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# LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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FRED O. DICKINSON, EXECUTIVE DIRECTOR

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

### **Consensual encounter - vehicle waiting to pull into traffic**

An initial encounter between police and the occupants of a vehicle when the car sat waiting to pull into traffic was not a seizure requiring Fourth Amendment protections, the 11th U.S. Circuit Court of Appeals held. The Court ruled on an issue of first impression in the circuit: whether the interaction between police and the individuals in a car that was neither parked nor moving was a consensual encounter under the Fourth Amendment. The Court ruled that such an encounter was consensual, rejected drug defendant Lyndon Baker's motion to suppress evidence. Baker argued that the plainclothes officers did not have probable cause or reasonable suspicion to detain him when they stopped the car as it prepared to pull out of a Tallahassee bus station parking lot. The officers eventually discovered drugs on all three occupants of the vehicle. The government argued that the initial interaction was a consensual encounter not requiring probable cause or reasonable suspicion, and the 11th Circuit agreed. "Here, police did not make a sufficient show of authority to sufficiently convey to Baker that his liberty was restrained. The officers did not display a weapon or use any language or tone that would indicate that compliance with the officers' request was compelled," the Court said.

[U.S. v. Baker, 5/8/02]

### **Warrantless search in emergency situation**

An emergency situation involving endangerment to life required an immediate response by police and fell within the exigent circumstances exception to justify a warrantless search for victims and the subsequent seizure of a shotgun, the 11th U.S. Circuit Court of Appeals held. Responding to two late-night 911 emergency calls about a disturbance involving gunshots, police arrived at Robert Holloway's mobile home with their weapons drawn. After securing Holloway and his wife, the officers searched the home for weapons and possible victims.

The search turned up the shotgun that gave rise to charges against Holloway, who claimed the search of his home violated the Fourth Amendment. The 11th Circuit disagreed. "Although the Fourth Amendment protects the sanctity of the home, its proscription against warrantless searches must give way to the sanctity of human life. When the police believe an emergency exists which calls for an immediate response to protect citizens from imminent danger, their actions are not less constitutional merely because the exigency arises on the wooden doorsteps of a home rather than marble stairs of a public forum," the 11<sup>th</sup> Circuit said.

[U.S. v. Holloway, 5/10/02]

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

### **DUI - jury instruction re: presumed impairment**

A trial judge did not commit fundamental error in a DUI case by improperly instructing the jury to make a statutory presumption of impairment based on blood alcohol levels since the instruction did not omit essential elements of the crime or misdefine the crime, the 1st DCA held. Robert Leveritt appealed his DUI manslaughter and vehicular homicide convictions. Leveritt argued that because the rule implementing implied consent laws had been declared invalid, the trial judge committed reversible error by instructing jurors that they could infer he was drunk at the time of the accident if they found his blood alcohol level was .08 or more. The State argued the blood test evidence was admissible under common law. The DCA affirmed the conviction but certified the question as one of great public importance. "The challenged instruction merely advised the jury of an evidentiary presumption of permissible inference that they were free to accept or reject. Thus we find no fundamental error," the DCA said.

[Leveritt v. State, 5/7/02]

### **Unlawful search of cigarette box**

A trial court should have suppressed drugs found in a cigarette box during a pat-down by an officer who acknowledged he did not have reasonable suspicion

to believe the box contained a weapon, the 1st DCA held. Nicolus Harford was convicted on drug-related charges and appealed the denial of his motion to suppress evidence seized during a frisk for weapons. Dispatched following a report of a street fight in progress with "unknown weapons," a Walton County sheriff's deputy encountered Harford. The deputy acknowledged that no one at the scene threatened him or acted suspiciously. The officer testified that he was not specifically concerned that the cigarette box he felt in Harford's pocket contained a weapon, but opened it to make sure and found drugs inside the box. The DCA reversed the conviction and discharging Harford. "This testimony ... persuades us that opening the box exceeded the limits of a justifiable intrusion on the privacy protected by the Fourth Amendment," the DCA said. "The State offers no authority supporting its claim that the vague and general police dispatch report of 'fighting with unknown weapons,' without more, furnished the basis for a reasonable suspicion that the cigarette box contained a dangerous weapon."

