
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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FLORIDA SUPREME COURT

Definition of "conviction" in felony DUI cases

A misdemeanor DUI conviction can serve as a predicate offense for a subsequent felony charge even if the misdemeanor case is still pending on appeal, the Florida Supreme Court held. The justices unanimously reversed dismissal of a case against Karen Finelli, who had been charged with felony driving while under the influence based on three prior misdemeanor DUI convictions. However, the trial court dismissed the felony case because one of the underlying misdemeanors was still pending on appeal. Required to determine the meaning of the word "conviction" under DUI law, the Supreme Court concluded that the Legislature did not intend to create a loophole based on such appeals. "This case ... involves a statute which, on its face, reflects a legislative intent to remove dangerous instrumentalities from the hands of those who have demonstrated unfitness to be entrusted with them," Justice Lewis wrote for the court. "To allow fourth-time offenders to escape felony charges only because an appeal from a predicate conviction has not yet been exhausted would be inconsistent with the Legislature's expressed intent. Moreover, in the event that a predicate conviction is reversed on appeal, the defendant may seek relief through a motion to vacate judgment filed pursuant to Florida Rules of Criminal Procedure 3.850."

[State v. Finelli, 3/1/01]

2nd District Court of Appeal

Failure to use turn signal - motion to suppress

A police officer did not have probable cause to stop an automobile based on its failure to give a proper turn signal after making a sudden stop, the 2nd DCA said. Bobby Bowling appealed his conviction and order of probation for possession of cocaine, arguing that the trial court erred in denying his dispositive motion to suppress. Bowling was stopped for violating section 316.155(3), F.S., failure to give a proper turn signal. While driving on the evening of August 15, 1999, Bowling was closely followed by a second car, which in turn was followed by a police officer. The three vehicles came to a sudden stop, and Bowling made a left turn without using a proper turn signal. The officer followed Bowling and issued a traffic citation for violating section 316.155(3). "Obviously, if Mr. Bowling's vehicle stopped suddenly, it was because of the application of the brakes, and the taillights properly

signaled the stop. From his position in the third vehicle, the officer was simply not able to see Mr. Bowling's brake lights. In sum, the officer was unable to show any reasonable basis for stopping Mr. Bowling's car," the DCA said. Because the stop was improper, the evidence should have been suppressed, the DCA said.

[Bowling v. State, 3/2/01]

Validity of breath test - license suspension

A defendant's proof that the breath test she refused to take had not been properly certified and would have been invalid does not preclude the suspension of her driver license, the 2nd DCA said. The Department of Highway Safety and Motor Vehicles appealed a circuit court order reinstating the suspended license of Charlene Coleman. Coleman's license was suspended after she was properly stopped and arrested for driving under the influence. Coleman refused to take a breath test after being informed that her refusal would cause her driving privileges to be suspended. At the administrative hearing, Coleman offered into evidence an FDLE investigative summary regarding deficiencies in the breath test training and testing procedures. The hearing officer ruled that the evidence was not relevant and sustained Coleman's license suspension. The Circuit Court quashed the administrative order and reinstated Coleman's driving privileges, concluding that a driver license may only be suspended for refusal to take a valid breath test and that once a defendant establishes that a valid or approved test was not available, her refusal can carry no suspension consequences. The DCA disagreed. "As the First District held (in its 1995 *Riggen* decision), '(a)lthough the validity of a breathalyzer test may be essential to its admissibility in a criminal proceeding, the hypothetical validity of a refused test is not relevant to review the administrative suspension of a driver's license.' Thus, the hearing officer in this case properly concluded that the evidence regarding the validity of the test Coleman would have taken did not preclude the suspension of her license," the DCA said.

