
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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U.S. SUPREME COURT

Suspect prevented from entering home

Police officers did not violate a drug suspect's Fourth Amendment rights when they prevented him from entering his home unescorted while they spent two hours getting a search warrant, the U.S. Supreme Court held. The justices, balancing the privacy rights of the suspect with the law enforcement concerns that evidence might be destroyed, concluded in an 8-1 opinion that under the facts of this case, the officers acted reasonably. Once the warrant was obtained, the officers found drug paraphernalia and marijuana inside the home. The defendant moved to suppress the contraband as being the fruit of an unlawful police search, and Illinois courts agreed. The Supreme Court, however, reversed. "(T)he police officers in this case had probable cause to believe that a home contained contraband, which was evidence of a crime. They reasonably believed that the home's resident, if left free of any restraint, would destroy that evidence. And they imposed a restraint that was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests. In our view, the restraint met the Fourth Amendment's demands," Justice Breyer wrote for the court. Only Justice Stevens dissented, saying the case was not a good candidate for reviewing the limits of such police conduct.

[Illinois vs. McArthur, 2/20/01]

1ST District Court of Appeal

Challenge to validity of vehicle inspection fee

A class action lawsuit challenging the fee charged for motor vehicle inspections in six Florida counties cannot proceed until the plaintiffs - estimated at more than 5 million motorists - first meet administrative requirements for seeking a refund, the 1st DCA said. The DCA reversed part of a trial court order granting class certification in the suit over the \$10 fee charged for inspections in six counties cited for high ozone levels by the federal government. The

plaintiffs alleged that the fee exceeded the actual costs of the inspection program and therefore was actually an illegal tax rather than a valid fee. Although the lawsuit concerned the validity of the fee, the DCA said the first count of the complaint actually challenged the manner in which the Department of Highway Safety and Motor Vehicles implemented the statute authorizing the fee, section 325.214, F.S. Therefore, the DCA reasoned, the plaintiffs raised an "as applied" challenge to the law, which requires that they first seek a refund under section 215.26, F.S., the refund statute, before filing suit. Circuit courts generally do not consider attacks on the facial constitutionality of an agency rule because an adequate remedy remains available through the administrative process, the DCA noted. "(Plaintiffs) have asserted a constitutional basis for their challenge to section 325.214(2). However, the gravamen of Count I of their complaint is an attack upon the implementing rule promulgated by the Department, and the manner in which the Department has administered and enforced the statute. ... In essence, appellees challenge the Department's interpretation and application of section 325.214, not the facial constitutionality of the provision," the DCA said.

[Department of Highway Safety and Motor Vehicles vs. Sarnoff, et al., 12/29/00]

Drug-Free Workplace-confidentiality of Information

An exception in the Florida Drug-Free Workplace Act does not authorize an order directing a state agency to divulge confidential information about anyone other than the employee involved in a legal challenge, the 1st DCA said. The court reversed a Public Employees Relations Commission order that directed the Department of Transportation to provide names and other information on employees who were given random alcohol breath tests on a particular date. The order did not direct DOT to divulge the results of the tests. The case involved a former DOT driver who was fired when he refused to submit to a random alcohol test. DOT argued that

releasing such confidential information would violate both state and federal law, saying an exception allowing disclosure when it is ordered by a hearing officer or court applies only to the employee involved in the dispute and not to any other agency employees. The DCA agreed. "Authorizing a hearing officer or court to order discovery of information regarding any person other than the specified employee in question allows the exception to swallow the rule. The very purpose of the confidentiality provision would be defeated," the DCA said. The court also agreed with DOT's argument that even if the state law - section 112.0455(11)(b), F.S. - is interpreted to permit a hearing officer to order such discovery, federal law and regulations preempt the statute.