[Harford v. State, 5/13/02]

#### **State agency as real party in interest**

When the Attorney General's Office sues on behalf of a state agency, that agency is the actual party in interest in the case, the 1st DCA said. Ruling in a dispute between AHCA and a hospital facility, the DCA dismissed an appeal as premature because related claims remained pending below. "[W]here the Office of the Attorney General brings a complaint on behalf of an agency or department of the state, that agency or department is the real party in interest and is a party to the litigation," the Court said.

[Munroe Regional Health System, Inc., v. AHCA, et al., 5/16/02]

#### **2nd District Court of Appeal**

##### **Double jeopardy stemming from plea at first appearance**

A man who pled guilty to driving with a suspended license at his first appearance in county court cannot later be charged with the felony level of the same offense because of double jeopardy, even though the state intended to bring felony charges from the start, the 2nd DCA said. Richard McManama was cited for driving while license suspended (DWLS), and at first appearance the next day he accepted the county court's offer to plead guilty in exchange for a sentence of five days in jail. The State raised no

objection at that time, but five days later argued that McManama was actually cited for a felony-level offense over which the county court had no jurisdiction. When its motion to set aside the plea was rejected, the State charged McManama with felony DWLS. McManama plead no contest to the felony charge, reserving his right to appeal on double jeopardy grounds. The DCA agreed that the initial plea agreement involved a misdemeanor — the only offense level under the jurisdiction of a county court — and said the State cannot then charge McManama with the felony-level offense based on the same traffic offense. "In the present case, the county court had jurisdiction to adjudicate a misdemeanor DWLS charge. Mr. McManama's county court adjudication of guilt for misdemeanor DWLS was not void. Thus, the adjudication had to be considered in determining whether Mr. McManama was placed twice in jeopardy," the DCA said. "[S]ince jeopardy had attached to Mr. McManama as a result of his plea to the misdemeanor DWLS and adjudication of guilt thereon, the subsequent conviction for felony DWLS was improper as a violation of his protections.

[McManama v. State, 5/10/02]

#### **Public records - private email on government computer**

Private email stored in government computers does not automatically become a public record by virtue of that storage, the 2nd DCA held in denying a newspaper's public records request for email involving two municipal employees. The DCA rejected a bid by the St. Petersburg Times to obtain copies of all email sent from or received by two City of Clearwater employees who used government-owned computers for communication. The City provided copies of all email messages determined to be "public" by the employees, but withheld messages designated as "private." The newspaper argued that it was entitled to all of the email stored by the employees on the City's computers but the DCA disagreed, noting that courts have said the mere placement of a document in a public official's file does not make it a public record. "Although digital in nature, there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk. ... This case demonstrates that the Public Records Act, chapter 119, Florida Statutes (2000), although permitting broad access to public records, is not an ideal tool for private citizens who wish to investigate the

nongovernmental activities of government employees during work hours," the DCA said. "This case demonstrates that the current definition of public records limits the ability of chapter 119 to serve as a tool to ferret out government workers who spend much of their time on private matters while on the public payroll. ... [A] government employee who spends most of the day working on private matters and personal correspondence or viewing websites for personal entertainment can currently respond to a public records request by declaring that the records on it are not 'public.' It may be difficult to find a solution to this problem that balances individual privacy and the public's right of access, but the current approach is troublesome. This issue, however, is a matter that must be addressed by the legislature. At least in this context, it is not a matter for this Court to resolve," the Court added.

[Times Publishing Company v. City of Clearwater, 5/10/02]

#### **Disclosure of confidential informant**

Where the defense claimed misidentification, a trial court erred by refusing to require the State to disclose the identity of a confidential informant whose purchase of cocaine directly led to the defendant's arrest and conviction, the 2nd DCA held. Everette Foster argued on appeal that the confidential informant (CI) could help establish that he was not the person who sold cocaine to the informant and an officer during an undercover drug deal. Following an in-camera hearing, the trial judge denied Foster's motion, concluding that the informant's testimony would not help Foster. This was error, the DCA concluded. "[R]elevance of the CI's identity ... must be addressed in this case," the DCA said. "[T]he accused should have decided whether to call the CI as a witness, or at least had the opportunity to interview the CI in preparation for trial. Thus, we reverse Foster's judgment and sentence and remand for a new trial before which the State must disclose the identity of the CI to the defense."

