
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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11th U.S. Circuit Court of Appeals

Sovereign immunity - same-sex harassment

The Equal Protection Clause of the U.S. Constitution protects individuals from same-gender sex discrimination just as it does from discrimination by a member of the opposite sex, and Congress did not go too far in prohibiting states from retaliating against employees who claim such discrimination, the 11th U.S. Circuit Court of Appeals held.

The court ruled in favor of a former male employee of the campus police department at an Alabama state university, who claimed in a lawsuit that he was subjected to sexual harassment by his immediate supervisor and that the police chief fired him for complaining about the harassment. The university's Board of Regents claimed Eleventh Amendment sovereign immunity and said Congress, in extending Title VII of the Civil Rights Act to state and local governments, exceeded its Fourteenth Amendment authority to abrogate state sovereign immunity. The 11th Circuit rejected both these arguments, concluding that the right to be free from sexual harassment is a constitutional rather than statutory right and that Congress' creation of the right to be free from retaliation for complaining was necessary to protect the right to be free from such harassment.

"(T)he employer is accountable for the sexual harassment, regardless of the sexes of the harasser and the employee-victim. To be sure, that the two are of the same sex may, in some cases, make it more difficult for the employee to establish that the employer discriminated against him in the workplace 'because of' his sex. That they are of the same sex, however, does not preclude a claim of sexual harassment ... (W)e discern no principled basis for holding that the Equal Protection Clause is implicated in a case of opposite-sex discrimination but not in a case of same-sex discrimination," the 11th Circuit held. "It is clear to us that Congress enacted the antiretaliation provision of Title VII to deter the sort of employment discrimination the statute (and Equal Protection Clause) prohibits. ... Title VII's antiretaliation provision encourages victims of discrimination to take on the risks and burdens of complaining to their employers about discrimination in the workplace."

[*Downing v. Board of Trustees of the University of Alabama, et al.*, 2/13/03]

Qualified immunity - officers' "split second" action

Police officers did not violate any clearly established law and are therefore entitled to qualified immunity for shooting an unarmed suspect a "split second" after she assaulted one officer and attempted to kill another, the 11th U.S. Circuit Court of Appeals held. Though she was convicted in a criminal trial of attempted second-degree murder and battery on a police officer, Betty Willingham won a civil rights jury award of \$6 million from the City of Boynton Beach and two of its police officers. The officers appealed to the 11th Circuit on qualified immunity grounds, and the court agreed that the officers should have received qualified immunity from Willingham's suit. However, the U.S. Supreme Court directed the 11th Circuit to reconsider the case in light of the justices' 2000 decision in *Hope v. Pelzer*, a case involving an Alabama prisoner's lawsuit against guards who handcuffed him to a hitching post and left him there for several hours as punishment for disruptive conduct. Upon reconsideration, the 11th Circuit renewed its conclusion that the Boynton Beach officers are entitled to qualified immunity because there was no clearly established federal law at the time of the 1987 incident to inform the officers that their actions violated Willingham's civil rights.

"The specific question before us here is whether, considering the pertinent facts, the Officer Defendants violated federal law that was already clearly established in 1987, by shooting Plaintiff within a 'split second' after she attempted to kill one officer and assaulted another," the 11th Circuit said. "(W)e have considered again whether, in the light of general constitutional rules on deadly force that had already been identified in the decisional law, this use of deadly force would have been seen as plainly unlawful by all objectively reasonable officers; and the answer is 'no' given the circumstances, including that the shooting occurred within a split second of an attempted murder on a fellow officer. No general decisional rules applied with obvious clarity to these circumstances in such a way as to give fair notice

that what these defendants were doing clearly violated federal law."

[*Willingham v. Loughnan and Buecler*, 2/18/03]

1st District Court of Appeal

Standard of Review

Because the circuit court applied the wrong standard of review, the 1st DCA quashed a decision of the circuit court and reinstated an administrative order suspending a defendant's driver license. The district court of appeal concluded that the findings of fact made by the hearing officer in the case were supported by competent substantial evidence. The only issue in dispute was whether an officer had probable cause to arrest the defendant for driving under the influence of alcohol. The court decided that the record contained at least some evidence that he did.