[Department of Transportation vs. Plummer, 1/10/01]

2nd District Court of Appeal

Motion to suppress

A brown paper bag that tested positive for cocaine residue, found near a police car in the vicinity of several people, does not give police probable cause to arrest the person closest to the bag, the 2nd DCA said. Michael McGowan appealed a trial court order denying his motion to suppress drug paraphernalia and cocaine. McGowan was arrested after a vehicle in which he was a passenger was stopped for driving without properly illuminated headlights. McGowan argued that the police lacked probable cause to arrest him, and the DCA agreed. "(T)he only evidence connecting the brown paper bag to McGowan other than his proximity to the bag is the fact that it contained tiny baggies with orange stripes which were identical to the empty baggies McGowan carried in his jacket. However, it is possible that the other passengers in the vehicle could have obtained similar baggies. Accordingly, we conclude that the trial court erred in finding that the abandoned bag could be attached to McGowan. It follows that the police did not have probable cause to arrest McGowan for possession of cocaine," the 2nd DCA said.

[McGowan vs. State, 01/05/01]

Motion to suppress - warrantless search of vehicle

In order to justify a detention beyond the time needed to issue a citation, an officer must have a reasonable suspicion based on articulable facts that criminal activity is occurring, the 2nd DCA said.

Tyron Summerall appealed his conviction and sentence for armed burglary and armed robbery. Summerall challenged the denial of his motion to suppress contraband found during a warrantless search of his vehicle. Summerall was stopped for speeding on Interstate 75, and the officer became suspicious when Summerall exited the car by making a wide turn away from the vehicle and did not close the door. While writing Summerall a citation, the officer noticed that two passengers were moving around, which added to his suspicion. The officer requested backup and engaged Summerall in conversation until the backup arrived. A subsequent search found evidence of armed robbery and burglary. The state argued that Summerall was not detained but rather decided voluntarily to remain at the scene after the deputy issued him the traffic citation and told him he was free to leave. The DCA disagreed. "In order to justify a detention beyond the time needed to issue a citation, the officer must have a reasonable suspicion based on articulable facts that criminal activity is occurring," the DCA said. "(T)he behavior observed did not give rise to a reasonable suspicion that appellant was engaged in criminal activity. Thus, appellant's continued detention at the scene after he had been issued the citation was improper."

[Summerall vs. State, 01/12/01]

Motion to suppress - use of confidential informant

A confirmed tip from a confidential informant who has repeatedly provided reliable information in the past provides reasonable suspicion justifying an investigatory stop, the 2nd DCA said. The state challenged an order granting Larry Hillman's motion to suppress cocaine seized during a consensual search. Two officers stopped and searched Hillman and his vehicle after a confidential informant, who they had used approximately eight times in the past, informed them that he had heard two individuals discussing a trip to a high-crime area to purchase cocaine. "Although the informant did not state that appellee was in actual possession of cocaine, the informant's information showed that appellee planned to attempt to purchase cocaine and was likely to have cocaine in his possession in the immediate future. The attempted purchase of cocaine is itself a crime. Under these circumstances, we do not believe it was necessary for the informant to have observed appellee in actual possession of the cocaine," the 2nd DCA said.

[State vs. Hillman, 01/12/01]

Motion to suppress - use of emergency and takedown lights

A deputy sheriff's use of his emergency and takedown lights to check a legally parked car results in an unauthorized investigatory stop, the 2nd DCA held. Stephen Hrezo appealed his conviction for possession of cocaine and drug paraphernalia. Hrezo sat alone in his car, which was parked at a public park that had no posted hours of operation. A deputy spotted Hrezo's vehicle and parked behind it to make a citizen contact to find out who was in the vehicle and why he was there. Prior to approaching Hrezo's vehicle on foot, the deputy turned on his patrol car's emergency lights and takedown lights. There was no suggestion that the officer had a reasonable suspicion of any criminal activity or even a traffic infraction at the time he made this decision. At the deputy's request, Hrezo produced identification. The deputy shined his flashlight into the car's interior and saw the end of a clear glass tube protruding from numerous papers on the console between the two front seats. The deputy ordered Hrezo out of the vehicle and placed him under arrest. Hrezo argued that the trial court erred in ruling that the initial encounter was a consensual police-citizen encounter, and contended that when the deputy inadvertently saw the crack cocaine pipe in plain view and recognized it as drug paraphernalia, he did not have probable cause to make an arrest. The DCA agreed. "Although we readily understand the officer's decision to turn on his takedown lights for personal safety, we must hold that the contact with Mr. Hrezo was a stop and not a consensual encounter. A consensual encounter is transformed into an investigatory stop if a reasonable person would not feel free to leave. When a police officer turns on his or her emergency and takedown lights under these circumstances, a reasonable person would expect to be stopped, at a minimum, for a traffic infraction and perhaps for the crime of fleeing and eluding if he or she drove away. Accordingly, the use of such lights is typically regarded as an act that initiates an investigatory stop," the DCA said.

