor of narcotics fell woefully shy of establishing probable cause to believe Bryant possessed narcotics."

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

[*Bryant vs. State*, 10/25/00]

Motion to suppress:

A court must look at the totality of the circumstances to determine whether information given by a confidential informant is sufficiently reliable to justify a stop and search of a person and his vehicle, the 2nd DCA said. Arseles Miller appealed his conviction for drug possession. Miller filed a motion to suppress,

contending that the evidence a confidential informant provided the investigating officer was not reliable and the facts known at the time of his arrest by the officers did not justify a stop and search. The DCA agreed, noting that the investigating officer had never used the confidential informant before. "The information given by the C.I. was not sufficiently reliable, nor was it verified so as to give the officers the probable cause needed to make a Terry stop and search of Miller or his vehicle," the DCA said.

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

[*Miller vs. State*, 9/29/00]

Miranda waiver - hearing impaired juvenile:

Statements by a hearing impaired juvenile are inadmissible if the state is unable to establish that an interpreter accurately "signed" the *Miranda* warnings to the juvenile or that the youth communicated his full understanding and made a voluntary waiver, the 2nd DCA held. A juvenile identified only as C.W. challenged a community control order issued after he was found guilty of criminal mischief for attempting to break into a car. C.W. was interviewed by a detective at school, and because he is hearing impaired his assistant principal asked the school coach to serve as a sign language interpreter. A detective read a *Miranda* warning, which the coach signed to C.W. The youth responded by signing to the coach that he understood the warning and was willing to talk with the detective. During the interview all of C.W.'s statements were communicated by signing through the coach. At trial, the detective testified concerning statements and admissions made by C.W. during his interview, but the coach who interpreted did not testify. C.W. argued on appeal that the trial court erred in admitting the detective's testimony regarding the juvenile's admissions, and said the state failed to demonstrate that his *Miranda* waiver was voluntary and intelligent. The DCA agreed. "When a confession is obtained following a *Miranda* warning, the State has the heavy burden of proving that the defendant knowingly and intelligently waived his or her privilege

against self-incrimination and right to counsel, particularly where, as here, the suspect is a juvenile," the DCA said. "The State did not have the benefit of the interpreter's testimony in this case. The State was, therefore, unable to establish that the coach accurately signed the *Miranda* warning to C.W. or that C.W. communicated his full understanding and made a voluntary waiver thereafter. Thus, it was error to admit C.W.'s statements at trial. Assistant Attorney General Jennifer R. Haymes represented the state on appeal.

[*C.W. vs. State*, 10/25/00]

Vehicular homicide/leaving scene of accident:

A charge of vehicular homicide/leaving the scene of an accident involving death bars prosecution for the charges of leaving the scene of an accident involving injury causing death while driving with a suspended license, pursuant to the double jeopardy doctrine, the 2nd DCA concluded. Terranton Hunt challenged two of his convictions arising out of an automobile accident. Hunt was convicted of vehicular homicide/leaving the scene of an accident involving death; causing death while driving with a suspended license; aggravated fleeing and eluding; resisting an officer with violence; leaving the scene of an accident involving injury; and possession of cocaine. Hunt argued for the first time on appeal that the charge of vehicular homicide/leaving the scene of an accident involving death bars his prosecution for the charges of leaving the scene of an accident involving injury and causing death while driving with a suspended license, based on double jeopardy. The DCA agreed. "Hunt cannot be convicted of vehicular homicide/leaving the scene of an accident involving death and leaving the scene of an accident involving injury (because) ... Hunt left the scene of only one accident," the DCA said.

[*Hunt vs. State*, 10/4/00]

3RD DISTRICT COURT OF APPEALS

First Amendment protection:

Profane and offensive language shouted at police officers that does not incite a breach of

the peace is protected by the First Amendment, the 3rd DCA said. A juvenile identified only as W.L. appealed an adjudication of delinquency and sentence of community control. Miami-Dade police officers were conducting a narcotics investigation when they encountered a group of 15-20 people within a small area. W.L. was standing in the group with four other juveniles and was not doing anything unlawful. When officers approached W.L. and demanded identification, the youth began shouting profanities at the police but did not attempt to flee, threaten an officer, or throw anything. W.L. argued that his words alone were protected by the First Amendment to the U.S. Constitution because while admittedly profane and offensive, the words did not incite a breach of the peace. "(W.L.) never physically interfered with the police, never physically threatened them in any manner, and never impeded the execution of their legal duty. The conduct for which (he) was punished was pure speech, and is thus protected by the First Amendment," the DCA said.

