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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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## **11th U.S. Circuit Court of Appeals**

### **Vehicle stop - Fourth Amendment violation**

An officer's mistaken belief that a city code required vehicles to have an inside rear-view mirror did not provide the requisite reasonable suspicion or probable cause to justify the initial stop of a defendant's van, the 11th U.S. Circuit Court of Appeals held.

Chittakone Chanthasouxat and another defendant appealed their cocaine-related convictions. The Alabama trial court found that the officer had probable cause to stop the defendants' van and therefore denied a motion to suppress drug evidence and statements. The officer put the defendants in his patrol car and told them they were being cited for a city code violation. Chanthasouxat consented to a search of the van. The patrol car was equipped for video and recorded the defendants' backseat discussion about the cocaine they were carrying. The defendants argued that the initial stop was illegal, and the 11th Circuit agreed.

"(T)he correct question is whether a mistake of law, no matter how reasonable or understandable, can provide the objectively reasonable grounds for reasonable suspicion or probable cause. And to that question we join the Fifth and Ninth Circuits in holding that a mistake of law cannot provide reasonable suspicion or probable cause to justify a traffic stop," the 11th Circuit said. "Because we conclude that the initial traffic stop violated the Fourth Amendment, the violation was not cured by voluntary consent, and that Chanthasouxat's statements (to the codefendant) while seated in the patrol car were fruits of the poisonous tree, we hold that the drug evidence and Chanthasouxat's statements must be suppressed."

[\[United States v. Chanthasouxat, 8/22/03\]](#)

### **Qualified immunity from suit - police shooting**

A police officer is not entitled to summary judgment in a lawsuit based on qualified immunity where his use of deadly force was premised not on the danger posed by a fleeing suspect, but rather by the risk of an accident during the pursuit, the 11th U.S. Circuit Court of Appeals held.

Reversing itself on remand from the U.S. Supreme Court, the 11th Circuit reinstated a lawsuit filed by a

man who was paralyzed after a Georgia sheriff's deputy's fired three shots into an allegedly stolen pickup truck during a high-speed Interstate highway chase. The court originally concluded that Deputy Fred Lawrence Cox could reasonably have believed he had sufficient probable cause to apply deadly force and therefore was entitled to qualified immunity. On remand, the 11th Circuit concluded that Cox may be able to make a case for qualified immunity at trial, but was not entitled to summary judgment on that basis because, under the Supreme Court's 1985 ruling in *Tennessee v. Garner*, a police officer can use deadly force to prevent the escape of a fleeing non-violent felony suspect only when the suspect poses an immediate threat of serious harm to police officers or others.

"Applying *Garner* in a common-sense way, a reasonable officer would have known that firing into the cabin of a pickup truck, traveling at approximately 80 miles per hour on Interstate 85 in the morning, would transform the risk of an accident on the highway into a virtual certainty. The facts of this case bear out these foreseeable consequences. Thus, Deputy Cox is not entitled to summary judgment, on qualified immunity grounds," the 11th Circuit said.

[\[Vaughan v. Cox, et al., 8/29/03\]](#)

## **Florida Supreme Court**

### **Deadline for government forfeiture actions**

A state appeals court was mistaken to conclude that government agencies are not bound by a 45-day deadline for forfeiture actions imposed by Florida statutes, the Florida Supreme Court held.

The justices reversed the 2nd DCA, which had held that the statutory time periods are not a jurisdictional bar but instead operate only as a temporary prohibition or limitation on replevin actions and other claims by third parties. Three dissenting justices maintained that the statutes give the government 45 days to consider its options prior to the point at which a third party may seek replevin, and the government has an additional 45 days beyond that period during which to file a forfeiture action. The 4-3 majority, however, said the 45-day period precludes any forfeiture action beyond that point.

"Section 932.704(4) plainly states that the seizing

agency 'shall promptly proceed against the contraband article by filing a complaint in the circuit court within the jurisdiction where the seizure or the offense occurred.' Promptly proceed is defined in section 932.701(2)(c) as 'to file the complaint within 45 days after seizure.' Thus, to initiate a forfeiture proceeding against property, the Act requires the seizing agency to file a complaint within 45 days of seizure," the court said.

