
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

FRED O. DICKINSON, EXECUTIVE DIRECTOR

VOLUME MMIII, ISSUE 3

11th U.S. Circuit Court of Appeals

Miranda waiver during custodial interrogation

A trial court should not deny a habeas corpus petition alleging *Miranda* violations regarding a confession without first examining the "totality of the circumstances" surrounding the custodial interrogation, the 11th U.S. Circuit Court of Appeals held.

Robert Hart received a life sentence after his conviction for two counts of first-degree murder, armed robbery and burglary. The chief evidence against Hart was his taped statement to police confessing to the robbery. At one point Hart discussed with police the pros and cons of having an attorney present, and an officer told Hart "that honesty wouldn't hurt him." The trial court denied Hart's motion to suppress the statement because his comments during the discussion with police regarding counsel failed to amount to an "unequivocal request for an attorney." Appealing, Hart alleged his confession had been coerced, and the 11th Circuit agreed.

"Our analysis cannot end with Hart's signing of the waiver form because we are required to examine the totality of the circumstances surrounding the interrogation to determine whether Hart's decision to waive his rights was made voluntarily, knowingly, and intelligently," the 11th Circuit said. "The admission of Hart's statement led his attorney to present a defense based on coercion and duress. ... The fact that this testimony would have been unnecessary if the prosecution had not been allowed to present the unlawfully obtained statement is further evidence that the admission of the statement was not harmless error."

[*Hart v. Attorney General for the State of Florida, et al.*, 3/5/03]

Constitutional challenge to "Choose Life" tags

A lawsuit challenging the constitutionality of Florida's "Choose Life" license tags and the disbursement of tag sale funds to adoption organizations was properly dismissed because the plaintiffs lacked standing, the 11th U.S. Circuit Court of Appeals held.

The court rejected the appeal of the Women's Emergency Network and two individuals, who

contended the statute authorizing the "Choose Life" license plate violates their First Amendment right to freedom of speech by providing a forum for pro-life car owners to express their political views but not providing a similar forum for pro-choice car owners. They also contended the statute improperly authorized the distribution of funds from tag sales in a manner that discriminates based on the viewpoint of the agency applying for the funds. The 11th Circuit rejected these and other arguments, saying the plaintiffs lacked standing to raise them.

"Appellants would rather we define their injury as 'the government's promotion of one side of the debate on the abortion rights issue in a speech forum, coupled with the lack of opportunity to present their opposing view.' The problem with Appellants' argument is that it presumes the State has done more than it actually has done. Has the State of Florida authorized the speech of one side of the abortion debate? Of course. Has the State denied the other side of the debate the same opportunity to speak? Not at all. The First Amendment does not require states to authorize the speech of those who have expressed no interest in speaking; it only protects the rights of those who wish to speak. The State of Florida has not denied Appellants access to the specialty license plate forum. It has not rejected Appellants' application for a specialty license plate, and it has not applied (the statute) in a discriminatory manner. Until it does so, Appellants have not suffered an injury-in-fact, and they lack standing to bring their claim," the 11th Circuit said.

[*Women's Emergency Network, et al., v. Bush, et al.*, 3/7/03]

Preclusive effect of state administrative ruling

The factual findings of a state administrative judge are entitled to the same weight in federal court as they are in that state's courts, the 11th U.S. Circuit Court of Appeals said in granting qualified immunity to two Georgia county officials.

The court rejected the appeal of a DeKalb County firefighter who was suspended for 30 days after a confrontation with the county administrator during a union-related protest. The firefighter sued alleging he was disciplined in retaliation for his protected

union activities, in violation of his First Amendment rights. The appeals court found that the administrator and the fire chief were entitled to qualified immunity because a merit system hearing officer found no evidence to dispute the county's contention that the firefighter was disciplined for insubordination rather than for engaging in protected union activities.

"Those findings are binding upon the court in a case such as this one if the employee received a full and fair opportunity to present his case in the administrative hearing. When a state agency, acting in a judicial capacity, resolves disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's court," the 11th Circuit said.