[Hrezo v. State, 1/31/01]

Motion To Suppress

Probable cause to believe that the passenger compartment of a vehicle contained contraband did not justify a search of the trunk or containers stored there, the 2nd DCA said. Kellen Lee Betz appealed his conviction for felony possession of marijuana, arguing that the trial court erred in denying his

dispositive motion to suppress. Betz was stopped after an officer on routine patrol observed that the left headlight of Betz's vehicle was out. Upon stopping Betz, the officer smelled a "very strong" odor of marijuana coming directly out of the rolled-down window of the vehicle. The officer also observed gray smoke in the vehicle and noticed a marijuana odor coming from Betz's shirt. After advising Betz that he was going to search the trunk of the car, the officer patted down Betz and found a plastic baggie containing marijuana. The officer placed Betz under arrest and searched the car and the trunk. The search of the trunk uncovered a separate package of marijuana stored in a metal box, inside a briefcase. The DCA held that the search of Betz was lawful. "The search of the trunk, however was illegal. No facts articulated by the officer suggested that he had probable cause to believe that Mr. Betz had concealed additional contraband in the trunk, and without those additional facts a search of the trunk was unreasonable under the Fourth Amendment. The limitation on the extent of the search is an important part of the United States Supreme Court's Fourth Amendment jurisprudence," the DCA said.

[Betz v. State, 1/24/01]

3rd District Court of Appeal

Motion to suppress - inculpatory statement

Even after a suspect invokes his right to remain silent, his inculpatory statement is admissible if it was voluntary and was initiated by him, the 3rd DCA said. Courtney Clark appealed his conviction for second-degree murder. Clark argued that the trial court erred in denying his motion to suppress a statement he made to the investigating detective while he was in custody - "I'm not going to talk to you now because what I say could put me in jail for a long time." Clark made the statement immediately after he had been given his Miranda warnings. "We find no error in the trial court's admission of defendant's statement 'because what I say could put me in jail for a long time.' Our research has disclosed no case on all fours, where the defendant in the same breath first invoked his right to remain silent and then volunteered an incriminating statement. However, the law is clear that even after a suspect has invoked his right to remain silent, an inculpatory statement is admissible if it was voluntary and initiated by the defendant," the DCA said.

[Clark v. State, 1/31/01]

Motion to suppress - warrantless entry

Where the initial entry into an apartment is illegal, the consent of a co-resident given while the search is underway will be found voluntary only if there is clear and convincing evidence that the consent was not a product of the illegal police action, the 3rd DCA said. The state sought to reverse an order granting a defense motion to suppress evidence. Detectives investigating graffiti taggers Michael David Sakezeles and Anwar Kahn received a tip as to their whereabouts. The detectives found Sakezeles' car parked outside the apartment complex where the two suspects allegedly were living, and had the apartment manager lead them to the apartment. The apartment door was slightly ajar and the manager pushed it open. When the detectives saw Sakezeles, they entered the apartment and chased him into the bathroom. Sakezeles then consented to a search of the apartment. While the search was being conducted, Kahn returned home and also gave his consent. The two defendants contended that the initial entry into the apartment was illegal. The state argued that the circumstances were not coercive enough to vitiate the defendant's consent, and contended that Kahn's consent to the search upon returning home dissipated the taint. The DCA disagreed. "We agree with the circuit court that the initial entry into the apartment was illegal and that no subsequent exigent circumstances occurred to justify the illegal entry and ameliorate the taint," the DCA said. The DCA also said that, "the police had an abundance of time to obtain a warrant after having learned the location of the defendant's apartment. The officers had yet another opportunity to obtain a search warrant when they realized the defendant's car was parked in front of the apartment complex. We find no exigent circumstances in the record facts to justify the officers crossing the apartment's threshold or performing a search without a warrant."