[*Department of Highway Safety and Motor Vehicles v. Friend*, 2/3/03]

Public records - trade records not marked confidential

An oral conversation with a state employee is not enough to classify a private company's documents confidential in order to avoid disclosure under the state's public records laws, the 1st DCA held. The court also determined that section 815.045, F.S. (2001), provides an exemption from public disclosure of trade secrets, even if the records are stored on computers or transmitted by email. The case arose when a company made a public records request to the Department of Environmental Protection, seeking documents about Griffin, LLC's contract with DEP to help eradicate hydrilla from certain lakes. The requested records dealt with studies of the eradication program and the prescriptive treatment formula used by Griffin on the project. When it provided the documents to DEP, Griffin never marked them confidential or otherwise indicated they were protected trade secrets, although a DEP employee testified that he was orally asked to use the information as he used other records that had been marked confidential. The company asserted a trade secrets exemption only after DEP received the public records request. A trial judge concluded that the records were not exempt from disclosure because they had not been marked confidential, and said statutory provisions exempting properly identified trade secrets applies to documents transmitted via email.

"The trade secret owner who fails to label a trade secret as such, or otherwise to specify in writing upon delivery to a state agency that information which it contends is confidential and exempt under the public records law is not to be disclosed, has not

taken measures or made efforts that are reasonable under the circumstances to maintain the information's secrecy. As a practical — and therefore as a legal — matter, a conversation with a state employee is not enough to prevent the information's being made available to anybody who makes a public records request," the DCA said.

[*SePRO Corporation v. Department of Environmental Protection and Griffin, LLC*, 2/12/03]

Release of cell phone records

Records of cellular phone calls by certain House employees but paid for by a political party are public records as they pertain to calls for official business but not for private calls, and the records may be redacted before their release in either case, the 1st DCA held. Ruling in a dispute between several media outlets and former House Speaker Tom Feeney, the DCA rejected the media's argument that reporters should be entitled to see all records related to the cell phones, which were being paid for by the Republican Party. In hopes of resolving the dispute, the House turned over records for public calls that redacted the actual telephone numbers called. The media outlets argued that they are entitled to receive the cellular phone records in their entirety without redaction. The DCA concluded that the records are public only to the extent they relate to public business and certain information should not be released even regarding those calls that involve public business.

"We hold that under the circumstances of this case, appellants are entitled to receipt of the redacted phone numbers for those designated as public calls, but are not entitled to receipt of the redacted private calls. Regarding the release of telephone numbers on the non-private calls, the DCA said, "Although we agree with the House that the disclosure of these telephone numbers may result in unreasonable consequences to the persons called, this argument should be made to the Florida Legislature, which has specified various public record exemptions for disclosure of telephone numbers."

[*Media General Operation, Inc., et al., v. Feeney, et al.*, 2/21/03]

Agency's failure to act on application

Because a state agency failed to act on a registered business' application for renewal, the agency now has no choice but to grant the renewal, the 1st DCA held.

Before a travel business' original registration expired, it applied for renewal as a Seller of Travel. Under a portion of Chapter 120, F.S., the Department of Agriculture and Consumer Services is required to approve such a request if the agency has not approved or denied the application within certain time periods. The department failed to initiate a

proceeding on the travel business' renewal application, and so the 90-day time period to act on the application applied, the DCA said. The court granted the business' petition for writ of mandamus and directed the department to issue the registration.

[*Premier International Travel, Inc., v. Bronson*,
2/21/03]

2nd District Court of Appeal

Motion to suppress confession

Because police told a suspect that he was not under arrest and was free to leave, he was not subjected to custodial interrogation and officers were not required to give him a *Miranda* warning, the 2nd DCA held.

Adan Loredo voluntarily drove himself to the sheriff's office in response to allegations of sexual abuse of a juvenile. Loredo made incriminating statements after officers told him that the interrogation room door was closed but not locked, he was not in custody and he was free to walk out at any time. After his confession a detective informed Loredo the information would be turned over to a judge. At no time was Loredo read his *Miranda* rights. Loredo was convicted of lewd, lascivious, or indecent assault and appealed, claiming his confession should not have been admitted.

Affirming the conviction, the DCA disagreed with Loredo's assertion that the detective's actions amounted to improper police conduct by offering false promises of leniency. Nevertheless, the court advised that "when law enforcement uses such deception, the legality of the confession is more likely to be sustained when *Miranda* warnings have been given."

[*Loredo v. State*, 2/7/03]

Traffic stop of man riding galloping horse

A police officer was not justified in stopping a man for riding a galloping horse down a paved street at night merely because it was unusual, since there was no evidence the rider hindered traffic or endangered others, the 2nd DCA held.

The officer stopped Jonathan Dye Jones for failing to have lights or reflectors and for operating without due regard for safety. A subsequent search of Jones produced evidence that led to drug and concealed weapon charges, to which Jones pled no contest. The trial court found probable cause for the stop, but the DCA agreed with Jones that the evidence should have been suppressed.

