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# LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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## 11<sup>th</sup> Circuit Court of Appeal

### Search and seizure - sentence enhancement

Even though evidence may have been seized in an unlawful search of a motel room, it is admissible because other evidence of guilt was so overwhelming that the defendants suffered no prejudice, the 11th U.S. Circuit Court of Appeals held. Three defendants appealed their counterfeiting convictions and enhanced sentences imposed because they also had a firearm. For over two weeks, the three men traveled throughout Florida and other Gulf Coast states, passing counterfeit money in a stolen vehicle with stolen tags. Officers eventually arrested the men at a Tallahassee motel and searched a backpack carried by one of the men and the motel room in which they stayed. The officers found counterfeit money, a color printer, and two guns with 50 rounds of ammunition. The trial court admitted the evidence even though the motel room was searched without a warrant, concluding that the items would have been discovered inevitably. The 11th Circuit agreed, and also affirmed the sentence enhancement based on the defendants' access to guns as they conducted their counterfeiting activities. "[W]e agree with the district court that enough evidence existed to justify finding that the defendants possessed the firearms 'in connection with' the underlying felony. The fact that the guns were not loaded or inoperable is not dispositive since criminals frequently use unloaded guns to execute crimes. We know of no requirement that the firearms be loaded or operable to meet the 'in connection with' requirement," the 11th Circuit held. "[I]t would be reasonable to conclude that the presence of the firearms protected the counterfeit money from theft during the execution of the felony."

[U.S. v. Rhind, 4/23/02]

### Search and seizure - consent to search

A warrantless search of a defendant's home was lawful because he implicitly agreed to the search by stepping aside to let officers in and by re-reading a consent-to-search form before signing it, the 11th

U.S. Circuit Court of Appeals held. Carlos Ramirez-Chilel appealed his conviction for counterfeiting immigration documents, contending that seized items were the product of an unlawful search. Based on a tip, officers went to Ramirez-Chilel's home without probable cause or exigent circumstances, hoping Ramirez-Chilel would let them in to search. The officers testified that Ramirez-Chilel "yielded the right-of-way" after answering the door, although the defendant disputed this. Ramirez-Chilel admitted to signing some papers because he felt he had no choice after police told him they had a right to search. The 11th Circuit affirmed the trial court's denial of a motion to suppress. "In this case it is hard to find a 'show of force' by the officers — guns were not drawn, nor were a large number of officers surrounding the trailer ready to arrest the suspect," the 11th Circuit said. "Although the officers did not receive any explicit verbal consent from Ramirez-Chilel to enter, the officers did receive some sort of implied consent to enter from Ramirez-Chilel's body language. ... [W]e find no official show of force which would have 'forced' the defendant to let the officers in, and ... Ramirez-Chilel demonstrated his consent to entry by 'yielding the right-of-way' for the officers to enter."

[U.S. v. Ramirez-Chilel, 4/25/02]

## FLORIDA SUPREME COURT

### Probable cause to search entire vehicle

Law enforcement officers had probable cause to search an entire car, not just the passenger compartment, because of the combination of marijuana odor coming out a car window, the driver's extraordinarily suspicious pre-search behavior and the discovery of marijuana on the driver, the Florida Supreme held. The Court reversed the 2nd DCA's determination last year that the smell of marijuana coming from Kellen Betz' car did not give officers probable cause to search the entire car. Justices instead approved a 1988 conclusion by the 5<sup>th</sup> DCA that the odor of marijuana alone justified a search of the defendant's car trunk. "[B]ased upon the totality of the

circumstances within the perception of the law enforcement officers in the instant case, probable cause to search the entirety of respondent's vehicle existed," Justice Lewis wrote for the Court. "Our conclusion here aligns this Court with a number of our sister jurisdictions in which courts have concluded that the smell of burnt marijuana, in combination with other circumstances, leads to law enforcement officers' possession of probable cause to search the entirety of a motor vehicle."

[State v. Betz, 4/4/02]

### **1<sup>st</sup> District Court of Appeal**

#### **Use of forged traffic citation as evidence**

A crucial piece of evidence in a forgery trial — a traffic citation the defendant signed with a false name — cannot be used as evidence because the traffic citation statute explicitly states that citations are inadmissible in any trial, the 1st DCA said. Richard Dixon was pulled over by police and given a citation for several traffic infractions, but provided a false name and signed the citation using that false name. When the falsehood was discovered, Dixon was additionally charged with forgery of a written instrument. Dixon moved to exclude the traffic citation from evidence, pointing to language in section 316.650(9), F.S., that prohibits use of traffic citations as evidence. The trial court denied Dixon's motion, but the DCA reversed. "[S]ection 316.650(9) provides that a traffic citation 'shall not be admissible in any trial.' The statute contains no exceptions to this clear and unambiguous prohibition. It is a well-established principle of statutory interpretation that an unambiguous statute is not subject to judicial construction, no matter how wise it may seem to alter the plain language of the statute," the DCA said, acknowledging that its decision will make convictions for forgery of a traffic citation more difficult.

