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# LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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FRED O. DICKINSON, EXECUTIVE DIRECTOR

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

### **Miranda warnings**

A defendant was not in custody while in the police chief's office and therefore was not entitled to Miranda warnings because he voluntarily went to the police station, where he was told he was not under arrest and had no reason to believe his freedom was limited, the 11th U.S. Circuit Court of Appeals held. Alabama death row inmate John Peoples appealed a federal trial court's denial of his petition for writ of habeas corpus. In 1983, Peoples murdered a couple and their 10-year-old son, and then stole the couple's 1968 Corvette. After agreeing to drive to the police station in the Corvette, Peoples had a 20-minute conversation with the chief, during which he produced a Bill of Sale and a tag receipt. After that, Peoples was read his Miranda warnings. On appeal, Peoples claimed that the documents should have been suppressed on grounds that the police obtained them in violation of his Miranda rights. The 11th Circuit disagreed.

"Under the circumstances, Peoples had no reason to believe that his 'freedom of action' was limited as a result of duress imposed by governmental coercion. What Peoples did shortly after leaving Chief Finn's office bears this out. Answering the telephone call from his attorney, Ray Robbins, Peoples told Robbins that he did not need his assistance because he and the police were merely discussing the car he had purchased from his friend," the court said.

*[Peoples v. Campbell, 7/21/04]*

### **State's authority to prosecute drunk pilots**

The State of Florida can prosecute two airline pilots who were stopped from flying their airliner from Miami International Airport because they were legally intoxicated, the 11th U.S. Circuit Court of Appeals said, reversing a lower court's determination that federal aviation law preempts the state from prosecuting the pilots.

The two America West pilots were ordered to return to the gate after pulling away to begin a flight from Miami to Phoenix. Breath tests showed their blood alcohol levels to be above 0.08, and they were charged under Florida law with operating an aircraft while intoxicated, operating a vehicle while

intoxicated and culpable negligence. A federal trial court concluded that federal aviation law preempted state law in the area of a pilot's qualification and capacity to operate a regularly scheduled commercial flight in interstate commerce. The lower court said Congress placed aviation safety solely under the purview of federal jurisdiction unless an incident resulted in a loss of life, injury or damage. The 11th Circuit said the preemption claim is not "facially conclusive," and therefore the trial court should have refrained from intervening.

*[Hughes and Cloyd v. Crist, 7/21/04]*

### **Wrongful death suit - "hog-tie" police restraint**

A group of Georgia police officers who struggled with a violent, fleeing suspect did not violate the man's constitutional rights when they resorted to a "hog-tie" technique to restrain him shortly before he died, the 11th U.S. Circuit Court of Appeals ruled. The court said a trial judge should have granted summary judgment to the officers in a wrongful death and civil rights lawsuit brought by Eric Irby's mother. Irby, who was later found to have methamphetamine in his bloodstream, led officers on an hour-long high-speed chase that endangered numerous civilians and officers. Irby repeatedly tried to strike officers and escape, and only became compliant after he was sprayed with pepper spray (or "OC"). Officers then immediately restrained Irby by cuffing his hands behind his back and strapping his hands and feet together in a way that caused his body to be bowed. Irby died of asphyxiation, but the court concluded that the officers' actions were reasonable under the circumstances.

"Irby repeatedly placed officers' lives and innocents' lives in danger by engaging the police in a multi-county vehicle chase that did not end until Irby had crashed twice. Once Irby's truck was finally stopped, the officers tried to restrain him in a less restrictive manner (simple handcuffing), but Irby ran and fought with the police and kept on violently kicking and resisting. The uncontroverted evidence in the record shows that legs can still be used to kick, even when the ankles are bound together. Therefore, it can be necessary to restrain further or secure the legs to avoid a power kick from the ground. Irby kicked violently until sprayed with the OC spray. As soon as he was sprayed and became compliant, the officers immediately fettered him. They took advantage of a

window of opportunity – of unknown duration – to restrain Irby in such a way that he could not harm another officer or himself should he decide to stop being compliant, a realistic possibility given his recent words and deeds. Again, we must look at the situation not with hindsight, but with the eye of the objectively reasonable officer on the scene. From the scene, we have a man who for a considerable time has consistently put his life and the lives of others in danger and who has shown that he has every intention of fighting and forcibly escaping arrest if possible. We cannot say the (officers') acts were beyond the outside borders of objective reasonableness given all the circumstances," the court said.