"(T)here was no evidence that the police had a reasonable suspicion of criminal activity, and the trial court made no such finding. The trial court found that the stop was valid for two reasons: (1) 'the sheer unusualness of a person riding a horse at

11:30 at night at a full gallop down a paved road'; and (2) the potential endangerment to others that resulted from this action. However, neither of these activities provides probable cause that Jones committed a traffic infraction," the DCA said.

[*Jones v. State*, 2/12/03]

3rd District Court of Appeal

Use of deadly force - burglary

The fact that burglary is considered a forcible felony does not warrant the use of deadly force to prevent the burglary of an unoccupied building, even though deadly force may be used to prevent some forcible felonies, the 3rd DCA said.

Deadly force would not reasonably be necessary under those circumstances, the court said in rejecting the argument of Victor Rodriguez, who was convicted of burglary of an unoccupied building and argued on appeal that his sentence was illegal. Rodriguez contended that he should not have been sentenced as a violent career criminal because burglary is not a qualifying enumerated offense under the forcible felony statute, since his burglary did not involve the use of force on an individual. On rehearing, the DCA again rejected Rodriguez argument, stating, "Whether deadly force is permissible to defend against a forcible felony depends on the working of the use of force statute, not the forcible felony definition."

[*Rodriguez v. State*, 2/26/03]

4th District Court of Appeal

Motion to suppress - vehicle search

Because a defendant did not argue that he was unlawfully detained, the trial court properly concluded that no unlawful search had occurred, the 4th DCA held.

Alexander Bain pled no contest to trafficking in cocaine. On appeal, Bain argued for the first time that his detention became unlawful when he refused permission for police to search his car trunk. The arrest came after police responded to a roadside emergency call to Bain's disable car. When police became suspicious, Bain agreed to a search of his vehicle but refused to let police search the trunk. When a canine unit arrived the dog alerted police to the trunk, where narcotics were found. On appeal, Bain argued for the first time that he was unlawfully detained once he refused permission to search the trunk and was ordered to sit on the ground until the backup unit arrived. The DCA disagreed.

"Because appellant did not assert below that he was unlawfully detained by any police conduct before the dog sniff search, we do not consider this argument

on appeal and affirm the denial of his motion to suppress," the DCA said.

[*Bain v. State*, 1/29/03]

Search and seizure - motion to suppress

A deputy who stopped his patrol car and walked up to the defendant's parked vehicle — conduct that by itself does not give rise to any constitutional safeguards — had probable cause to detain and search the defendant after smelling marijuana coming from the car, the 4th DCA held.

The deputy became suspicious when he spotted a juvenile in his parked car in an area known for heavy drug dealing. As the deputy walked toward the car, he recognized the odor of marijuana coming from inside and detained the juvenile, who was identified only as T.P. The juvenile was arrested after a search turned up marijuana. T.P. moved to suppress the contraband, arguing that the detention and search were not justified. The trial court granted the motion to suppress, but the state successfully appealed. "(The deputy) testified that he detained T.P. only after he first smelled the previously burnt marijuana coming from his car, giving him probable cause to search and detain. And, contrary to T.P.'s argument, there is no evidence in the record, and he points to none, that would support the position that the officer detained T.P. prior to smelling the odor of marijuana," the court said.

[*State v. T.P.*, 2/5/03]

Search and seizure - initial encounter

A man's consensual encounter with police, which ended when he ran away, did not rise to the level of a seizure even when police called to him to stop because he was free to leave at any time, the 4th DCA held.

Keydrum Blue was convicted of grand theft, trespass and resisting arrest without violence. The DCA reversed the conviction on competency grounds, but also addressed Blue's search-and-seizure arguments. A police officer saw Blue coming from the direction of a reported robbery and approached him to ask if he had seen anything. The officer testified that at this time he did not suspect that Blue had committed a crime. During a voluntary exchange with the officer, Blue became nervous and ran off as the officer shouted out to him to stop. As he fled, Blue dropped a crate containing evidence linking him to the robbery. On appeal, Blue argued that the evidence should have been suppressed because it was obtained as the result of an illegal seizure, but the DCA disagreed.

"Blue willingly walked over to Detective Bader when the detective first called to him. However, this does not mean that Blue submitted to his authority. A citizen may voluntarily respond to questioning or refuse to do so, but is still free to leave. At this point,

Blue was free to leave. Even when Blue started to run away, despite the fact that Detective Bader called for him to stop, he still had not been seized under the law. Therefore, the recovery of the crate was not due to an illegal seizure, but rather Blue's abandonment. The trial court did not err in denying the motion to suppress the crate and its contents," the DCA said.

