
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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U.S. Supreme Court

Detention of legal aliens without bail

Upholding a 1996 mandatory detention law, the U.S. Supreme Court ruled that the nation's attorney general has the discretion to detain lawful aliens without bond while their deportation cases are pending.

Hyung Joon Kim, a lawful permanent resident, became subject to INS deportation following two theft convictions and was detained pending removal proceedings. While in custody Kim filed a habeas petition contending his detention under 8 U.S.C. § 1226(c) violated the Due Process Clause because of its no-bail provision. The 9th U.S. Circuit Court of Appeals agreed with Kim, citing an earlier Supreme Court decision. Reversing, the justices ruled 5-4 that Kim's detention was limited to weeks or months. Writing for the majority, Chief Justice Rehnquist said, "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as Kim be detained for the brief period necessary for their removal proceedings." In a dissent, Justice Breyer disagreed with the majority's conclusion that Kim admitted to being deportable and stated that Kim should have the opportunity to challenge his deportation at a bail hearing.

[*Demore v. Kim*, 4/29/03]

1st District Court of Appeal

Whistle-blower - temporary reinstatement of state employee

A former state worker is entitled to temporary reinstatement under the Whistle-Blower's Act because her letter of resignation – presented to her as the only alternative to a letter of termination – amounted to an actual discharge, the 1st DCA held. Mavis Georgalis, a manager for the Department of Transportation, was called into a meeting and shown two letters, one submitting her resignation and the other advising her that her services were no longer needed. Georgalis accepted the resignation, she

said, only in response to coercion. She then filed a whistle-blower complaint claiming she was fired because she participated in a complaint made by a contractor under her supervision. The Florida Commission on Human Relations concluded that Georgalis' departure from DOT was an actual discharge and requested her temporary reinstatement while the case remained pending. A trial court granted the request and the DCA affirmed, rejecting DOT's arguments that Georgalis resigned and was not discharged and that she was not entitled to temporary relief because the commission failed to follow statutory time periods for providing notice. The court noted that the statute does not provide any remedies when the commission fails to meet the time periods.

"The time periods contained within the statute constitute directions to FCHR to expeditiously handle complaints and seek relief for the complainant where it is warranted. It does not serve the legislative purpose to preclude a complaining employee from obtaining relief based upon FCHR's failure to follow statutory directives," the DCA said.

[*Department of Transportation v. Florida Commission on Human Relations and Georgalis*, 4/10/03]

Agency rejection of findings of fact

The 1st DCA reversed a state agency's determination and granted an interim rate increase to two Panhandle nursing homes that sought the increase after their liability insurance premiums skyrocketed. The DCA said the agency improperly rejected a hearing officer's conclusions of fact by labeling them as conclusions of law.

The two nursing homes requested the interim rate increase because their insurance premiums rose substantially in 2000 after their Medicaid reimbursement rates for that year had already been set based on their 1999 insurance costs. The Agency for Health Care Administration denied the request, noting that at the time neither Florida or federal law nor a state reimbursement plan required nursing homes to carry liability insurance. The hearing officer concluded that in maintaining liability insurance, each nursing home acted as a "prudent provider" in accordance with federal standards of

care, but AHCA overruled that conclusion by determining that it was subject to agency interpretation. The DCA disagreed, and said the nursing homes appropriately determined that they must maintain liability insurance.

"Although the government did not specifically require providers to carry liability insurance at that time, clearly, the providers would suffer adverse consequences if they failed to do so. The effect of the provisions was such that a prudent provider operating under the reimbursement principles of (federal guidelines) would carry liability insurance. To suggest otherwise is disingenuous," the DCA said.

[Brookwood-Walton County Convalescent Center and Brookwood-Washington County Convalescent Center v. Agency for Health Care Administration, 4/8/03]

Agency's refusal to grant formal hearing

A state agency's refusal to grant a formal administrative hearing to an unsuccessful grant applicant is based on faulty reasoning that would allow government agencies to award grants arbitrarily or even fraudulently without risk of their decisions being challenged on appeal, the 1st DCA said.

