
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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U.S. SUPREME COURT

Warrantless search of probationer

The Fourth Amendment does not prohibit a warrantless search of a probationer when it is supported by a reasonable suspicion of criminal activity and authorized by a condition of probation, the U.S. Supreme Court held. Mark James Knights was sentenced to probation for a drug offense in California. As a condition to his probation, Knights agreed to be searched "at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." When two utilities suffered incidents of arson and vandalism, authorities suspected Knights because of his contentious history with the utilities. A sheriff's deputy, who was aware of the search conditions of Knights' probation, believed he had reasonable suspicion to search Knights' apartment without a warrant. The trial court granted Knights' motion to suppress incendiary materials and detonation devices discovered in his apartment, even though the court found reasonable suspicion for the search, on the basis that the search was investigatory rather than probationary. The appellate court affirmed, but the Supreme Court reversed. Noting that probationers are more likely to violate the law than ordinary citizens, the Court said, "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interest is reasonable. The same circumstances that lead us to conclude that reasonable suspicion is constitutionally sufficient also render a warrant requirement unnecessary." Writing a separate concurring opinion, Justice Souter said, "We now hold that law enforcement searches of probationers who have been informed of a search condition are permissible upon individualized suspicion of criminal behavior committed during the probationary period, thus removing any issue of the subjective intention of the investigation officers from the case."

[U.S. v. Knights, 12/10/01]

1st District Court of Appeal

Payday lenders - scope of investigative subpoenas

Investigative subpoenas issued by the State as part of its investigation into the payday loan industry are overly broad and must be limited to records involving Florida transactions or corporate practices implemented in the

State, the 1st DCA said. The court upheld in part the subpoenas issued by the Attorney General's Office, which requested detailed information as part of its probe into whether payday lenders were charging illegal interest to consumers. The subpoenas demanded production of documents dating back to 1994, including documents related to operations outside of Florida. The DCA, adopting the reasoning of the 5th DCA in a similar case earlier this year, limited the scope of the subpoena by largely exempting documents created before a lender was incorporated and transactions outside the State. The DCA rejected a lender's claim that the Attorney General's Office did not have the legal authority to issue the subpoenas, that the subpoenas violated the right of privacy of its customers and that the subpoenas improperly demanded production of trade secrets.

[Advance America, et al., v. Office of the Attorney General, 12/17/01]

DNA testing of juvenile convicted of burglary

The law requiring defendants who are convicted or plead guilty to burglary to provide a blood sample for a DNA database is constitutional because those defendants have no reasonable expectation of privacy with respect to the testing, the 1st DCA held. Issuing the first ruling of its kind in Florida, the court rejected a juvenile's claim that Florida's constitutional privacy provision, combined with the State's search and seizure provision, gives a defendant greater protections than does the Fourth Amendment to the U.S. Constitution. The juvenile, identified only as L.S., pled no contest to burglary charges and was placed on community control. The State then requested that the girl be required to submit to DNA testing under Florida's database statute, but the defense argued that the law is unconstitutional as applied to burglary. The trial court disagreed, and the DCA affirmed. "In circumstances like the one at issue, involving search and seizure issues, the Florida Constitution's right of privacy provision ... does not modify the applicability of Article I, section 12(search and seizure), so as to provide more protection than that provided under the Fourth Amendment," the DCA said.

[L.S. v. State, 12/17/01]

2nd District Court of Appeal

Jury instruction - use of force against officers

Where a defendant is charged with resisting arrest or battery on a law enforcement officer, the jury may be instructed on the defendant's justifiable use of force only

if the evidence establishes that police used excessive force, the 2nd DCA held. Michael Caldwell asked for a new trial after he was convicted of resisting a police officer with violence and battery on a law enforcement officer. Caldwell claimed the trial judge improperly refused his request for a jury instruction on justifiable use of force. Caldwell admitted that he had attempted to flee police when they tried to handcuff him and he continued to struggle. After scuffling with the officers, Caldwell was finally subdued with pepper spray. Affirming the convictions, the DCA said, "The evidence here simply did not show the officers used excessive force in restraining Caldwell. ... [A]ll the evidence, even that from Caldwell himself, showed that he was continuing to fight the officers' attempts to subdue him when they used pepper spray. In this scenario, the trial court properly refused to instruct the jury concerning justifiable use of force." [Caldwell v. State, 12/28/01]