[Dixon v. State, 4/4/02]

#### **Warrant's description of property to be seized**

Although a search warrant did not specifically identify the property to be seized, it plainly referred to an earlier probable cause statement that did describe the property, the 1st DCA said in allowing evidence seized pursuant to the warrant. The State appealed a trial court order granting Gary Eldridge's motion to suppress drug paraphernalia seized from his home pursuant to a search warrant. The warrant was issued to search the premises "for the property described in this warrant," incorporating by reference a probable cause statement that described

particular items. The trial judge ruled the warrant was facially invalid because it did not sufficiently describe the property to be seized, but the DCA disagreed and reversed the suppression order. "Although the warrant does not identify the articles to be seized, it does refer to those articles in language that could not be mistaken," the DCA said. "Any law enforcement officer would readily understand that the warrant authorizes the seizure of contraband articles used in the possession, distribution, and manufacture of methamphetamine. That was the sole purpose of the warrant."

[State v. Eldridge, 4/10/02]

#### **Use of probationer in sting operation**

Prosecutors' failure to get court permission to use a probationer as an informant in a sting operation, even though the informant would have to violate her probation in order to participate, does not violate due process, the 1st DCA held. The State appealed the dismissal of drug charges against Frederick Myers. The trial court ruled that Myers' due process rights were violated when a Special Investigations Unit of the State Attorney's Office asked Traci Kite to be a confidential informant in a drug buy without first getting permission from the judge overseeing her probation from an earlier case. One term of her probation was that Kite would stay away from excessive alcohol and illegal drugs. In its successful motion to dismiss, the defense called the use of Kite "outrageous, contemptuous, and illegal" because she involvement brought her in contact with drugs. The DCA disagreed and reversed the lower court's dismissal. "We are unable to discern any convincing argument that should persuade a court to find that the use of a probationer as a confidential informant in a sting operation would be viewed in the same light as putting an informant on a contingency fee or actually manufacturing illicit drugs for use in a law enforcement operation," the DCA said.

[State v. Myers, 4/22/02]

#### **Legislature's authority to alter negotiated pay raise**

A trial court correctly dismissed a police union's complaint that the Legislature acted illegally when it failed to fully fund a pay raise for union members included in a wage agreement negotiated with the executive branch, the 1<sup>st</sup> DCA said. The Court said the union's request for an order implementing the negotiated wage agreement and directing the Legislature to revise the negotiation laws would violate the constitutional separation of powers. The

DCA noted that numerous court cases have established that wage agreements negotiated with the executive branch depend on the funding support of the legislative branch before they can be implemented. The case arose out of the union's negotiations with the Governor's Office over wages for state correctional officers and correctional probation officers for the 2000-2001 fiscal year. The Legislature appropriated an amount sufficient to fund only half the 5 percent pay raise included in the negotiated agreement. "A wage agreement with a public employer is subject to the necessary public funding which involves the powers, duties, and discretion of the Legislature. The Legislature is not required to fund a collective bargaining agreement of public employees," the DCA said. [Florida Police Benevolent Association v. Bush and Florida Legislature, 4/16/02]

## **2nd District Court of Appeal Bid challenge - voluntary use of competitive procedures**

A State agency making a procurement that is exempt from competitive bidding procedures does not bind itself to those procedures simply by electing to use a competitive process to help with its decision, the 2nd DCA held. The University of South Florida's colleges of nursing and medicine sought a contract with the Department of Health to provide gynecological services in Hillsborough County's public health clinics. Even though health care services are exempt from statutory competitive sealed bid procedures, the department chose to use a competitive process to evaluate various vendors who sought the contract. USF was not awarded the contract and petitioned for a formal administrative hearing, contending that because the department voluntarily used a competitive selection format, it was therefore bound to abide by statutory procedures for competitive procurement and bid protests. The DCA disagreed. "A procurement that has been exempted from competitive procedural mandates is not subjected to those mandates simply because the procuring agency elects to employ a competitive mechanism for sorting out its choices. To hold otherwise would undermine the purpose of the statutory exemption. Also, as a practical matter such could have an anticompetitive effect, in that it would discourage agencies from incorporating competitive components into their exempt procurement decision making," the DCA said.

