
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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U. S. SUPREME COURT

First Amendment vs. wiretap law

The First Amendment takes priority over wiretap laws to protect a person who discloses the content of a telephone conversation that was illegally intercepted and taped by someone else, the U.S. Supreme Court held. In a 6-3 ruling, the Court said First Amendment protections prevent a Pennsylvania radio host from being held liable for broadcasting a recording of a cellular telephone conversation. The host received a copy of the conversation between a labor union president and his chief negotiator, but did not know who intercepted the conversation or recorded it. The union negotiator sued, claiming radio stations that broadcast the conversation violated state and federal laws, but the broadcasters said they were protected by the First Amendment. The Supreme Court agreed that when a media outlet obtains the information legally - even though the information was gathered illegally by someone else - it may not be punished for broadcasting or publishing the information concerning a matter of public concern. "(A) stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern," Justice Stevens wrote for the Court. "In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance. ... One of the costs associated with participation in public affairs is an attendant loss of privacy."

[Bartnicki vs. Vopper, 5/21/01]

Right to attorney - questioning for related crime

The Sixth Amendment right to counsel does not bar police from interrogating a suspect about one crime while he is under indictment for a related crime, the U.S. Supreme Court held. While under arrest for an unrelated offense, Raymond Cobb confessed to a home burglary, but denied any involvement in the disappearance of a woman and child from that home. Cobb was indicted for the burglary and an attorney was appointed to represent him. Cobb then confessed to his father that he murdered the woman and her child, and his father contacted police. While in custody, Cobb waived his *Miranda* rights and confessed to the murders, and was later convicted and sentenced to death. Cobb argued on appeal that his confession should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel, which he claimed was triggered when an attorney was appointed in the burglary case. In a

narrowly divided 5-4 decision, the Supreme Court disagreed, concluding that while the burglary and murders were related, they were separate offenses and the lawyer dealing with the burglary may not necessarily work on the murder case. "At the time he confessed to Odessa police, respondent had been indicted for burglary of the ... residence, but he had not been charged in the murders ... Accordingly, the Sixth Amendment right to counsel did not bar police from interrogating respondent regarding the murders, and respondent's confession was therefore admissible," Chief Justice Rehnquist wrote for the Court. Dissenting, Justice Breyer wrote, "The majority's view of the case and its definition of the word 'offense' threatens previous Supreme Court decisions establishing the way police should apply the Sixth Amendment. ... In my view, this unnecessarily technical definition undermines Sixth Amendment protections while doing nothing to further effective law enforcement."

[Texas v. Cobb, 4/2/01]

Warrantless arrests for minor criminal offenses

The Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, including a misdemeanor seatbelt violation punishable only by a fine, the U.S. Supreme Court held in a 5-4 decision. Gail Atwater and her husband sued the City of Lago Vista, Texas, claiming police Officer Bart Turek violated her right to be free from unreasonable seizure when he arrested her and took her away in handcuffs for failing to wear a seatbelt. Texas law makes seatbelt violations a primary offense and specifically authorizes officers to make warrantless arrests. After the arrest, Atwater was taken to the police station, a mug shot was taken, and she was placed alone in a jail cell for about an hour. A magistrate released her on bond, and Atwater later pled no contest to the seatbelt misdemeanor and paid a \$50 fine. On appeal, she argued that her arrest was unconstitutional, but a narrowly divided Supreme Court disagreed, concluding that the arrest was acceptable because the officer had probable cause and the arrest was not conducted in an "extraordinary manner." "Atwater's arrest satisfied constitutional requirements. There is no dispute that Officer Turek had probable cause to believe that Atwater had committed a crime in his presence. She admits that neither she nor her children were wearing seat belts, as required by (Texas law). Turek was accordingly authorized (not required, but authorized) to make a custodial arrest without balancing costs and benefits or determining whether or not Atwater's arrest was in some

sense necessary," Justice Souter wrote for the Court. "The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment." Writing for the dissent, Justice O'Connor said, "(A)s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. ... The Court neglects the Fourth Amendment's express command in the name of administrative ease. In so doing, it cloaks the pointless indignity that Gail Atwater suffered with the mantle of reasonableness."

[Atwater v. City of Lago Vista, 4/24/01]

Private right of action - anti-discrimination law

No private right of action exists allowing citizens to sue state agencies that receive federal assistance under Title VI, the civil rights law that bans discrimination based on race, color or national origin, a divided U.S. Supreme Court held. By its ruling, the Court reversed an 11th U.S. Circuit Court of Appeals ruling against Alabama's policy of offering driver's license exams only in English. Plaintiffs in a class action argued that the English-only policy had the effect of discriminating against non-English speakers based on their national origin, in violation of a U.S. Department of Justice anti-discrimination regulation implementing §601 of Title VI of the Civil Rights Act of 1964. Both the trial court and the 11th Circuit rejected Alabama's argument that Title VI did not provide a cause of action for the suit. By a 5-4 vote the Supreme Court reversed, saying the Department of Justice regulation cannot achieve what Congress did not explicitly provide. The Court said it is "a given" that individuals may sue over state-sponsored, intentional discrimination. "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself," Justice Scalia wrote for the majority. "Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under (the law)." Dissenting, Justice Stevens wrote, "Today, in a decision unfounded in our precedent and hostile to decades of settled expectations, a majority of this Court carves out an important exception to the right of private action long recognized under Title VI."

[Alexander v. Sandoval, 4/24/01]

11th U.S. Circuit Court of Appeals

Use of satellite technology for testimony

The Florida Supreme Court's decision to permit witnesses to testify via satellite in a criminal trial does not violate the Sixth Amendment's Confrontation Clause or other federal law, the 11th U.S. Circuit Court of Appeals held. The federal appeals court reviewed only whether the state justices had contradicted or unreasonably applied federal law in allowing the testimony of two residents of Argentina who could not return to Florida to testify in person about a robbery. The Florida Supreme Court three years ago upheld the use of satellite technology in the case and the 11th Circuit affirmed, supporting the state court's determination that the technology allowed the defendant a reasonable opportunity to confront the witnesses against him. "We conclude that the Florida Supreme Court's decision was neither contrary to, nor an unreasonable application of, clearly established Federal law as determined by the United States Supreme Court," the 11th Circuit said.

