
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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11th U.S. Circuit Court of Appeals FMLA - required period of incapacity

To qualify for the protections of the Family and Medical Leave Act, a sick or injured worker must be incapacitated for three consecutive entire days – a period of more than 72 hours – rather than for partial segments of three consecutive days, the 11th U.S. Circuit Court of Appeals held in the first ruling of its kind in the nation.

A Broward County hospital employee fell at work and broke her elbow and wrist. Her injuries forced to her to miss portions of several workdays, but she only missed complete days on two separate occasions. Over the course of the next two weeks, she missed portions of numerous days. Finally the hospital fired her for excessive absenteeism, and she sued claiming she was protected by the Family and Medical Leave Act. Under the act and regulations promulgated to implement it, a person is protected by the act only if he or she is incapacitated for "more than three consecutive calendar days." At issue before the 11th Circuit was whether this meant three days in which the employee was incapacitated all day long, or whether instead it could apply where the employee was incapacitated for at least part of the day on three consecutive days. The 11th Circuit, ruling on an issue of first impression among federal appeals courts, concluded that the language requires incapacity for a period longer than 72 consecutive hours.

"If we interpret (the act) as requiring full days of incapacity, as we do, the requirement will ensure that 'serious health conditions' are in fact serious, and are ones that result in an extended period of incapacity, as Congress intended. This interpretation adds certainty to the law by reading the regulation to set forth an objective, bright-line rule defining the period of incapacity necessary to invoke the protections of the FMLA," the 11th Circuit said.

"Under (an) opposing interpretation ... courts and juries would continually confront confounding issues about how much incapacity on a given day is enough for that day to count toward the regulatory requirement. Are five hours enough? Fifty minutes? Fifteen minutes? Five minutes? Does it depend on the circumstances? If so, how so? We are loathe to adopt a strained interpretation of a regulatory

provision that would result in employers, employees, and courts facing an uncertain and ever-shifting legal landscape."

[Russell v. North Broward Hospital, 10/2/03]

Traffic stop - prolonged detention

A driver's nervous and evasive behavior, even though coupled with his and a passenger's differing but not inconsistent statements, did not provide an officer with reasonable suspicion to justify continuing a traffic stop after a warning ticket had been issued, the 11th U.S. Circuit Court of Appeals held.

Jessie Perkins Jr. and Johnny Scott were pulled over on an Alabama highway when an officer noticed their vehicle, which had Florida tags, veer onto the shoulder. A license check showed that Perkins' drivers license was valid and he had no outstanding warrants. Perkins and Scott complied with the officer's request to sit in the patrol car while the traffic citation was completed. The officer continued to question Perkins, who became extremely nervous and evasive in his behavior. Perkins and Scott gave different answers about whom they were visiting in Alabama. Suspicious, the officer radioed for a canine unit and a subsequent search of the vehicle revealed contraband. Perkins eventually admitted having narcotics in the car. The magistrate judge granted Perkins' motion to suppress all statements and evidence and the 11th Circuit affirmed, agreeing with the judge that the duration of the stop was unreasonable.

"We find these circumstances, separately or cumulative, cannot support a legitimate inference of further illegal activity that rises to the level of objective, reasonable suspicion required under the Fourth Amendment," the court said. "In this Circuit, we have required more than the innocuous characteristics of nervousness, a habit of repeating questions, and an out-of-state license for giving rise to reasonable suspicion."

[U.S. v. Perkins, 10/22/03]

1st District Court of Appeal

Service First - collective bargaining process

Collective bargaining actions taken by the governor and Legislature in implementing the governor's Service First initiative were generally proper,

although proviso language in the 2001 general appropriations act was invalid because it did not relate directly to any specific appropriation, the 1st DCA held.

The court rejected several challenges brought by AFSCME on behalf of four bargaining units of state Career Service employees. The DCA denied the union's claims that the legislative process that led to a new collective bargaining agreement abused the impasse resolution process and so severely undermined the collective bargaining process that it rendered the legislative scheme arbitrary and unreasonable and denied public employees their rights under the Florida Constitution. The court also rejected AFSCME's argument that it had standing to challenge the legislative changes because it is directly affected by the change in impasse resolution procedures.