The DCA ordered the Florida Housing Finance Corporation to hold a formal hearing on a challenge brought by Ybor III, Ltd., an unsuccessful applicant for low-income housing funds in 2001. Ybor contended that the application of another competitor for funds, Windsong II, was scored incorrectly in a way that enabled Windsong to be awarded funds but denied funds to Ybor. The FHFC denied the request for a hearing, contending that Ybor's petition amounted to a disallowed intervention in the appeal of another applicant. Ybor responded that its petition was not an intervention in Windsong's case, but instead was its own proceeding challenging the effect on Ybor of the way Windsong's application was scored. The DCA agreed with Ybor and directed FHFC to hold a formal administrative proceeding on Ybor's appeal.

"Once it became aware of perceived irregularities or improprieties in the application evaluation procedures employed by (FHFC), Appellant was denied any meaningful opportunity to be heard. Were (FHFC's) interpretation of its rules to be approved by this court, then an unsuccessful, simultaneous applicant for a finite, limited benefit who questions the integrity of the evaluation process itself would not have an adequate forum to be heard. An agency could act fraudulently, illegally, arbitrarily, dishonestly, or inconsistently with impunity. The administrative need for decisional finality is a nullity if the road toward closure does not permit a

reasonable point of entry for an aggrieved applicant to speak and be heard," the DCA said.

[Ybor III, Ltd., v. Florida Housing Finance Corporation, 4/23/03]

2nd District Court of Appeal

Marchman Act - right to court-appointed counsel

A person undergoing involuntary commitment to substance abuse treatment under the Marchman Act has a constitutional right to representation by an attorney, and the state must pay for the attorney if the defendant cannot, the 2nd DCA held.

The DCA affirmed a lower court's determination that Hillsborough County must pay the fees of attorney Mark Albrechta, who was appointed by the court to represent a man in proceedings under the "Hal S. Marchman Alcohol and Other Drug Services Act of 1993." The DCA noted that no Florida appellate court has directly addressed the question of whether appointment of counsel in such cases is constitutionally required, but said the U.S. Supreme Court has recognized that involuntary commitment triggers due process protections.

"Because due process is implicated, we conclude that a defendant has a constitutional right to be represented by counsel in Marchman Act proceedings. Accordingly, (the trial court) ...did not err in requiring the County to pay Albrechta's fees," the DCA said.

[Hillsborough County v. Albrechta, 4/4/03]

3rd District Court of Appeal

Home venue privilege - sword-wielder exception

A trial court incorrectly rejected a state agency's motion to dismiss a lawsuit against it because the plaintiff failed to file suit in the agency's headquarters county and the lower court should have recognized the agency's home venue privilege, the 3rd DCA held.

A former Florida International University employee sued the Department of Insurance, claiming that the agency's withdrawal of legal representation in an earlier lawsuit constituted a breach of contract. The department moved to dismiss the case due to improper venue, based on the agency's home venue privilege. The trial court denied the motion to dismiss saying the "sword-wielder" exception to the privilege applied to protect the employee, Frank Amador, from the state's actions. The DCA disagreed.

"Amador's suit against the Department is not 'in the nature of a shield against the state's thrust,' as no constitutionally guaranteed right or property interest was infringed upon. There is no constitutional right in Florida to have one's attorney's fees paid," the DCA said. "Amador may not characterize this breach of

contract claim against the Department as an unconstitutional taking of a property interest so as to invoke the sword wielder doctrine."

[*Department of Insurance v. Amador*, 4/2/03]

Motion to suppress reversed

A bulletin based on a tip from a reliable source, together with the combined knowledge of various law enforcement officers and agents, provided probable cause to stop and arrest a suspect, the 3rd DCA held.