[Department of Highway Safety and Motor Vehicles v. Coleman, 3/23/01]

Motion to suppress - consensual encounter

When a law enforcement officer approaches a person to ask questions or check identification and the citizen voluntarily cooperates, the encounter does not constitute a seizure and does not require objective justification, the

2nd DCA said. Stacy Lee Watts challenged his convictions for drug possession, arguing that the trial court should have suppressed the drugs officers discovered after they approached him on the street. As Watts walked from what Fort Myers officers considered a "high drug area" toward a "drug house," they stopped Watts and he agreed that they could talk to him about drug activity in the area. The officers acknowledged that they had not seen Watts engage in any criminal activity. At the officers' request, Watts also voluntarily provided identification. After running a warrants check and asking Watts some questions, the officers told him he was free to go. An officer then asked Watts if he could search him and Watts said "sure," and then told the officer that he had marijuana in a pocket. Watts contended that the consensual encounter was transformed into a stop when the officer, having already indicated that Watts was free to go, asked him for consent to search. Watts argued that the consent was not voluntary, but rather was made in acquiescence to the officer's apparent authority. Even if his consent was voluntary, Watts added, the search was invalid because the officers did not have a founded suspicion to request consent to search. The DCA disagreed. "(A)n officer's request for consent to search is not a seizure and, therefore, does not require objective justification," the DCA said. "(We) hold that an officer need not have a reasonable or founded suspicion of criminal activity before seeking consent to search." [Watts v. State, 3/16/01]

Executing valid search warrant

A law enforcement officer's decision to make an additional undercover drug buy rather than execute a valid search warrant did not violate the defendant's due process right, the 2nd DCA held. The state appealed an order dismissing a count of trafficking in cocaine. Earl Taylor cross-appealed, asserting that the multiple prosecutions in this case violate constitutional prohibitions against double jeopardy. The DCA disagreed. Earl Taylor was arrested for three separate cocaine sales in 1998. On September 22 and September 29 of that year, an undercover officer and a confidential informant purchased cocaine from Taylor at his home. Following the second purchase, the officer obtained a search warrant for the premises on October 8. That day, the officer again went to Taylor's residence, but instead of executing the warrant decided to make a third purchase of cocaine. The search warrant was executed the following day. Taylor contended that because the officer failed to execute the warrant and arrest him on October 8, the officer created the situation for the sale to occur. The trial court dismissed the charge, but the DCA reversed. "Even under Mr. Taylor's hypothesis - that he should have been arrested on October 8th to prevent more criminal prosecutions - he could have posted bail, been released, and participated in another transaction. Furthermore, section 933.05, Florida Statutes, requires that an executed warrant be returned within ten days of issuance. This provision suggests that police

officers normally have some temporal leeway in making their cases against potential criminals and a minimal delay will not generally intrude into the defendant's due process rights," the DCA said. [State v. Taylor, 3/23/01]

Recovering investigative costs

Police departments are entitled to recover specifically identified salary expenses from indigent defendants, but should not pursue recovery in every routine case, the 2nd DCA said. Javier Vargas appealed an order awarding \$49.58 as investigative costs to the Arcadia Police Department following resolution of his concealed weapon case. Vargas was arrested after police received a report of a man with a firearm at a restaurant and dispatched seven officers to the scene. The state determined Vargas to be indigent and appointed a public defender to represent him. The department wanted to recover \$100 from Vargas pursuant to section 938.27(1) F.S. (1999), contending that the cost of dispatching officers to the restaurant to arrest Vargas and transporting him to the county jail equaled or exceeded this amount. Vargas protested and the trial court scheduled a special hearing, at which a lieutenant testified that he believed the department had spent more than \$100 on the event. Through cross-examination, Vargas' attorney established that the award should not exceed \$49.58. The DCA agreed in an opinion sharply critical of the police department's unyielding pursuit of the small recovery amount. "The Arcadia Police Department can now proudly boast that it has a possibility of eventually collecting \$49.58 from an indigent man. It expended only a few hundred dollars of a lieutenant's time to obtain this asset. Meanwhile, the department's decision to pursue this cost has caused the offices of two public defenders, the Office of the Attorney General, the clerk of the Twelfth Judicial Circuit Court, a circuit court judge, a court reporter, and the staff and judges of this court each to spend substantially more than \$49.58 of taxpayer money to help the police department purchase this questionable asset. If a public corporation engaged in this type of activity, its stockholders would be outraged at its lack of business acumen. We doubt the legislature envisioned that law enforcement agencies would invoke section 938.27(1) to pursue minimal costs of investigation for every minor arrest. The legislature probably assumed that departments would use some common sense about seeking costs only when the value of the award would more than offset the cost of producing the award," the DCA said.