[*Garrett v. Athens-Clarke County, et al.*, 7/30/04]

#### **Qualified immunity - fatal shooting by officer**

A Jacksonville sheriff's deputy was entitled to qualified immunity from a lawsuit filed by the family of an apparently deranged man the officer fatally shot, the 11th U.S. Circuit Court of Appeals held. The court reversed a trial court's determination that because at least one witness disputed the officer's version of events that led to the shooting, summary judgment was inappropriate and the officer was not entitled to summary judgment. The lawsuit resulted from the shooting death of Charles Scott Kesinger, who was killed by Deputy Officer Thomas Herrington after Kesinger walked through rush hour traffic on Interstate 95 in Jacksonville in an apparent attempt to harm himself and others, and then attacked the officer's vehicle. The officer believed Kesinger was deranged and was attempting to harm himself and others by intentionally trying to stand in front of fast-moving cars and trucks. The 11th Circuit said Herrington is entitled to qualified immunity, noting that before an officer surrenders such immunity he or she is entitled to "fair and clear" warning that the challenged conduct violates federally protected rights.

"We have found no preexisting case law involving materially similar facts that would give a reasonable police officer fair and clear warning that shooting a crazed man, intent upon causing harm to himself and others, including the officer who had retreated as far as possible, and has acted in self defense, violated the Constitution. Here Herrington acted in self defense. He did not violate the Constitution or any clearly established law. He is entitled to qualified immunity," the 11th Circuit said.

[*Kesinger v. Conner*, 8/26/04]

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

#### **Justification for agency to break lease**

Because a rat infestation rendered a building leased

by the Department of Corrections unusable, the agency must prevail in a lease dispute with its landlord, the 1st DCA held.

A trial court ruled in favor of the former landlord of the unspecified Jackson County property, who sued the department for breaking its lease. The trial court found that the department was estopped from asserting that various problems – including a rat infestation – rendered the premises "untenantable" during the period of the renewed lease. The lower court acknowledged that without its finding of estoppel, the rat infestation alone would have caused the leased building to be unusable by the department. The DCA concluded that the evidence did not support a finding that the department was estopped from citing the rat infestation, and therefore the department must prevail in its defense against the landlord's claim for damages.

[*Department of Corrections v. Brooks*, 8/4/04]

#### **Home venue privilege**

Because the Attorney General was a party to a declaratory judgment action when a motion for change of venue was decided, venue in Leon County was proper and a trial court therefore correctly denied a motion to dismiss for improper venue or to transfer the case to another county, the 1st DCA said.

A medical facility sued Dr. John Lanza and the Attorney General in a declaratory judgment action, the details of which were not discussed in the DCA opinion. Lanza moved to dismiss or, alternatively, to transfer the case to St. Lucie County. The DCA affirmed the trial court order denying the motion, noting that the home venue privilege applied because the Attorney General was a party to the action at the time it was decided.

"Since Lanza moved to have the case dismissed or venue changed when the Attorney General was still a party to the action, the trial court did not err by denying Lanza's motion at that time," the DCA said.

[*Lanza and Crist v. Lawnwood Medical Center, Inc.*, 8/4/04]

#### **Inevitable discovery doctrine**

A trial court did not err by admitting drug evidence even though the cocaine was seized during a traffic stop of questionable validity, because the drugs inevitably would have been discovered by detectives who were prepared to arrest the defendant regardless of the traffic stop, the 3rd DCA held.

Defendant Rafael Rosales sold a small amount of cocaine to a confidential informant in Key West and then drove to Miami in order to obtain a half kilo of the drug requested by the informant. While Rosales was traveling, he instructed his wife to sell a small amount of the drug to the informant. Detectives prepared to arrest Rosales when he returned from

Miami based on the two small-quantity sales, expecting that a subsequent search of his car would discover the half kilo of cocaine. Additionally, they directed a patrol officer to follow Rosales' vehicle and pull it over for any traffic infraction, in hopes that a search associated with such a stop would produce the half kilo of cocaine without making Rosales aware of the confidential informant. A traffic stop did take place, but the justification for the stop was questionable and the stop took an improper amount of time. Rosales moved to have the half kilo ruled inadmissible because of the improprieties surrounding the traffic stop, but the state successfully argued that the cocaine inevitably would have been discovered when they arrested Rosales for the two smaller sales. The DCA agreed and affirmed the trial court's decision to admit the evidence.