However, the DCA agreed with the union that proviso language in the state budget improperly made changes to substantive law and was not directly and rationally related to appropriations. *[Florida Public Employees Council 79, AFSCME, v. Bush, 10/22/03]*

Arbitration of dispute involving state agency

In a legal dispute over a contract issued by a state agency, the shift of the case from circuit court to the State Arbitration Board does not negate the time limits during which an aggrieved party must file its request for arbitration, the 1st DCA held. The DCA affirmed a lower court order denying a road contractor's request to arbitrate a dispute with the Department of Transportation. White Construction Company originally claimed damages of more than \$2 million, a dollar level that placed the dispute before the circuit court. However, White later determined that its damages were just over \$200,000, which under the law enabled the company to seek review by the State Arbitration Board. White filed its request for arbitration with the board beyond the statutory time limitation, which allows 820 days from the date of the department's final acceptance of the work. White argued that the concept of equitable tolling should have placed this time limitation on hold because the company filed its original \$2 million complaint within proper time frames. The DCA rejected this argument, concluding that the provisions of White's contract with the state clearly gave the company 820 days from DOT's final acceptance of the work to file a request for arbitration.

"White has cited no authority . . . for the proposition that the concept of equitable tolling applies to a contractual provision setting forth a time period within which a claim for arbitration must be filed," the DCA said. "(E)quitable estoppel does not apply here,

because White's failure to timely request arbitration is not attributable to DOT's wrongdoing."

[White Construction Company, Inc., v. Department of Transportation, 10/17/03]

Search and seizure - exigent circumstances

A warrantless entry of a defendant's motel room was unlawful because no exigent circumstances existed other than those created by the officers themselves through their unreasonable fears, subjective speculation and lack of knowledge about the situation at hand, the 1st DCA held.

Anthony Lee appealed his conviction on drug trafficking charges. After a confidential informant tipped police about a drug deal that would occur in a motel room, eight or nine officers staked out the motel and sent the informant inside wired with listening devices. Police monitored the drug transaction and decided to enter the room after becoming concerned they might lose control of the situation. Officers knocked and announced their presence, then used a battering ram to enter the room. Officers seized contraband and arrested Lee. The trial court denied Lee's motion to suppress the evidence on the basis that the officers had probable cause and exigent circumstances to justify entering without a warrant. The DCA disagreed and reversed. "Any fears that it would not have been possible to control the suspects were not reasonable, given that the suspects were so outnumbered and did not know that police were outside," the DCA said. "Neither a lack of knowledge nor sheer speculation or guesswork about the situation at hand translates to exigent circumstances. Police must have a factual basis to forego a warrant and enter a constitutionally protected area; it is not enough that they are uninformed and subjectively afraid the situation *may* be worse than anticipated. . . (T)he possibility that the drugs might be destroyed was not a valid exigency, because that possibility did not actually exist until the officers knocked on the door and announced their presence."

Assistant Attorney General Philip W. Edwards represented the state on appeal.

[Lee v. State, 10/22/03]

Voluntariness of plea

A driver's license revocation is a collateral consequence of entering a plea to charges of driving with a suspended or revoked license, therefore neither the trial court nor counsel is required to advise the defendant of this specific consequence, the 1st DCA held in concluding that a defendant's no contest plea was voluntary.

Demello Bolware entered a no contest plea to driving while his license was suspended or revoked. The county court subsequently rejected Bolware's postconviction claim that his plea was not voluntary.

Reversing, the circuit court ruled that Bolware was entitled to postconviction relief because he had not been warned before entering his plea that his license could be revoked for five years. Disagreeing, the DCA granted the state's petition for certiorari review, quashed the order and remanded.