[Harrell vs. Butterworth, et al., 5/16/01]

ADA and Rehabilitation Act - driving as "major life activity"

A person's inability to drive to work for six months does not qualify as an impairment substantially limiting a major life activity under the Americans with Disabilities Act or the Rehabilitation Act, the 11th U.S. Circuit Court of Appeals held. The court affirmed a summary judgment against a nurse for Hillsborough County's Department of Health and Social Services. After the nurse suffered a seizure and was diagnosed with a form of epilepsy, her doctor advised her not to drive for six months. The county made some accommodations in her work schedule, but not to the extent she had requested. She sued, but a magistrate judge rejected her ADA and Rehabilitation Act claims. The 11th Circuit agreed, noting that the federal laws are for physical or mental impairments that substantially limit "major life activities" and driving does not fall under that term. "It would at the least be an oddity that a major life activity should require a license from the state, revocable for a variety of reasons including failure to insure. We are an automobile society and an automobile economy, so that it is not entirely farfetched to promote driving to a major life activity; but millions of Americans do not drive, millions are passengers to work, and deprivation of being self-driven to work cannot be sensibly compared to inability to see or to learn," the court said.

[Chenoweth vs. Hillsborough County, 5/10/01]

Florida Supreme Court

Miranda - officer's obligation to advise suspects

Law enforcement officers must be honest and fair when a suspect asks if he should invoke his right to counsel, but the officers are not required to advise whether the suspect should invoke his *Miranda* rights, the Florida Supreme

Court held. The state appealed an order dismissing Brian Glatzmayer's convictions of first-degree felony murder and attempted robbery without a firearm. Glatzmayer was found at the scene of the 1998 murder of Eric Schunk and, based on his original statement, was initially believed to be a potential witness. Through follow-up investigation, Glatzmayer and three other individuals became suspects in the murder. Glatzmayer later decided to change his original statement and agreed to accompany officers to the police station. After signing a waiver of his *Miranda* rights, Glatzmayer made a non-recorded confession to the officers. When the officers asked Glatzmayer if they could record his confession, he responded by asking if they "thought he should have an attorney." The officers' response was that it was not their decision, but rather his decision. Glatzmayer then gave a taped confession, which was admitted into evidence at his trial. Glatzmayer argued on appeal that since the officers' answer to his question was not "straightforward" as required by 1999's *Almeida v. State*, his confession should not have been admitted. The 4th DCA agreed, and asked the Supreme Court to determine what *Almeida* requires of officers when a suspect asks them if he should invoke the right to counsel. "In sum, nothing in *Almeida* requires that law enforcement officers act as legal advisors or personal counselors for suspects. Such a task is properly left to defense counsel. To require officers to advise and counsel suspects would impinge on the officers' sworn duty to prevent and detect crime and enforce the laws of the state. All that is required of interrogating officers ... is that they be honest and fair when addressing a suspect's constitutional rights," Justice Shaw wrote for the unanimous court.

[State v. Glatzmayer, 5/3/01]

Reliability of police informant

A telephone call that alerts police of a crime qualifies as a disclosure from a citizen-informant, rather than an anonymous tipster, when the informant claims to be the suspect's mother, the Florida Supreme Court held unanimously. Gregory Maynard pleaded no contest to carrying a concealed firearm, reserving his right to appeal the denial of his motion to suppress the weapon. The 2nd DCA reversed, concluding that the police did not have reasonable suspicion to conduct a Terry stop. Police received a telephone call from a woman claiming to be Maynard's mother, concerning an alleged firearm violation. Seeing an individual matching the woman's description, an officer detained Maynard, conducted a pat-down search and found a 9mm machine gun in his backpack. At a suppression hearing, the officer testified that Maynard was not doing anything illegal but was stopped based on the information given by the dispatcher. The state contended that the DCA erred in granting Maynard's motion to suppress the firearm, and the Supreme Court agreed. "(W)e find that the caller was not anonymous, as she told the police that she was the mother of the suspect, thereby demonstrating the basis of her

knowledge and veracity, a factor that is seldom established from a truly anonymous tip. ... In addition to being an identified informant, we find that the caller qualified as a citizen informant. There is no indication that the caller was motivated by any reason other than a concern for the safety of her son and others. Under these circumstances, the stop and frisk was permissible under the Fourth Amendment. The tip provided the officer with the necessary reasonable suspicion to justify the stop," Justice Harding wrote for the Court.

[State v. Maynard, 3/29/01]

Whistle-Blower's protection for state workers

A state worker is entitled to protection under the Whistle-Blower's Act after she wrote several memos objecting to an agency action that may have constituted misfeasance, the Florida Supreme Court held. Resolving a dispute between two DCAs, the Court ruled 4-3 that the complaints of a former state child protective investigator are protected by the Whistle-Blower's Act. Her complaint was based on a series of memos and letters she wrote objecting to a change of venue in a child abuse case. The woman claimed supervisors in the then-Department of Health and Rehabilitative Services intentionally misinformed a trial court about the child's residence in order to gain approval for the change of venue. The Supreme Court said the department's actions in the case may have amounted to misfeasance, and said the Whistle-Blower's Act must be interpreted broadly in a way that protects the worker. The justices reversed the 2nd DCA, which concluded that intradepartmental complaints about matters properly under the agency's jurisdiction cannot equate to whistle-blower acts in most circumstances. "(T)he Act is remedial and should be given a liberal construction," Justice Shaw wrote for the majority. "The district court's strict construction is incompatible with the broad language in the Act which establishes a wide scope of activity that may give rise to its protections. ... The statute could not have been more broadly worded."

