
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

FRED O. DICKINSON, EXECUTIVE DIRECTOR

VOLUME MMII, ISSUE 2

11th Circuit Court of Appeal

Expectation of privacy in building common areas

Tenants of a large, multi-unit apartment building do not have a reasonable expectation of privacy in the building's common areas where the lock on the door of the building is not functioning and anyone may enter, the 11th U.S. Circuit Court of Appeals held. Reynaldo Miravalles argued that police did not have probable cause for a search that turned up counterfeit labeled cigars in his apartment. Acting on an informant's tip, police went to the apartment building where Miravalles lived with his wife, entering the building through the front door. The building's electronic card locking mechanism was not working and the door was unlocked. Officers knocked on Miravalles' door and, while standing in the hallway attempting to gain permission to enter, observed boxes of cigars inside the apartment. At an officer's request, the wife handed over one cigar but refused to allow the officers inside the apartment. After the encounter, an officer hid in the hallway and observed Miravalles' wife throw out bags of garbage that were later found to contain counterfeit cigar labels. The 11th Circuit affirmed a lower court's decision to allow the cigars and counterfeit labels to be admitted into evidence, despite a magistrate judge's conclusion that the officers lacked probable cause for their search because of the apartment residents' expectation of privacy in the common areas. "On the day of the search, the lobby of this apartment building and the hallways and other common areas of it were open and accessible not only to all the many tenants and their visitors, to the landlord and all its employees, to workers of various types, and to delivery people of all kinds, but also to the public at large. There was nothing to prevent anyone and everyone who wanted to do so from walking in the unlocked door and wandering freely about the premises. Under these circumstances, any expectation of privacy in the common areas of the building was not only unreasonable, but foolhardy," the 11th Circuit said.

[U.S. v. Miravalles, 1/29/02]

Qualified immunity - mistaken identity in arrest

Police officers' arrest of the wrong person — a different individual with the same name, age and race as listed in a valid arrest warrant — was a reasonable mistake and entitled them to qualified immunity, the 11th U.S. Circuit Court of Appeals held. Following a late-night traffic stop for a broken tail light, officers found drugs in the driver's purse and arrested her. When officers ran a background check on her passenger, Joe Rodriguez, the police dispatcher relayed descriptive information from an outstanding warrant. The officers questioned Rodriguez and compared his physical characteristics to those cited in the warrant. Concluding that the passenger was the person indicated in the warrant, officers arrested Rodriguez. The warrant was for a different person with the same name as Rodriguez and similar social security numbers, addresses in nearby towns, birth states and tattoos. The only material difference between the warrant description and Rodriguez was a five-inch height discrepancy. The 11th Circuit concluded that the mistake was a reasonable one and entitled the officers to qualified immunity in Rodriguez's lawsuit alleging a violation of his constitutional rights. "A reasonable mistake cannot ... be transformed into an unreasonable mistake over such a small difference, given all the circumstances. In other words, in the context of this case, a mistaken estimate of no more than five inches does not equal a constitutional violation," the 11th Circuit said. "Time was short in the situation facing (the officers): a nighttime traffic stop. The officers had minutes to make their determination, not months or even days: Rodriguez soon had to be either arrested or let go."

[Rodriguez v. Farrell, 1/30/02]

1st District Court of Appeal

Drug-free workplace - denial of worker's comp benefits

A worker whose employer has a Drug-Free Workplace program in place is not entitled to worker's compensation benefits if she refuses to take a second drug test after the first one proves unusable,

the 1st DCA held. The Court rejected Lisa Van Duyn's argument that the Florida Administrative Code required that she be given 24 hours to return to a medical clinic to provide a second urine sample. Van Duyn was injured while operating a dump truck and was sent to a medical clinic for treatment. While there, Van Duyn was directed to provide a urine sample for drug testing, but the sample she gave was below the acceptable temperature range. Van Duyn was instructed to provide a second sample but refused, saying she had to get home to her son. A Judge of Compensation Claims ruled her ineligible for benefits for failing to comply with the drug testing requirement, but Van Duyn argued that administrative rules should have allowed her an additional 24 hours to provide a sample. The DCA disagreed, noting that Rule 59A-24.005(3)(c)8 allows the additional time only if the worker is unable to give an acceptable urine sample after drinking a glass of water every half hour for two hours. "[A]fter consuming only a single glass of water, Van Duyn left the clinic without attempting to give a second sample. Given the facts of this case, therefore, Van Duyn cannot claim that she was denied an opportunity, pursuant to (the rule), to give another sample," the DCA said.