Registration of sexual predators and offenders

Although the registration requirements for sexual predators are identical to those imposed for sexual offenders - requiring registration with the State when renewing a driver license - the requirements are not interchangeable, the 2nd DCA held. David Jackson, a designated sexual predator, had his probation revoked for failing to comply with the sexual offender registration statute, section 943.0435, F.S. Jackson argued that this statute, which addresses sexual offenders, does not apply to him, a sexual predator. Both statutes require identical registration through the Department of Highway Safety and Motor Vehicles when renewing a driver license. Jackson's license had been suspended for failure to pay a traffic fine and was automatically reinstated after he paid the fine. Because he did not register at that time, the state charged Jackson with a probation violation, but charged him under the sexual offender statute - not the sexual predator statute. The State argued harmless error, but the DCA said the issue was one of proof and said Jackson's probation should not have been revoked based on his failure to register under either statute. "Because Jackson's license was not subject to renewal but was automatically reinstated after he paid the traffic fines, the (sexual predator) registration requirements ... were never triggered. Therefore, this violation should be stricken from the revocation order on remand," the DCA said. However, the Court affirmed the probation violation on other grounds.

[Jackson v. State, 12/21/01]

Due process - adequate notice of administrative hearing

A telephone message left the day before a hearing on behalf of a state agency and a municipality was inadequate notice where the other party faced dismissal of his petition as a sanction for discovery violations, the 2nd DCA held. Henry Ross, a private citizen, appealed a final order of the Department of Environmental Protection,

which approved an administrative law judge's dismissal of Ross' petition. It was undisputed that the only notice Ross received regarding the hearing on the motion for sanctions was a phone message left the day before the hearing. The DCA, concluding that this notice was inadequate, noted that although due process concepts are less stringent in an administrative proceeding than in a judicial proceeding, they do still apply. An evidentiary hearing is required before an action can be dismissed as a sanction for discovery violations. Due process requires adequate notice of the hearing to afford the wayward party an opportunity to be heard on the question of whether the violations were willful or done in bad faith," the DCA said.

[Ross v. City of Tarpon Springs and Department of Environmental Protection, 12/21/01]

3rd District Court of Appeal

Notice required for summary judgment motion

A state law enforcement agency is entitled to a new hearing over the forfeiture of almost \$30,000 because the claimant's attorney failed to give the agency sufficient notice that he would move for an immediate ruling in his favor, the 3rd DCA said. The Court reversed a summary judgment that awarded the money to James Chancellor, who presented three witnesses to support his argument that he owned the money and it most likely came from legitimate business ventures. The Florida Highway Patrol had sought the currency, which amounted to \$29,980. The DCA agreed that Chancellor had standing to seek the funds, but said the trial court erred in granting summary judgment when Chancellor's attorney made an oral motion at the conclusion of a hearing on standing. The DCA noted that a motion for summary judgment must state the grounds on which it is based and the points of law involved, and must be served on the other party at least 20 days before it is heard. Because Chancellor failed to provide such notice to the Highway Patrol, the summary judgment order must be reversed and a new hearing held, the DCA said.