[Foster v. State, 5/22/02]

#### **Search and seizure - passenger of vehicle**

Police did not have probable cause to conduct personal searches of individual passengers based only on the discovery of drugs in a search of the vehicle and a drug-sniffing dog's alert, the 2nd DCA said. Richard Cady was a passenger in a pickup truck stopped by police for a traffic infraction. The driver had been the target of a narcotics investigation

by Cape Coral police, and a canine team was called. A drug-sniffing dog alerted to the presence of drugs, and the driver was arrested after police found cocaine on his side of the truck. Police searched Cady and found cocaine in his pocket. On appeal, Cady challenged the denial of his motion to suppress the seized cocaine, arguing that the search was not justified. The DCA agreed and reversed Cady's conviction. "The officers had no information regarding Cady's involvement in drug activity, and the State did not present any evidence that would support a finding of constructive possession. Thus, we agree that the fact that Cady was a passenger in vehicle where drugs were found did not give the police probable cause to search Cady," the DCA said.

[Cady v. State, 5/24/02]

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

#### **Evidence - excited utterance exception**

A trial court erred by admitting as excited utterances the hearsay identification statements made by bystanders to a shooting where no evidence was presented regarding their state of mind or describing the defendant, the 3<sup>rd</sup> DCA held. Carroll Phillips appealed his convictions for aggravated battery with a firearm, complaining that over his objections, the trial judge admitted out-of-court statements made to a detective describing him as the shooter. One of the victims told the detective that unidentified bystanders said Phillips had shot her, and the detective testified that eyewitness Ebony Burns identified Phillips as the shooter when the detective interviewed her 30 minutes after the shooting. The detective said Ms. Burns appeared to be "kind of in shock, a little excited" and "kind of" upset. "It was error to admit the statements attributed to the unidentified bystanders as excited utterances because there was no evidence proffered regarding their states of mind. Thus, it is impossible to tell whether the declarants were still under the stress of excitement caused by the shooting," the DCA said. "The only evidence as to Ms. Burns' state of mind showed little more than someone who was mildly upset and somewhat disbelieving, rather than someone who was still under the stress of excitement caused by a startling event."

[Phillips v. State, 5/1/02]

#### **Applicability of liability standard in government buildings**

Government buildings are not exempt from a November ruling that placed a greater burden on the

owners of premises in slip-and-fall cases involving transitory foreign substances, the 3rd DCA held. The DCA reversed a summary judgment in favor of Miami-Dade County against a man who sued over injuries he suffered in a slip-and-fall on a banana peel in a restroom at Miami International Airport. In the appeal, the county argued that the Florida Supreme Court's recent ruling in Owens v. Publix Supermarkets applied only to food service establishments. In Owens, the justices held that once a plaintiff in a slip-and-fall case establishes that the fall was caused by a transitory foreign substance, the burden shifts to the business defendant to show that it exercised reasonable care under the circumstances. The DCA noted that the Owens opinion states that it applies to slip-and-fall cases arising from "business premises" and is not limited to food service establishments. The DCA also noted that a bill passed by the Legislature and awaiting action by the Governor addresses premises liability in response to Owens, and is intended to apply to pending cases.

[Bien-Aime v. Miami-Dade County, 5/15/02]

#### **Aggravated battery - ramming police car**

To prove that a defendant who rammed a police car committed aggravated battery, the State must show that the occupants of the car were injured, jostled or otherwise affected by the impact, the 3rd DCA held. A juvenile identified as V.A. appealed his adjudication of delinquency for aggravated battery. Police arrived at V.A.'s home, but before officers could get out of their car V.A. rammed the vehicle with the family car. None of the officers were injured, shaken or moved by the impact, so the defense contended the collision did not constitute battery. The DCA agreed and reversed the adjudication of delinquency, finding that aggravated battery requires proof that the occupants were injured, jostled or moved about within the vehicle, or that they had to brace themselves against the impending impact. "The State points out that when V.A. rammed the police car, he caused it to move backwards. The State argues that from this, the trial court could draw the inference that the officers were jostled or shaken up. There may be cases where the impact is so severe that such an inference can be drawn, but the impact in this case was not of such magnitude, and no one made that argument in the trial," the DCA said.