*[DeGregorio v. Balkwill, 8/21/03]*

## **1st District Court of Appeal**

### **Effective date of biennial reenactment of statutes**

The Legislature's biennial readoption of the Florida Statutes has rendered moot a challenge to the constitutionality of an Everglades law, even though the reenactment of the statutes has not technically reached "publication" yet, the 1st DCA held. Two environmental organizations challenged the law, claiming the statute — which deals with Everglades restoration bonds — violates the single-subject requirement of the Florida Constitution. Agreeing with the Department of Environmental Protection, the DCA said the appeal has been rendered moot by the Legislature's biennial reenactment the Florida Statutes, which cures any single-subject violations. The environmental organizations argued that dismissal on that basis would be premature because statutes say reenactment takes effect "immediately upon publication," and the updated version has not yet been published. The DCA said the language has been interpreted as making the reenactment effective as of the date on which the act became law, so the latest reenactment took effect on July 1. "Moreover, while it is true that appellants initiated their challenge during the window period for raising a single subject claim, they have failed to articulate any practical purpose that would be served by allowing this appeal from the denial of declaratory and injunctive relief to continue now that the window period has closed. Accordingly, we conclude that this appeal is moot, and dismiss it on that basis," the DCA said.

*[Environmental Confederation of Southwest Florida and Manasota-88 v. Struhs, et al., 8/14/03]*

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

### **Search and seizure - probable cause from dog alert**

The fact that a narcotics detection dog has been trained and certified, by itself, is insufficient to furnish probable cause for a search when the dog alerts, the 2nd DCA held.

Gary Matheson pled no contest to possession of controlled substances and drug paraphernalia, and on appeal challenged the denial of his motion to suppress contraband seized from his vehicle. An officer recounted how he walked his police dog, Razor, around Matheson's car. The dog alerted the officer near the car's hatchback, and a search produced drug paraphernalia. Matheson argued that the dog alert did not give police probable cause to justify the search, and the DCA agreed.

"An officer who knows only that his dog is trained and certified, and who has no other information, at most can only suspect that a search based on the dog's alert will yield contraband. Of course, mere suspicion cannot justify a search," the DCA said. "(T)he most telling indicator of what the dog's behavior means is the dog's past performance in the field. Here, the State did not present any evidence of Razor's track record. Accordingly, the State did not meet its burden to establish that the deputies had probable cause to search Matheson's car." Assistant Attorney General Susan M. Shanahan represented the state on appeal.

*[Matheson v. State, 8/1/03]*

### **Search and seizure - unlawful detention**

A consensual encounter became an illegal investigatory detention when an officer, responding to an unreliable anonymous tip, asked the occupants of a car to step out after they had provided a reasonable explanation for their presence, the 2nd DCA held.

Michael Jacoby appealed his conviction for possession of methamphetamine and drug paraphernalia. The arresting officer, acting on an anonymous tip that people were smoking drugs in a car parked behind a restaurant, approached a vehicle located behind another nearby business. The passenger provided identification and said she and Jacoby were in the car because her roommate did not allow men in the home. The officer obtained consent to search the woman's purse and Jacoby's person, but Jacoby refused to consent to a search of the car. A canine unit alerted the officer to drugs in the car, and Jacoby was later convicted. Jacoby argued on appeal that the trial court should have suppressed the drugs based on an illegal initial detention. The DCA agreed, finding that the anonymous tip was not sufficiently reliable to justify the investigatory stop.

"The record does not even establish that the tip accurately described Jacoby. His car was not parked at the location the tipster gave, nor was there evidence that the informant related the make, model, or color of the car, or that Jacoby's car matched any such description," the DCA said. "Because the anonymous tip lacked sufficient indicia of reliability, the officer lacked the well-founded suspicion

necessary to justify an investigatory stop. ... This illegality tainted the subsequent seizure of evidence."

Assistant Attorney General Helen S. Parnes represented the state on appeal.

[*Jacoby v. State*, 8/13/03]

#### **Informant Probable cause - confidential**

Police did not have probable cause to justify a search and seizure based on a confidential informant's tip where there was only minimal testimony to support the informant's reliability and knowledge, the 2nd DCA held.

