
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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U.S. Supreme Court

Limited affirmative action upheld

In a pair of mixed decisions, the U.S. Supreme Court said that it is permissible that universities continue to boost minority enrollment by using affirmative action plans that take race into consideration, as long as they don't automatically give minority candidates an unfair advantage.

The justices ruled 5-4 to uphold a University of Michigan Law School policy that sought to establish a "critical mass" of minorities by allowing the admissions office to take race into consideration. However, in a separate 6-3 decision the court struck down the university's undergraduate admissions policy that assigned extra points to minority candidates, giving them one-fifth of the total points needed to gain admission solely on the basis of race. Unsuccessful applicants had argued that the affirmative action policies unfairly discriminated against white candidates, but the Supreme Court recognized the benefits of diversity and approved "narrowly tailored" programs to foster it. "(T)he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body," Justice O'Connor wrote for the majority in the law school case.

[*Grutter v. Bollinger*, 6/23/03]

[*Gratz v. Bollinger*, 6/23/03]

11th U.S. Circuit Court of Appeals

Summary judgment - officer's use of force

A trial court correctly rejected a lawsuit alleging that a Fort Lauderdale police officer violated a suspect's constitutional rights by pepper-spraying and shooting the man during a particularly difficult arrest, the 11th U.S. Circuit Court of Appeals said.

Summary judgment in favor of the city was proper because the arrest was based on probable cause and the officer's application of force was reasonable under the circumstances, the court said. The lawsuit was filed by Anthony McCormick over his arrest that resulted from his assault against a woman at a coin

laundry. Witnesses said McCormick threatened the woman with an ornate wooden walking stick before pushing her to the ground, causing her head to bleed. McCormick then brandished the stick at Officer Jonathan Welker, who used pepper spray to no effect against McCormick before shooting the suspect as he advanced on the officer. McCormick's lawsuit alleged unlawful arrest and excessive force, but the 11th Circuit said the officer's actions were justified in light of the scene he encountered when responding to McCormick's assault on the woman. "Shortly after arriving at the Laundry, Officer Welker had sufficient and trustworthy information upon which to base probable cause to arrest McCormick for a violent felony. In addition, Officer Welker's uses of force on McCormick were reasonable under the circumstances, considering that McCormick had apparently just committed a crime of violence and — from an objectively reasonable viewpoint — refused to submit to police authority, and posed a continual threat of further violence. The district court correctly granted summary judgment in favor of Officer Welker and the City," the court said.

[*McCormick v. City of Fort Lauderdale and Welker*, 6/11/03]

1st District Court of Appeal

Attempted murder of law enforcement officer

The first DCA held that fundamental fairness requires retroactive application of a Florida Supreme Court decision that knowledge of a victim's law enforcement status is a necessary element of the crime of attempted murder of a law enforcement officer, although there was no constitutional issue involved on appeal.

In 1993, Henry Barnum was convicted of attempted first-degree murder of a law enforcement officer and sentenced to 27 years in prison. An officer in civilian clothing confronted Barnum while he was committing a burglary; at trial it was a disputed issue whether Barnum knew the man was an officer. In his post-conviction motion, Barnum claimed his due process rights were violated because the jury was not instructed to determine whether he knew the status of the victim. Barnum argued that the 1997 Florida

Supreme decision in *Thompson v. State* — that knowledge was a necessary element of the crime — should be applied retroactively to his case. The DCA agreed and reversed for a new trial or judgment on the lesser-included crime of attempted murder.

"(I)t cannot be said in this case that the trial court imposed a criminal sanction where none was intended, because the jury might have convicted Barnum of attempted murder of a law-enforcement officer if it had been properly instructed," the DCA said.

[*Barnum v. State*, 6/2/03]

Search and seizure - "Knock and announce" rule

Where police forcibly entered a residence to execute a warrant without a "particularized belief" that a suspect was either armed or likely to destroy contraband, the search was deemed illegal because there were no exigent circumstances to create an exception to the "knock and announce" rule, 1st DCA held.

Leangelo Kellom, charged with two counts involving cocaine and cannabis possession, moved to suppress drugs seized from his residence on grounds that officers violated the "knock and announce" rule found in section 933.09, F.S. Officers obtained a search warrant after suspecting Kellom of selling crack cocaine from his home. An officer testified that police knocked once and announced their presence but no one answered. After waiting "several seconds" police forced their way into the home and discovered Kellom removing contraband.

Reversing the conviction and remanding the case, the DCA held, "While the quantity of time sufficient to provide a suspect with due notice will vary depending upon the particular circumstances at issue, the facts of this case do not establish that the quantity of time between the officers' knock and announce and their hasty entry was sufficient to permit appellant to respond."