[Florida Highway Patrol v. In Re: the Forfeiture of, etc., 12/12/01]

Sovereign immunity - officer's action during sting

Sovereign immunity does not protect Miami-Dade County from liability for an incident in which the actions of a county police officer conducting a sting operation resulted in injuries to an innocent bystander, the 3rd DCA said. The court rejected the county's claim that the officers' actions were discretionary and therefore protected by sovereign immunity. Lucious Brown, who was a paying guest at a Howard Johnson motel, was injured in a fall he suffered after being startled by an officer who pointed a gun at him and ordered him to freeze. Brown sued, alleging the county owed a duty to warn or protect innocent bystanders while conducting the prostitution sting. The DCA found that the county did owe a duty of care to Brown because the officers' conduct created a

foreseeable zone of risk. The DCA said sovereign immunity does not apply because the conduct of the sting was not a discretionary, policy-setting action of the county but was instead operational in nature. "Lucious Brown was not an alleged target of the sting operation at the hotel and the police were not attempting to arrest him. Therefore, the challenged conduct in this case did not involve an officer's discretionary conduct in making an arrest," the DCA said.

[Brown v. Miami-Dade County, et al., 12/5/01]

Qualified immunity - wrongful arrest lawsuit

Municipal police officers are not entitled to qualified immunity in a wrongful arrest lawsuit because they were not in "hot pursuit" of a suspect when they entered his home and arrested him, the 3rd DCA said. The City of Key West and several of its officers were sued by plaintiffs whose civil rights complaint claimed the officers impermissibly entered one plaintiff's home without a warrant, made wrongful arrests and used excessive force. The case arose from an incident in which a taxi driver told officers he saw Steve Brown throw full beer cans at passing traffic and then disappear into a friend's home. Officers entered the home without a warrant and arrested Brown and several other individuals. The trial court granted summary judgment in favor of the city on the merits, and granted summary judgment for the officers based on qualified immunity. The DCA reversed the order regarding the officers, saying they had no basis to pursue Brown inside the private residence. "According to the officers' analysis, because they had responded promptly to the report of criminal activity, they were entitled to enter the house to make the arrest. We think the law is clearly established that the foregoing does not amount to hot pursuit," the DCA said. "There was no immediate or continuous pursuit of Brown originating outside the house and continuing into the house. ... Based on this summary judgment record, the defendant officers who entered the house are not entitled to section 1983 qualified immunity insofar as they entered the house to arrest Steve Brown."

[Moody, et al., v. City of Key West, et al., 12/26/01]

Impeachment - officer's prior inconsistent statements

Defense counsel may attempt to impeach the credibility of a law enforcement officer by asking about the officer's prior inconsistent sworn statements if the officer has testified to a material, significant fact that is critical to the defense, the 3rd DCA said. Appealing his drug trafficking conviction, Rafael Varas argued that the trial court should have allowed him to cross-examine a Drug Enforcement Administration agent about statements the agent included in his trial testimony but had omitted in previous sworn statements. The agent testified that following a surveillance operation, Varas seemed nervous when asked about the contents of a brown bag suspected of containing cocaine. On cross-examination, Varas'

attorney asked the agent why he had failed to mention the nervousness in his arrest report, at a deposition and during a suppression hearing. The trial court sustained the State's objection, finding that Varas' attorney had engaged in impermissible noncritical, negative cross-examination. The DCA disagreed and reversed, noting that negative cross-examination is permissible when a witness appears to be fabricating. "Considering the record before us, we do not understand how the DEA agent's testimony may be deemed mere non-critical details. The DEA agent's testimony about Varas' demeanor went to the very heart of the defense below and we conclude that the trial court abused its discretion when it failed to allow Varas to impeach the agent about the omission of such evidence during pretrial statements," the DCA said.

[Varas v. State, 12/05/01]

Torts-counties-sovereign immunity-police negligence

Parents of minor child who was blinded in one eye by flying debris when police officer shot school bus hijacker during hijacking of child's school bus brought action against police officer and county. The Circuit Court, Dade County, Phillip Bloom, J., granted summary judgment in favor of county, and parents appealed. The Third District Court of Appeal, Cope, J., held that police officer's act of shooting hijacker was discretionary, entitling officer and county employer to sovereign immunity. Affirmed.