"Because license revocation under the mandatory provisions of chapter 322 is not a 'punishment,' regardless of whether it is ordered by the Department of Highway Safety and Motor Vehicles or by a court, it is not a 'direct consequence' of the defendant's plea, as that term was defined by Florida courts before the circuit court addressed this case," the DCA said.

Assistant Attorney General James W. Rogers represented the state on appeal.

[*State v. Bolware*, 10/31/03]

Plea bargain has no bearing on administrative suspension

A five-year administrative revocation of the defendant's driver license for her second conviction for DUI could not be negotiated away as part of a criminal sentence in a plea agreement where the record indicated that her DUI convictions were only one year and two months apart and the statute required her license to be revoked for five years.

[*Department of Highway Safety and Motor Vehicles v. Gordon*, 10/31/03]

2nd District Court of Appeal

Eligibility for hardship driving permit

The circuit court exceeded the scope of certiorari review when it ordered the Department of Highway Safety and Motor Vehicles to reinstate a motorist's driver's license, which had been revoked due to his four convictions for DUI. The 2nd DCA remanded the case for the circuit court to determine whether the Department's hearing officer's denial of the motorist's hardship permit amounted to an abuse of discretion, and, if needed, to require the hearing officer to enter an appropriate order containing factual findings relevant to the motorist's eligibility for a hardship permit or to hold another hearing to make the necessary findings.

[*Department of Highway Safety and Motor Vehicles v. Bailey*, 10/17/03]

3rd District Court of Appeal

Lawsuit over police investigation

A trial court correctly granted summary judgment in favor of a city that had been sued by one of its police officers, who alleged that he suffered professionally as a result of a city investigation into his activities, the 3rd DCA held.

The officer was investigated and reprimanded by the City of Homestead over allegations of discrepancies

in his reports concerning narcotics investigations. The city initially forwarded the matter to the local state attorney's office, but that office concluded that it should be handled administrative and returned the matter to the city. After receiving a written reprimand, the officer sued the city for "negligent supervision" of the investigation, alleging that the investigation cost him an anticipated promotion and the higher earnings that would have gone with it. The trial court granted the city's motion for summary judgment and the DCA affirmed, citing Florida Supreme Court cases as far back as 1985's *Trianon Park* and *Everton* decisions.

"Beginning with (those cases), it has been recognized that the negligent conduct of police investigations does not give rise to a cause of action because the duty to protect citizens and enforce the law is one owed generally to the public," the DCA said.

[*Pritchett v. City of Homestead*, 10/1/03]

4th District Court of Appeal

On-duty status of state employee

A jury, rather than a judge, should decide whether a state A jury, rather than a judge, should decide employee had returned to his official duties when he was involved in an accident after diverting to watch his son play soccer, the 4th DCA said.

While taking a state vehicle to an assigned parking lot for the night, a Department of Transportation employee deviated from the scope of his employment to drive to a park for his son's soccer game. After the game, the worker allegedly struck a man, who then sued the department. The trial court granted summary judgment in favor of the department but the DCA reversed, concluding that a genuine issue of material fact exists regarding whether, at the time of the accident, the worker had reentered the scope of his employment.

"This question is one for the jury," the DCA concluded in reversing the summary judgment.

[*Ford v. Department of Transportation*, 10/1/03]

Miranda waiver

A defendant's waiver of his *Miranda* rights was valid and was not the product of intimidation, coercion or deception even though the defendant's native language was Creole, the 4th DCA held.

Dieuold Louis, convicted of sexual battery and indecent assault upon a child, appealed his conviction by claiming that his confession was erroneously admitted due to a language barrier. Louis, age 18, was summoned from school and informed of the charges against him, and agreed to go with officers to the station for further questioning. Louis signed a *Miranda* waiver form and a detective explained his right to an attorney; when asked if he understood, Louis replied that he did. During pretrial

proceedings, the trial court denied a motion to suppress Louis' confession, and Louis then unsuccessfully challenged the voluntariness of his statements.