[*Kellom v. State*, 6/18/03]

3rd District Court of Appeal

Unemployment benefits - refusal to perform risky task

A worker who is fired after refusing to do his job at the risk of personal injury or property damage is entitled to unemployment benefits because his refusal does not constitute misconduct, the 3rd DCA said.

The court reversed the state Unemployment Appeals Commission, which had denied benefits sought by Tony Delaughter. The piano delivery worker was fired after he refused to proceed with a particularly risky delivery, which would have required

carrying a large piano up three flights of narrow stairs at the end of a workday, aided only by an inexperienced assistant. The customer was willing to delay the delivery, but the employer fired Delaughter upon his refusal to proceed and the state commission denied unemployment benefits.

"We reverse because the employer's testimony at the hearing completely failed to address, much less rebut, the claimant's testimony about the risk of personal injury or property damage if the delivery proceeded without more experienced help. Given the safety issue, the refusal to proceed did not constitute misconduct," the DCA said.

[*Delaughter v. Unemployment Appeals Commission*, 6/4/03]

Denial of unemployment benefits - change in work schedule

A state commission wrongly concluded that an employer did not change a worker's job duties when it moved her to a new office and insisted that she work until 9 p.m. at least once a week, the 3rd DCA held in reinstating unemployment benefits for the woman.

Sunita Mohammed was employed as an analyst for an insurance company when she went on maternity leave. Upon her return, she was transferred to another department within the company and told she would have to work her regular hours plus one late shift. Mohammed said she could not work until 9 p.m. because of child care needs and offered to work through her lunch hour and take work home to complete her assignments. The company insisted on the work schedule it established, and fired Mohammed for alleged insubordination when she refused to work the extra hours. An appeals referee ruled for Mohammed but the state Unemployment Appeals Commission reversed, concluding that there was no evidence in the record that Mohammed's job duties had changed or that the demand for additional hours was a new requirement. The commission said Mohammed's refusal to work the additional evening hours amounted to misconduct that disqualified her for unemployment benefits. The DCA disagreed.

"It is uncontroverted that when the claimant returned from maternity leave, she was transferred to another department where the hours that the claimant was required to work were not those agreed to on hire," the DCA said. "Clearly, there was evidence that the claimant's terms of hire had changed. For this reason, we find that the UAC improperly substituted its judgment for that of the appeals referee."

[*Mohammed v. Unemployment Appeals Commission*, 6/11/03]

4th District Court of Appeal

Motion to suppress - vehicle stop

Where an initial vehicle stop was unreasonable, an outstanding arrest warrant for the driver did not constitute an intervening circumstance sufficient to remove the taint of the illegal stop and justify a search of the driver, the 4th DCA held, suppressing evidence seized.

Anthony Frierson was stopped for failing to use his turn signal and driving with a cracked taillight. An officer ran a check on Frierson and discovered an outstanding arrest warrant for his failure to appear in an unrelated matter. Frierson was arrested, and a search of the vehicle turned up a firearm. A subsequent investigation revealed that the arrest warrant was invalid. Moreover, the officer testified that Frierson's failure to use his turn signal did not affect traffic or create a safety concern and although the taillight was cracked, it was working. Frierson appealed, and the DCA agreed that the conviction ought to be reversed because the firearm evidence should have been suppressed.

"(A)lthough the officer might justifiably rely on the erroneously issued warrant to make an arrest, the firearm uncovered during the search incident to the arrest was nonetheless the fruit of the illegal stop," the DCA said.

[Frierson v. State, 6/4/03]

Rule that lets DUI drivers avoid punitive damages

The Florida Supreme Court should review the economic castigation limitation rule, at least for DUI cases, because the present rule will allow a drunk driver who injured another motorist to avoid virtually all financial liability for his actions, the 4th DCA said. The court reluctantly agreed with the defendant that the fact that he injured the plaintiff as a result of driving while intoxicated does not, by itself, authorize a jury to assess punitive damages in excess of his financial resources. The only evidence of the driver's financial resources was his own testimony that his income was just over \$2,600 the previous year. The jury awarded punitive damages of \$250,000, but the DCA said that amount cannot stand because it far exceeds the defendant's ability to pay. The DCA noted that case law has established that the amount of punitive damages cannot be so large as to exceed the defendant's financial ability. Certifying the issue to the Supreme Court, the DCA expressed frustration that criminal fines — including those for DUI — can exceed the defendant's financial resources and obligate him to pay the amount over time, yet no similar provision allows plaintiffs to recover damages civilly.