[*Blue v. State*, 2/12/03]

Public records - state agencies' home venue privilege

Florida state agencies are not entitled to their traditional home venue privilege when citizens seek access to public records that are located entirely in one county and access has been denied in that county, the 4th DCA held.

The home venue privilege generally allows a state agency to have a case heard in its headquarters county, but the DCA said an exception exists in the area of public records. The court ruled in favor of a South Florida newspaper seeking access to investigative files regarding criminal charges against parents accused of neglecting their minor children. The Department of Children and Families argued that the public records dispute should be heard in Leon County. One judge agreed, pointing out that Florida courts have allowed only three exceptions to the home venue privilege — waiver by statute, when a governmental body is sued as a joint tortfeasor and "sword-wielder" cases — and none of those exceptions applies in this case. The DCA majority, however, said home venue cases typically involve disputes over money or non-record-keeping policies, and the foundation of the public records law supports another exception.

"We think it would severely burden the right of access to public records to require that all such actions in court to vindicate that right be deemed within the home court privilege of state government. To do so is to require all those seeking access to inspect records actually maintained in an applicant's home county elsewhere to tread their way to Tallahassee to bring a judicial proceeding just to settle the right to do so. There is absolutely nothing in the Public Records laws to suggest such an interpretation of the general venue statute, and everything implicit in the Public Records laws indicates that such a burden was never intended," the DCA said. "The exception we apply today is proper because this governmental agency, DCF, has denied the right of inspection of public records in Palm Beach County, not in Leon County. The agency performed its act of denial here, not at the home office. Here is where the legal action to rectify that denial should take place."

[*Department of Children and Families v. Sun-Sentinel, Inc.*, 2/19/03]

DUI manslaughter - presumption of impairment

A trial court erroneously granted a new trial following DUI convictions based on an improper jury instruction on the presumption of impairment, where the defendant did not object to the instruction and the state proved unlawful blood-alcohol levels, the 4th DCA held.

William Cameron was found guilty of DUI-manslaughter, vehicular homicide, and DUI-property damage. The trial court granted Cameron's motion for a new trial based on the Florida Supreme Court's decision in *Miles v. State*, but the DCA said its won ruling in *Dodge v. State* controlled. In *Dodge*, the court found that presumption of impairment was a moot concern when the state proved beyond a reasonable doubt that a DUI defendant had unlawful blood-alcohol levels, whereas the *Miles* decision revolved around insufficient blood handling procedures.

Reversing the order granting Cameron a new trial, the DCA said, "The state proved beyond a reasonable doubt that he drove with an unlawful blood alcohol level. As in *Dodge*, any presumption of impairment issues was a moot concern."

[*State v. Cameron*, 2/19/03]

Resisting arrest without violence

In a case of resisting arrest without violence where the legality of the arrest was not in material dispute, no fundamental error occurred when the jury was instructed that the arrest constitutes a lawful execution of a legal duty, the 4th DCA held.

Rene Gutterrez was a passenger in a vehicle involved in a hit and run. Gutterrez fled from the scene and hid in a swamp, where police found him. Gutterrez ran away again, but was caught and arrested after a brief struggle with police officers. Gutterrez contended that at one point while he was being handcuffed an officer hit him with a flashlight. Gutterrez' defense was he never intended to resist but failed to understand the situation due to a language barrier, coupled with his fear of police dogs. On appeal, Gutterrez argued for a new trial because the judge's instructions to the jury removed from consideration an element of the crime. The DCA disagreed.

"We acknowledge that it would not be difficult to construct various legal theories as to why this arrest may not have been a lawful one. Nonetheless, since we are concerned here with fundamental error, the question we address is not whether the arrest was in fact lawful, but whether the issue of the lawfulness of the arrest was in material dispute at trial," the DCA said. "Accordingly, having lodged no objection to an instruction relating to an element of the offense which was not in material dispute, Gutterrez cannot demonstrate fundamental error."

Burglary - proving stealthy entry

Proof that a juvenile defendant jumped a fence to enter a school without permission and then fled after triggering an alarm creates a statutory presumption of stealthy entry without consent, sufficient to support a prima facie case for burglary, the 4th DCA held.