[Van Duyn v. Truck Driver Services, Inc., 2/6/02]

Indemnification from government's negligence

General indemnification language incorporated into a permit approval process protects the government from liability even though a citizen's injury may have been caused by the government's own negligence, the 1st DCA said. The Court ruled for the City of Pensacola, which sought to be indemnified after a woman was injured falling over a support line at a Fourth of July celebration. The event was sponsored by a service organization that, pursuant to city ordinance, purchased an insurance policy for the event and agreed to indemnify the city from all claims arising out of the event. The Court record showed that the woman's injuries were caused by the city's negligence, but arose out of the permitted activities. The organization argued that the city could not seek indemnity for its own negligence without express language to that effect, but the DCA disagreed. "The City could have required an indemnification agreement to be executed that contained language expressly limited in scope, but chose not to," the DCA said. "[T]he City did not limit the scope of the indemnification language as it did in other ordinances."

[Ray v. Pensacola Sertoma Club, Inc., et al., 2/14/02]

State licensing action based on federal exclusion

A decision by the federal government to bar a doctor from participating in federal health care programs does not count as action by a licensing authority that can cost the doctor his Florida medical license, the 1st DCA held. The Court reversed an order of the Department of Health, which determined that Dr. Benjamin Paz Ocampo had violated Florida law by having his "license or authority to practice medicine revoked" by another licensing authority. The department cited the federal government's exclusion of Ocampo from participation in Medicare, Medicaid and all other federal health programs. The DCA concluded that because the federal government did not license Ocampo, its exclusion of him from certain programs cannot be used by Florida to act against his license. "[T]he only privilege taken away from Ocampo by his exclusion from federal health care programs is the entitlement to bill the federal government, which is not included in Florida's definition of the 'practice of medicine. Thus, Ocampo still has the same authority to practice medicine as he did prior to the exclusion. While it may affect Ocampo's ability to practice medicine because some patients will most likely be forced to go elsewhere, it does not affect his authority," the DCA said.

[Ocampo v. Department of Health, 2/13/02]

Entitlement to preliminary hearing

A defendant who has been released from confinement is not entitled to an adversary preliminary hearing regardless of whether the release was on his own recognizance or on bail, because either method provides all the relief available to him, the 1st DCA held. James Dumlar, who had been arrested on motor vehicle charges, contested the circuit court's denial of a preliminary adversary hearing. After his arrest, Dumlar made bail and was released. He then demanded a hearing because the State had failed to file charges against him within 21 days of his arrest. The State argued that because he had already been released, Dumlar was not entitled to this relief under Florida Rules of Criminal Procedure 3.133(b)(5), which calls for the release of a defendant if he is not charged within 21 days. "The only remedy available to the petitioner under Rule 3.133(b) is release on recognizance. (Dumlar) is currently released on bail. We find that the distinction between these forms of release is not of

such a magnitude that a Rule 3.133(b) hearing is necessary. In short, petitioner's ultimate remedy would potentially be his release from confinement, a right which he enjoyed at the time he filed his motion for hearing and which, so far as we are aware, will remain in effect until trial," the DCA said.

[Dumlar v. State, 2/26/02]

2nd District Court of Appeal Entitlement to formal hearing over denied promotion

A State university professor is not entitled to a formal evidentiary hearing over his failed bid for a promotion because the decision not to promote him did not affect his "substantial interests," the 2nd DCA held. The DCA rejected the appeal of Dr. Arthur Herold, an associate professor at the University of South Florida College of Medicine whose bid to become a full professor was denied. After denying the promotion, the university then declined to grant Dr. Herold a formal administrative hearing under section 120.57(1), F.S. The doctor appealed, but the DCA said such a hearing is available only to a party whose substantial interests are determined in an agency proceeding. The DCA cited a similar decision last year by the 11th U.S. Circuit Court of Appeals in a case involving a West Palm Beach firefighter. "[C]ase law makes it clear that a substantial interest is one based on a legal entitlement, and not on a mere unilateral expectation," the DCA said. "(Dr. Herold) does not allege the existence of laws, rules or contractual provisions that would legally entitle him to full professorship. His unilateral expectation of being promoted was insufficient to create an interest that necessitated a hearing upon denial."