[Robles v. Metropolitan Dade County, 12/19/01]

4TH District Court of Appeal Immunity from liability - officer beyond jurisdiction

A police officer who accidentally shot a bystander while temporarily out of his jurisdiction to purchase a soft drink enjoys statutory immunity from liability because he was acting within his employment, the 4th DCA said. The Greenacres City officer, who was working 12-hour night shift, drove to a service station barely outside Greenacres' city limits to get a soft drink. At the station, he saw a vehicle matching one under criminal investigation. As he walked toward the vehicle, two large dogs jumped out and came toward him in a threatening way. The officer shot at the dogs, scaring them off, but a woman who was pumping gas into her car was hit in the ankle by one of the bullets. The DCA concluded that the officer was immune from liability because he was acting in the service of his agency at the time of the incident, even though he was outside his jurisdiction. "[The point] that attending to personal comfort facilitates employment, makes sense in tort cases," the DCA said. "An on-duty police officer in a patrol car, or on the beat, must occasionally go outside the jurisdiction to purchase food or use a restroom. It is inherent in the nature of the

employment and anticipated by the employer. ... [T]his officer's actions in protecting himself from being injured by the attacking dogs benefited his employer."
[Ryan v. Roy, 12/5/01]

Unauthorized repairs as theft

A car dealer employee who repaired a customer's car "on the side" deprived the dealer of money it would have made from the repair job and therefore committed theft, 4th DCA said. Appealing his conviction for petit theft, Allan Urbanik argued that it was not a crime for him to repair a customer's car "on the side" at his employer's Cadillac dealership. When a customer objected to the high cost of a repair, Urbanik said he could do it cheaper in exchange for cash. Urbanik actually recruited a free-lance mechanic to do the repair job, which was done on the dealership's premises but with the mechanic's own tools. The two men split the fee. After the repair, Urbanik refused to give the customer a receipt and a guaranty for the work. "We do not agree with appellant that what occurred in this case did not constitute a theft. Our theft statute, section 812.014(1), Florida Statutes (1999), defines theft as obtaining or using the property of another with the intent to deprive the person of a right to the property. ... Depriving the dealer of the amount it should have received from the labor was a theft," the DCA said.
[Urbanik v. State, 12/26/01]

Search and seizure - traffic roadblocks

Police conducting a vehicle safety and drug roadblock cannot substitute standard operating procedures and oral briefings for detailed written guidelines that identify the specific procedures to be used, the 4th DCA said. West Palm Beach police had set up a roadblock to check for vehicle safety violations and illegal drugs when motorist Earnest Jones was stopped and questioned about narcotics. Officers noticed marijuana seeds in the rear of Jones' truck, and a search revealed marijuana and cocaine. Jones was convicted of possession of marijuana and cocaine. Because of a manpower shortage during the roadblock, not all motorists were asked about drugs. Officers testified that they had participated in a pre-inspection briefing and followed written guidelines for detecting safety violations, but there were no written procedures for the drug inspections. Jones argued that the operational guidelines for the checkpoint were inadequate, and the DCA agreed and suppressed the drug evidence against him. "Although the guidelines addressed the important issue of which vehicles would initially be stopped (all) they did not address which cars would be checked for narcotics or the procedures to be used. The pre-roadblock oral briefing made it clear that the detection of illegal drugs was to be an integral part of this roadblock. The written guidelines, however, neither mentioned nor addressed the presence or duties of the narcotics officers. The failure of the written guidelines to address this aspect of the inspection left the crucial decisions of which drivers would be questioned about

drugs and how they would be questioned solely to the discretion of the officers on the scene," the DCA said.
[Jones v. State, 11/28/01]