[Vargas v. State, 3/23/01]

3rd District Court of Appeal

Race or color as basis for investigatory stop

Racial incongruity - a person seemingly "out of place" in a particular area - cannot provide the basis for reasonable suspicion of criminal behavior to support an investigatory stop, the 3rd DCA said. Omar Phillips was convicted of

burglary of an unoccupied dwelling and petit theft. Phillips appealed the denial of his motion to suppress evidence that was obtained when police officers stopped him on the day of the burglary. Phillips argued that he was improperly stopped merely because he was a black man walking in a predominately white neighborhood, and the DCA agreed. "Officer Little's testimony indicated that he became suspicious only after he learned that Officer Campbell was detaining a black man. Clearly the fact that a black person is merely walking in a predominately white neighborhood does not indicate that he has committed, is committing, or is about to commit a crime," the DCA said. "Therefore, because the police officers did not have the necessary founded suspicion to support the investigatory stop, the (evidence) that was obtained during the invalid search must be suppressed."

[Phillips v. State, 3/14/01]

Sovereign immunity - police pursuit on foot

A police officer's pursuit of a suspect on foot is an operational activity, and therefore sovereign immunity does not protect the public employer from liability for injuries resulting from the chase, the 3rd DCA said. The court said the running pursuit of a suspect is legally the same as a pursuit in a police car. The DCA affirmed a lower court order granting a new trial to a woman injured by a Miami police officer who collided with her while running after an assault suspect during the Calle Ocho street festival in 1997. "We believe that (the officer's) actions of chasing a suspect through a crowd of people, on foot, were operational in nature and not immune from suit," the DCA said. "(T)he method chosen by police officers engaging in hot pursuit is an operational function that is not immune from liability if accomplished in a manner contrary to reason and public safety."

[City of Miami v. De La Cruz, 3/14/01]

Motion to suppress - confidential informant

When an untested confidential informant comes forward personally to give information that is immediately verifiable at the scene, that information is more reliable than any received via an anonymous phone tip and carries sufficient indicia of reliability to justify an investigatory stop, the 3rd DCA said. The state appealed an order granting Jose Gil's motion to suppress evidence. A Miami-Dade Police narcotics detective received information from an untested confidential informant that he had known for a short time. The informant told the detective that he had purchased cocaine from Gil on several occasions and thought he could do so again. The informant accompanied the detective in his car and pointed out Gil's residence, identified his car, and gave a general description of Gil. After an extensive undercover operation, Gil was arrested. Gil subsequently filed a motion to suppress physical evidence, arguing that the officers lacked a reasonable suspicion to justify the detention and search of his vehicle because the tip they acted on came from an untested confidential informant.

The state stipulated that the informant's reliability was untested, but argued that because the informant was present with the police when Gil was arrested, his reliability was greater than that of a "mere tipster." The state argued that although the informant's reliability was untested, the information he gave the police officers carried enough indicia of reliability to justify the investigatory stop. The DCA agreed, reversing the trial court's suppression order and remanding for further proceedings. The DCA concluded that the confidential informant's tip carried sufficient indicia of reliability to create a founded suspicion on the part of the police officers to justify an investigatory stop.

[State v. Gil, 3/21/01]

4TH District Court of Appeal

Anonymous tip - probable cause to arrest

If an anonymous tip on which police act is confirmed and independently corroborated by the activity they witness prior to stopping and seizing a defendant, the seizure does not violate the Fourth Amendment, the 4th DCA said. Ronald League challenged his conviction for purchase and possession of cocaine. League was arrested after an 11-year veteran of the Vero Beach Police Department and a member of the county's Multi-Agency Criminal Enforcement Unit, acting on an anonymous tip, observed him drive up to a known drug dealer's residence and conduct a transaction there. Officers grabbed League as he attempted to get back into his vehicle, and pieces of cocaine fell out of his hand. League contended that the police stopped and seized him without probable cause, but the DCA disagreed. "While anonymous tips are not in and of themselves sufficient to constitute either reasonable suspicion or probable cause, when independent investigation reveals corroboration of the substance of the tip, the totality of the circumstances may rise to either reasonable suspicion or probable cause. The anonymous tip in this case was corroborated by the independent observation of conduct consistent with a drug transaction. Specifically, a trained officer witnessed a hand to hand transaction involving a known drug dealer where the money was exchanged for a small object. We thus conclude that there was probable cause for (League's) seizure," the DCA said.