[University of South Florida College of Nursing, et al., v. Department of Health, et al., 4/3/02]

## **Excusable neglect standard in administrative proceedings**

The Legislature should consider adopting an excusable neglect standard for administrative proceedings so that more issues could be decided on their merits rather than dismissed over technical deficiencies, a panel of the 3<sup>rd</sup> DCA suggested. The Court reluctantly affirmed a Department of Children and Family Services order dismissing the appeal of foster parents whose application to renew their medical foster home license was denied by the agency. Relevant rules required the parents' request for an administrative hearing to arrive at the department within 21 days of their receipt of the denial letter. The parents' attorney mailed their request the day before the deadline, but it did not reach the department until the day after the deadline — even though the attorney's office is located near the department office. The department concluded that it was undisputed that the request arrived one day late and therefore must be denied as untimely. The DCA concurred, but said an excusable neglect standard should be available in administrative matters just as it is in judicial proceedings. "[W]e are very sympathetic to the (parents') argument. In administrative matters affecting substantial interests, adopting an excusable neglect standard or a time schedule based on the date of service of requests for hearing would promote legitimate public policies. Unfortunately, this Court lacks the power to create either rule for use in administrative proceedings," the DCA said. "Judicial rules generally encourage the setting aside of defaults in order to promote the public policy of allowing claims to be decided on their merits, rather than upon procedural technicalities. ... In the context of administrative law, the courts cannot override a filing rule that does not violate due process." Writing a special concurring opinion, Chief Judge Blue added, "One of the strengths of our system of justice is the belief that conflicts should be decided on the merits. For this reason, we employ the doctrine of 'excusable neglect' to prevent the dismissal of potentially meritorious claims for technical defects. This concept has served the public well in the court system. I would ask that the legislature consider providing this equitable relief for those citizens of the State who are required to have their personal and property rights decided in the administrative arena." [Cann v. Department of Children and Family Services, 4/5/02]

### **Intervening cause argued in DUI death**

The fact that the victim in a DUI manslaughter case refused a blood transfusion that might have saved his life does not absolve the driver of criminal liability because it was his actions that caused the victim's life-threatening injuries, the 2nd DCA held. Darwin Klinger challenged his conviction for DUI manslaughter. Trial testimony indicated that victim Thomas Branco, a Jehovah's Witness, had an 85-90 percent chance of surviving his injuries if he had received a blood transfusion. Instead, Branco refused a transfusion on religious grounds and died due to blood loss. Klinger maintained that the victim's refusal to accept the transfusion was an intervening cause of death, exonerating him from criminal liability. The DCA disagreed and affirmed the conviction. "Klinger's actions caused life-threatening injuries to Mr. Branco. The fact that Mr. Branco refused a blood transfusion which might have saved his life does not absolve Klinger from criminal liability," the DCA said. [Klinger v. State, 4/12/02]

### **Officer's vague answer re: need for attorney**

An officer's evasive and misleading answer to a suspect's questions about needing an attorney during an initial interrogation misled the suspect and cast doubt on the suspect's pre-confession Miranda waiver, the 2nd DCA held. Henry Isom appealed the denial of his motion to suppress his confession on charges related to a high-speed chase that ended in a crash. An officer stopped Isom while he was walking on an interstate because Isom fit the description of a suspect who had fled on foot from a car. Isom was advised that he was not supposed to hitchhike on a highway. The officer then read Isom his Miranda rights and asked him if he understood. Isom responded: "But I, I ain't did, I got, I need a lawyer cause I was hitch-hiking?" The officer answered, "No," paused, and then asked Isom where he was coming from. An hour later Isom admitted to being the driver. Reversing and remanding for new trial, the DCA said, "[W]hen Isom asked the officer if he needed a lawyer for hitchhiking, the officer answered 'No' and continued with the interrogation. We agree with Isom that the officer's response was improper ... Although the officer's answer was simple and straightforward ... it was also evasive and misleading because the questioning that was about to occur was not directed to a hitchhiking offense. The officer should have clarified the reason for the interrogation so there would be no question that any waiver of counsel was made with Isom's full

knowledge of the circumstances under which he was being questioned." [Isom v. State, 4/17/02]