Search and seizure - justification for traffic stop

A police officer who observes a vehicle operated in an unusual manner may have sufficient justification for a stop even though no violation of traffic regulations took place and no citation was issued, the 4th DCA held. Frederick Finizio challenged the denial of his motion to suppress, arguing that a Palm Beach County sheriff's deputy lacked reasonable suspicion to justify the investigatory stop that resulted in DUI and drug possession charges. While on DUI patrol, Deputy Alfred Araujo saw Finizio's truck being driven erratically. The deputy stopped Finizio and, after smelling alcohol, conducted a DUI investigation that also turned up cocaine. The deputy arrested Finizio, but did not issue a traffic citation. The DCA said that under the totality of the circumstances, the deputy's actions were justified. "We are not persuaded by appellant's argument that before Araujo could possess a reasonable suspicion to stop him, he had to observe his driving for an extended period of time or distance. In this case, Araujo observed him operate his truck in an unusual manner by hitting the curb with the front and back tires, speeding up and then abruptly stopping in quick succession. Under the circumstances, we conclude that an extended observation was neither possible nor necessary," the DCA said.
[Finizio v. State, 11/28/01]

Lewd and lascivious - involvement of another

The law against lewd and lascivious acts committed with "another person" does not apply where a defendant's solitary act of masturbation occurred in a parked car while an undercover police officer looked on from outside, the 4th DCA said. Ronald Conforti challenged a probation revocation that stemmed from his conviction for sexual battery on a person less than 12. While serving the probation, Conforti encountered an undercover police officer at a park and, with the officer's consent, sat in his car and masturbated for about 25 seconds while the officer stood outside and watched. The officer arrested Conforti and charged him with an unnatural and lascivious act with another person. Conforti contended that someone other than the officer must be offended in order for a violation of the statute to occur. The trial court ruled that the law does not require that the act be offensive to another person, although it nevertheless found that the officer had been offended. Reversing, the DCA said, "[T]he plain wording of the statute requires that the alleged lewd and lascivious act be committed with another person. It cannot be said that appellant's masturbation was committed by a person with 'another person.' Certainly, the public exhibition statute ..., if charged, would have been applicable to appellant's behavior under these circumstances."
[Conforti v. State, 11/28/01]

Search and seizure - grounds for investigatory stop

Police conducting a trespass program must have reasonable suspicion of criminal activity to justify an investigatory stop if "no trespass" signs were not posted and the suspect was told to leave the premises by those in authority, the 4th DCA said. Nitika Griffin challenged the trial court's refusal to suppress cocaine found during a trespass program at a Pompano Beach hotel. Officers saw Griffin walking back and forth in front of rooms at the hotel and then return to his car. Officers drove their unmarked car to block Griffin's exit and, while talking to him, saw a plastic baggie on the floorboard and discovered cocaine. Reversing the trial court's denial of the motion to suppress, the DCA concluded, "The officers approached appellant to determine whether he was a guest or a visitor. They were entitled to ask him a few questions to dispel concerns about his presence on the property and to warn him regarding trespassing. However, when they drove their vehicle behind appellant's car, effectively preventing his exit, he could not leave. Therefore, the police effected a stop unsupported by either reasonable suspicion or probable cause."

[Griffin v. State, 11/28/01]

Nondisclosure privilege re: surveillance location

The nondisclosure privilege that allows a testifying officer to withhold the location of a surveillance position is recognized only in the most unusual circumstances where the witness' very safety would be directly compromised, the 4th DCA held. Harold Rainer was convicted of sale of cocaine after an officer, using a surveillance camera with a special telephoto lens, observed what appeared to be a drug transaction. The defense attempted to cross-examine the officer about his exact location during the surveillance, but the officer refused because the camera was expensive, was still in use, and disclosure "would be bad" for future officer safety. The trial court sustained the State's objection, but the DCA reversed. "[I]n view of defendant's demonstrable need for the information in his cross examination, these reasons clearly fail to provide a proper basis for the trial judge to allow the use of the privilege in this case," the DCA said. "Only after resolving all doubts in favor of the defendant's right to confront the witnesses against him, may the judge determine that the concern for the safety of the witnesses overcomes the defendant's strong interest in a full cross examination of the witnesses against him."