[Irven vs. Department of Health and Rehabilitative Services, 4/19/01]

Liability for vehicle accidents - sudden stop

An abrupt stop by a vehicle in front is insufficient to overcome the presumption of negligence on the part of a trailing driver in a rear-end collision, the Florida Supreme Court held. The Court rejected a company's argument that its driver was not at fault in an accident because the vehicle in front of it stopped suddenly when it ran into another vehicle turning off the highway. The justices concluded that the two leading vehicles likely gave various indications of slowing down or turning, which the company's driver apparently failed to see. Just because the middle vehicle stopped suddenly does not free the trailing driver from his obligation to maintain a safe following distance and anticipate problems, the Court said. "Unfortunately, accidents on the roadway ahead are a routine hazard faced by the driving public. Such

accidents are encountered far too frequently and are to be reasonably expected. Each driver is charged under the law with remaining alert and following the vehicle in front of him or her at a safe distance," Justice Shaw wrote for the Court. "It is logical to charge the rear driver with this responsibility because he or she is the person who is in control of the following distance."

[Clampitt vs. D.J. Spencer Sales, 5/10/01]

1st District Court of Appeal

Constitutionality of Public Records Law

A lower court incorrectly threw out a local elected official's conviction for violating the Public Records Law, the 1st DCA said, rejecting the lower court's conclusion that the statute was unconstitutionally applied. Escambia County School Board member Vanette Webb was convicted of violating the law for repeatedly delaying a parent's request to see certain public records. Webb took almost four months before attempting to schedule a time when the parent could review the documents and then cut the review short, providing requested documents only after a grand jury asked her to do so seven months after the initial request. The Public Records Law requires that public officials allow "reasonable" access to records, but the county court said the law was unconstitutionally vague as applied to Webb because it forced her to speculate about what was expected of her by failing to define "reasonable." The DCA rejected this argument, explaining that courts have frequently upheld the constitutionality of statutes that require certain conduct to be "reasonable" under the particular circumstances. "(S)ection 119.07(1)(a) provided Webb with fair warning that her dilatory responses to (the parent's) requests would not comport with the statute's requirement that she provide 'reasonable' access to public records in her custody," the DCA said.

[State v. Webb, 4/10/01]

Constitutionality of statute

The lack of a specific intent element does not render Florida's animal cruelty statute facially unconstitutional, the 1st DCA said. Ronald Reynolds appealed his conviction for violating section 828.12(2), F.S., which prohibits excessively or repeatedly inflicting pain or suffering on an animal. Reynolds contended that the law is facially unconstitutional because it does not include a specific intent element, and in the alternative that the state failed to present a prima facie case as to intent. "The fact that section 828.12(2), F.S. (1997), requires only general, rather than specific, intent does not, as appellant argues, necessitate the conclusion that the statute is unconstitutional," the DCA said. "The legislature has, by plain language, declared that one is guilty of the crime proscribed by section 828.12(2) regardless of whether he or she acted with the specific intent to inflict upon an animal a cruel death or excessive or reported unnecessary pain or suffering."

[Reynolds v. State, 4/12/01]

Resisting officer with violence - self-defense instruction

An individual may defend himself against unlawful or excessive police force even when he is being arrested, and is entitled to a jury instruction on self-defense, the 1st DCA said. Wilton Langston was found guilty of escape and resisting an officer with violence. He contended that the trial court reversibly erred by refusing to give a requested jury instruction on the lawful use of force to defend against an officer's use of unlawful or excessive force while making an arrest, even though Langston presented some evidence in support of the instruction. "There is a right to a self-defense instruction when there has been sufficient evidence presented to support it. ... A defendant is entitled to his requested self-defense instruction regardless of how weak or improbable his testimony may have been with respect to the circumstances leading up to the battery," the DCA said. "(S)elf defense is not irrelevant, but rather is quite relevant, to a prosecution for resisting arrest with violence."

[Langston v. State, 4/20/01]

2nd District Court of Appeal

Motion to suppress - illegal search

An undercover officer who observes a drug deal involving multiple individuals but cannot identify which of two suspects was the seller lacks probable cause to conduct a pat-down search of both men, the 2nd DCA said. Andre McCloud was charged with possession of cocaine after an undercover Tampa police officer who was investigating street-level narcotics sales observed a drug transaction involving McCloud and two other men. The officer saw one of the men hand over money and receive a small item before riding away on a bicycle, and officers stopped him and found cocaine. The bicyclist refused to say which of the two other men actually sold him the drugs, and even though the officer saw the transaction he was unable to determine whether it was McCloud or the other man who sold the drugs to the bicyclist. Officers then stopped and searched both McCloud and the other man, and eventually found cocaine in McCloud's possession. On appeal, the DCA concluded that the cocaine should have been suppressed because the officers did not have probable cause to search McCloud. "(T)he officer's observations in this case did not create probable cause to believe McCloud had committed the crime. Probable cause does not exist where the circumstances are at least equally consistent with noncriminal activity. Certainly, the circumstances in this case established a possibility that McCloud was the one who sold the drugs, but they were at least equally consistent with his simply being a bystander. If the officers had questioned the men and obtained information that pointed to McCloud as the seller, they might have developed the probable cause necessary for the warrantless search. As it was, the search

was illegal and the drugs should have been suppressed," the DCA said.

[McCloud v. State, 5/18/01]

Confidential informant - probable cause

Confirmed information from a reliable confidential informant, combined with a high-crime area, an attempt to flee, and justifiable safety concerns can add up to give an officer reasonable suspicion for a search, the 2nd DCA said. Keith Mitchell appealed his conviction for possession of marijuana with intent to sell within one thousand feet of a school and for opposing an officer without violence. Corporal Gillum, a 10-year veteran of the Palmetto Police Department, received a telephone call from a confidential informant regarding drug sales at a local store. The informant described what both men were wearing. The officer called for assistance and then proceeded to the area. When Corporal Gillum approached the men, Mitchell fled on his bicycle. Mitchell was eventually stopped and threw a plastic bag over a fence. Corporal Gillum retrieved the bag, which contained ten smaller bags of marijuana. On appeal, the DCA refused to throw out the drug evidence. "(G)uided by the Supreme Court's analysis in *Wardlow*, we find that the aggregate of the following circumstances gave rise to reasonable suspicion: high crime area, recent drug sales, a known confidential informant, the verification of information provided by the C.I., and the suspect's abbreviated attempt at flight. This case involved more than the suspect's presence in a high crime area and an isolated attempt to flee. The State proved that Officer Gillum reasonably and constitutionally intruded upon Mr. Mitchell's expectation of privacy when he stopped the suspect to make a brief investigation. During this legal Terry stop Mr. Mitchell's conduct gave rise to probable cause to detain him further, and the subsequent seizure of the abandoned marijuana was lawful," the DCA said.