### **3rd District Court of Appeal**

#### **Department's basis for suspending license**

The Department of Highway Safety and Motor Vehicles may suspend a driver's license for his refusal to take a breath test once a criminal DUI investigation independently determines that he was the driver of the vehicle, the 3rd DCA said. Anthony Bello argued that the Department improperly used privileged information from an accident report to determine that he was the driver of a vehicle involved in an accident. A trial court agreed, concluding that the identification of the driver was determined during the accident investigation, but the DCA quashed that order because the circuit court reweighed the evidence and ignored evidence that supported a hearing officer's findings against Bello. The DCA pointed out that Bello, questioned by officers after being read his Miranda rights, acknowledged driving the vehicle. "Once the criminal investigation independently established Bello to be the driver, his refusal to submit to the breath test constituted a valid reason to suspend his license," the DCA held. [Department of Highway Safety and Motor Vehicles v. Bello, 4/10/02]

### **4TH District Court of Appeal**

#### **Insufficient evidence for paraphernalia conviction**

A drug paraphernalia conviction must be reversed where police never tested the defendant's homemade pipe for contraband residue and no evidence was presented showing that the defendant intended to use the pipe for illegal purposes, the 4th DCA held. Lisa Goodroe appealed the denial of her motion for acquittal on charges of drug paraphernalia. An officer on patrol saw an object fall out of Goodroe's pocket and based on his experience and training believed the object to be a crack cocaine pipe. The officer saw residue in the pipe but never tested it, and no drugs were found on Goodroe. This was insufficient to support the conviction, the DCA said. "[T]he arresting officer testified only that there was some kind of residue on the pipe found in appellant's possession. However, the residue was not tested and no evidence was presented that the residue was a controlled substance," the DCA said. [Goodroe v. State, 4/3/02]

### **Nonconsensual encounter due to check for warrants**

After an officer looked at a driver's license during a consensual encounter, the encounter became non-consensual when the officer retained the license and ran a check on the driver, the 4th DCA said in ruling a subsequent search illegal. The DCA said no reasonable person would have felt free to leave while the officer retained the license and ran a warrant check. An officer was dispatched to investigate someone sleeping in a car. The officer testified that when he woke Robert Baez and asked for identification, he had no reason to believe Baez had committed any crime and the encounter was consensual. After a computer check revealed Baez had an outstanding arrest warrant, the officer handcuffed Baez and then searched the back of the vehicle, where he found baggies of cocaine. The trial court denied Baez's motion to suppress the drugs as the product of an illegal arrest, but the DCA reversed. "[A]t the point in time after the officer had inspected appellant's driver license, the consensual encounter had ended. When the officer retained it in order to investigate further by running a warrant check, no reasonable person would have felt free to leave. The search which produced the cocaine, accordingly, was the fruit of an unlawful seizure and violated the Fourth Amendment," the DCA said. [Baez v. State, 4/10/02]

### **Florida jurisdiction over non-resident vehicle owner**

A non-resident who consents to the operation of his vehicle in Florida has sufficient "minimum contacts" with the State to be subject to the jurisdiction of Florida courts, the 4th DCA said. The Court ruled against a California resident who loaned his car to his adult son, who took the vehicle to Miami where he lived with his wife. The wife was involved in an automobile accident while driving in Florida, and testimony showed that the owner consented to his daughter-in-law's use of the vehicle. The California owner argued that Florida cannot assert personal jurisdiction over him because he did not purposely establish contacts with Florida, but the DCA disagreed. The Court noted that Florida law makes an owner liable for damages caused by the negligent operation of the vehicle when it is operated with his consent. "Appellant's consent to the operation of his vehicle in Florida takes this case out of the realm of mere foreseeability and into the realm of sufficient minimum contacts. Appellant, the owner of the vehicle, gave it to his son and daughter-in-law and

consented to their use of it. He specifically knew that they were living and driving the vehicle in Florida at the time of the accident. It is no stretch to expect that if the vehicle were involved in an accident in Florida, he would be expected to be hauled into court in Florida for injuries resulting from the use of his property with his consent." [Stevenson v. Brosdal, 4/17/02]

### **5th District Court of Appeal**

#### **Miranda warnings - prison conversation**

A defendant's Fifth Amendment rights were not violated when his former stepdaughter visited him in prison and, while wearing a police wire, elicited incriminating statements about his past sexual abuse of her, the 5th DCA held. After the victim, now an adult, obtained the incriminating statements about events two decades ago, Ray Russell was prosecuted for sexual battery of a minor. The trial court suppressed a tape recording of Russell's conversation with the woman, which she initiated as part of her attempt to get the State to reopen the case stemming from his sexual abuse of her when she was a child. Russell contended he should have been read his Miranda rights, but the DCA disagreed and allowed information from the prison conversation to be admitted. "Russell's primary argument ... appears to be that he was entitled to be read his Miranda rights by the police or by (the victim), since she was acting as a police agent. However, Miranda warnings are not required unless a suspect is in custody and facing interrogation by the police. It is insufficient that a suspect is already in prison being held on other charges, to establish custodial interrogation in a different case. In such cases, the suspect's freedom must be more limited than per normal prison routine. Here, Russell was simply talking with (the victim) in the visiting reception area and could have refused to speak with her or terminated the conversation and left," the DCA said. [State v. Russell, 4/5/02]

