
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

FRED O. DICKINSON, EXECUTIVE DIRECTOR

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FLORIDA SUPREME COURT

Admissibility of blood alcohol test:

A blood alcohol test report that is offered as proof to establish an element of a criminal offense is admissible as a business record through the testimony of the hospital's record custodian, the Florida Supreme Court said. James Baber challenged his DUI manslaughter conviction, arguing that his blood alcohol report was inadmissible without testimony from the laboratory technician who performed the test and testimony establishing the chain of custody. The Supreme Court concluded that its 1994 decision in *Love vs. Garcia* applies in criminal cases, and therefore the report was properly admitted as a business record through the testimony of the hospital's records custodian. "Based on federal and state precedent, this Court holds that a hospital record of a blood test made for medical purposes, which is maintained by the hospital as a medical or business record, may be admitted in criminal cases pursuant to the business record exception to the hearsay rule. We emphasize, however, that defendants must be given a full and fair opportunity to contest the relevancy of such records before they are submitted into evidence," Justice Shaw wrote for the unanimous court. Assistant Attorney General Robert Wheeler represented the state on appeal. [*Baber vs. State*, 8/31/00]

1ST DISTRICT COURT OF APPEAL

Workers' comp - officer's lunch break

A law enforcement officer who is injured on his way to lunch is entitled to workers' compensation if his department considers him on duty even while he is on his lunch break, the 1st DCA said. The DCA reversed the determination of a judge of compensation

claims, who concluded that the officer - a 25-year veteran of the Largo Police Department - was not discharging his primary law enforcement responsibilities at the time he was injured. Evidence from the officer's superiors showed that the department authorizes a half hour for lunch, but that officers must keep their radios on throughout their lunch break and be ready to respond immediately if needed. The DCA said that distinguishes this case from ones where an employee is clearly off duty and therefore not eligible for benefits. "(T)he officer was never considered to be off duty because the accident occurred during regular working hours while the officer was on call," the DCA said.

[*Klyse vs. City of Largo*, et al., 8/16/00]

2ND DISTRICT COURT OF APPEAL

Possession of cocaine - illegal stop:

An officer who was stationed 100 yards away from a known drug location but did not observe an exchange of money or drugs did not have a well-founded suspicion to conduct a traffic stop, the 2nd DCA said. Halley Williams challenged his conviction for possession of cocaine. An officer observed Williams stop in front of an apartment complex and saw five people run to the driver's side of the vehicle waving their arms. When Williams drove off, the officer followed and stopped the vehicle based on what he had observed. Williams agreed to a search of his vehicle, and the officer found two pieces of crack cocaine under the emergency brake. Williams contended that the initial stop was illegal, and so the cocaine should not have been admitted into evidence. The DCA agreed, concluding that the cocaine should have been suppressed because the officer lacked a founded

suspicion of criminal activity to stop the vehicle. "Although Williams did subsequently consent to the search of his vehicle, the illegal stop presumptively tainted the voluntariness of the consent unless the State could establish by clear and convincing evidence that there was an unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior illegal police action and thus render the consent freely and voluntarily given," the DCA said. "There was no such break in the chain of illegality here. The officer obtained Williams' consent to search shortly after he stopped the vehicle. Williams' subsequent consent was, therefore, not voluntary, and failed to validate the search."

Assistant Attorney General Katherine Coombs Cline represented the state on appeal.

[*Williams vs. State*, 8/30/00]

Voluntariness of confession - officer's implied promise:

A defendant's confession is rendered involuntary if it is based on an implied promise made by a police officer, the 2nd DCA said. Paula Albritton appealed her judgment and sentence for abuse of a dead body, contending that statements she made to police should have been suppressed because they were made involuntarily. In a case the DCA called "peculiar and somewhat macabre," Albritton, a funeral home director, was accused of mutilating a corpse by severing a hand and tossing it in a river, and placing dolls with notes pinned to them inside the victim's chest cavity. Albritton alleged that her statements to police were induced by a promise that she would not be subjected to prosecution if the acts performed on the victim's body were part of a religious ritual. The DCA concluded that the trial court erred in denying Albritton's motion to suppress. "Whatever her ulterior motive for the confession, it was clearly induced by the detective's assurance that if there were a religious motive behind the mutilation, Ms. Albritton would not be prosecuted," the DCA said.