"(T)he arrest would have been made on probable cause had there not been the traffic stop, and the cocaine would inevitably have been discovered. We conclude that the facts found by the (trial) court are supported by the record, and that the inevitable discovery doctrine is applicable here," the DCA said. Assistant Attorney General John D. Barker represented the state on appeal.

[*Rosales v. State*, 8/4/04]

#### **Invalid search - no warrant as basis for arrest**

Police officers improperly arrested a man on a warrant for violation of probation because the warrant had been resolved six days earlier, and the man's attempt to flee the officers did not justify a search that found a single methamphetamine pill in his possession, the 1st DCA said.

The court granted Kendrick Robinson's motion to suppress and vacated the probation sentence he received after pleading nolo contendere to one count of possession of methamphetamine. Believing there was an active warrant for Robinson's arrest, officers approached him as he stood on a sidewalk in a park. When the officers approached, Robinson fled on foot. He was caught and searched, and the methamphetamine pill was found. On appeal, Robinson pointed out that the warrant matter had been resolved six days earlier, so there was no basis for the arrest and search. The state asserted that Robinson's flight raised a suspicion of criminal activity, justifying the seizure of drugs following Robinson's arrest. The DCA disagreed.

"(T)he officers' reliance on the void warrant was insufficient to justify appellant's arrest and search," the DCA said. "(The state) concedes that flight alone is not a proper basis for a founded suspicion of criminal activity as would justify an arrest, or even an investigatory stop. Because the warrant was void and appellant's flight is by itself insufficient to justify the arrest and incidental search, the lower court

erred in denying the motion to suppress." Senior Assistant Attorney General Charlie McCoy represented the state on appeal.

[*Robinson v. State*, 8/18/04]

#### **Multiple DUIs - court's authority to order hardship license**

A trial court improperly ordered the state to grant a hardship driver's license to a man whose four DUI convictions led to his license being revoked in 1991, the 1st DCA said.

The dispute in the case revolved around which version of the license revocation statute applied – the 1997 law, which allowed the driver to apply for reinstatement upon meeting certain criteria, or a 1998 amendment that provided that anyone convicted of four DUIs could no longer have driving privileges for any reason. The 1998 statute was declared unconstitutional on single-subject grounds, but was later reenacted properly by the Legislature. A trial judge last year concluded that the 1997 version of the law applied to Johnny Fountain and ordered the Department of Highway Safety and Motor Vehicles to grant him a hardship license. The agency appealed, and the DCA said the judge had no authority to issue the order regardless of which version of the law was applicable.

"Based on the plain language of the 1997 version of the statute, it is within the Department's discretion to decide whether to reinstate the license of a petitioner who meets the statutorily specified requirements. Thus, had the 1997 version of the statute been applicable, the court should have remanded the case for the Department to conduct a hearing to determine whether Fountain met the statutory requirements for a hardship license. Under the 1998 version of the statute, neither the circuit court nor the Department had discretion to issue the hardship license," the DCA said.

[*Department of Highway Safety and Motor Vehicles v. Fountain*, 8/24/04]

#### **Disclosure of police "takedown" signal**

A detective who allegedly gave a "takedown signal" alerting backup officers to arrest a drug suspect can be fully cross-examined and required to reveal what the takedown signal was, the 1st DCA ruled in reversing a conviction for sale or delivery of cocaine. At issue in the case was whether defendant Charles Barr had actually handed crack cocaine to the undercover detective during the purported drug deal. The detective testified that after Barr handed him the crack, he uttered the takedown signal. The transaction was tape recorded, and Barr's defense sought to learn the takedown signal in order to show the jury that the takedown signal had not been given – meaning, according to the defense, that no drugs had changed hands. The trial court refused to order

the detective to divulge the takedown signal, fearful that criminals would quickly learn a signal used throughout Jacksonville. The DCA concluded that Barr was entitled to fully cross-examine the detective, even if it meant disclosure of the signal. "The State argued that the fact that a takedown signal was given proved that a transaction had taken place. Without knowing the precise word or words used as the takedown signal, the defense's ability to challenge the State's witnesses' testimony that the takedown signal had been given was compromised, and the jury had no way to determine whether the audiotape corroborated or disproved their testimony," the DCA said. "By permitting the State to present testimony that the takedown signal was given, but not allowing the defense a fair opportunity to challenge the assertion, the trial court's ruling required defense counsel to trust – not test – the Officer's testimony. . . . Whether keeping the 'takedown signal' secret serves any purpose that varying it would not serve, appellant's basic due process and confrontation rights outweigh any 'need' for official secrecy here."