[*Travers v. Jones and Wilder*, 3/11/03]

Suspect's flight - reasonable suspicion

A suspect's flight on foot, after he had been standing under a no-loitering sign in a reputed problem area at night, gave officers reasonable suspicion to stop him, the 11th U.S. Circuit Court of Appeals said.

Lewis Franklin challenged the denial of his motion to suppress his statements and drugs that were discovered after police officers tackled him following a prolonged foot chase. Franklin was on a sidewalk when he saw uniformed patrol officers from a Riviera Beach SWAT team, and ran. Franklin managed to scale two fences and race across a parking lot before being apprehended. Franklin argued that his flight cannot be used to justify the stop because the officers improperly provoked it, but the 11th Circuit disagreed, saying Franklin's flight was "particularly suspicious" because of its nature and duration.

"While flight is not proof of wrongdoing, it is indicative of such. Innocent persons might run from police officers; but flight creates an ambiguity; and the officers may stop the person to resolve the ambiguity," the 11th Circuit said. "While initially (Franklin's) flight might have indicated that he was just trying to remove himself from a potentially dangerous situation ..., at some point between when he cleared the first fence and started to scale the second, his flight more clearly indicated his potential involvement in wrongdoing and his desire to evade the police. We believe this flight — combined with the other factors — gave the officers reasonable suspicion to stop Franklin."

[*U.S. v. Franklin*, 3/12/03]

ADA - reasonableness of accommodation

In complying with the Americans with Disabilities Act, an employer is not required to make an accommodation of indefinite leaves of absence that would allow an employee to return to work at some

uncertain point in the future, the 11th U.S. Circuit Court of Appeals held.

The 11th Circuit, reversing a lower court, said the Lee County clerk of circuit court should not have been ordered to reinstate a long-time employee whose absences grew over the years as he increasingly suffered from cluster headaches that began in 1978. The clerk granted the employee, Mark Wood, substantial discretionary leave and even created a new position for Wood to accommodate his headaches. Eventually Wood's absences reached more than one-quarter of the year. In December 1999 Wood was granted discretionary leave without pay and with no termination date, but the next month the clerk terminated Wood's employment. Wood sued under ADA and the Family Medical Leave Act, and a jury ruled in his favor on the ADA claim. On appeal, the clerk argued that Wood's requested accommodation of indefinite leaves of absence was not reasonable, and the 11th Circuit agreed.

"While a leave of absence might be a reasonable accommodation in some cases, Wood was requesting an indefinite leave of absence. Wood might return to work within a month or two, or he could be stricken with another cluster headache soon after his return and require another indefinite leave of absence. Wood was not requesting an accommodation that allowed him to continue work in the present, but rather, in the future — at some indefinite time," the 11th Circuit said. "Wood was requesting an accommodation of indefinite leaves of absence so that he could work at some uncertain point in the future. Wood's requested accommodation was not reasonable. The ADA covers people who can perform the essential functions of their jobs presently or in the immediate future. As a result, we conclude from the record that Wood was not a qualified individual under the ADA."

[*Wood v. Green*, 3/13/03]

Florida Supreme Court

Constitutionality of motor vehicle statute**

A comprehensive Florida law primarily designed to address the operation of motor vehicles is unconstitutional because it also includes a provision on an unrelated subject, thus violating the single-subject requirement, the Florida Supreme Court held.

Affirming the conclusion of the 5th DCA, the justices ruled 5-2 that Chapter 98-223, Laws of Florida, violates the single-subject rule of the Florida Constitution. The provisions of the law range from speeding fines and license plate expiration to mandatory revocation of driver's licenses and reinstatement of driving privileges. However, one section relates to the use of private debt collectors to

collect debts evidenced by bad checks. "We agree with the district court and circuit court below that chapter 98-223 violates the single subject rule. Section 2 of the law, which involves assigning bad check debt to a private debt collector, has no natural or logical connection to the law's subject matter, which is driver's licenses, operation of motor vehicles, and vehicle registrations," the court said in an unsigned opinion. Justices Cantero and Wells dissented, suggesting that one of the purposes of the law was to provide for the suspension of drivers' licenses for those who pass worthless checks, and therefore the bad check collection provision is related to the rest of the statute.