[V.A. v. State, 5/22/02]

#### **Civil forfeiture - fugitive disentitlement doctrine**

Under Florida civil forfeiture law, a fugitive from justice cannot use state courts to challenge the forfeiture of money he claims is his while he simultaneously refuses to enter the United States in order to avoid criminal charges, the 3<sup>rd</sup> DCA said. The DCA said a Florida law codifying the "fugitive disentitlement doctrine" was not improperly applied retroactively to a Colombian man because it was his refusal to enter the United States after the law was enacted — not his actions before that time — that led to his claim being dismissed. Authorities in Florida seized more than \$400,000 in currency from bank accounts controlled by Andres Tejada after the state Comptroller's Office alerted investigators about suspicious financial transactions. Tejada was also criminally indicted, and two years later the Legislature enacted section 896.106, F.S., to prevent anyone from using state courts to fend off civil forfeiture if that person evades criminal charges by remaining outside of Florida. Tejada argued that the statute was being improperly applied retroactively, but the DCA said Tejada's refusal to return to Florida after the law was enacted served to defeat his Argument. "All that Tejada had to do to avoid the application of the statute was to renounce his status as a fugitive. The trial court did not dismiss his claim because Tejada had used the resources of the courts prior to the application of the statute. The claim was properly dismissed because, after the effective date of the statute, Tejada would be using the resources of our courts to litigate his entitlement to funds which (authorities are) seeking to forfeit," the DCA said. "It is Tejada's flight or his continued refusal to appear in the face of judicial action that is the critical predicate to his disentitlement. His own actions or inactions as a fugitive after the enactment of the statute is what prevents him from pursuing his claim to the funds."

[Tejada v. In Re: Forfeiture, etc., 5/29/02]

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

##### **Miranda waiver - incriminating statements**

A jailed defendant's statements initiated and obtained by police through a telephone conversation are inadmissible where the defendant had previously invoked his Miranda rights, the 4th DCA held. Zachary Dixon appealed his first-degree murder and carjacking conviction, claiming that his incriminating statements violated his constitutional rights. Investigators found skin on the victim matching Dixon's DNA, and Dixon was booked into the local jail. Acting on a request from a man

purporting to be Dixon's uncle, a detective called the jail and spoke with Dixon, who initiated the conversation by stating that he wanted to cut a deal. The detective responded he could not make a deal and Dixon insisted to the detective that he "was going to find my stuff all over that guy. I want a deal." The detective ended the call. At trial, Dixon moved to suppress the detective's testimony regarding the conversation, but the trial court admitted the testimony. The DCA reversed, saying the detective's conversation with Dixon amounted to an improper interrogation after Dixon had invoked his Miranda rights. "While Miranda does not apply to volunteered statements, the State cannot escape the fact that the detective placed the phone call, not Dixon. Once he realized the detective was on the line, Dixon initiated only that he wanted to make a deal. Since he previously invoked his Miranda rights, since he was in jail, and since he did not make the phone call, we hold the detective should have obtained a waiver from him before continuing that conversation. A reasonable person would have concluded that continuing this conversation with Dixon would have led to an incriminating response," the DCA said.

[Dixon v. State, 05/01/02]

#### **Valid stop - reasonable suspicion from marijuana seed**

The presence of a single marijuana seed, observed by an officer during a valid traffic stop, is sufficient to give the officer reasonable suspicion to detain the driver while waiting for canine backup to search of the vehicle, the 4th DCA held. A juvenile identified only as K.G.M. appealed his conviction for possessing more than 20 grams of marijuana and drug paraphernalia, arguing that he was illegally detained while the officer waited for backup. K.G.M. was stopped for driving with a cracked windshield, but the officer saw what he believed was a marijuana seed in the back seat. While completing the traffic citation, the officer called for a canine backup team. Marijuana was found during the subsequent search, and K.G.M. was arrested. The trial court denied K.G.M.'s motion to suppress, and the DCA affirmed. "Marijuana seeds are the precursors to the marijuana plant. They are likewise, a common by-product of the possession of marijuana. It is therefore a reasonable inference from the existence of a marijuana seed, that marijuana is or has been in close proximity. Possession of marijuana is criminal conduct, therefore the reasonable inference is that criminal activity is

afoot," the DCA said. "[W]e believe that it is a reasonable inference from the existence of the marijuana seed on the facts of this case, that marijuana may be present. We further find that this inference is sufficient to support a finding of reasonable suspicion to detain the defendants until the arrival of a canine narcotics officer some thirty minutes later."