Wayne Owens appealed his conviction and sentence for marijuana possession, challenging the denial of his motion to suppress. Owens was arrested in response to a confidential informant's tip that an individual was standing in front of apartments with marijuana in his pant pockets. The tipster gave an address and described the clothing, race and height of the individual. The arresting officer testified that he considered the informant to be reliable based on information provided in other cases, but failed to state the number of times he used the informant and whether the information resulted in arrests.

Suppressing the marijuana evidence, the DCA concluded, "Based on the minimal testimony regarding reliability, along with the other relevant factors such as no evidence of the C.I.'s basis of knowledge, no evidence of the temporal proximity of the events, and no corroborated facts that would not be known to the general public, we conclude that (the officer) did not have probable cause based on the C.I.'s tip to search Owens and seize the baggies from his pocket."

Assistant Attorney General Helene S. Parnes represented the state on appeal.

[*Owens v. State*, 8/22/03]

#### **Home venue privilege - mandamus proceedings**

Rejecting its own prior case law, the 2nd DCA held that the Department of Corrections is entitled to the home venue privilege when prison inmates seek mandamus relief against the department.

The court acknowledged that a trial judge relied on earlier DCA decisions in concluding that a prisoner's action for additional gain time must be heard in Polk County, where he was incarcerated. However, the DCA said in an *en banc* ruling that its own earlier decisions were in error because only habeas corpus petitions, not those for mandamus, must be heard where the inmate is housed. Because there is no specific venue statute applicable to petitions for writs of mandamus, the general venue statute applies, including the home venue privilege that allows state agencies to have cases heard in their headquarters county.

"In contrast to cases in which a prisoner seeks

habeas relief against the Department, there is no legal justification to override the general venue rules, and in particular, the Department's home venue privilege in cases in which a prisoner seeks mandamus relief against the Department.

Accordingly, we recede from our earlier cases to the extent that they hold venue in a mandamus proceeding lies in the county where the prisoner is housed, and we affirm the trial court's order transferring venue to Leon County," the DCA said.

[*Stovall v. Cooper, et al.*, 8/27/03]

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

#### **Deficient petition for administrative hearing**

A state agency was under no obligation to pass a deficient request for a hearing to the Division of Administrative Hearings after the petitioner relied on out-of-date procedures in filing its petition, the 3rd DCA held.

The Agency for Health Care Administration properly denied Brookwood Extended Care Center's request for an administrative hearing after finding the request to be legally insufficient, the DCA concluded. After an annual inspection of Brookwood, AHCA issued a detailed 48-page Statement of Deficiencies detailing numerous problems at the center, and filed an administrative complaint seeking \$81,000 in penalties. Brookwood responded with a two-and-a-half-page petition for hearing to which it attached copies of AHCA's survey, list of deficiencies and complaint. The agency dismissed the petition, concluding that the request for formal hearing was insufficient because it did not contain the required statement of "all disputed issues of material fact." On appeal, Brookwood argued that the procedures it employed had been acceptable in the past and the agency should have forwarded the complaint to DOAH for its consideration. Noting that the relevant statutes were amended in 1998 to change the procedures, the DCA rejected Brookwood's argument, although it reversed the dismissal order so the extended care center may have the chance to amend its petition to comply with requirements.

"AHCA relies on (current) rules and statutory provisions as supporting its decision. Brookwood's counsel answers with a recalcitrant insistence that in previous years the unrefined denials such as the one he asserted below sufficed to secure hearings on agency actions. The simple answer to this is that the rules have changed," the DCA said. "The amended statute and rules are crystal clear. In a proceeding governed by Rule 28-106.201, the burden is now on the person or entity petitioning for an administrative hearing to state the ultimate facts, to identify the facts that are in dispute, and to allege the facts that warrant, in the petitioner's opinion,

reversal. ... General denials and non-specific allegations of compliance will no longer suffice." In a separate concurring opinion, Judge Cope suggested the Legislature consider amending the statutes because it has inadvertently "created a system that is hazardous to those who want to request an administrative hearing." He wrote: "There is an inherent conflict of interest in this system. The administrative agency which wishes to assess the administrative penalty is the same agency which is allowed to deny a hearing outright, simply on the basis of deficiencies — real or imagined — in the petition for administrative hearing. ... I have no quarrel with the idea that the statutes must be obeyed, but if the agency which is assessing the administrative fine is also the agency determining the right to a hearing, then the agency's power to deny a hearing must be carefully circumscribed." [Brookwood Extended Care Center of Homestead v. Agency for Health Care Administration, 8/13/03]

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## 4th District Court of Appeal

### School's liability for field trip injuries

A public school board is not liable for injuries caused by a student driving a private vehicle during a school field trip, the 4th DCA held.