Assistant Attorney General Wendy Buffington represented the state on appeal.

[*Albritton vs. State*, 9/20/00]

3RD DISTRICT COURT OF APPEAL

Attempted sexual battery:

Where there is undisputed factual evidence to establish a prima facie case of attempted sexual battery, physical or medical evidence is not required, the 3rd DCA said. The state challenged the dismissal of an attempted sexual battery charge against Julio Ortiz, arguing that the trial court erred in dismissing the charge because the circumstantial evidence was sufficient to establish a prima facie case. The state also argued that the trial court improperly weighed the evidence and the credibility of its witnesses. The DCA agreed. "(E)ven in the absence of medical or physical evidence such as semen or DNA, we think that the other circumstantial evidence here is sufficient for a jury to consider whether the appellee engaged in an attempted sexual battery of the victim, and the trial court erred in dismissing the count," the DCA said.

Assistant Attorney General Margaret A. Brenan represented the state on appeal.

[*State vs. Ortiz*, 8/23/00]

Admissibility of statement - excited utterance

A statement made by a distraught bystander immediately after an accident is admissible under the excited utterance exception to the hearsay rule, the 3rd DCA held. Kirt Edwards appealed his convictions and sentences for several counts related to driving under the influence. Edwards contended that the trial court erred by admitting into evidence an excited utterance made at the accident scene by a woman who claimed she was at a party at which Edwards was urged not to drive. Edwards said the woman's statement should not have been admitted because she did not describe the accident or accident scene, but instead described events occurring at a party prior to the accident. Edwards argued that there was an inadequate predicate because the state failed to establish how long it had been since he and the

woman left the party. The DCA disagreed. "The relevant question was whether the statement was made while the person is under the stress of excitement caused by the event, and the relevant event was the automobile accident. There was a proper predicate. The admission of this excited utterance into evidence was within the discretion of the trial court," the DCA said. Assistant Attorney General Linda S. Katz represented the state on appeal. [*Edwards vs. State*, 8/2/00]

4TH DISTRICT COURT OF APPEAL

Motion to suppress - fresh pursuit

Officers who immediately respond to a "be on the lookout" alert and looked continuously for the suspects before apprehending them minutes later were properly engaged in "fresh pursuit," the 4th DCA stated. Jerry Porter appealed his conviction and sentence for robbery with a weapon. Porter contended that the trial court erred in denying his motion to suppress. He argued that the DCA's recent decision in *State vs. Greer* compelled the finding that Pompano Beach police officers were not in fresh pursuit when they arrested, searched and seized him within the Fort Lauderdale city limits. The officers were responding to a BOLO specifying that an armed robbery had occurred and that the perpetrators were four black males in a white four-door older model Cadillac, a description that matched the vehicle in which Porter was riding. Affirming, the DCA said the Pompano Beach police officers were engaged in a fresh pursuit when they arrested Porter. "(T)here is no logical reason why the pursuit should not be deemed a 'fresh pursuit' when the officers responded without unnecessary delay to the BOLO and, in continuous and uninterrupted fashion, sought and apprehended the occupants of the white Cadillac within a matter of minutes. This is not an instance where the robbery was committed in another jurisdiction and these officers took it upon themselves to make an arrest outside their jurisdiction; nor is this an instance where there was an extended time lapse between the commission of the robbery, the

issuance of a BOLO and the apprehension of the perpetrators," the DCA said.

Assistant Attorney General Robert R. Wheeler represented the state on appeal. [*Porter vs. State*, 8/23/00]

5TH DISTRICT COURT OF APPEAL

Lawsuit against sheriff's deputies - probable cause:

If an officer conducting an investigation is reasonably convinced that a person has committed a felony, the officer will not be held liable if information given by a witness subsequently proves untrue, the 5th DCA said. A couple appealed a summary judgment against them in their lawsuit against the Orange County deputies who arrested the woman for threatening a neighbor with a gun. Deputies arrived at the couple's residence after receiving two phone calls. The first call reported that the woman, Rosemary Thomas, had threatened the neighbor with a gun. The second call reported that the neighbor, Ruben Almonte, had assaulted Thomas and her husband. Thomas contended that the dispute over whether she pointed a gun at Almonte should preclude summary judgment on the issue of probable cause for arrest. "We believe her ultimate guilt or innocence is irrelevant to the right, even the obligation, of the police to make an arrest in this case," the DCA said. "The fact that the officers believed Almonte when he said that Rosemary pointed the gun at him instead of believing Rosemary's statement that she kept the gun at her side gave the officer probable cause to believe that a crime was committed and that Rosemary committed it."