[Mitchell v. State, 5/18/01]

Constitutionality of driver's license checkpoint

A driver's license checkpoint program is unconstitutional if its primary purpose is to stop drugs or other general criminal wrongdoing, the 2nd DCA said. Charles Davis appealed his convictions for cocaine possession and no valid driver's license, saying the evidence should have been suppressed because the search was invalid. Davis was stopped at a Tampa Police Department driver's license checkpoint, and cited the U.S. Supreme Court's decision in *City of Indianapolis v. Edmond* to argue that his motion to suppress should have been granted because the primary purpose of the checkpoint was to interdict drugs. The DCA agreed, rejecting the state's contention that the purpose of the checkpoint was to check for valid licenses. "Because the police conducted a driver's license checkpoint that violated the Fourth Amendment [by checking for other criminal wrongdoing], we reverse the denial of the motion to suppress and the resulting judgment and sentence," the DCA said.

[Davis v. State, 5/23/01]

Motion to suppress - seizure of cigarettes from minor

A police officer may seize cigarettes as contraband once he observes them in the possession of a minor, even though the cigarettes themselves are a legal product, the 2nd DCA said. A minor identified as B.W. appealed an order denying his motion to suppress cocaine, which had been concealed in a cigarette package in his shirt pocket. An officer saw B.W. and a companion standing in front of a convenience store and asked for identification. B.W. reached into his back pocket and produced a cigarette package and his identification. Learning that B.W. was just 16, the officer took the cigarettes and reached for a second cigarette pack he saw in B.W.'s shirt pocket. The teenager put his hand over the shirt pocket to stop the officer, but the officer successfully confiscated the second pack, which turned out to contain cocaine. B.W. moved to suppress the cocaine, arguing that it was illegally seized. The DCA disagreed. "(W)e are of the opinion that the police officer had the right to seize the cigarettes as contraband once he observed them in the hands of a minor," the DCA said. "The possession of contraband means possessing any property, object, or thing that is against any law or regulation. ... (I)t is clear that the cigarettes in B.W.'s possession were contraband." Dissenting, Acting Chief Judge Parker said, "The state ... argues that it would be illogical for a law enforcement officer to encounter a child in possession of tobacco, write a citation, and walk away. However illogical, I am not ready to toss aside a child's Fourth Amendment right to be protected from unreasonable seizures when the legislature has not seen fit to make that leap."

[B.W. v. State, 4/18/01]

"Knock and announce" rule

Where officers executing a valid search warrant knock and announce themselves but fail to wait a reasonable amount of time before busting in, the search is illegal, the 2nd DCA held. John Richardson argued on appeal that Bradenton police officers failed to comply with section 933.09, F.S. (1999), the "knock and announce" rule, when they executed a search warrant at his home at 5:30 a.m. A team of eight officers knocked on Richardson's door and yelled "Bradenton Police Department, search warrant." The officers waited about 10 seconds before using a battering ram to gain entrance, and Richardson contended this failed to give him reasonable time to respond. Richardson argued that the trial court should have suppressed contraband seized pursuant to the search warrant. The DCA agreed and reversed, remanding with instructions to grant Richardson's motion to suppress and to discharge him. "In failing to permit time for a response in executing a search warrant, the police follow a recipe for tragedy. We wish to see neither our law enforcement officers nor our citizens harmed. In this day and age in our country, many citizens lawfully possess firearms and

are aware of the frequency of home invasion robberies. Awakening citizens from slumber and depriving them of an opportunity to recognize law enforcement's presence and purpose could result in a misunderstanding with horrific consequences," the DCA said.
[Richardson v. State, 5/9/01]

Valid third party consent - motion to suppress

A driver's consent to search a car does not include a search inside a passenger's purse or fanny pack that is left behind when the passenger complies with an instruction to exit the vehicle, the 2nd DCA said. Sharon Brown appealed drug possession convictions arising from a proper traffic stop of a vehicle in which she was a passenger. The officer who stopped the vehicle observed Brown sitting in the passenger seat with a fanny pack in her lap. The officer received the driver's consent to search the car for narcotics, and both the driver and Brown were ordered to exit the vehicle. As Brown got out, she left her fanny pack on the floorboard of the front passenger seat. Although the officer knew the fanny pack had been in Brown's possession, he did not ask her permission before opening it. Brown moved to suppress the drug evidence discovered in the fanny pack, conceding that the traffic stop was valid but arguing that the officer lacked consent or probable cause to search the fanny pack. The state contended that the driver's consent to search the vehicle for narcotics extended to the fanny pack. The DCA disagreed, concluding that an officer must inquire of a passenger before searching inside such a purse or fanny pack. "(A)lthough Ms. Brown and the driver may have exercised shared use and joint access and control over the car in which they were stopped, this 'shared use' could not apply to the fanny pack in Ms. Brown's lap. The fanny pack, like a purse, is a container suggesting individual ownership, in which a person has a significant expectation of privacy. The officer here never saw the pack in the driver's possession, and he knew that Ms. Brown was in possession of it until he ordered her out of the car. Under these circumstances, it was not reasonable for the officer to assume that the male driver had the apparent authority to consent to the search of the pack," the DCA said.
[Brown v. State, 4/6/01]

Fellow officer rule

Motorist sought review by certiorari of the Department of Highway Safety and Motor Vehicles' order that sustained the suspension of his driver's license for failing to take a breath test. The Circuit Court, Pasco County, quashed the order. On grant of Department's petition for certiorari review, the 2nd DCA held that: (1) trial court applied incorrect law when quashing the Department's order, and (2) "fellow officer rule" was properly invoked by the Department to conclude that probable cause existed to arrest motorist for driving while under the influence of alcohol (DUI). The fellow officer had information that the motorist was speeding and that he crossed the fog line

twice, which the arresting officer put together with his own observations of the motorist's inebriated state.
[State v. Porter, 5/4/01]