"(T)here was competent substantial evidence that Louis had the requisite level of English comprehension to waive *Miranda*. The record showed that Louis was of average intelligence and suffered from no mental infirmity. He was an adult just shy of his 19th birthday. At the time of the interrogation, he had been in the United States for two years and was attending a public high school where he was taught classes in English as well as Creole. Louis was able to converse with (a detective) in English, and he did not need the questions repeated to him and answered the questions," the DCA said.

Assistant Attorney General Laurel R. Wiley and Certified Legal Intern Alison F. Smith represented the state on appeal.

[Louis v. State, 10/01/03]

Evidence of good moral character

A state agency correctly overruled an administrative law judge's position that judgments in previous cases were not evidence of lack of good moral character on the part of an applicant for a license from the agency, the 4th DCA held.

The applicant for a yacht broker's license, Ronald Palamara, had been convicted of resisting an officer without violence, had a judgment against him for dishonest conduct in a yacht transaction, and was found to have evaded service of process in another yacht transaction. Despite this history, the ALJ ruled that those judgments were not competent evidence of lack of good moral character. The Department of Business and Professional Regulation disagreed and denied Palamara's application. The DCA sided with the department, but concluded that it must reverse the department's action because the ALJ must still decide the factual issue of whether Palamara was of good moral character.

"(N)either the statutes nor the rules categorically exclude applicant from consideration. Accordingly, although these judgments are certainly strong evidence regarding appellant's moral character, it is for the ALJ to determine this factual issue," the DCA said.

[Palamara v. Department of Business and Professional Regulation, 10/8/03]

Reasonable suspicion - detention

Because an officer lacked probable cause to initially stop and detain a juvenile, a fellow officer was not justified in arresting the juvenile for giving a false name during the unlawful detention, the 4th DCA ruled, holding that a lawful detention is a prerequisite to the crime of giving a fictitious name.

A juvenile identified only J.P. was adjudicated delinquent for unlawful use of a false name and resisting a police officer without violence. While on patrol, an officer responded to a call for backup assistance and arrived at a convenience store parking lot to find another officer detaining J. P. and a companion for possible trespass offenses. The two youths failed to produce any identification and the officer issued a traffic citation under the false name given by J.P. The officer instructed the two to stay put until their parents arrived or until they could locate their drivers' licenses. Twenty minutes passed, and then the officer saw the vehicle speed away with its lights off. The vehicle eventually crashed and J.P. fled the scene. On appeal, the DCA reversed both convictions, holding that the officers lacked probable cause to detain J.P. for trespass and therefore the fictitious name charge could not stand.

The DCA also reversed the resisting officer charge due to insufficient evidence, reasoning, "The mere flight of J.P., a passenger in a stopped vehicle who was not suspected of any personal criminal behavior, is insufficient to sustain a conviction for resisting without violence."

Assistant Attorney General Marni A. Bryson represented the state on appeal.

[J.P. v. State, 10/15/03]

DUI - probable cause

An officer had probable cause, based on prior encounters, to stop a suspect for driving a scooter with a suspended license, even though he lacked probable cause to stop him for safety violations because the safety requirements did not apply to the scooter, the 4th DCA said.

While on patrol, Officer Jeffrey Bell spotted Michael Stone riding his Yamaha scooter. Knowing that Stone's driver's license had been suspended, Bell called out to Stone. Stone showed the officer his license, which had been reinstated the day before. Bell smelled alcohol on Stone's breath and administered a field sobriety test, which Stone failed. The trial court denied Stone's motion to suppress the sobriety test, reasoning that the officer had probable cause to stop Stone for not wearing a helmet and eye protection. Stone appealed, arguing that the stop was illegal because the statutory safety requirements did not apply to his scooter. The DCA agreed that the safety requirements did not justify the stop, but nevertheless found the stop to be lawful based on Stone's earlier license suspension. "Bell's hailing Stone was a permissible traffic stop because Bell had probable cause to suspect Stone was committing a traffic violation by driving his scooter with a suspended license. As a result, the trial court did not err by denying Stone's motion to suppress the sobriety test evidence and we affirm,"

the DCA said.
Assistant Attorney General Claudine M. LaFrance represented the state on appeal.