[*Department of Highway Safety and Motor Vehicles v. Critchfield*, 3/13/03]

**Note: DHSMV still conforms with prior law while *Critchfield* is not yet final.

1st District Court of Appeal

Circuit court invalidation of agency rules

A trial court should not have bypassed the expertise of a state administrative agency in order to declare that a disputed fishing net design complied with the net ban provision of the Florida Constitution, the 1st DCA held.

The DCA reversed a lower court's declaratory judgment invalidating two rules of the Fish and Wildlife Conservation Commission. The trial court also declared a specific net designed by two Panhandle fishermen to be a legal net under Article X, section 16 of the Constitution. The DCA said the action was not properly before the circuit court because the fishermen did not exhaust available administrative remedies before they sought relief in court. The DCA noted that it is well established that a constitutional challenge to an agency's rule must first be presented to the agency and the administrative process must be exhausted before the issue may be raised in court.

"Moreover, under the doctrine of primary jurisdiction, the circuit court should have refrained from exercising its jurisdiction. The issue raised in the complaint involves technical expertise in the area of fishing gear specifications and prohibitions. Such expertise is outside the ordinary experience of judges and juries, but within the special competence of the Commission. Therefore, the Commission, not the circuit court, should have ruled upon the issue first," the DCA said. "Relief at the administrative level and not in the circuit court would have been appropriate."

[*Florida Fish and Wildlife Conservation Commission v. Pringle and Crum*, 2/28/03]

Administrative public employees - collective bargaining

The 1st DCA rejected an appeal by a union hoping to represent certain Miami-Dade County school administrators, saying it is too early in the process for an appellate court to review the constitutionality of statutes limiting the collective bargaining rights of administrators.

The union filed a petition to represent a unit of assistant principals and vice principals, but the Public Employees Relations Commission followed a hearing officer's recommendation and concluded that the assistant principals met the statutory criteria of managerial employees and administrative personnel and were therefore precluded from collective bargaining. The union then asked the DCA to interpret the constitutionality of the relevant statutes, sections 447.203(4)(a)6 and 228.041(10), F.S.

The DCA affirmed PERC's dismissal of the petition, but did so without prejudice to the union's right to seek a declaratory judgment in circuit court concerning the constitutionality of the statutes. Noting that the arguments before it involved allegations of fact that go beyond the record on appeal, the DCA said further proceedings would provide an opportunity for a record to be developed so the DCA can properly review the issues.

[*Dade County School Administrators Association, Local 77, vs. School Board of Miami-Dade County, et al.*, 3/13/03]

Lawsuit alleging sheriff's negligent release of prisoner

The 1st DCA reinstated a lawsuit against the Gadsden County sheriff alleging that the sheriff's negligent release of a domestic abuser made it possible for him to murder a man who was visiting the abuser's wife.

William Stroba spent a week in the Gadsden County Jail on domestic violence charges, during which time he wrote several threatening letters to his estranged wife. Despite a circuit court order that no bond be given to Stroba, the sheriff's office released him on bond one week later. Stroba went home, where he found Robert Brown visiting his wife and killed Brown. Brown's estate sued the sheriff alleging a breach of a duty of care owed to Brown. The trial court dismissed the lawsuit, concluding that the sheriff owned no statutory, general or special duty of care to Brown, but the DCA disagreed.

"The Estate alleged that the threatening letters Stroba wrote while in jail were retained by the Gadsden County Jail and were in Stroba's file. In the letters, Stroba said he intended to kill his wife, that he wanted to accomplish his purpose as soon as he was released, and, more to the point, he made his intent clear to so act if he found her with another

man. By retaining these letters in Stroba's file instead of showing them to Michelle, the defendant's wife, or informing her of their content, and then releasing Stroba and merely informing Michelle Stroba that her husband had been released, the sheriff deprived her of critical information that might have saved the victim's life," the DCA said.