[K.G.M. v. State, 5/8/02]

#### **Entitlement to Eleventh Amendment immunity**

Florida sheriffs are a part of local government rather than an arm of the State, and therefore a sheriff is not entitled to full immunity from suit under the Eleventh Amendment, the 4th DCA held. The court said sheriffs may still enjoy the protection of absolute or qualified immunity in civil rights claims arising under federal law, but not the "constitutional design" immunity protected by the Eleventh Amendment. The DCA ruled against the Broward County sheriff in an equal pay lawsuit brought by a female employee. The DCA agreed with a trial court's decision that the sheriff waived his opportunity to claim immunity by relying on the Eleventh Amendment, because that form of immunity is not actually available to him. "The question is whether the Sheriff is a 'stand-in' for the State of Florida —that is, whether the State itself will bear the effects of the judgment in this case. ... The Florida Constitution names the Sheriff as a county official, not as an official of the State. ... Thus any money judgment in this case will be paid from the local county budget or by insurance purchased there from by the Sheriff," the DCA said. "Because the only immunity claimed by Sheriff Jenne is the 'constitutional design' immunity protected by the Eleventh Amendment, and we have concluded that he is not an arm of the State and therefore not entitled to claim such immunity, we hold that the trial court reached the correct result in refusing to enforce his immunity claim."

[Jenne v. Maranto, 5/8/02]

#### **Statute of limitations - state and federal discrimination claims**

A worker who goes to federal court alleging sex discrimination under both federal and state laws doesn't lose the chance to sue in state court just because a federal judge takes too long to decide jurisdictional issues, the 4<sup>th</sup> DCA held. The DCA ruled in favor of a secretary who claimed she was fired in 1992 after complaining about sexual harassment. The woman sued in federal court

raising both federal and state claims. The federal court determined in 1997 that the employers were not subject to Title VII of the Civil Rights Act of 1964 and granted summary judgment for the employer on that claim. As a result, the federal court dismissed the woman's state law claims, and less than a month later she filed in state court. A circuit judge dismissed her lawsuit, concluding that the statute of limitations had expired on her state claims. The DCA reversed, determining that the federal case put the state claims on hold. "(Federal law) tolls the running of any applicable state statute of limitations on the related state law claims during the pendency of the federal claim. The purpose of this tolling provision is undoubtedly to allow claimants to pursue their federal claim in a federal court without cost to their state law claims, should the federal claim prove unsuccessful," the DCA said. "[T]here is no reason to suppose that Congress intended for judges to search for some obscure intent unarticulated in the statutory text to avoid application of the tolling provision." [Scarfo v. Ginsberg, 5/8/02]

#### **Search based on arrest warrant**

Neither an arrest warrant nor a juvenile's acquiescence to authority justified police officers' entry into a suspect's home when they didn't have any reason to believe he would be there at the time, the 4th DCA said. The juvenile, identified only as V.P.S., was charged with drug offenses after officers, serving an arrest warrant for another man, searched a home and found drug paraphernalia the juvenile admitted were his. V.P.S. had answered the door to two uniformed and armed deputies, who showed him an arrest warrant for the suspect. After telling the deputies that his mother was at work and the suspect was not there, V.P.S. consented to a search of the home, which resulted in discovery of V.P.S.' drug paraphernalia. "[T]he officers showed appellant the warrant, leading appellant to believe that they had the right to search the premises. We do not think a lay person, particularly a juvenile, should be expected to understand the limits of an arrest warrant and that it does not permit the officers to enter into the premises. Indeed, even the trial court was under the erroneous belief that the officers could enter the premises based upon the arrest warrant alone even though there was no evidence that the suspect was within," the DCA said. [V.P.S. v. State, 5/15/02]