Use of copies of arrest documents in license suspension hearing

The Department of Highway Safety and Motor Vehicles is authorized to use copies of arrest documents in license suspension hearings, the 2nd DCA said. After the Department of Highway Safety and Motor Vehicles suspended Meeham's driver's license, the Circuit Court in Lee County granted Meeham's petition for writ of certiorari and quashed the Department's order. Meeham's underlying complaint was that it is improper for the Department to maintain copies of arrest documents which are used on a repetitive basis to enable hearing officers to: (a) review files prior to the commencement of the formal review hearing in order to determine if the documentary evidence is adequate and (b) employ documents from separately maintained files of the Bureau of Administrative Review as the hearing officer determines appropriate, on a case-by-case basis. Meeham contended this procedure runs afoul of a driver's right to due process. She did not challenge the authority of the documents. The Department filed a petition for writ of certiorari. The District Court of Appeal held that the Department could use copies of arrest documents in license suspension hearings, pursuant to Rule 15A-6.013, F.A.C.

[State v. Virginia Meeham, 5/18/01]

3rd District Court of Appeal

Forfeiture proceedings

The Florida law allowing the forfeiture of boats and equipment that are used in illegal saltwater fishing is constitutional, but a vessel's owner must be given immediate notice so he can challenge the forfeiture, the 3rd DCA said. Sergio Valdes pled guilty to misdemeanor charges of possessing undersized crawfish and out-of-season stone crab claws aboard his brother's 43-foot fishing boat in 1997. The next year, the Florida Marine Patrol seized the boat in anticipation of a forfeiture action under section 370.061, F.S. The state's motion for forfeiture was served on the defendant's attorney, but not on the brother who actually owned the vessel. Valdes moved to dismiss the forfeiture proceeding, arguing that section 370.061 is unconstitutional because it does not contain provisions for due process and an opportunity to be heard. The court denied Valdes' motion, concluding that he did not have standing to challenge the statute because he had no ownership interest in the boat. Valdes' brother then moved to intervene and to dismiss the forfeiture proceeding, arguing that the statute is unconstitutional because it does not contain sufficient procedural safeguards to assure that the owner and other interested persons are give notice and an opportunity to be heard. The DCA held that the statute itself is valid, but

said the way the forfeiture was conducted in this case was improper and must be reversed. "(T)he due process clause of the Florida Constitution forbids the forfeiture of personal property without giving interested persons, including the owner, notice and an opportunity to be heard. The state's claims and the owner's defenses must be heard before a forfeiture is declared," the DCA said. "We urge the legislature to revisit this statute so as to assure that it operates fairly with respect to citizens and the agency."

[State v. Valdes, 4/11/01]

Statute of limitations - bribe of public servant

Charges stemming from the bribe of public servants necessarily involve fraud and violation of a fiduciary duty, and therefore are not bound by the strict three-year statute of limitations affecting other third-degree felonies, the 3rd DCA said. The DCA refused to block the prosecution of numerous Miami-area lawyers and law firm employees arrested in connection with an alleged scheme involving fraudulent personal injury claims and kickbacks to Miami-Dade County risk management employees. The defendants argued that the three-year statute of limitations for third-degree felonies had elapsed, but the state said the cases are covered by a statutory provision that extends the time if either fraud or a breach of fiduciary obligation is a material element of the charged offense of unlawful compensation. The DCA concluded that both grounds for the extension were present in the case. "It seems quite clear that when a public servant's performance of his public duty is corruptly 'bought' ... then a fraud has been committed on the members of the public who have the right to expect their public servants to perform their public duties uninfluenced by such actions. As the corrupt 'purchase' and the involvement of a public servant must be proven as elements of the crime, and as the 'purchase' and the public servant's involvement amount to fraud, fraud is necessarily a material element of the charged offense. We also observe that a public servant stands in a special relationship of trust and responsibility to the public, which rightly expects the public servant to perform in the public's best interest. ... (A) breach of a fiduciary obligation is of necessity a material element of the offense," the DCA said.

[Alvarez, et al., v. State, 4/11/01]

Lawsuit from plaintiff's criminal activity

Criminals who are robbed while conducting a drug transaction in a dark hotel parking lot have no grounds to claim in a lawsuit that the hotel owed them a duty to have better lighting and security, the 3rd DCA said. In sharp language, the DCA said that as a matter of law the drug dealers should not be rewarded for their illegal activity. The DCA was forced to rule against the hotel on procedural grounds, but invited the trial court to reconsider orders in the case that favored the plaintiffs. "The plaintiffs, who ... were conducting a drug transaction

inside a vehicle in the parking lot of the defendants' hotel when they were robbed and shot by an unknown perpetrator, are not entitled to recover. ... (T)he defendants' actions in allegedly failing to provide proper lighting and security were not a legal cause of the plaintiffs' injuries, breached no cognizable duty, and created no "zone of risk" to the plaintiffs, who were engaged in the commission of unlawful acts they affirmatively wished to conceal. The trial court should quickly put an end to this travesty," the DCA said.

[Hiialeah Hotel, Inc. v. Talley and Woods, 5/23/01]

Impermissible comment on right to remain silent

Where a defendant waives his *Miranda* rights and voluntarily gives a statement to the police, a detective may testify that the defendant refused to formalize his statement in a tape recording, the 3rd DCA said. Humberto Fernandez appealed his conviction for first-degree murder, arguing that at trial the investigating detective made an impermissible comment on his right to remain silent. Fernandez argued that the state could not ask the detective during direct examination whether Fernandez was asked to give a taped statement after he had already given an oral statement. The DCA disagreed. "Where, as here, a defendant has waived his *Miranda* rights and voluntarily given a statement to the police, it is not a comment on silence for the detective to explain that the defendant refused to memorialize the already-given oral statement in a tape recording. The defendant in such circumstances has already elected to speak. A refusal to write down, or record, what has already been said does not amount to invocation of the right to silence," the DCA said.