[*Estate of Robert Brown v. Woodham*, 3/18/03]

2nd District Court of Appeal

Need for formal disciplinary hearing

A state agency should have granted a formal hearing before revoking the medical license of a doctor who disputed whether his federal conviction for accepting kickbacks in exchange for Medicare referrals was related to the practice of medicine, the 2nd DCA held.

The state Board of Medicine rejected Dr. Michael Spuza's repeated requests for a formal hearing, concluding that Spuza's federal conviction meant there were no disputed issues of material fact that would require a formal hearing. The Department of Health took the position that its possession of a certified copy of Spuza's conviction, by itself, was sufficient to prove a violation of Florida rules. The DCA disagreed and ordered that Spuza be granted a formal hearing.

"While the certified copy of the conviction certainly established that Spuza was found guilty of crimes, it did not, in itself, establish that the crimes were related to the practice of medicine. We conclude that Spuza raised questions of law and fact that required an evidentiary hearing. The Department erred in denying him the formal hearing he so adamantly requested," the DCA said.

[*Spuza v. Department of Health and Board of Medicine*, 3/5/03]

Traffic stop - unreasonable detention

A police officer was not justified in detaining a suspect during a routine traffic stop beyond the time required to issue a citation in order to investigate his unfounded suspicions of illegal drug activity, the 2nd DCA held.

Candice Nulph challenged the denial of her motion to suppress, following her no-contest plea to several drug charges. Nulph was a passenger in a vehicle stopped for careless driving. During the stop the officer recognized the driver as a known drug dealer in the area, but the officer testified he had no reason to believe the car contained narcotics. The officer testified that he delayed issuing a citation in order for a canine unit to arrive, which took some 17 minutes. "After all checks were run on the vehicle and the occupants, the detective had not even begun to write a citation and instead was standing by waiting for the canine to arrive. This was improper because

the detective did not articulate a reasonable suspicion that the vehicle occupants were committing a crime," the DCA said. "(T)he detective did not have a basis to suspect that either (the driver) or Nulph was in possession of drugs at the time of the traffic stop."

[*Nulph v. State*, 3/12/03]

Urine testing prohibited in DUI cases**

Approving the state's motion for certification, the 2nd DCA asked the Florida Supreme Court to resolve questions over the validity of urinalysis tests.

The DCA held last October that because there is no state-approved method for conducting urine tests, the results of such tests are not admissible in DUI cases. Anthony Bodden was given a traffic citation for driving under the influence and submitted to a blood alcohol test and urine test. The blood alcohol test showed he was not legally drunk, but the urine test showed the presence of marijuana in his system. He was then charged with drug offenses based on the results of the urine test, but the trial court prohibited mention of the urine test results because the test procedures were not "approved" for DUI cases as required by law. The state argued on appeal that urine test methods did not have to be approved under the law, but the DCA disagreed. Responding favorably to the state's motion for certification, the DCA certified the question to the Supreme Court for resolution.

[*State v. Bodden*, 3/28/03]

**Note: Resulting from this case, Fla. Stat. §§ 316.1932 and 327.352 were amended by House Bill 947, Ch. No. 2003, effective 05/27/03. The bill clarifies that FDLE need not promulgate rules for urine testing.

No license revocation for unlawful manufacture of marijuana

The 2nd DCA reversed a trial court's direction to revoke a defendant's license after he was convicted of unlawful manufacture of marijuana. Due to a disparity in the law, the unlawful manufacture of marijuana is not one of the enumerated offenses contained in the statute that mandates license revocation upon conviction of such drug offenses as possession and trafficking. Thus, a defendant convicted of the arguably more severe offense of unlawful manufacture will not lose his license. The court pointed out the discrepancy and asked the legislature to reexamine the law.