[State v. Sakezeles and Kahn, 2/7/01]

Obstruction of justice - resisting arrest

Officers are legally justified in ordering an individual to exit a vehicle in order to conduct a limited investigation, and refusal to do so clearly obstructs their investigation, the 3rd DCA said. Marice Billips appealed her conviction for obstruction of justice. After her car was stopped by officers responding to a "be on the lookout" message, or BOLO, Billips refused an officer's request that she exit the vehicle. Billips argued that

the facts did not establish the charge of obstruction of justice under section 843.02, F.S., because the officers were not engaged in the lawful execution of a legal duty when they asked her to exit her car. The DCA disagreed. "Based on the BOLO, the officers had probable cause to believe that the vehicle Billips was driving had been used to leave the scene of a possible homicide and were thus justified in seizing the vehicle as evidence in their investigation of the crime. But, even if probable cause did not exist to seize the vehicle at the time of the traffic stop, the officers were still legally justified in ordering Billips to exit the vehicle in order to conduct a limited investigation, and her refusal to do so clearly obstructed their investigation," the DCA said.

[Billips v. State, 1/24/01]

Driving under the influence - Evidence-Roadside sobriety tests

The Court held that no *Miranda* warnings need be given prior to the administration of roadside sobriety tests, so long as the motorist is not in custody. In the present case, the state argues that Alvarez was not in custody because this was an ordinary traffic stop. Because Alvarez was not in custody, it was not necessary to read him his *Miranda* rights. Accordingly, the motion to suppress the results of the roadside sobriety tests administered in this case was correctly denied by the trial judge.

[State v. Luis Alvarez, 2/7/01]

4TH District Court of Appeal

Detective's testimony - admissible hearsay

A detective's testimony concerning a caller ID readout and numbers he saw on a digital display pager is not inadmissible hearsay, the 4th DCA said. Garnett Bowe appealed his conviction for tampering with evidence. Bowe contended that the trial court erroneously allowed a detective to describe readouts from a pager and a caller I.D. device, both of which were utilized when a police informant arranged a drug purchase from Bowe. Bowe argued that the detective's testimony about the readouts was hearsay, but the DCA disagreed. "The caller I.D. display and pager readouts are not statements generated by a person, so they are not hearsay within the meaning of subsection 90.801(1)(c). Such evidence is admissible unless excluded by some other evidentiary rule," the DCA said. "(O)nly statements made by persons fall within the definition of hearsay."

[Bowe v. State, 2/14/01]

Driving while license suspended

A 1998 Florida statute pertaining to driving while a license is suspended, revoked, canceled, or disqualified is not unconstitutionally vague, the 4th DCA said. Bryce Levine appealed his convictions for felony driving while license suspended (DWLS) (habitual offender) and resisting arrest without violence. Levine argued that the DWLS statute, section 322.34(5), F.S., is unconstitutionally vague because it classifies as a felon "(a)ny person whose driver's license has been revoked pursuant to s. 322.264 (habitual offender) ..." Levine argued that the section does not confer any authority to actually "revoke" a license, but merely defines a "habitual traffic offender." Thus, he said, the two statutes do not give adequate warning of the proscribed conduct. The DCA disagreed "(E)ven though section 322.264 merely defines a habitual traffic offender and does not provide for the revoking of a defendant's driver's license, section 322.34(5) is clear that once a defendant is considered a habitual traffic offender, and drives with a revoked license, he commits the conduct proscribed under section 322.34 and is guilty of a third degree felony," the DCA said. [Levine v. State, 2/14/01]