[Fernandez v. State, 5/9/01]

4TH District Court of Appeal

Motion to suppress - *Miranda* warning

A BB gun seized after police questioned a juvenile in his home without giving him *Miranda* warnings must be suppressed as the fruits of a poisonous tree, the 4th DCA said. The state argued that the juvenile, identified as C.F., was not in custody and therefore not given *Miranda* warnings when he was first questioned in his home. The trial court also suppressed a statement C.F. later gave at the police station because there is no evidence providing C.F. voluntarily waived *Miranda* before giving that statement. The state argued that even if the initial questioning was improper, the trial court erred in suppressing the BB gun because merely violating *Miranda*, without more, does not trigger application of an exclusionary rule. The DCA disagreed. The DCA concluded that the initial interrogation was custodial and consequently required *Miranda* warnings, and therefore the BB gun was properly suppressed because it was recovered as a result of information learned in a statement obtained in violation of *Miranda*.

[State v. C.F., 5/16/01]

DUI roadblock - written guidelines

Written guidelines for a DUI roadblock are valid if they are clear and reasonable, focus on procedures to be followed during the initial stop and detention of motorists, and do not permit random or arbitrary vehicle stops, the 4th DCA said. David Rinaldo appealed his conviction for driving under the influence (DUI) and carrying a concealed firearm, contending that the trial court erred in denying his motion to suppress evidence gathered at a DUI roadblock. Rinaldo argued that the roadblock failed to comply with the requirements of Florida case law dealing with roadblocks, in that the written guidelines did not specifically address detention techniques governing the roadblock encounter. Rinaldo also argued that the police lacked reasonable suspicion to detain and question him during the roadblock stop and to order him out of his vehicle. The DCA concluded that the guidelines properly set out the detention techniques with reasonable specificity and limited the discretion of police officers at the scene. "(A) driver who is lawfully stopped for a DUI checkpoint is under a legal obligation to respond to an officer's requests for certain information and documents, and the driver's refusal to respond to these requests may constitute the misdemeanor offense of obstructing or opposing an officer. If a driver engages in obstructive conduct ... then standard police detention and arrest procedures, rather than checkpoint guidelines, would govern the officer's handling of the situation," the DCA said.

[Rinaldo v. State, 5/16/01]

Double jeopardy violation

Robbery and carjacking convictions arising from separate acts involving different property but committed during the same criminal episode do not violate the double jeopardy clauses of the state and federal constitutions, the 4th DCA said. Manny Harris appealed his convictions for carjacking and robbery with a firearm. The convictions stemmed from events in which Harris and others robbed and bound James Reed, threw him into his own car and drove the car to another location, where they stole more items and left Reed and the car. Harris argued that his convictions violated his double jeopardy rights, but the DCA disagreed. Citing *Consiglio v. State*, the DCA affirmed Harris' convictions, concluding that the convictions arose from separate acts and involved different property. "(T)his case involves separate criminal acts which support the carjacking and robbery convictions. The assailants relieved Reed of his bracelet, thumb ring, and wallet, while Harris held a gun to Reed's head; these acts amounted to the crime of robbery with a firearm. The three men then forced Reed into the back of his car and drove him to a new location; this taking of Reed's car justifies the carjacking conviction," the DCA said.

[Harris v. State, 5/2/01]

Unlawful stop - officer observations

A well-trained officer who observes a driver drinking from a brown paper bag has reasonable suspicion to conclude that the driver is operating a vehicle with an open container of an alcoholic beverage, the 4th DCA held. Ronnie Dixon was pulled over after an officer observed him drink from a bottle contained in a brown paper bag. Following the stop, Dixon was charged with possession of cocaine, tampering with evidence, driving under the influence and resisting arrest without violence. Dixon argued that the trial court should have suppressed the evidence, which he contended was seized as a result of an unlawful stop. Dixon said what the officer observed did not amount to a well-founded articulable suspicion of criminal activity, but the DCA disagreed. "Appellant appears to misunderstand the difference between well-founded suspicion and probable cause, as he argues that 'there was an equal or greater likelihood that the bottle inside the bag was water or a soft drink.' That would not be the test here. Reasonable suspicion is a less demanding standard than probable cause," the DCA said.

[Dixon v. State, 4/25/01]

Search - informative statement by arresting officer

An officer's informative statement to a suspect, warning that he could die if the substance in his mouth was cocaine and he swallowed it, does not constitute an illegal search, the 4th DCA said. The state appealed a suppression order won by a juvenile defendant, E.S. The minor was stopped for riding his bicycle without lights at night, and during the stop the officer noticed that E.S. was attempting to keep his mouth closed as he spoke. Believing E.S. was concealing something, the officer told him that if the substance in his mouth was cocaine and he swallowed it, it could kill him. E.S. then spit the cocaine out of his mouth. The trial court suppressed the search but the DCA reversed, saying the officer did not seize E.S. and his comments were only informative, not an order for E.S. to spit out what was in his mouth. "(T)his officer did nothing which could amount to a seizure. Rather, the appellant's spitting out the cocaine was a voluntary act. We therefore reverse the order suppressing the cocaine," the DCA said.

[State v. E.S., 4/25/01]

Constructive possession of cocaine

Where contraband is found in a public place, a defendant's proximity to it, without more, is not sufficient to establish constructive possession, the 4th DCA said. Larry Scruggs appealed his conviction for possession of cocaine and driving with a revoked license. The drugs were found on the ground a few feet away from Scruggs' car and the car contained items similar to the containers holding the drugs, but no witnesses actually saw Scruggs in possession of the drugs. Scruggs argued that the trial court erred in denying his motion for acquittal because the state

failed to present sufficient evidence that he constructively possessed the drugs. The DCA agreed, noting that the containers were common items that do not conclusively link the drugs to Scruggs. "(T)he state failed to satisfy the elements of constructive possession. There was no evidence presented at trial that the appellant had dominion and control over the contraband or knowledge of its presence. The contraband was found in a public place; no fingerprint evidence linked the appellant to the items found on the grass near his car; no drugs were recovered from appellant's vehicle; no one saw appellant discard the items; and appellant did not make any incriminating statements. Although plastic baggies 'similar' to the ones found on the ground were recovered from appellant's vehicle, as well as the lid to a 35 mm canister, these items are fungible and readily available to anyone," the DCA said.