#### **Collateral estoppel - whistle-blower claim**

A federal court's determination that a public employee was not fired for illegally discriminatory reasons does not preclude the employee from pursuing a state whistle-blower claim against her government employer, the 4th DCA said. The DCA revived a lawsuit against the City of Fort Lauderdale by Deborah Rice-Lamar, who was fired from her position as the city's affirmative action specialist because she attempted to use official reports to express her opinion that the city's hiring practices were discriminatory. A federal court determined that Rice-Lamar was fired not for expressing her views but rather for insubordination for including those views in official reports after she was expressly told not to do so by her superiors. After the federal court ruled, Rice-Lamar pursued her whistle-blower complaint in state court, where the city argued for collateral estoppel based on the federal court decision. The DCA, however, concluded that the elements necessary to support a whistle-blower claim are distinct from those in a discrimination claim and therefore collateral estoppel does not apply. "[T]he federal court's conclusion that Lamar was not terminated for discriminatory (race/gender related) reasons or for exercising her First Amendment right to free speech is not determinative of the issues relating to her state whistleblower claim. The fact that the federal court determined that she was terminated for insubordination has no bearing on whether she was retaliated against for her disclosure of alleged discriminatory practices by the City," the DCA said. [Rice-Lamar v. City of Fort Lauderdale, 5/15/02]

#### **Attempt to evade service**

A litigant cannot seek review of an otherwise non-appealable order by claiming he was never properly served when he went to great lengths to avoid service, the 4th DCA said. Ron Palamara sought review of a non-final order denying his motion to set aside a default judgment against him. Although such orders are not appealable, Palamara asserted that the trial court didn't have jurisdiction over him because he was not properly served with notice. The trial court found that Palamara had attempted to evade service by running away from the process server and locking himself inside his business. This was sufficient to overcome Palamara's contention that he was not properly served, the DCA said. "[T]estimony showed that appellant was informed of the contents of the notice, that the notice was placed on the door through which appellant later came out,

and that the appellant had picked the papers up. This evidence was sufficient to support the finding that appellant had been personally served," the DCA said.

[Palamara v. World Class Yachts, Inc., 5/29/02]

#### **Element of crime - guilty knowledge or intent**

The State must prove criminal intent when prosecuting a sexual offender for failing to notify authorities of a change of address, even though the Legislature failed to explicitly write the proof-of-intent requirement into law, the 4th DCA held. Victor Giorgetti, a convicted sexual offender, was convicted of violating his probation by failing to notify authorities when he changed his address after the end of his probation. Both Giorgetti's probation officer and his attorney testified that they had not informed him he would have to continue registering even after his probation ended. The DCA said that because violation of the registration requirement is a felony, it must presume that guilty intent is an element of the crime that must be proven by the State. "This statute creates no mere informational reporting requirement, the violation of which is punished with a small fine. In this case, the penalty for the offense turned out to be more than six and one-half years imprisonment. In spite of the failure of the legislature to include an explicit element of intent in the statutory text, (precedents) require the courts to read a 'broadly applicable' intent requirement into the State's burden of proof. We do so now, thus requiring a new trial," the DCA said.

[Giorgetti v. State, 5/22/02]

#### **Double jeopardy - revoked license**

Double jeopardy does not prevent a defendant from being convicted and sentenced for driving on a revoked license under two separate sections of law because the two offenses do not require identical elements of proof, 4th DCA said. Auburn Webb claimed that his convictions for violating two revocation statutes, sections 322.34(5) and 322.341, F.S., constituted double jeopardy because the charges resulted from a single accident. Webb was charged with driving under both an habitual traffic offender revocation and a permanent license revocation after he fled the scene of an automobile accident in which he was involved. Affirming the two convictions, the DCA concluded, "Because it requires three criminal convictions or fifteen convictions for moving traffic offenses, the habitual traffic offender statute primarily punishes recidivist bad driving. A permanent revocation of a driver's

license occurs in cases involving a death or seriously dangerous conduct, such as a fourth DUI. Where the legislature has authorized multiple revocations of a driver's license using the same convictions under separate statutes, it follows that the legislature intended to authorize separate punishments when a defendant's conduct has triggered those revocations." [Webb v. State, 5/22/02]

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

#### **Search and seizure - unreasonable detention**

An officer who stopped a vehicle for blocking an intersection but had no other suspicion of criminal conduct unreasonably detained the driver by extending the time required to write a citation based on erroneous information provided by the Division of Motor Vehicles, the 5th DCA held. Gregg Eldridge appealed the denial of his motion to suppress marijuana found in his vehicle. Testimony revealed that when Eldridge was stopped, he appeared nervous, gave three different home addresses and had a large roll of \$100 bills. A DMV check indicated that Eldridge had a valid Florida license and a suspended Virginia license. While writing a traffic citation, the officer called for canine back-up. While the dog was sniffing around the car, a dispatcher informed the officer that Eldridge's Florida license had been issued in error. The canine search turned up marijuana, and Eldridge was arrested on license and marijuana charges. It was later determined that Eldridge's Florida driver's license was issued properly and the information about the Virginia suspension was wrong. The trial court nonetheless ruled that the length of Eldridge's detention was reasonable because of the confusion over the license issue, but the DCA disagreed and reversed. "[T]he officer did not have reasonable suspicion that criminal activity was afoot to detain Eldridge any longer than necessary to write the traffic citation," the DCA said. "We find that the continued detention of Eldridge while the officer was dealing with the DMV's erroneous information allowed Eldridge to be subjected to a search where one otherwise would not have occurred."