#### **Evidence - cautionary warnings on reports**

Hospital records that contain laboratory reports may be admissible as evidence even if they warn that the results are for medical purposes only, because warnings go to the weight and not the admissibility of the reports, the 5th DCA held. Larry Nimmons appealed his conviction for sexual battery on a person physically helpless to resist. The victim, who had been drugged and raped, was taken to a hospital, where specimen samples were collected and sent to a

laboratory for testing. The test report showed that the victim had ingested a sedative. Nimmons contended that the hospital records were unreliable and inadmissible because the report's legend stated that the test was done without chain of custody handling and the results were for medical, not legal, purposes. The DCA affirmed the report's admission as evidence. "In order to bar the introduction of relevant evidence due to a gap in the chain of custody, the defendant must show that there was a probability of tampering with the evidence, and a mere possibility of tampering is insufficient. Furthermore, the test is relied upon by physicians for diagnostic purposes. Under these circumstances, we agree with the trial court's conclusion that the warning implicated the weight but not the admissibility of the report," the DCA said. "Although in the instant case the warning may cause doubt on the report's trustworthiness, in light of the supporting testimony we conclude that any doubt was a matter for the jury."

[Nimmons v. State, 4/12/02]

#### **Voluntariness of statement**

A trial court properly rejected a defendant's request to suppress his taped statements where there was no evidence that law enforcement officers acted improperly or coerced the statement from the relatively uneducated man, the 5th DCA held. Javion James was arrested as a juvenile and later convicted on various felony and weapons-related charges. Following his arrest, James was taken to the Juvenile Assessment Center, where officers unsuccessfully attempted to contact his mother. James was then read his Miranda rights and signed a written waiver acknowledging that he understood. On appeal, James argued that the taped statements were not knowingly and voluntarily made because he could barely read or spell and dropped out of school in the ninth grade, and because his mother was not present during the interrogation. The DCA disagreed, noting that both issues are properly determined in the trial court by the totality of the circumstances. "In the record before us, we find no evidence of coercion or improper conduct on the part of the law enforcement officers. ... Although James was relatively uneducated, the trial court considered his educational level, along with all other circumstances surrounding his statement, in concluding that his statement was voluntarily made," the DCA said. In addition, "[F]ailure to notify a child's parent is relevant to the voluntariness of a

statement made during police interrogation, but does not require exclusion of the statement. There is nothing in the record to suggest that the fact that James' mother was absent affected the voluntariness of his statement."

[James v. State, 4/12/02]

#### **Elements of crime - driving while license revoked**

In prosecuting an habitual traffic offender for driving with a revoked license, the State only needs to show that the license has been revoked and does not have to list the underlying offenses that led to the revocation, the 5th DCA said. James Arthur appealed his conviction for driving with a revoked license as a designated habitual traffic offender pursuant to section 322.34(5), F.S. Arthur complained that the charging information failed to specify the prior offenses that led to his designation, although he never alleged that he didn't know about the revocation. Affirming in an en banc ruling, the DCA said it is the fact that the Department has designated the defendant as an habitual traffic offender based on his driving record and has thereby revoked his license, and not the underlying traffic offenses themselves, that is the element of the offense. "If after receiving the notice of revocation Arthur believed his driving record was in error his remedy was to have his record corrected, not to ignore the revocation and continue to drive," the DCA said. "To state it simply, the law requires that one whose license is revoked because he is an habitual traffic offender must not drive unless or until his revocation is set aside. The State proved that Arthur's was, that he did, and that it wasn't."

[Arthur v. State, 4/26/02]

### **ATTORNEY GENERAL OPINIONS**

#### **Searches by code enforcement officers**

In response to a request from the Polk County attorney, the Attorney General issued an advisory opinion (2002-27, 4/4/02) stating in sum: "A local government code inspector is not authorized to enter onto any private, commercial or residential property to assure compliance with or to enforce the various technical codes or to conduct any administrative inspections or searches without the consent of the owner or the operator or occupant of such premises, or without a duly issued search or administrative inspection warrant."

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