The school board could be liable only if a plaintiff can establish negligence by the teacher who authorized the field trip, which it could not in this case, the DCA said. The field trip consisted of students driving their own vehicles or riding with others to a store to buy hospital uniforms as part of a health occupations class. The plaintiffs alleged that they were injured as a result of negligent driving by one of the students. A lower court issued a summary judgment in favor of the school board, and the DCA affirmed.

"Inasmuch as the student in this case was neither an employee of the school board, nor driving a school board vehicle, we do not see how the school board could be liable. If the school board had chartered a bus or van to transport these students, the school board would not be liable for the negligence of the driver, because the driver would be an independent contractor. The school board in this case had no more control over the driving than did the school board in (such a case)," the DCA said.

[Louis and Joseph v. Broward County School Board, et al., 8/13/03]

### Local authority to regulate towing fees

Florida counties are not preempted by federal law from placing limits on storage fees charged by tow truck operators, the 4th DCA held.

A Broward County ordinance was challenged by two towing companies that had been cited for charging excessive storage fees after completing non-consensual tows. Both companies acknowledged charging more than the ordinance allowed but asserted that the ordinance was invalid because the county lacked the authority to regulate local non-consensual storage fees. The companies argued that federal law preempted any state or local government from limiting storage fees, but the DCA disagreed.

"(T)he transportation of a vehicle, including the storage of a vehicle, has been left by Congress to the State and local governing bodies to regulate," the DCA said.

[HTS Industries, Inc., et al., v. Broward County, 8/20/03]

### Search and seizure - police powers

In obtaining a suspect's consent to conduct a warrantless search of his home outside their jurisdiction, police officers acted improperly under "color of office" to obtain evidence not available to a private citizen, the 4th DCA held.

The DCA concluded that a trial court properly suppressed the evidence against Robert Sills, who was charged with trafficking in oxycodone based on contraband seized from his apartment. After Sills was arrested, handcuffed and advised of his rights, officers raised the possibility of him becoming a police informant, indicating that his cooperation might result in more lenient treatment. Sills volunteered that he had drugs in his home, which was located outside the officers' territorial jurisdiction, and signed a search waiver. Officers drove Sills to his apartment and found drugs there. The trial court suppressed the evidence on the basis that the officers had misused their office in obtaining Sills' consent to conduct the warrantless search. The DCA agreed.

"It is certainly reasonable to believe Sills's cooperation with the officers, his volunteered information and consent to search, would not have been provided had the officers been mere private citizens; it was only in their official capacity as police officers, not as private citizens, that they could hold out the prospect of performing substantial assistance or becoming a police informant whereby he could reasonably expect some leniency," the DCA said.

Assistant Attorney General Donna L. Eng represented the state on appeal.

[State v. Sills, 8/20/03]

### **Public officers' liability for display of opinion**

A city and two of its officials cannot be held liable for defamation for their actions in publicly displaying a woman's photograph of a neighbor's property and her disparaging caption about it, the 4th DCA said. Shortly before Christmas 1998, Sewall's Point resident Jann Levin went to town hall with a picture she took of Blaine and Sally Rhodes' backyard, which she had framed and captioned, "Our View of the Hillbilly Hellhole." At Levin's request, the photograph was displayed on the town hall front counter, along with other holiday greetings, for the town's holiday open house. The photo was removed the next day when the mayor learned that the Rhodeses were upset about the picture, but the Rhodeses sued the town, the town clerk and the mayor for defamation and other violations. After the trial court rejected the town's motion for a directed verdict, the jury ruled for the Rhodeses and the court awarded them \$50,000. The DCA reversed, saying the directed verdict should have been granted because the photo and caption constituted non-actionable pure opinion as expressed by neighbor Levin.