[Herold v. University of South Florida, 2/13/02]

Probable cause - deputy's inexperience in drug arrests

A deputy's lack of experience in drug arrests, combined with his uncertainty about what he felt during a pat-down search in which he found cocaine in the defendant's pocket, did not give him probable cause to seize the drug, the 2nd DCA held. A Collier County deputy found cocaine in Santos Rodriguez's pocket during a search following a traffic stop. At Rodriguez's cocaine possession trial, the deputy testified that he was not sure if what he felt during the pat-down was drugs and said he had only participated in "several" cocaine arrests. The deputy never testified about receiving special drug

identification training or indicated he knew what cocaine felt like. The DCA concluded that the totality of the circumstances did not give the deputy probable cause and ordered Rodriguez released. "In this case, the deputy's testimony did not establish that he immediately knew the objects in Rodriguez's pocket were drugs. Moreover, the deputy did not have extensive experience with drug crimes. Also, the deputy never testified that he knew what cocaine felt like; he merely stated he had seen crack and powdered cocaine," the DCA noted.

[Rodriguez v. State, 1/30/02]

Cigarette lighter not a deadly weapon

A cigarette lighter shaped like a gun cannot be considered a deadly weapon under the aggravated battery statute even if the defendant pointed it in the victims' faces, the 2nd DCA held. A juvenile identified as J.W. appealed his adjudication of delinquency on aggravated assault charges, arguing that there was insufficient evidence showing he had used a deadly weapon. The victims testified that they believed the cigarette lighter was a gun. The trial court denied J.W.'s motion for acquittal, but the DCA reversed the adjudications and ordered that the offense be reduced to misdemeanor assault. "[T]he lighter was not an instrument that, when used in the ordinary manner contemplated by its design, was likely to cause great bodily harm or death. Further, there was no evidence that the lighter was used in a manner likely to cause great bodily harm," the DCA said.

[J.W. v. State, 2/6/02]

3rd District Court of Appeal

Probable cause - search of garbage

A drug suspect's past practices gave law enforcement officers reason to search her trash and the results of the search gave them sufficient probable cause to get a search warrant, the 3rd DCA said in upholding evidence found through the warrant. The State appealed a trial court order granting Diane Gross' motion to suppress drugs and paraphernalia found in her home pursuant to a search warrant. The Monroe County Sheriff's Office had previously found baggies with cocaine residue in Gross' trash at her previous residence, and searched her trash after being informed that Gross had moved but was again selling drugs. The search outside the new residence also turned up baggies with suspected cocaine residue, so deputies applied for a warrant to search the new home. The trial court granted Gross's motion to suppress drug evidence found in

the home but the DCA reversed, concluding the deputies had probable cause for the warrant. "[T]he existence of probable cause is to be determined from the totality of the circumstances, and a prior history of drug offenses is one factor which may be taken into account. The prior activities of the defendant at the earlier address were matters that properly could be considered," the DCA said. "In light of all the other available information, the single trash search at the new address was sufficient to corroborate the anonymous tip and to provide probable cause for the issuance of the search warrant."

[State v. Gross and Goodner, 2/13/02]

4TH District Court of Appeal

Exception to agency's home venue privilege

The home venue privilege that usually sends suits against state agencies to Tallahassee for trial does not have to be applied when a state agency is added to a case as an impleaded defendant in certain proceedings, the 4th DCA concluded. The Court rejected the Department of Insurance's request for a case to be transferred to Tallahassee. The department was brought into a lawsuit against a viatical settlement provider when the plaintiff initiated supplementary proceedings under section 56.29, F.S. (2000), by impleading the agency as a defendant and seeking funds from a bond. The DCA supported the trial court's refusal to transfer venue in order to accommodate the department, but such a transfer might require court proceedings that duplicate those already conducted in Broward County. "The policy reasons behind the home venue privilege would not be well served by strict application of the rule here," the DCA said. "Transfer of venue in this case would result in new and additional litigation in a different court and would do little to further the policy considerations of the home venue privilege."

[Department of Insurance v. Accelerated Benefits Corp. and Wolk, 2/27/02]

Search and seizure - expectation of privacy

A defendant's Fourth Amendment rights were not violated when police conducted a warrantless search of his home's open and exposed carport because the man did not have a reasonable expectation of privacy there, the 4th DCA concluded. Donald Duhart was charged with grand theft of a motorcycle. Responding to an anonymous tip that a man was removing parts from a stolen motorcycle at a particular home, police saw Duhart in a carport taking parts from a motorcycle. When asked by

officers, Duhart acknowledged he did not have title to the motorcycle. Police then entered the covered but open garage without a warrant or Duhart's consent and retrieved the vehicle identification number from the motorcycle. Duhart was arrested following confirmation that the motorcycle was stolen, but the trial court suppressed evidence because of the warrantless search. The State appealed, and the DCA reversed. "Although it is well settled that one has an expectation of privacy in his home or its curtilage, the Fourth Amendment is not necessarily a protection in areas of the home, as in this case, which are open and exposed to public view," the DCA wrote. In a sharp dissent, Judge Klein said, "The mere fact that the carport was visible from the street was not, in my opinion, sufficient to carry the State's burden."