[League v. State, 3/7/01]

Forfeiture - removal of vehicle number

A vehicle owner who alters or removes one plate containing the vehicle's VIN number, but leaves two others intact, does not violate the law making it illegal to alter "the" VIN number, the 4th DCA said. The City of Margate appealed an order dismissing its forfeiture action for failure to establish probable cause. A Margate police officer observed a pickup truck in the parking lot of an automobile repair shop and saw that it lacked the required vehicle identification number (VIN) on the dash board. There were two holes visible where the VIN had

previously been attached, but the VIN did appear on the driver's side door jam and attached to the firewall of the engine compartment underneath the hood. The city impounded the vehicle despite establishing that it belonged to the shop's owner and the two displayed VINs were consistent with the vehicle title. The city sought forfeiture based on a violation of section 319.33, F.S., which makes it illegal to remove or alter "the" motor number or vehicle identification number. The city contended that the statute is violated even if only one VIN plate is missing, and the fact that the vehicle had visible VINs on the firewall and the door jam was of no consequence. "We are unable to determine, from the wording of the statute, if the legislature intended to criminalize removal of one VIN, where others are intact and visible. If the statute criminalized the removal of 'a' VIN, it would be clear; however, the use of the word 'the' makes it unclear as to whether the statute applies in this case," the DCA said. Because of the uncertainty, it must construe the statute in favor of the vehicle owner, the court said.

[City of Margate v. Singh, 3/7/01]

5TH District Court of Appeal

Resisting arrest - failure to answer officer's questions

An individual is not required to cooperate with an officer by answering his questions during a citizen encounter, the 5th DCA said. A juvenile identified as F.P. appealed her conviction for resisting arrest without violence. F.P. was arrested after an officer witnessed her yelling and waving her arms at the scene of a reported fight. As the officer approached her, F.P. walked away. He ordered her to stop, and she responded with a vulgarity and was subsequently arrested. "The officer admitted that he had no reason to believe that appellant was or had been engaged in criminal conduct. This was not a *Terry* stop. It seems clear that one can walk away from a citizen encounter. The trial court's observation that 'from his testimony I find that he (the officer) felt that the Defendant could be stirring up the crowd' is contrary to the officer's sworn testimony that he had no reasonable suspicion that appellant had committed a crime. A judgment of acquittal should have been entered," the DCA said.

[F.P. v. State, 3/2/01]

Motion to suppress - illegal detention

Officers cannot place an individual in the back of a locked police car without his consent for an unreasonably long period of time, without any probable cause to suspect he is guilty of criminal activity, the 5th DCA said. Anthony Clinton was a passenger in a car that was pulled over for a routine traffic stop. While officers searched the car, they placed Clinton in the back of a locked police cruiser. When Clinton was allowed to exit the vehicle, officers found drugs stuffed into the back seat. After his motion to

suppress was denied, Clinton pled *nolo contendere* to possession of cocaine, but then appealed. Clinton contended that police officers unlawfully detained him for an unreasonable period of time - longer than necessary to investigate the traffic stop - and said officers legally seized him by placing him in the back of the patrol car without any probable cause to suspect that he had committed a crime. The DCA agreed. "Where abandonment of evidence is the product of an illegal stop, the abandonment is involuntary and the abandoned property must be suppressed. Evidence abandoned in a patrol vehicle, where the suspect has been detained without probable cause or other justification, requires suppression of the evidence seized," the DCA said. "Although a suspect's voluntary abandonment of evidence can remove the taint of illegal conduct, the abandonment must be truly voluntary and not merely the product of police conduct."