[*Huesca v. State*, 3/28/2003]

3rd District Court of Appeal

Search and seizure - patdown

A safety patdown was justified following a citizen's tip that the suspect was selling drugs in a known crime area coupled with the suspect's suspicious

attempt to hide something as police approached him, the 3rd DCA held. Corey Enich pled guilty to possessing and carrying a concealed firearm and appealed the denial of his motion to suppress the gun found on him, arguing that the search was illegal. When an off-duty officer spotted Enich following a citizen's tip, Enich fled to the end of a hallway and attempted to hide something. Alarmed, the officer called Enich over and later testified that Enich started "stuttering and shaking all over the place" during questioning. "(W)e recognize that several of the factors taken alone would not justify the pat-down search of the defendant. However, in the instant case, as explained by the police officer, he decided to pat-down the defendant for his safety based on the totality of the circumstances," the DCA said. "(B)ased on the totality of the circumstances, as observed by an experienced police officer, the pat-down search for weapons was justified."

[*Enich v. State*, 3/5/03]

Unemployment - one-time loss of control

A one-time argument in the privacy of a boss' office does not rise to the level of "misconduct" sufficient to deny unemployment benefits to a fired worker, the 3rd DCA said.

The court reversed a denial of unemployment compensation benefits for a long-time employee of a supermarket deli, who was fired when she refused to lower her voice during a heated discussion in the store co-manager's office. The DCA, noting that the 2nd DCA held in 2000 that a single episode of poor judgment does not constitute misconduct, said the woman should not have been denied unemployment benefits.

"(A)lthough the employer was justified in discharging the claimant, we find that the claimant's single incident of loss of self-control did not constitute misconduct connected with work," the DCA said.

[*Tabares v. Unemployment Appeals Commission*, 3/5/03]

Fresh pursuit and BOLO

Under the fresh pursuit doctrine, an officer was justified in following and stopping a vehicle that matched a description from an alert even though the stop occurred outside the officer's jurisdiction, the 3rd DCA held.

The state appealed a trial court order that concluded the stop was illegal and defendant Jean Gelin's motion to suppress should be granted. An off-duty Miami Beach detective was less than a mile outside the Miami Beach city limits when he heard a "be on the lookout" (BOLO) description of a van involved in a Miami Beach robbery. Anticipating that the van would flee Miami Beach on the same causeway he was driving, the detective pulled over and waited.

Within minutes he saw a van matching the BOLO description and called a dispatcher to report that he was in pursuit. The detective followed the van until it became trapped at a dead-end. The suspects were immediately handcuffed and arrested as other officers arrived. The DCA reversed the lower court order granting Gelin's motion to suppress.

"Detective King was the first officer to locate the suspects and immediately contacted his department which, at the direction of Detective King, arrived to effectuate the stop at the instant the suspects were cornered by their own actions, i.e., driving into a dead-end," the DCA said. "(T)he stop of the defendants was proper in light of the fresh pursuit doctrine."

[*State v. Gelin*, 3/19/03]

Insubordination - employee's refusal to meet requirements

A public employee's repeated failure to comply with the employer's valid job requirements can be seen as a tacit refusal to comply, subjecting the employee to being fired for insubordination, the 3rd DCA said. The court affirmed the Miami-Dade County School Board's dismissal of an elementary school teacher who had a history of excessive absences and failed to comply with the school's requirements for lesson plans that could be used by substitute teachers. The teacher, Henrietta Dolega, asserted that she never refused to provide lesson plans, but instead merely failed to have them done as required. The DCA rejected this distinction and upheld the board's decision to fire the teacher.

"Dolega was repeatedly directed to provide lesson plans as a contingency for unexpected absences. She continually failed to do so," the DCA said. "We hold that Dolega's repeated failure to comply with her lesson plan requirement is a tacit refusal to comply with the (school's) directives ... (and) affirm the School Board's decision to terminate Dolega's employment."

[*Dolega v. School Board of Miami-Dade County*, 3/26/03]

4th District Court of Appeal

Constructive possession - knowledge inferred

Where three people sat in a car in which a container of cocaine was found, the defendant's mere proximity to the container is not enough by itself to infer that he knew the container held cocaine, the 4th DCA held.