[*Stone v. State*, 10/22/03]

Search and seizure - probable cause

A citizen's tip about a possible burglary provided probable cause for an investigatory detention but did not justify an officer's decision to arrest a suspect without further verifying the accuracy of the tip, the 4th DCA held.

An officer, responding to the tip of a possible burglary, came upon a woman who fit the description provided by the caller. The caller had described a woman being handed items by a man who had jumped a fence. The officer handcuffed the woman after she failed to reasonably explain her presence and jumped the fence, drew his revolver and searched the premises. The officer found Joseph Swartz at the rear of the property with his hands under the hood of a truck. The officer placed Swartz under arrest and discovered prescription drugs during a pat-down. The owner of the house later verified Swartz's story that the home belonged to his mother and he had permission to be there. Appealing his conviction for narcotics possession, Swartz argued that the drugs were seized as a result of an unlawful arrest and should have been suppressed. The DCA agreed and reversed.

"A man working underneath the hood of a truck is not inherently criminal. Furthermore, as soon as Swartz became aware of Murray's presence, he informed Murray that the house belonged to his mother and that he was allowed to be there. This should have allayed any would-be suspicions at least until such a claim could be verified," the DCA said.

Assistant Attorney General Joseph A. Tringali represented the state on appeal.

[*Swartz v. State*, 10/22/03]

DUI stop - reasonable suspicion

A driver's left-hand turn from the wrong lane was not so erratic as to suggest intoxication and therefore did not give a sheriff's deputy a valid reason to conduct a stop for driving under the influence, the 4th DCA held.

The trial court found that Jamie Nicholas was in violation of probation for DUI. After his motion to suppress was denied, Nicholas admitted to the violation. An officer spotted Nicholas making a left turn from the right-hand lane of a roadway that had two lanes, one turning lane and another lane that headed north. The arresting deputy testified that he was only following Nicholas for a very short period of time and was driving two car lengths behind him when he saw Nicholas make the turn without signaling. The deputy said the turn did not interfere

with traffic. Nicholas appealed the suppression issue, arguing that the stop was improper. The DCA agreed and reversed.

"(W)e recognize that there is no statutory definition of erratic driving and it is necessarily determined on a case by case basis. However . . . we hold that Nicholas's turn did not amount to erratic driving. As such, officer Moore did not have a founded suspicion that Nicholas was under the influence." Assistant Attorney General David M. Schultz represented the state on appeal.

[*Nicholas v. State*, 10/29/03]

5th District Court of Appeal

Notice to insurance department of suit against government

Because the parents of an injured child failed to notify the state that they intended to sue the governmental entity they blamed for their son's injuries, a trial court properly issued a summary judgment that effectively ended the parents' lawsuit, the 5th DCA held.

Robert and Sandra Motor sued the Citrus County School Board alleging that the board's negligence led to their 4-year-old son being injured while playing on a school playground. The school board submitted extensive documentation to show that the Motors never notified the state Department of Insurance (now the Department of Financial Services) of their claim, even though the board asserted their **failure** as an affirmative defense three months before the Motors' three-year time limit for giving notice had expired.

"(N)otice to the insurance department is an essential element of the cause of action. A complaint that does not allege departmental notice fails to state a cause of action," the DCA said. "(B)ecause it is too late for the Motors to cure the defect in the complaint, the final judgment in favor of the school board is affirmed."

[*Motor v. Citrus County School Board*, 10/3/03]

DUI stop – reasonable suspicion

The circuit court erred by *sua sponte* (on its own) considering the issue of whether the police had reasonable suspicion of impairment to initiate a traffic stop for DUI and by reweighing the evidence on the issue of whether the driver was misled and confused regarding her right to speak to an attorney prior to submitting to an alcohol breath test and on the issue of whether the driver was properly informed of penalties for refusal before refusing to take the breath test.

[*Department of Highway Safety and Motor Vehicles v. Marshall*, 7/3/03]

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