[Clinton v. State, 3/2/01]

Motion to suppress

In order to enjoy Fourth Amendment protections in the area surrounding a commercial business, the proprietor must avoid leaving objects in plain view and must take steps to affirmatively bar the public from the area, the 5th DCA said. Rodney Ratcliff appealed an order placing him on two years probation for two counts of dealing in stolen property, including a stolen Ryder truck. Ratcliff argued that the trial court should have granted his motion to suppress because he had a right to privacy in the area behind his business. Ratcliff also argued that his store was commercial property whose curtilage was entitled to Fourth Amendment protection and officers' warrantless entry onto the curtilage should result in any evidence being suppressed. The state argued that commercial curtilages have far less Fourth Amendment protection than homes or residences, if any, and that in this case it was entitled to none because Ratcliff had done almost nothing to try to establish an area of privacy behind his business. The DCA agreed with the state. "Ratcliff made no effort to exclude access by the public or others to the area behind his store. The store was a retail establishment and the general public was welcome to drive to the front of his premises. Access to the rear was through a drive which had neither gates, fences nor 'no trespassing' signs. The rear of the store was also visible from the public highway, ergo, the off-loading of stolen goods from a stolen trailer could be seen. Further, the drive leading to the rear of the store was apparently used by persons other than Ratcliff and his employees, including the police, who regularly patrolled the area. There is simply no objective or subjective manifestation that Ratcliff asserted a right to privacy in the area behind his store and thus a warrantless search did not violate his Fourth Amendment rights," the DCA said.

[Ratcliff v. State, 3/9/01]

Victim's efforts elevating offense to carjacking

A victim's efforts to prevent the theft of her vehicle can elevate a grand theft to a carjacking, the 5th DCA held. Thomas Lovett appealed his convictions for carjacking and resisting arrest without violence. Lovett contended that he was guilty of only grand theft auto rather than carjacking, and efforts of victim Dawn Nickloy to keep her car from being stolen could not elevate his grand theft to a carjacking. The DCA disagreed. "By jumping on the hood of her car, Nickloy was attempting, albeit unsuccessfully, to prevent Lovett from taking her car," the DCA said. "By accelerating the car while Nickloy was on the hood attempting to prevent its theft, Lovett clearly committed an act of violence prohibited by the carjacking statute. Accordingly, we find no error in Lovett's conviction for this offense."

[Lovett v. State, 3/9/01]

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ATTORNEY GENERAL'S OPINION

Safety helmets for scooters

In response to a request from the Bay County Sheriff, the Attorney General issued an advisory opinion (2001-11, 2/28/01) stating in sum: "The Florida Legislature has specifically exempted scooters from the definition of a bicycle and a person under 16 years of age would not, therefore, be subject to the requirement of wearing a safety helmet."

Law enforcement officer's rights

In response to a request from the Ocala police chief, the Attorney General issued an advisory opinion (2001-17, 3/13/01) stating in sum: "A law enforcement officer's chosen representative is not authorized by section 112.533, Florida Statutes, to review the complaint and statements made against the officer immediately prior to commencement of an investigative interview conducted pursuant to that statute."

Background checks - law enforcement academies

In response to a request from the executive director of the Florida Department of Law Enforcement, the Attorney General issued an advisory opinion (2001-19, 3/20/01) stating in sum: "Section 943.14(8), Florida Statutes, requires a criminal history background check for an applicant prior to entrance into a basic recruit class and, consistent with the Legislature's intent, would be satisfied by an agency's criminal history background check performed when an individual has been hired in anticipation of his or her attending a law enforcement training program."

Parking restrictions on state roads

In response to a request from the Flagler County attorney, the Attorney General issued an advisory opinion (2001-22, 3/20/01) stating in sum: "While a county may enforce state traffic laws on state roads, it may not impose more stringent parking regulations on such roads."

The materials presented are a compilation of cases from the Attorney General's Criminal Law Alert and Appellate Alert as well as summaries from the Office of General Counsel. They are being presented to alert the Division of Florida Highway Patrol and the Division of Driver Licenses of legal issues and analysis for informational purposes only. The purpose is to merely acquaint you with recent court decisions. Rulings may change with different factual situations. All questions should be directed to the local state attorney or the Office of General Counsel (850) 488-1606, SunCom 278-1606. If you care to review other Legal Bulletins, please note the web site address: DHSMV Homepage (<http://www.hsmv.state.fl.us/>) or FHP Homepage (www.fhp.state.fl.us).