Improper testimony - anonymous tip

Reversible error occurred when the state's lead detective was allowed to testify that he did not have a suspect until he received an anonymous telephone message implicating the defendant, the 4th DCA held. Gerald Stribbling appealed his conviction and life sentence for first-degree murder with a firearm. Stribbling contended on appeal that he is entitled to a new trial because the state's lead detective improperly testified that he had no suspect for the crime until he received a telephone message naming Stribbling as the perpetrator. The DCA rejected the State's argument that the detective's testimony was admissible to establish a logical sequence of events and show why he proceeded to investigate Stribbling as a possible suspect. "Identification was the key factor in this case and the unknown caller's identification of appellant as the perpetrator specifically linked him to the murder. Without objectionable testimony, the State's case consisted primarily of the testimony of (two women who knew the defendant). The only witness on the scene ... was unable to identify appellant in a line-up," the DCA said. The state failed to show that the error was harmless and did not affect the jury's verdict, and therefore a new trial is necessary, the court said. [Stribbling v. State, 2/14/01]

Improper comments on right to remain silent

It is highly prejudicial and an improper comment on a defendant's right to counsel and to remain silent for a detective to comment during direct examination that he questioned the defendant about why he hired a lawyer prior to his arrest if he was innocent, the 4th DCA said. Courtney Jones appealed his conviction for first-degree murder. Several months before his arrest Jones contacted a law firm, which informed the West Palm Beach Police Department that it was representing Jones. The law firm informed police that Jones was invoking his right to remain silent and right to assistance of counsel. Jones was later arrested and advised of his Miranda rights. He signed a card waiving Miranda and agreed to speak with Detective Ghianda. At the trial the detective testified that he asked Jones why he had hired the law firm several months before his arrest "if you were so innocent." Jones' attorney objected and the trial court sustained the objection, but did not give a curative instruction until almost a half-hour had passed. The defense argued that the detective's testimony amounted to an improper comment on Jones' right to remain silent, and the DCA agreed. "(W)e have an extremely prejudicial comment by Detective Ghianda and a lapse of at least 27 minutes between the prejudicial comment and the curative instruction. The instruction does not make unmistakably clear what is to be disregarded and how important it is that the precise comment objected to play no part in the jury's deliberation. The curative instruction was insufficient to cure the prejudicial harm," the DCA said. [Jones v. State, 1/31/01]

5TH District Court of Appeal

Resisting arrest with or without violence

A defendant cannot be convicted of both resisting arrest with violence and resisting arrest without violence if those convictions stem from a continuous resistance to officers' ongoing attempt to effect an arrest, the 5th DCA said. Bruce Madison appealed his judgment and convictions for three counts: resisting arrest with violence, battery on a law enforcement officer, and resisting arrest without violence. All of the counts stemmed from a single episode and a continuous resistance to the arrest. The DCA noted that a defendant may properly be convicted of resisting arrest both with and without violence if the convictions address two separate acts of resisting, but not a single continuous act. "(B)oth Madison's conviction for resisting arrest with

violence and resisting arrest without violence arose from a single episode even though two police officers were involved. On the other hand, it is clear that Madison's conviction for resisting arrest with violence was proper for struggling with and intentionally striking one of the police officers. Therefore, only his conviction for resisting arrest without violence should be vacated," the DCA said. [Madison v. State, 2/16/01]

Motion to suppress - pre-confession inquiry

An officer adequately responded to a pre-confession inquiry when he directly informed a suspect that the decision to have a lawyer present during questioning was clearly a decision he had to make for himself, the 5th DCA said. The state appealed an order granting Jason Seaton's motion to suppress. During an interview, Seaton asked Volusia County Investigator Kunkle whether he should have an attorney present, and the investigator replied that it was a decision Seaton would have to make for himself. Seaton signed a written waiver of his rights prior to confessing to a murder. Seaton argued on appeal that his confession should have been suppressed because a reasonable person would have believed he was in custody and Investigator Kunkle failed to respond to his question regarding whether he should have a lawyer, as required by the Florida Supreme Court's 1999 decision in Almeida vs. State. The DCA disagreed. "Even if Almeida were applicable, the response given by Kunkle fully meets the high court's requirement. He clearly and straightforwardly informed Seaton that the decision to have a lawyer, or not, was a decision he had to make for himself. Seaton makes two contrary arguments: first, that Almeida requires the officer to answer any such question and there is only one correct answer to the question - "yes!". Alternatively, by telling Seaton that he "couldn't" answer the question, Kunkle "chilled" Seaton's exercise of his right to ask and get answers to other questions by suggesting that he had no information to impart. We do not credit either argument; rather we conclude that Kunkle's response and the follow-up dialogue were open and forthright as required by Almeida. The statement that followed Seaton's decision to speak without consulting a lawyer should not have been suppressed," the DCA said. [State vs. Seaton, 01/19/01]