[Scruggs v. State, 4/25/01]

Patdown search - consensual encounter

An officer may constitutionally conduct a patdown search for weapons during a consensual encounter with a citizen if, during the encounter, the officer reasonably believes the citizen may be armed and dangerous, the 4th DCA said. Claude Johnson appealed the denial of his motion to suppress cocaine found in his left front pants pocket. During a consensual encounter with Broward Sheriff's Deputy Alex McDonald, Johnson began to shake violently and appeared to be nervous, and had a large bulge in his left front pants pocket. According to Deputy McDonald, Johnson kept reaching for the bulge. Concerned that Johnson might have a weapon, the deputy began a patdown search, but Johnson fled when the deputy reached for the bulging pocket. The deputy eventually handcuffed Johnson and discovered cocaine in the pocket. On appeal, the DCA concluded that Deputy McDonald made observations that supported his reasonable belief that Johnson was armed and potentially dangerous. The deputy was therefore entitled to conduct a patdown under the Fourth Amendment, the court said. "This case tiptoes at the outer limits of Fourth Amendment jurisprudence, where the right of personal privacy runs up against concerns for the safety of law enforcement officers on the street. There is no clear, bright dividing line between a permissible pat down and one that is constitutionally infirm. The Florida cases are fact sensitive; if mapped out, they would look like the west coast of Norway," the DCA said.

[Johnson v. State, 5/23/01]

Disclosure of confidential informant

The state is required to disclose the identity of a confidential informant when a defendant has been charged with selling or delivering illegal drugs to the informant, the 4th DCA said. Tommy Styles was convicted of delivery of cocaine. He contended that the state was required to disclose the identity of the confidential informant whose alleged drug purchase from

Styles formed the basis for the conviction. The DCA agreed. "Because the crime in this case involved the delivery of cocaine directly to the informant, this case falls within the exception to the limited informant privilege described in (earlier cases). If one goal of the privilege is to preserve the anonymity of those helping the police, that aspect is not implicated here. Unlike a tipster who provides information to the police to establish probable cause for a search or arrest, the informant in this case disclosed his identity by coming face to face with the defendant to purchase drugs," the DCA said.

[Styles v. State, 4/4/01]

Motion to suppress - consensual encounter

An officer's request asking an individual, "Come here for a minute, can I talk to you?" is not coercive and the subsequent encounter is therefore consensual, the 4th DCA said. Indian River County Deputy Todd Finnegan saw David Chapman riding his bicycle so slowly it threatened to impede traffic. The deputy got out of his patrol car, made eye contact with Chapman and said, "Come here for a minute, can I talk to you?" Chapman replied, "Sure." Chapman grew increasingly nervous during the encounter, leading the deputy to conduct a search that turned up several pieces of crack cocaine. Chapman argued that he was stopped and detained without founded suspicion of unlawful activity, and so his subsequent consent to be searched was involuntary and the cocaine should be suppressed. The state argued that the deputy's full request clearly made the encounter consensual. The DCA agreed with the state and said the trial court properly denied Chapman's motion to suppress the cocaine. "The record supports the trial court's finding that the contact between Deputy Finnegan and appellant was a consensual encounter. As the court noted in its written order, there was no evidence suggesting that the deputy's manner was 'confrontational, coercive, oppressive or dominating.' The trial court properly applied the 'reasonable person' test to its analysis and evaluated the totality of circumstances surrounding the roadside encounter in concluding that the encounter was consensual," the DCA said.

[Chapman v. State, 4/4/01]

5TH District Court of Appeal

Motion to suppress - consent to search vehicle

A police officer did have authority to request consent to search a vehicle after the conclusion of a valid traffic stop because at that point the stop turned into a consensual citizen encounter, the 5th DCA said. The state appealed an order suppressing prescription drugs found in a vehicle after Robert Kindle gave consent for a search following the conclusion of a traffic stop. Kindle was arrested and moved to suppress the evidence, saying the search was invalid. The trial court concluded that the consent to search was invalid because the traffic stop lasted longer than the time necessary to write the traffic citation and

Officer Billy Rhodes did not have reasonable suspicion to justify detaining Kindle beyond that period. The DCA disagreed. "Kindle exited the vehicle prior to both the issuance of the citation and the request to search. Thus, the encounter was not a show of authority that went beyond a consensual encounter," the DCA said. "(T)here was no reason Rhodes could not ask Kindle for consent to search the vehicle. We conclude that the fact that consent was given after the citation was issued does not invalidate the consent or the search."
[State v. Kindle, 4/12/01]

Investigative subpoena - seized property

Seized property should be returned to its owner at the conclusion of a criminal case even if it is also covered by an investigative subpoena for a civil case, the 5th DCA held. Bradenton Group, Inc. and Eight Hundred, Inc. (Corporations) appealed a trial court's denial of their motion for return of property. The motion was made after the businesses were acquitted of criminal RICO charges. The Office of Statewide Prosecution seized various documents and records in pursuit of the criminal case and, pursuant to an investigative subpoena, the documents were turned over the Attorney General's Office for use in a civil suit stemming from the same charges. The businesses argued the law requires that their property be returned at the conclusion of the criminal proceedings. The Office of Statewide Prosecution countered that it no longer had the documents in its custody and had turned them over to the Attorney General's Office pursuant to the investigative subpoena. The DCA agreed with the companies and ordered a hearing to determine whether the seized materials should be returned, even though the civil investigation has not been concluded. "If circuit courts with concurrent jurisdiction may not seize property held in *custodia legis* through issuance of a subpoena, surely the Department may not. Therefore, once a motion for return of property is filed, the trial court with jurisdiction over the criminal proceedings is laden with the responsibility to determine whether a proper basis exists to return the property to the owner. This determination requires notice to the owner of the property and a hearing where all interested parties are given an opportunity to present evidence and argument to the trial court," the DCA said. "(T)he trial court erred in holding that issuance of the subpoena prevented return of the property to the Corporations."
[Eight Hundred, Inc., v. State, 4/12/01]