The victim, a confidential informant, identified Karim Bagley from a photograph taken by police following his arrest. Bagley moved to suppress the photographic identification and his subsequent confession, alleging it was obtained as the result of an unlawful arrest. The informant/victim had furnished state law enforcement and the FBI with information that was contained in a "be on the lookout" bulletin that led to Bagley's arrest. In granting the motion to suppress, the trial court found that although the BOLO was sufficient to justify the stop, it was insufficient for the arrest. The DCA disagreed and reversed the trial court's order to suppress.

"This information was properly viewed as reliable, having come from the confidential informant/victim as well from the observations of state and federal agents," the DCA said. "Reasonable grounds existed to support an arrest."

[*State v. Bagley*, 4/23/03]

Sovereign immunity waiver - legislative claims bills

Damages recovered by one person through a legislative claims bill do not prevent another injured person from recovering amounts up to the \$100,000 cap allowed in an action at law under Florida's limited waiver of sovereign immunity, the 3rd DCA said.

The court ruled in favor of a driver who, like his passenger, was injured in an automobile accident with a City of Miami police car. The passenger sued the city and eventually reached a \$5 million settlement. The city paid \$100,000 as provided in section 768.28, F.S., the sovereign immunity law, and the Legislature passed a claims bill directing the city to pay the remaining \$4.9 million over three years. The driver, Marcos Valdez, then sued, but the city argued that the amounts it paid to the passenger exhausted the \$200,000 per incident allowed under the law. Valdez argued that the claims bill for the passenger had no effect on the city's obligation to make payment to resolve his action, and the DCA agreed.

"A reading of section 768.28 supports the conclusion that had the legislature intended that any amounts procured by means of claims bills be applied to

exhaust the per person/per incident waiver of immunity, the legislature would have included such a provision. While section 768.28 provides for a number of eventualities and gives instruction on how the waiver of immunity works, it makes no mention of the novel exhaustion argument advanced by the City," the DCA said. "While the per person/per incident limitations may, in some instances, make unavoidable a race to the courthouse, the reading of the statute advocated by the City will clearly eviscerate one of the essential purposes of this waiver which is to obviate for as many claimants as possible resort to the more cumbersome legislative claims bill route to recovery."

[*City of Miami v. Valdez*, 4/23/03]

4th District Court of Appeal

Entrapment - proof of unlawful inducement

A defendant failed to prove he had been unlawfully induced to commit the crime of child exploitation where his own acts showed that he was predisposed to commit the crime independent of the government's actions, the 4th DCA said.

Edward Marreel appealed the denial of his motion to dismiss on the basis of entrapment. During a computer sting operation, an FDLE agent posed as a teenager named Kelly and entered an Internet chat room called "Married Wants Affair." Marreel, age 39, responded and "Kelly" immediately identified herself as being 15. Marreel asked Kelly if she was "just looking for a sexual relationship." After several weeks filled with numerous e-mails, Marreel arranged to meet "Kelly" in person to engage in sex acts. The trial court rejected Marreel's contention that he was lured or induced into a sexual conversation and that "he was not predisposed to this type of activity."

"Upon learning 'Kelly's' age, appellant was not deterred but continued to engage her in the idea of having an affair," the DCA said. "The fact that 'Kelly' helped to keep the idea of an affair going by initiating some of the later contacts with appellant is of no moment. By the end of the first chat, appellant had already shown that he was 'predisposed' and that, independent of the government's actions, he stood ready and willing, without persuasion, to commit the offense."

[*Marreel v. State*, 4/2/03]

Resisting arrest with violence - strip search

A suspect's violent resistance to a strip search is unlawful even if the search is being conducted improperly, the 4th DCA held.

Willie Perry was arrested and booked into the Broward County jail on cocaine charges. Because he had been arrested for a narcotics offense, Perry was subject to a strip search, pursuant to

departmental policy. He was taken to a strip room, where he complied with orders to undress but refused to submit to an anal cavity search. He started screaming and struggling with detention officers, hitting one deputy in the face with his fist and kicking another in the leg. Consequently, Perry was charged with battery on a law enforcement officer and resisting with violence. On appeal, Perry argued that the strip search was not conducted in a lawful manner and therefore his motion for acquittal should have been granted. Without passing judgment on whether the search in this case was conducted properly, the DCA rejected Perry's assertion.