Police testimony about witness' credibility

It is considered especially harmful when a police officer gives an opinion on a witness' credibility

because of the importance placed on officers' testimony, the 5th DCA said. Scott Olsen appealed his conviction for robbery with a firearm, contending that the trial court erred by allowing a police officer to testify that she believed the alleged victim when he said he had been robbed at gunpoint. The DCA agreed. "We find that the police officer's testimony was an improper comment on the reliability of the alleged victim's version of the facts and that the trial court's failure to sustain the defense's objection to the police officer's testimony constitutes harmful error," the DCA said.

[Olsen v. State, 2/2/01]

Alleged Miranda violation - motion to suppress

A defendant who voluntarily presented himself for questioning, chose to ride with detectives rather than his brother, and was informed that he was free to leave in the initial interrogation was not in custody for purposes of Miranda, the 5th DCA said. Jimmy Bedoya appealed his conviction and sentence for the first-degree murder of 17-year-old Shauna Card. Bedoya argued on appeal that the state failed to prove that the murder was premeditated, and said the trial court erred in admitting his recorded statement based on violation of his Miranda rights. When Bedoya was taken to the sheriff's department for questioning, he gave a statement that he had never been in the victim's apartment. Bedoya was not given Miranda warnings prior to making this statement, and contended that the statement was recorded and videotaped without his knowledge or consent. Therefore, he argued, the trial court erred when it denied his motion to suppress and subsequently allowed his statement into evidence. The state contended that although Bedoya was interrogated, he was not in custody and therefore Miranda warnings were not required. Affirming the conviction and sentence, the DCA concluded that Bedoya was not in custody at the time his recorded statement was given and his Miranda rights were not violated. The DCA also concluded that a defendant does not have a reasonable expectation of privacy in a police interview room, therefore the fact that the interview was audiotaped and videotaped without Bedoya's consent or knowledge does not constitute a violation of his due process rights.

[Bedoya v. State, 2/9/01]

Improper custodial interrogation

Incriminating statements made by a suspect who was properly read his Miranda rights, invoked his right to counsel and then reinitiated conversation with a

corrections officer did not arise from an improper custodial interrogation, the 5th DCA said. Sashtri Harnanan was convicted of first-degree murder and carjacking. Harnanan contended that the trial court erred in admitting into evidence statements he made to a corrections officer while in custody. Harnanan contended that the statements arose from an improper custodial interrogation, but the DCA disagreed. "We affirm based on the following principles. First, it is undisputed that it was Harnanan who initiated the further communication and conversation with (corrections officer) Price and thus a waiver of his Fifth Amendment rights could be found. Second, the trial court's factual finding that the conversation between Harnanan and Price was not an interrogation is supported by the record. Harnanan was not subjected to a custodial interrogation when he spoke to Price. As such, Harnanan's Fifth Amendment rights, as reflected in the Miranda warnings which had previously been provided to him, were not violated," the DCA said. [Harnanan v. State, 01/26/01]

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).

ATTORNEY GENERAL'S OPINION

City's authority to establish speed limit

In response to a request from the Town of Indialantic attorney, the Attorney General issued an advisory opinion (2001-06, 2/12/01) stating in sum: "A municipality has the authority to set a 30 miles per hour speed limit on that portion of a county road that runs through a residential district and is located within the municipality."

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