Attorney General's authority re: investigative subpoena

The Attorney General's Office is authorized to issue an investigative subpoena in a RICO case as long as it has "reason to believe" that the subject of the subpoena has violated the law, the 5th DCA said. In a case stemming from Florida's crackdown on the payday loan industry, the DCA was asked to resolve the scope of the investigatory powers of the Attorney General's Office and to decide

whether a particular subpoena was valid. The business targeted by the subpoena claimed it was invalid because the Attorney General's Office did not have "reason to believe" the business had violated or was violating Florida's usury laws. The DCA concluded that the Attorney General's Office does have authority to issue such subpoenas, although the subpoena in this case was overly broad because it requested more information than was necessary for the investigation. In upholding the Attorney General's authority to issue investigatory subpoenas in such cases, the DCA applied the definition of "reason to believe" established by the U.S. Supreme Court in its landmark *Terry v. Ohio* stop-and-frisk case. "The Terry court fashioned an objective or reasonably prudent person standard for the term 'reason to believe,' which appears to translate well in the context we are now considering. We conclude, therefore, that the test to be applied in determining whether the Attorney General is authorized to issue an investigatory subpoena under section 895.06(2), is whether under the circumstances a reasonably prudent person would be warranted in the belief that a person or other enterprise who is the subject of the subpoena has engaged in, or is engaging in, activity in violation of the Florida RICO Act," the DCA said.
[Check 'n Go of Florida, Inc., vs. State of Florida, 5/11/01]

Denial of motion to suppress

An individual's presence in a location that police officers consider to be a high crime area, by itself, is not enough to support a reasonable, particularized suspicion necessary to authorize an investigatory stop, the 5th DCA said. Dennis McMaster appealed the order placing him on probation and sentencing him to time served following his plea of *nolo contendere* to charges of possession of cocaine and drug paraphernalia. McMaster argued that the trial court should have granted his motion to suppress because police lacked reasonable suspicion to stop his car and seize drugs and paraphernalia from him. The state argued that McMaster's presence in a high crime area was sufficient to establish a reasonable suspicion. The state also argued that the fact that McMaster left the area as the officers approached was enough to provide them with reasonable suspicion to justify stopping McMaster. The DCA disagreed. "The evidence contained in the record clearly established that McMaster was in a location that the police officers considered to be a high crime area. However, the record is devoid of any evidence that McMaster engaged in unprovoked flight upon noticing the presence of the officers and, in fact, the testimony establishes that McMaster did not flee the police officers. We find from the evidence in the record that all the officers had was a curiosity about what McMaster was doing driving through a high crime area at 11:00 at night. There are no other facts which support a reasonable suspicion for the stop in the instant case," the DCA said.
[McMaster v. State, 3/30/01]

Possession of cocaine and drug paraphernalia

The fact that a small container is found in close proximity to cocaine and carries cocaine residue - with a positive field test showing the presence of the drug - is sufficient to support a conviction for possession of drug paraphernalia, the 5th DCA said. Matthew Townsend was convicted of possession of cocaine and possession of drug paraphernalia. Townsend appealed the paraphernalia conviction, contending that the state had insufficient evidence to prove that the container found in his pocket constituted drug paraphernalia. The container and a white rock, both of which were found in the pocket, tested positive for the presence of cocaine. "Although the mere field test alone of residue might not be enough to sustain a conviction for possession of cocaine or possession of drug paraphernalia, the presence of a tenth of a gram of cocaine in close proximity to a container containing a white residue, which field-tested positive for cocaine, is sufficient to sustain the inference that the container was used or intended to be used to package cocaine," the DCA said.

[Townsend v. State, 4/6/01]

ATTORNEY GENERAL'S OPINION

Service charge for clerk's release of vehicle

In response to a request from the Broward County Clerk of the Circuit and County Court relating to unpaid traffic citations, the Attorney General issued an advisory opinion (2001-32, 5/8/01) stating in sum: "The Clerk of Courts of Broward County may impose the \$4 fee for 'writing a paper' authorized by section 28.24(11), Florida Statutes, if it has been determined that none of the specific fees provided in section 28.24, Florida Statutes, applies. However, to the extent that a specific service charge is authorized in the statute for the particular service performed by the clerk, that fee must be collected instead."

Informal - Contraband forfeiture trust funds

In response to a request from the Lake Park police chief, the Attorney General on 5/3/01 issued an informal opinion concluding: "(C)ontraband forfeiture trust funds may be expended upon a request by the chief of police to the governing body of the municipality which is accompanied by a written certification that the request complies with the provisions of the statute. Further, these funds may only be spent following their appropriation to the police department by the governing body of the municipality."

Law Enforcement Officers' Bill of Rights

In response to a request from the Wildwood city attorney, the Attorney General issued an advisory opinion (2001-34, 5/11/01) stating in sum: "Section 112.532(1), Florida Statutes, applies to any situation in which a law enforcement agency is conducting an internal investigation of a law enforcement officer, as defined in

section 112.531, Florida Statutes, and the officer is subject to interrogation by members of the law enforcement agency for any reason that could lead to disciplinary action, demotion, or dismissal. Thus, the rights and privileges afforded by section 112.532(1) would be applicable to situations in which the officer is under investigation and subject to interrogation by his or her agency based upon an alleged violation of the agency's rules and regulations."

Registration requirements for sexual offenders

In response to a request from the Okaloosa County Sheriff, the Attorney General issued an advisory opinion (2001-27, 4/4/01) stating in sum: "The Florida Department of Law Enforcement has determined that the provisions of section 943.0435, Florida Statutes, require that a sexual offender register initially with both law enforcement (either the sheriff or FDLE) and the Department of Highway Safety and Motor Vehicles and, thereafter, only with DHSMV upon establishing a new Florida residence."

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