"(T)he use of force or violence to resist an officer during a post-arrest strip search is unlawful, even though the officer improperly performs the search. In other words, noncompliance with the strip search statute is not a defense to resisting with violence. We thus conclude that the trial court did not err in denying the motion for judgment of acquittal," the DCA said.

[*Perry v. State*, 4/30/03]

5th District Court of Appeal

Motion to suppress - witness fails to show

A trial court did not abuse its discretion by granting a defendant's motion to suppress when the state's main witness, the arresting officer, failed to appear at the suppression hearing, the 5th DCA held. Arthur Burke moved to suppress cocaine on the basis of an illegal vehicle stop. In his report, the arresting officer stated his reasons for the stop, but the officer failed to appear for the suppression hearing. Before granting Burke's motion, the judge told the prosecutor, "I will leave up to you before I rule the opportunity to nolle pros it, but as far as I'm concerned, I'm granting the motion to suppress. ... (D)o you have a decision you want to make?" The prosecutor did not file a nolle prosequi or move for a continuance but told the court it was creating an onerous burden on the state. The DCA affirmed the trial court's order denying the state's subsequent motion to vacate the suppression order.

"The state had an opportunity to request a continuance or file a nolle prosequi, but failed to do either. Therefore, the trial court was within its discretion to grant the motion to suppress," the DCA said.

[*State v. Burke*, 4/25/03]

Ignorance and forfeiture

A woman was not considered an "innocent owner" after admitting she knew the driver of her motorcycle was under the influence of alcohol. The woman, Neave, was a passenger and Potter was the driver of a motorcycle owned by Neave that was stopped

for traveling in excess of the speed limit. Because Potter had blood-shot eyes and smelled as if he had been drinking alcohol, the officer conducted a field sobriety test, which indicated that Potter was under the influence of alcohol. Potter was arrested for DUI, and it was discovered that Potter's license had been revoked based on a prior DUI conviction. Subsequently, the Department of Highway Safety and Motor Vehicles seized Neave's motorcycle. At the hearing, Neave conceded that she had known that Potter was driving her motorcycle under the influence, but claimed to be unaware that Potter's driver license was suspended. Neave contended that her ignorance of the status of Potter's driver license made her an innocent owner, and that the motorcycle could not be forfeited unless she knew not only that Potter was too impaired to drive, but also that Potter had a suspended license. The 5th DCA held that an owner is "innocent" only if the owner does not know or have reason to know that the property will be used in criminal activity. Because Neave knew the vehicle was being used in criminal activity (the DUI), the court said that the seizure was proper.

[*Dept. of Hwy. Safety and Motor Vehicles v. Megan-Neave*, 4/25/03]

Attorney General's Opinion

Attorney's fees for law enforcement officers

In response to a request from the Miami city attorney, the Attorney General issued an advisory opinion (2003-13, 4/1/03) stating: "I am of the opinion that section 111.065, Florida Statutes, permits, but does not require, the city to reimburse a law enforcement officer for legal costs and reasonable attorney's fees incurred by said officer in connection with the defense of criminal charges commenced against such officer where the action arose out of the performance of the officer's official duties and the prosecutor has 'nolle prossed' the criminal action."

School zones on roads where traffic light located

In response to a request from state Representative Mike Davis, the Attorney General issued an advisory opinion (2003-14, 4/ /03) stating: "I am of the opinion that section 316.1895(8), Florida Statutes, does not preclude the coexistence of a traffic control device and a designated school zone on a highway or street adjacent to a school."

Disposal of property obtained through forfeiture

In response to a request from the Coral Gables city attorney, the Attorney General issued an advisory opinion (2003-16, 4/30/03) stating: "(I)t is my opinion that Chapter 932, Florida Statutes, does not restrict the disposal or subsequent use of property obtained

through contraband forfeiture procedures after the property is no longer needed for the purpose for which it was acquired."

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