A juvenile identified as S.D. appealed his adjudication of delinquency for burglary, contending that the state presented insufficient evidence to show he entered the school on a Sunday with the intent to commit a crime. Police officers responded to an alarm at the school and found the cafeteria vandalized. S.D. told police he entered the school, and the principal testified that the youth did not have permission to be on school grounds on a Sunday. The DCA affirmed S.D.'s conviction, saying the circumstances supported the burglary charge. "Choosing a day when it was certain no one would be at the school and then running from the scene after the alarm was triggered demonstrates that S.D. was acting to avoid discovery and thus stealthily," the DCA said.

[*S.D. v. State*, 2/26/03]

5th District Court of Appeal

Government liability - open and obvious hazard

A local government cannot be held liable for injuries suffered by a woman who was injured when she took a shortcut across a timber structure instead of using an adjacent path to exit a city park, the 5th DCA said.

A landowner — in this case, the City of Melbourne — is not required to give an invitee warning of an obvious danger and is entitled to assume the person will perceive something obvious, the DCA said. Linda Dunn sued the city, saying she was injured when her foot got caught in a gap between two timbers that were part of a decorative planter. The DCA noted that Dunn admitted she would have seen the gap if she had been looking, and said the trial court should have granted a directed verdict in the city's favor.

"(A)nyone walking across this planter is held to know that this is a hazard to walking. Because Dunn had ample notice of an open and obvious hazard, she cannot blame the city for her fall," the DCA said.

"Furthermore, the city had no duty to make the planter safe for walking, a function for which it was not designed. The city had no reason to suspect that a grown woman would consider the planter an exit path, or use it to perform a sort of tightrope act, instead of proceeding to the parking lot by simply walking around it along the adjacent path."

[*City of Melbourne v. Dunn*, 2/21/03]

Suppression of confession reversed

A trial court incorrectly suppressed a confession where officers stopped a custodial interrogation when the defendant asked for an attorney and only resumed their questioning when the defendant reinitiated the conversation and was read his *Miranda* rights, the 5th DCA held.

James Blackburn was in custody in North Carolina on unrelated charges when two Altamonte Springs police detectives traveled to question him about his suspected involvement in auto theft, sexual battery and homicide in Florida. The officers read Blackburn his *Miranda* rights, at which point Blackburn requested an attorney and the interrogation stopped. One officer left the room to call an attorney, and when he returned Blackburn said he wanted to talk. Blackburn was again read his *Miranda* rights, and confessed to actions that led to charges in Florida. Finding that Blackburn's statements were voluntary, the trial court nevertheless deemed them inadmissible because the detectives failed to secure a specific waiver of his original request for an attorney. The DCA disagreed.

"(W)e agree with the State's argument that the waiver of a *Miranda* right may be shown by independent circumstances and by the actions of the accused as opposed to any express statement of waiver. It is clear from the record that Blackburn proceeded voluntarily with his statement after the second reading of his *Miranda* rights," the DCA said.

[*State v. Blackburn*, 2/21/03]

Motion to suppress - consensual encounter

Following a consensual encounter, a detention became justified when the suspect provided an officer with false identification and fled the scene despite orders to stop, the 5th DCA held.

An officer encountered Victor Chappell when he responded to a citizen's call about a suspicious man sitting on the steps of the caller's apartment complex. Asked why he was there, Chappell told the officer he had friends at the complex and was waiting for one to arrive. Becoming nervous, Chappell attempted to give the occupants of one apartment two bags he had been carrying, but they denied knowing him. When the officer discovered that Chappell had given him false identification, Chappell ran, tossing the bags as he fled. The bags were later found to contain drug contraband. On appeal, Chappell argued that his detention was illegal, but the DCA disagreed.

"A court's evaluation of reasonable suspicion is guided by common sense and ordinary human experience. Moreover, part of the totality of the circumstances is the fact of flight. In the instant case,

responding to a call from a person who would be classified as a 'citizen informant,' and would therefore be considered reliable, the officer found Chappell sitting on the stairway with no apparent purpose," the DCA said. "Under the circumstances, we conclude that Officer Brackmeier was justified in detaining Chappell."

[*Chappell v. State*, 2/28/03]

Attorney General's Opinion

Airport authority power to create law enforcement agency

In response to a request from Orlando Sanford International Airport, the Attorney General issued an advisory opinion (2003-04, 2/12/03) stating: "In sum, it is my opinion that the Sanford Airport Authority is authorized by section 11(4)(f), Chapter 71-924, Laws of Florida, and section 332.08(2)(a), Florida Statutes, to create its own airport guards or police with full police powers within the territorial limits of the airport authority district."

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