[State v. Duhart, 2/6/02]

5th District Court of Appeal

Propriety of police interview tactics

Where police did not engage in improper coercive interview tactics, a defendant's post-Miranda statements are admissible even if a statement given prior to the Miranda warning is inadmissible, the 5th DCA concluded. The State successfully appealed a trial court order suppressing statements made by burglary suspect Myron Ernst during an interview with police. Before giving any Miranda warning, interviewing officers told Ernst they had a photograph of him in New Smyrna Beach after he denied having been there. Upon seeing the photo, Ernst responded that he should talk to an attorney. The officers immediately ended the interview and began to leave the interview room, but Ernst indicated he wanted to continue the conversation. Ernst signed a Miranda waiver and the interview continued. The trial judge suppressed both the pre-Miranda comments and Ernst's statement after signing the waiver, citing improper "gamesmanship" by the officers in an attempt to get Ernst to talk. The DCA reversed, saying the officer's tactics did not violate Ernst's constitutional rights. "Admittedly, the officers' reference to a photograph showing his presence in New Smyrna Beach may have been designed to arouse Ernst's curiosity, but the tactic was not executed in a manner calculated to break his will," the DCA concluded. "[W]hile Ernst's initial, unwarned statements may have been inadmissible, they were voluntary and not the product of improper police coercion. After the Miranda warnings were read to Ernst, his subsequent statements were admissible. ... It was Ernst who reinitiated the

conversation and who thereafter validly waived his rights."

[State v. Ernst, 2/8/02]

Functional equivalent of interrogation

A trial court incorrectly suppressed a statement and gun because the young defendant divulged the location of the weapon in response to threats from his father rather than from any coercive action by police officers, the 5th DCA held. Officer Smith went to Dustin Alexander's home, which he shared with his parents, to question him about an armed robbery. At the conclusion of the interview the officer told Alexander's father that he believed the young man was involved in the crime, at which point the father became extremely agitated. Officer Smith arrested Alexander at that time for his own protection, and the father used a threatening tone to demand that Alexander reveal the location of the gun. Based on Alexander's response to his father, the officer found the weapon in the defendant's room. The trial court suppressed the gun and Alexander's statement, concluding that Alexander was not given a proper Miranda warning and his statement was coerced by the atmosphere of the interview and the father's threatening manner. The DCA disagreed, saying the officer did not conduct an interrogation or its functional equivalent prior to Alexander revealing the location of the gun. "The purpose of Miranda warnings is to prevent government officials from using 'the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment,'" the DCA said. "There is no evidence ... that the defendant was subjected to psychological pressure or direct questioning by the police, at least as it relates to the suppressed statements. There was also no evidence indicating that Officer Smith engaged in a conscious design to create an 'interrogation environment' when the suppressed statements were made. Thus, the defendant's statement in response to his father's question should not be considered the result of police interrogation."

[State v. Alexander, 2/22/02]

ATTORNEY GENERAL OPINIONS

Firearms, stun guns for animal control officers

In response to a request from the North Port city attorney, the Attorney General issued an advisory opinion (2002-15, 2/21/02) stating in sum: "1) The City of North Port may not authorize any animal control officers who are not law enforcement officers to carry firearms, including small-caliber

rifles; 2) While section 828.27, Florida Statutes, authorizes a city or county to adopt an ordinance authorizing its animal control officers to carry a device to chemically subdue and tranquilize an animal provided that the officer has successfully completed training as prescribed in the statute, the statute does not authorize the city ordinance to permit such officers to use nonchemical stun devices such as taser guns."

Use of public funds for organization memberships

In response to a request from the Polk County Clerk of the Circuit Court, the Attorney General issued an advisory opinion (2002-16, 2/22/02) stating in sum: "County funds may be used by the supervisor of elections to purchase memberships in local chambers of commerce, and to pay related expenses for attending meetings of the chambers and other community organizations in order to carry out the legislative mandate to the office of the supervisor to develop public-private programs to ensure the recruitment of skilled clerks and inspectors."

Approved by: Enoch J. Whitney
General Counsel

Edited by: Michael J. Alderman
Assistant General Counsel

Judson M. Chapman
Assistant General Counsel

Sena Hitson Finklea
Assistant General Counsel

Laurie Beth Woodham
Assistant General Counsel

Judy Miller
Paralegal Specialist

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)