[Rainer v. State, 12/19/01]

DUI - proof of impairment

Where the State proves that a DUI manslaughter defendant had an unlawful blood alcohol level, it is moot whether the trial court properly instructed the jury on the presumption of impairment since the State did not have to

prove impairment, the 4th DCA said. The DCA considered Gregory Dodge's appeal on rehearing and replaced its own earlier opinion. Dodge, who was convicted of DUI manslaughter, argued the trial court erred by admitting the blood test and instructing the jury on a presumption of impairment because the State had failed to prove the reliability of the tests. Dodge argued that blood taken from him at a hospital was not properly extracted and preserved, thus compromising the test results. A toxicologist testified that Dodge's alcohol blood level was .09, but two State witnesses were not present and could not verify the events surrounding the blood draw and test. The DCA found that although the blood alcohol test was not properly admitted under the presumption of impairment statute, it was properly admitted under the common law approach. "In this case, there was evidence that the level of alcohol in appellant's blood at the time it was tested was 0.09. Moreover, there was expert testimony that appellant's blood alcohol level at the time of the accident was 0.12. Thus, it was proper to instruct the jury that if it found that appellant's blood alcohol level was greater than 0.08 at the time he drove his automobile into the (victim's) vehicle, then the jury must also find that appellant was guilty of the offense of DUI," the DCA said.

[Dodge v. State, 12/06/01]

Prima facie case - driving with revoked license

In order to establish a *prima facie* case that a motorist had been driving with a revoked license, the State does not have to prove each separate conviction that was the basis for the revocation, the 4th DCA said. Instead, the Court said, the State only has to prove that the motorist had been driving with a revoked license and that the Department of Highway Safety and Motor Vehicles had given the motorist notice. Appealing his conviction for driving with a revoked license, Charles Rodgers argued that the State had not presented a *prima facie* case under section 322.34(5), F.S., because it failed to separately prove each of the three prior convictions that resulted in his license being revoked. The State submitted certified copies of computer printouts of Rodgers' driving record showing the three convictions for driving with a suspended license (DWLS) and indicating that he had been notified of the revocation. Finding that the certified copies were sufficient *prima facie* evidence of the revocation, the DCA said, "[T]he violation created by section 322.34(5) does not involve - as an element of the crime - a finding that the motorist has been convicted on three separate occasions of DWLS. Instead it involves driving a motor vehicle on the public highways of Florida at a time when DMV has revoked the motorist's license and given notice of the revocation."

[Rodgers v. State, 12/5/01]

Probable cause for vehicle stop

An officer who stops a driver for obstruction of traffic lacks probable cause for the stop if there is no showing

that the defendant acted willfully with the specific intent to impede or hinder traffic, the 4th DCA said. James Underwood challenged the denial of his motion to suppress crack cocaine seized when he was stopped for obstructing traffic. During a routine patrol, a Broward County sheriff's deputy came upon a Toyota stopped in the middle of a narrow street. There was no traffic on the street at the time, and the deputy saw a man who had been standing next to the car suddenly flee. As the deputy drove up behind the Toyota, it moved on. The deputy said he stopped the car a few blocks away to issue a citation for obstructing traffic but saw that the driver, Underwood, was chewing a white object. Based on his experience, the deputy recognized the object as crack cocaine, which a field test confirmed. Underwood argued that the officer did not have probable cause to stop his car for obstructing traffic because he had just momentarily stopped his car, barely affecting traffic. The trial court found probable cause for the stop, but the DCA disagreed. "As soon as the officer's vehicle approached, appellant moved forward, allowing the officer to continue his travel along the street without having to stop or drive around appellant's vehicle. Although the deputy had to slow down, there is no indication that his 'normal use' of the street was hindered or endangered by appellant's conduct," the DCA said.