Senior Assistant Attorney General Charlie McCoy represented the state on appeal.

[*Barr v. State*, 8/30/04]

## 2nd District Court of Appeal

### **Admissibility of 911 call - excited utterance**

A new trial is required where a judge failed to hold a hearing to consider the necessary evidence and make critical factual findings in determining whether a 911 call was admissible as an excited utterance, the 2nd DCA held.

A defendant named Little Tommy Tucker appealed his convictions for carrying a concealed firearm, aggravated assault with a firearm and being a felon in possession of a firearm. The state sought to introduce a 911 telephone call from the victim, a felon who claimed Tucker shot at his feet with a handgun during a dispute over drugs. The caller said he had fled to his mother's house to place the call, and the state argued the call was admissible as an excited utterance. After listening to the recording, the judge allowed the 911 call to be admitted as evidence, declaring that "I've listened to the tape and it sounds to me like he's excited." The defense objected, and the DCA agreed with the defense. "(T)he process emphasizes a decision by the trial court that, under all the circumstances, it is more probable than not that there was a startling event, that the statement was made before there was time to contrive or misrepresent, and that the statement was made while the person was under the stress of excitement caused by the event. Because this case was a swearing match between convicted felons and the tape may have buttressed (the witness')

testimony, we are unable to conclude beyond a reasonable doubt that the improper admission of this evidence did not contribute to the verdict," the DCA said.

Senior Assistant Attorney General Katherine V. Blanco represented the state on appeal.

[*Tucker v. State*, 7/23/04]

### **Reasonable suspicion for vehicle stop**

Officers are not given reasonable suspicion to stop a vehicle just because it drives away from a high crime area when a police vehicle shows up, even though they would gain reasonable suspicion if a pedestrian responded with unprovoked flight under similar circumstances, the 2nd DCA held.

The court held that the U.S. Supreme Court's 2000 decision in *Illinois v. Wardlow* does not apply where a defendant did not violate any traffic laws while driving away from what looked to the officer like a possible drug deal. John Paff was charged with cocaine possession after an officer pulled him over after seeing Paff's car adjacent to another vehicle in a gas station parking lot in a known high crime area. At issue was whether *Wardlow* – which held that officers had a reasonable suspicion to detain a suspect who fled on foot – applied in a case involving vehicles that did not commit any traffic infractions. The DCA, in a 2-1 decision, concluded that *Wardlow* did not apply.

"Flight on foot is distinctly different than flight in a car. When 'headlong flight' occurs on foot, the defendant's intent to elude an officer may be clear, even though no law is broken. When 'flight' occurs in a vehicle, the vehicle often conceals the emotions of its occupants and it is more difficult to determine that such a defendant is demonstrating 'nervous, evasive behavior,' or is intending to engage in 'headlong' flight. A car that obeys all traffic regulations when leaving a location when a police car arrives would seem to be the motor vehicle equivalent of a person who simply walks away from an officer on foot. Such a pedestrian does not invoke the rule of *Wardlow*," the DCA said.

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

[*Paff v. State*, 8/13/04]

## 4th District Court of Appeal

### **Untimely filing - postal clerk's error**

An appeal cannot be deemed filed on time where it reached court officials past the filing deadline even though the sender brought it to the post office one day before the deadline and paid for overnight delivery, only to be undone by a postal worker's mistake marking the package for second-day delivery, the 4th DCA held.

In a 2-1 decision, a panel of the court ruled against

Jane Ann Harrell, who was appealing an order changing visitation and holding her in contempt. Harrell produced records suggesting she asked the Post Office to deliver the package the next day, even though a postal clerk marked it for two-day delivery. Over the objections of one judge who said Harrell should not be penalized for a postal clerk's error, the DCA dismissed the appeal because the untimely filing left it without jurisdiction.

"Timely mailing of a notice of appeal is insufficient to confer jurisdiction on this court," the DCA said, noting that jurisdiction occurs only when the document is delivered to the proper official on time.