[*Thomas vs. Beary*, 9/22/00]

Lawbreaker's liability for own negligence

Citizens who are injured as a result of their own criminal misconduct while trying to elude law enforcement authorities cannot bring a negligence action against the officers or the law enforcement agency, the 5th DCA said. Deciding an issue of first impression, the DCA ruled against the estate of a teenager who was

killed while trying to avoid an Orange County Sheriff's Deputy who was pursuing him. The teenager ran several red lights and stop signs and had been speeding. The deputy initially chased the vehicle, but told dispatchers he was breaking off the pursuit because of the risk to others. However, the deputy actually continued to follow the vehicle, and the teenager's estate argued that this created a zone of risk that led to the fatal accident, which also killed a motorcyclist. The deputy was fired for failing to follow his agency's pursuit policy, but the DCA said the estate's suit against the Sheriff's Office cannot stand. Common sense and all rational notions of public policy dictate that a violator fleeing law enforcement who injures himself as a result of his own criminal misconduct should not be able to bring an action for negligence against the law enforcement officer trying to detain him, or against his employer," the DCA said. "In short, while both the pursuer and the pursued create a zone of risk for innocent third parties in a motor vehicle chase and thereby owe them a duty of care, the deputy did not create a zone of risk to Bryant by pursuing him for his violation of the law, nor did he cause Bryant any harm. Bryant had the absolute duty to stop, and any injuries incurred by him because he failed to do so were caused solely by himself."

[*Bryant vs. Beary*, 8/31/00]

Motion to suppress - inventory search

An officer cannot conduct an inventory search of a vehicle once he has determined he should release the driver and not impound the vehicle, the 5th DCA said. Brian Bryant appealed the denial of his motion to suppress evidence. Although the DCA did not indicate the nature of the evidence in question, the evidence was found in Bryant's golf bag after he was arrested on an outstanding warrant for a probation violation. Casselberry Police Officer Michael McBurney made a valid traffic stop of a pickup truck in which Bryant was a passenger. After determining that he should release the driver and truck, Officer McBurney took Bryant to the police station on the outstanding warrant, and brought Bryant's golf bag with him even though

Bryant asked that it be left with his companions. Bryant argued on appeal that the search of his golf bag could not have been justified as an inventory search because the inventory search of the truck pursuant to the initial impoundment ended once the officer released the driver. Once the impoundment ended, Bryant argued, the bag should not have been brought to the station with him. The DCA agreed and granted Bryant's motion to suppress. "When McBurney refused to turn over the bag to Bryant's companions but instead brought the bag to the station for a search, he seized the bag without any appropriate exception to the Fourth Amendment's warrant requirement. Any suggestion that the seizure and subsequent search was reasonable based on McBurney's good faith intent to protect Bryant's property is undercut by the testimony that McBurney told Bryant specifically that he was going to have to search the bag," the DCA said.

Assistant Attorney General Angela D. McCravy represented the state on appeal.

[*Bryant vs. State*, 8/25/00]

ATTORNEY GENERAL'S OPINION

Seat belt requirements - student transportation

In response to a request from state Representative Gaston Cantens, the Attorney General issued an advisory opinion (2000-44, 8/100) stating in sum: "1) A van designed to transport more than 10 persons, including the driver, regularly used to transport students is considered a school bus and currently is not required to have or to use safety restraints. However, a school bus purchased after December 31, 2000, must be equipped with safety restraints for each student who is being transported; 2) A van designed to carry no more than 10 persons, including the driver, is a motor vehicle required to have safety restraints that must be used by passengers. The ability to stop a motor vehicle for failure to use a safety restraint as a primary offense depends upon the age of the students being transported."

Opinion # 2000-44

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