[*W.L. vs. State*, 10/18/00]

Civil forfeiture action - seizure of currency

A woman cannot claim standing to assert that she is the rightful owner of more than \$100,000 in seized currency when two weeks earlier she signed a document for police saying the money belonged to someone else, the 3rd DCA said. Maria Piqueras appealed an order denying her standing to contest forfeiture of the seized currency in a civil forfeiture action. Piqueras filed an affidavit in the forfeiture action stating under oath that she owned the currency even though two weeks earlier, when the currency was seized, she told police that the money belonged to someone else. At the time of the seizure, Piqueras signed a document in which she waived any rights to the seized currency and swore that she was not the owner. On appeal, Piqueras contended that she was forced to sign the affidavit waiving her right to the currency. "The undisputed record of evidence contradicts the assertion of coercion as she drove herself to the police station and was given *Miranda*

warnings, even though she was not in custody. She then gave an extensive statement to the police. Under these circumstances, the trial court could properly find that Piqueras' subsequent affidavit was insufficient to relieve her of the legal effect of her prior renunciation of any rights to the seized currency," the DCA said.

Assistant State Attorneys Israel Reyes and Robert S. Glazier represented the state on appeal.

[Piqueras vs. State, 10/25/00]

4TH DISTRICT COURT OF APPEALS

Blood alcohol test - order suppressing results:

The mere odor of alcohol on a unconscious motorist's breath at an accident scene is insufficient to provide reasonable cause for an officer to have a blood sample taken involuntarily, the 4th DCA said. The state appealed an order suppressing the results of a blood alcohol test conducted on a sample taken from an unconscious motorist at the request of a police officer. Douglas Kliphouse was driving a motorcycle when he was struck by a car and knocked unconscious. An officer at the scene smelled alcohol on Kliphouse's breath and, upon arriving at the hospital, ordered a blood sample to determine Kliphouse's blood alcohol level even though the motorist was still unconscious. Kliphouse filed a motion to suppress, contending that the police lacked reasonable cause to have blood involuntarily drawn from him. The DCA agreed. "(T)he sole evidence of an odor of alcohol on appellee's breath was insufficient reasonable cause for the officer to believe that appellee was 'under the influence' of alcoholic beverages and subject him to a blood draw," the DCA said. Dissenting, Judge Farmer wrote, "As I see it, the issue in this case is whether defendant's permission for a blood test under the implied consent statute is effective and can be utilized by the state. If the consent is valid, the Fourth Amendment's probable cause requirement would be inapplicable. The validity of the consent would therefore depend on the requirements of the statute, not the Constitution. Ultimately the dispute comes down to whether

the odor of alcohol on the driver's breath satisfies the statute's requirement for reasonable cause. I think it does."

Assistant Attorney General Robert R. Wheeler represented the state on appeal.

[*State vs. Kliphouse*, 9/27/00]

5TH DISTRICT COURT OF APPEALS

Strong-arm robbery:

Snatching money from a victim's clutched fist while using force to pry his fingers apart is sufficient evidence of a strong-arm robbery to present the question to a jury, the 5th DCA said. Wendell Sanders appealed his robbery conviction, contending that he should only have been found guilty of the lesser and newly-created offense of robbery by sudden snatching. Sanders argued that the state failed to present sufficient evidence of a robbery for the issue of guilt of this crime to be presented to the jury. The DCA disagreed, concluding that a fair question for the jury existed as to whether Sanders' actions amounted to a traditional strong-arm robbery. "A jury could reasonably conclude that the acts were more than a robbery by snatching because (the victim's) fingers were pried open with force and this act of force committed against him by a stranger reasonably put (the victim) in fear of imminent physical danger. The controlling factor is not the victim's state of mind but whether a jury could conclude a reasonable person, under like circumstances, would have felt sufficiently threatened to accede to the robber's demands," the DCA said.

Assistant Attorney General Carmen F. Corrente represented the state on appeal.

[*Sanders vs. State*, 10/20/00]

ATTORNEY GENERAL'S OPINION

Seat belts on private school buses:

In response to a request from state Representative Gaston Cantens, the Attorney General issued an advisory opinion (2000-57, 9/28/00) stating in sum: "1) A privately owned and operated multi-passenger van designed and used to transport more than 10 persons for compensation falls within the definition of a bus that is exempt from the safety belt requirements

of section 316.614, Florida Statutes. However, a van designed for cargo that is retrofitted or altered to accommodate transportation of more than 10 persons is not a bus and must be equipped with safety belts; 2) Children under the age of sixteen transported in vans that are not designed to transport more than 10 persons, but rather have been retrofitted or altered to accommodate such transportation, would be required to be restrained by safety belts while the motor vehicle is moving. Whether the failure to properly restrain the children constitutes a primary offense depends upon the age of the children being transported."

Attorney General Opinions

Informal - Recording of conversation without consent:

In response to a request from state Representative George Albright regarding who legally can record a conversation without a person's knowledge or consent, the Attorney General on 9/25/00 issued an informal opinion concluding: "(I)n order to qualify as an investigative or law enforcement officer, (a person) must be an officer of the state or any political subdivision thereof (e.g., city or county), of the United States, or any other state or political subdivision thereof. A private investigator, although licensed by the state, would not appear to normally qualify."
Opinion # 2000908

Approved by: Enoch J. Whitney
General Counsel

Edited by: Keith Tomkiel
Hearing Officer

Judson Chapman
Assistant General Counsel

Laurie Beth Woodham
Assistant General Counsel

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