A juvenile identified only as J.M. appealed an order adjudicating him delinquent for possession of cocaine. J.M. was arrested after an officer approached a parked car and, smelling marijuana, conducted a search of the vehicle. Finding cocaine in a glue tube on the floorboard next to J.M., the

officer searched J.M. but found no contraband on him. The officer testified that J.M. never made any suspicious movements or incriminating statements, and the only reason he believed the glue tube belonged to J.M. was because it was near him in the back seat of the car.

"The state's argument that it proved knowledge by presenting evidence that the glue container was in plain view is unavailing. While knowledge of the presence of contraband can be established by proof that the contraband was in plain view, such proof was not presented here," the DCA said. "Thus, even assuming that the state proved that the glue container was in plain view, the state, at most, proved appellant's knowledge of the presence of the glue tube, not the cocaine inside it."

[*J.M. v. State*, 3/5/03]

Reasonable suspicion - deputy's personal knowledge

A sheriff's deputy had reasonable suspicion to justify a stop when he saw someone driving his friend's custom-made tractor and knew the friend hadn't told him the tractor was on loan, 4th DCA held.

The state appealed a trial court order granting Jose Gonzalez's motion to suppress based on an illegal stop. Deputy Henry Zuback stopped Gonzalez as he drove the tractor, which Zuback immediately recognized as belonging to his friend. The deputy testified about his personal knowledge of the tractor's unique features, and said that during the stop Gonzalez told him he was stealing the tractor because the owner owed him money. The deputy read Gonzalez his *Miranda* warnings before arresting him for grand theft. Deputy Zuback admitted that at the time of the stop he did not know whether the tractor was stolen, but said the owner regularly notified him if the tractor was on loan. Reversing the suppression order, the DCA concluded, "Deputy Zuback articulated specific facts and personal knowledge which supported his 'reasonable suspicion' that a crime was occurring. Based upon the totality of the circumstances, he operated with far more than a 'mere hunch.' We therefore reverse the trial court's order granting the motion to suppress and remand for further proceedings."

[*State v. Gonzalez*, 3/19/03]

DUI manslaughter - sentencing

Trial courts are not required to impose a "minimum" fine and conditions of probation where a defendant is sentenced to prison time for conviction of DUI with property damage, the 4th DCA said.

Eric McGhee entered an open plea to DUI manslaughter and five counts of DUI causing property damage. After drinking and taking prescription drugs, McGhee took his mother's car for

a joyride that resulted in a fatality and property damage. The trial court sentenced McGhee to almost 11 years in prison on the manslaughter charge, to be followed by probation for the property damages. The court ordered "mandatory" special conditions of probation including a \$250 fine, a period of community service, attendance at a DUI school and having his car immobilized for ten days. McGhee appealed the mandatory "special conditions." The DCA affirmed the DUI school requirement but reversed the other special conditions.

"(T)he statutory scheme makes sense: everyone convicted of DUI, in whatever form, must complete a substance abuse course. However, a trial judge is not required to make a violator convicted of DUI with personal injury or property damage perform community service or have his car immobilized.

These terms may not be practical or desirable if a defendant is serving a long prison sentence prior to his probation.

[*McGhee v. State*, 3/19/03]

5th District Court of Appeal

Search and seizure - consensual encounter

A consensual encounter does not become a seizure when an officer asks for and holds a citizen's identification for the length of time it reasonably takes to complete a warrant check, the 5th DCA held.

As uniformed officers approached a group of men gathered on a sidewalk, some of the men walked away but Lorenzo Golphin remained. Police asked Golphin for his identification, which he freely handed over, and there was no evidence that police intimidated or harassed Golphin or the others. During the few minutes it took officers to run a computer check on his driver's license, Golphin volunteered that he had an arrest history and might have an "open warrant." Golphin was arrested and a search resulted in drugs and paraphernalia. Golphin moved to suppress the evidence, but the trial court denied the motion and the DCA affirmed.

"(W)e think that when a citizen voluntarily relinquishes possession of his property to police, reasonably implicit in such consent is that the police will retain the property for the period of time reasonably needed to accomplish the police purpose or until the consent is withdrawn, whichever first occurs," the DCA reasoned.