[Eldridge v. State, 5/3/02]

#### **Termination of employee - adherence to policy**

The firing of a state supervisor should not be reversed merely because an investigation lasted several months despite an agency policy calling for such investigations to end within 30 days, the 5th DCA said. A former Florida Highway Patrol motorcycle squad supervisor appealed an order

dismissing him. The supervisor was fired after the troopers under his command complained of a series of incidents of verbal abuse, profanity, and racist and sexist epithets. Among his arguments on appeal was that he should not have to face any disciplinary action because FHP failed to follow its own rules and procedures, which call for investigations to end within 30 days unless an extension is granted. The DCA rejected his argument and affirmed the order of dismissal. "Florida law has long been clear ... that an agency's failure to meet such procedural benchmarks as investigation deadlines will not prevent disciplinary action unless the delay has prejudiced the employee. Here, there has been no prejudice to (the supervisor). His claim of mental distress due to the duration of the proceedings and loss of confidence in the fairness of the FHP are not the substantive prejudice contemplated," the DCA said.

[Littleford v. Department of Highway Safety and Motor Vehicles, 5/3/02]

#### **Evidence insufficient to revoke probation**

A defendant's probation cannot be revoked based on a baggie of marijuana found at his feet when the issue was constructive possession and the State had no fingerprints or other hard evidence to link the defendant to the drugs, the 5th DCA said. The Court said police did not demonstrate that Stephen King had sufficient dominion and control over the baggie or even knew it was on the ground near him in a public place. Even though no drugs were actually found on King, his probation was revoked and he was sentenced to 10 years in prison. King argued that the evidence was insufficient, and the DCA agreed. "To establish constructive possession, the State must show that the accused had dominion and control over the contraband, knew the contraband was in his presence, and knew of the illicit nature of the substance. Here, the evidence was wholly insufficient to demonstrate that King had dominion and control over the contraband or knowledge of its presence," the DCA said. "When contraband is found in a public place, more than mere proximity to the defendant must be shown to sustain a conviction."

[King v. State, 5/17/02]

#### **Incompetent worker's entitlement to unemployment benefits**

A fired worker is entitled to unemployment benefits if his termination was the result of his incompetence as long as he did not commit misconduct, the 5<sup>th</sup>

DCA said. The Court reversed a decision by the Unemployment Appeals Commission, which affirmed a referee's finding that Herbert Fisher was disqualified from receiving benefits. The referee determined that Fisher was fired for misconduct connected with work. Fisher argued that the record clearly showed he was not discharged for misconduct as it is defined in statutes, and the DCA agreed. "The Employment Termination Report in this case shows that Fisher was discharged from employment because of incompetence rather than misconduct ... The report of the Agency for Workforce Innovation shows the reason for Fisher's termination was 'inability to perform the work,'" the DCA said. "We agree with the appellant that the instant record reflects incompetence, not misconduct."

[Fisher v. Unemployment Appeals Commission, 5/24/02]

### **ATTORNEY GENERAL OPINIONS**

#### **Public records provided through private entity**

In response to a request from the general counsel for the Pasco County District School Board, the Attorney General issued an advisory opinion (2002-37 5/20/02) stating in sum: "The District School Board of Pasco County is not authorized to require that production and copying of public records be accomplished only through a private company that acts as a clearinghouse for the school district's public records information pursuant to a contract between the school district and the private company. Although the district may, for its convenience, contract with private companies to provide information also obtainable through the district, it may not abdicate its duty to produce such records for inspection and copying by requiring those seeking public records to do so only through its designee and then paying whatever fee that company may establish for its services. The district is the custodian of its public records and, upon request, must produce such records for inspection and copy such records at the statutorily prescribed fee."

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