[Underwood v. State, 12/05/01]

Entrapment - officer's state of mind

In a case revolving around an entrapment defense, it is error for a trial court to deny the defendant an opportunity to present non-hearsay evidence of an officer's state of mind when it shows bias and is essential to the defense, the 4th DCA said. Wardell Everett challenged his conviction for delivery of cocaine, contending the trial court should not have excluded Everett's testimony that the undercover detective had previously threatened him. Everett was arrested for selling drugs to Detective Roderick McGowan, whom he had encountered before but did not recognize. Everett testified that when he was arrested on a previous occasion by McGowan, the detective had threatened to arrest Everett every time he saw him on the street. Everett argued that McGowan's statement supported his defense that he was a detective who was biased and out "to get" him. Reversing and remanding for new trial, the DCA said, "When addressing an entrapment defense, evidence of the government agent's state of mind is very relevant and cannot be considered harmless if there is strong evidence of government involvement and persistence. Further, because the case boiled down to a credibility determination, evidence tending to impeach McGowan and demonstrate his bias would be highly relevant."

[Everett v. State, 12/05/01]

Scope of discovery - criminal histories of witnesses

Under criminal rules for discovery, the State is only required to disclose prior or pending criminal histories of those individuals it intends to call as civilian witness and who are subject to impeachment, the 4th DCA said. In a capital murder case, the trial court granted a defense motion to compel disclosure of any criminal records of all 100 of the State's listed witnesses, even though the State had notified the defense it only intended to call 30 of those witnesses. The defense sought FCIC, NCIC and PALMS reports. The State testified that it was prohibited from releasing the federal information and its access could be canceled if the reports were released to the defense. The State also said the FCIC and PALMS information could be retrieved as public records from the appropriate agencies in Florida, and the defense did not refute the State's claim. "(T)he trial court departed from the essential requirements of law in compelling the State to obtain and disclose the criminal records of all listed State witnesses without first determining whether all or any part of the information sought by the defendants was readily available to them through due diligence and whether the defendants had exerted and exhausted efforts to obtain the information," the DCA said.

[State v. Wright and Pedroza, 12/05/01]

5th District Court of Appeal Search and seizure - stop and frisk

Drug evidence found on a suspect should have been suppressed because police did not have a well-founded, articulable suspicion of criminal activity to justify their stop of the defendant, the 5th DCA held. A minor identified as C.Q. contested his drug convictions, arguing that the search and seizure were illegal. C.Q. was a passenger in a car that had improperly parked in a fire lane outside a supermarket, prompting a citizen to call police. When officers arrived, the driver moved the car to a proper parking space. An officer then began chatting with the driver about why he had parked improperly, and the conversation eventually led to the officer's request to search the car and then its occupants. The search eventually found drugs on C.Q., and he was arrested. The State argued that because C.Q. consented to a pat-down search for weapons, officers did not need reasonable suspicion to search him. The DCA disagreed, saying the officer's demand that C.Q. empty his pockets exceeded the scope of a lawful protective frisk for weapons even had C.Q. consented to a weapon search. "Absent a knowing and voluntary consent, Deputy Borows had no right to conduct a pat down or to ask C.Q. to remove anything from his pockets. Police may not lawfully conduct pat-down searches based merely on routine or generalized safety concerns. Even if C.Q. had consented, Borows exceeded the scope of the search," the DCA said.

[C.Q. v. State, 12/14/01]

Ryce proceedings - hearsay evidence

A Jimmy Ryce defendant who is committed based largely on unsworn police reports that do not relate to a conviction or plea has been denied the opportunity to confront his accusers and has suffered a violation of his due process and fair trial rights, the 5th DCA said. Police testifying at Damon Jenkins' civil commitment proceeding used reports that contained hearsay information and never rested on sexual offense convictions. Jenkins' conviction rested on the officers' testimony. Finding that the introduction of such unreliable evidence was so extremely prejudicial that the entire proceeding was tainted, the DCA said, "If this type of unreliable hearsay is factored into the experts' opinion, do we not have a case of 'garbage in, garbage out?'" In reversing Jenkins' commitment, the DCA concluded, "Courts must recognize the distinction between police reports which contain unchallenged and unchallengeable prejudicial hearsay and police reports which relate to cases in which the respondent has pled or has been convicted. It is only the latter which have an indicia of reliability."

[Jenkins v. State, 11/30/01]

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