[*Golphin v. State*, 3/7/03]

Validity of liability waiver - state-required training

Trying to resolve competing public policies, the 5th DCA said Florida's priority on having well-trained law enforcement officers does not override a training

school's ability to require that trainees sign a binding liability waiver.

A woman who wanted to become a certified police officer was injured while taking a training course at a community college. She signed a required general release prior to taking the class, but argued that legislative action designed to ensure well-trained police officers means trainees should not be required to execute a release, and therefore the release signed in this case is invalid. The argument in favor of the release, the DCA noted, is the view that the Legislature recognized the urgency of having well-trained police officers and determined that the state is better served by certifying college training programs, even if they insist on releases of liability. Unable to resolve the policy considerations, the DCA affirmed a lower court ruling in favor of the college but asked the Florida Supreme Court to determine whether trainees may validly waive personal injury liability.

"The trial court determined, after considering the public policy argument, that the parties' general release should prevail," the DCA said. "It may be that by permitting the certification of colleges which insist on the release that the legislature has inferentially established the public policy in this regard. Or it may be that the legislature simply failed to consider the issue. Even though we agree that it should be the legislature which determines the appropriate public policy in this instance because it has taken such an active role in the certification and training of police officers, we nevertheless certify the ... issue to the supreme court as one of great public importance."

[Naylor v. District Board of Trustees of Valencia Community College, 3/14/03]

Search and seizure - scope of consent

A police officer exceeded the scope of a consensual search by opening a cigarette box he found in a suspect's pocket, and therefore the suspect's motion to suppress cocaine found in the box should have been granted, the 5th DCA said.

Convicted of cocaine possession, Alexander Aponte appealed the trial court's decision to admit crack cocaine found on him during a consensual search. An officer approached Aponte as he stood next to a truck in a high crime area. After some "small talk," Aponte handed the officer his identification when the officer asked his name. Aponte agreed to a search of his person and the officer discovered the cocaine when he opened a cigarette box found in one of Aponte's pockets.

"Applying the Fourth Amendment's basic test of objective reasonableness to the instant case, a reasonable person in Aponte's position would not understand that the officer's request to search him included a search of sealed containers on his person

in which he has a heightened expectation of privacy. The more objective and reasonable understanding here would be that the officer's search was for a weapon on Aponte's person. We find that there was no reasonable basis or consent given for the extended search and the motion to suppress the evidence found in the cigarette box should have been granted," the DCA said.

[Aponte v. State, 3/14/03]

Attorney General's Opinion

DROP retirement - re-employment of public employee

In response to a request from the City of Live Oak, the Attorney General issued an advisory opinion (2003-10,3/26/03) stating: "(I)n order for the city manager to be employed by the city after receiving a DROP payment, he must have terminated employment with the city and not be re-employed during the calendar month following his retirement. Moreover, it would be advisable for the city to comply with the direction of the Division of Retirement in its consideration of the city manager for re-employment to avoid potential liability for refunding improperly paid DROP benefits."

Approved by: Enoch J. Whitney
General Counsel

Edited by Jedediah Main
Editor-in-Chief

Michael J. Alderman
Assistant General Counsel

Judson Chapman
Assistant General Counsel

Bryan Pugh
Assistant General Counsel

Sena Hitson Finklea
Assistant General Counsel

Kathy Jimenez
Assistant General Counsel

The materials presented are a compilation of cases from the Attorney General's Criminal Law Alert and Appellate Alert as well as summaries from the Office of General Counsel. They are being presented to alert the Division of Florida Highway Patrol and the Division of Driver Licenses of legal issues and analysis for informational purposes only. The purpose is to merely acquaint you with recent court decisions. Rulings may change with different factual situations. All questions should be directed to the local State attorney or the Office of General Counsel (850) 488-1606, SunCom 278-1606. If you wish to review other Legal Bulletins, please note the web site address: DHSMV Homepage (<http://www.hsmv.state.fl.us/>) or FHP Homepage (<http://www.fhp.state.fl.us/>)