"Here, all of the facts upon which Levin based her opinion are contained in the photograph. The caption is nothing more than her commentary on the facts presented in the photograph," the DCA said. "(A)nyone viewing the photograph can confirm the condition of appellees' property and draw his or her own conclusion concerning the 'Hillbilly Hellhole' description. For these reasons, the defamation claim fails as a matter of law."

[*Town of Sewall's Point, et al., v. Rhodes, 8/27/03*]

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

### **Search and seizure - scope of consent**

Officers did not exceed a suspect's consent to search him when they opened a cigarette box found in a shirt pocket since he had not placed any verbal or non-verbal limits on his general consent, 5th DCA held, withdrawing its original decision.

The court withdrew its original decision in the case after the state moved for rehearing of the DCA's unfavorable decision to suppress cocaine found in a cigarette box found in Alexander Aponte's shirt pocket. Aponte agreed to let police search his person and did not try to stop an officer from opening the cigarette box. The state argued that the officers did not exceed the scope of Aponte's consent in opening the cigarette pack, and the DCA agreed.

"In our view, Aponte's general consent to the search followed by inaction to stop or limit the search could be interpreted by a reasonable officer to be within the bounds of the original consent," the DCA said.

Assistant Attorney General Patrick v. Krechowski represented the state on appeal.

[*Aponte v. State, 8/13/03*]

### **Miranda - motion to suppress**

Once an officer initiated a conversation with a defendant who had invoked his right to counsel, an improper custodial interrogation occurred despite the defendant's continued expressed desire to cooperate in exchange for bond, the 5th DCA held. Siroos Pirzadeh, who was charged with trafficking in opium, challenged the trial court's denial of his motion to suppress. After he was arrested, Pirzadeh was read his *Miranda* rights and invoked his right to counsel before being booked into jail. At the jail, Pirzadeh was advised of the charges, the sentencing guidelines and his no-bond status. A back-and-forth dialogue then ensued between a detective and Pirzadeh over the bond issue and Pirzadeh's offer to cooperate. The detective told Pirzadeh he could cooperate but that his no-bond status would remain unchanged. Pirzadeh then provided a written confession, but later Pirzadeh moved to suppress the statement, arguing it violated his right to counsel. The DCA agreed, reversing and remanding.

"Once the detective told Pirzadeh about the nature of the charges against him, he should have terminated the confrontation as it became clear that continuing the conversation would lead to an incriminating response," the DCA said. "There is no question that it was (the detective), and not Pirzadeh, who initiated the contact after Pirzadeh invoked his right to counsel. All Pirzadeh did was respond to the renewed contact by continuing to express his interest in cooperating and in getting a bond. The law concerning *Miranda* warnings and the right to counsel establishes a policy whose purpose is to prevent what happened in this case." Assistant Attorney General Patrick W. Krechowski represented the state on appeal

[*Pirzadeh v. State, 8/22/03*]

### **Search and seizure - voluntariness of consent**

During a consensual search of a home, a visitor had a legitimate expectation of privacy with respect to the closed part of his backpack and items from inside the backpack were therefore seized unlawfully, the 5th DCA held.

Lyndon Hicks appealed his conviction for burglary of a conveyance, arguing that evidence on and in his backpack was illegally seized and should have been suppressed. Four police officers entered a home to investigate a stolen vehicle parked in the front yard, and were given consent to search the home by both the owner and a renter. After a pat-down Hicks, a visitor, remained handcuffed during the search. Hicks' backpack was located in a bedroom and items on top of the backpack were in plain view.

Officers testified that Hicks responded, "Go ahead, search it," when police asked for permission to search his backpack. Items from the stolen vehicle were found on top of and inside the backpack. On appeal, Hicks contended that his consent was involuntary. The DCA agreed, reversing and remanding with instructions to grant the suppression motion regarding only those items found inside the backpack.

"Here, there may well have been justification for the use of handcuffs when Hicks was initially encountered. The continued use of handcuffs after the original pat-down search did not reveal any weapons. Thus, where there was no escape risk because of the presence of several police officers, a circumstance exists that weighs heavily on the voluntariness of Hick's consent to search the backpack," the DCA said. "No matter the burden of proof, the State did not demonstrate that the consent to search the closed backpack was voluntarily given."

Assistant Attorney General Bonnie Jean Parrish represented the state on appeal.

[\[Hicks v. State, 8/29/03\]](#)

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