"Punitive damages are nothing more than civil fines determined by juries instead of judges. They express a community's measurement of the enormity of specific malicious conduct — conduct

that must necessarily be beyond civilized norms," the DCA said. "The criminal DUI fine — but not the civil one — may be hung over (a defendant) like a Damoclean sword. He can be forced to make periodic payments on it as he earns the resources to do so, but the victim will never share in any of it. It seems anomalous that the amount of society's outrage at malicious conduct violating both criminal and civil norms may be fixed by judgment in criminal cases, with compelled payment to await a judgment debtor's acquisition of resources to pay it, but not in civil cases. As this civil financial castigation limitation is judge-made, it should be eliminated by judges."

[Zuckerman v. Robinson, 6/11/03]

Motion to dismiss - illegal stop

A vehicle's abrupt U-turn, late at night in the vicinity of a recent burglary, did not give rise to a reasonable suspicion that the car's occupants were connected to the crime sufficient to justify a police stop, the 4th DCA held.

Alvin Batson appealed his conviction for burglary of a dwelling and grand theft. Batson challenged the trial court's denial of his motion to suppress, contending the evidence was a result of an illegal vehicle stop. Police officers responding to a residential burglary call saw a car driving toward the scene. At about the time the parked patrol cars would have come into view, the car suddenly stopped, made a U-turn and departed, traveling between 25 and 30 mph. Police stopped the car and found items stolen from the residence. The DCA reversed the convictions and remanded for a new trial.

"Here, the car's 'U-turn' is legally insufficient to support the inference that its occupants were attempting to evade the police, which were gathered further toward the end of the cul-de-sac. It is certainly difficult to say that the vehicle 'sped away' at twenty-five to thirty miles an hour. Thus, the only thing unusual about the circumstances was the late hour and the recently reported crime. The vehicle's mere presence near the scene is insufficient to give rise to a reasonable suspicion that its occupants were connected to the recent burglary."

[Batson v. State, 6/25/03]

5th District Court of Appeal

DUI - admissibility of statements

Statements made by a driver in a follow-up interview with police as part of an accident investigation were admissible even though officers did not re-advise him of his *Miranda* rights because the statements were non-custodial, as the defendant was not under arrest and was free to leave at any time, the 5th DCA held.

Donald Vedner Jr. appealed his convictions for DUI

manslaughter and other charges stemming from an accident in which Vedner, who was driving his car, rear-ended another vehicle, killing his best friend. The day after the accident, Vedner agreed to be interviewed by a traffic homicide investigator, who read him his rights. Five days later, Vedner went to the police station to retrieve his clothing and agreed to a second interview but was not read his rights. Six months later Vedner agreed to a third interview and was asked about his marijuana use; again he was not read his *Miranda* rights. The DCA found that the third interview should not have been admitted at trial because Vedner should have been given another *Miranda* warning, but the court concluded that the error was harmless.

"(T)he statements made in connection with the improper third interview were largely repetitive of those made in connection with the valid first two interviews," the DCA said. "In circumstances where statements made inadmissible by *Miranda* are cumulative of validly obtained statements, the courts have generally determined upon a harmless error analysis that a reversal is unnecessary. We conclude, as well, upon a review of the entire record, that the error in admitting the third interview into evidence was harmless."

[*Vedner v. State*, 6/13/03]

Attorney General's Opinion

Public records - social security numbers

In response to a request from the Orange Park town attorney, the Attorney General issued an advisory opinion (2003-23, 6/6/03) stating: "(T)he 'legitimate business purpose' exception in section 119.0721, Florida Statutes, does not authorize the town to release the social security numbers of its water and sewer system customers to a private company that intends to enter the social security numbers into a computer database and sell access to the database to other entities and individuals."

Public records - copyrighted voting machine manuals

In response to a request from the Department of State, the Attorney General issued an advisory opinion (2003-26, 6/6/03) stating in part: "(I)t is my opinion that the federal copyright law, when read together with Florida's Public Records Law, authorizes and requires the custodian of records of the Department of State to make maintenance manuals supplied to the Bureau of Voting Systems Certification, as required by the Florida Voting Systems Standards and Chapter 101, Florida Statutes, available for examination and inspection purposes. With regard to reproducing, copying, and distributing copies of these maintenance manuals,

which are protected under the federal copyright law, the state law must yield to the federal law on the subject. The Department of State, as the custodian of these records, should advise individuals seeking to copy such records of the limitations of the federal copyright law and the consequences of violating its provisions; such notice may take the form of a posted notice that the making of a copy may be subject to the copyright law. However, as this office has suggested previously, it is advisable for the custodian to refrain from copying such records himself or herself."

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