[*Harrell v. Harrell*, 8/4/04]

### **Double jeopardy - two convictions from single incident**

A defendant's double-jeopardy rights were not violated by his dual convictions for robbery and battery arising from a single incident in which he injured a woman while trying to snatch her purse, the 4th DCA held.

When Albert Dunbar attempted the purse snatching, the victim grabbed the purse and refused to let it go. Dunbar lifted her up and swung her around, breaking or dislocating three of her fingers before she finally gave up the purse. Dunbar challenged the dual convictions, saying they amounted to double jeopardy. The DCA disagreed, citing section 775.021(4)(b), which directly addresses the issue of whether multiple convictions can arise from a single criminal act.

"The statute provides for a separate conviction and sentence for each criminal offense committed during a single criminal episode, so long as the separate offenses do not require the same elements of proof, the offenses are not degrees of the same offense, and one offense is not subsumed by another," the DCA noted.

Assistant Attorney General Georgina Jimenez-Orosa represented the state on appeal.

[*Dunbar v. State*, 8/4/04]

### **Sovereign immunity - man mistakenly incarcerated**

A court clerk and county sheriff are protected by sovereign immunity from being sued by a man who needlessly spent two months in jail after the clerk's office failed to notify the sheriff that a capias for the man's arrest had been set aside, the 4th DCA said. A Broward County court set aside the capias calling for the arrest of Edwin Lovett, but the Clerk of Circuit Court neglected to provide that information to the sheriff's office. As a result, Lovett was picked up and spent two months in jail. He sued the clerk and sheriff, but the DCA concluded that the two offices enjoyed sovereign immunity protection because they did not owe a special duty of care to Lovett.

"We conclude that sovereign immunity bars the plaintiff's claims against the clerk and the sheriff, because they did not owe him a special duty which was different from the duty owed the public in general," the DCA said.

[*Lovett v. Forman and Jenne*, 8/25/04]

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

### **DUI - incomplete warning by police**

Evidence that a driver refused to submit to a DUI breath test was properly admitted at trial even though police officers did not give the woman a complete warning about all the potential consequences if she refused, the 5th DCA said. When asked to submit to a breath test, Jennifer Grzelka was warned that her refusal would result in the suspension of her driver's license. However, she was not informed that, if her license had been suspended for a prior refusal, this refusal would constitute a misdemeanor. Grzelka asserted on appeal that the failure of police to give the complete warning as required by law renders the evidence of her refusal inadmissible. The DCA disagreed.

"Evidence that a suspect refused investigative testing is relevant because it tends to prove a consciousness of guilt, provided that the suspect first was informed that adverse consequences would flow from his or her refusal. Here, because Appellant was advised of at least one adverse consequence that would result from her refusal, her decision to refuse was relevant and the trial court did not abuse its discretion in admitting the evidence," the DCA said.

Assistant Attorney General Angela D. McCravy represented the state on appeal.

[*Grzelka v. State*, 8/6/04]

### **Motion to suppress - validity of old warrant**

A police officer arresting a suspect on an outstanding 10-year-old warrant cannot be expected to know that the decade-old case is no longer valid because the prosecution was not begun in time, the 5th DCA said in upholding a drug possession conviction.

An Orange County sheriff's deputy stopped Saboor Abdullah as he rode his bike one night in 2003. A radio check revealed that Abdullah had an outstanding 1993 warrant for petit theft. Abdullah was arrested, and a search turned up crack cocaine and drug paraphernalia in Abdullah's pockets. Abdullah argued that the drug evidence should be suppressed because the 1993 petit theft case was not prosecuted within the allowable window. The DCA agreed that prosecution for the earlier case is now barred by the statute of limitations, but said that does not mean Abdullah's arrest on the old warrant was illegal. Because the warrant itself was valid, the

DCA said, so was Abdullah's arrest – and the discovery of the drugs.  
"The deputy was not required to address legal questions, such as whether prosecution of the underlying offense was barred by the statute of limitations, before effectuating the arrest," the DCA said. "Abdullah argues that some state actor was required to purge this warrant from their system, but fails to cite any authority for this proposition. Indeed, it is difficult to see how either the police, prosecutor, or the courts could accomplish this task without knowledge of the facts relating to the defense, such as the facts behind Abdullah's non-appearance. Consequently, we conclude that the trial court properly refused to suppress contraband seized incident to Abdullah's arrest."  
Assistant Attorney General Belle B. Schumann represented the state on appeal.

[*Abdullah v. State*, 8/13/04]

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