
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

FRED O. DICKINSON, EXECUTIVE DIRECTOR

VOLUME MMIV, ISSUE 2

Florida Supreme Court

Automobile as deadly weapon in robbery

A defendant who used an automobile while committing a robbery is not deemed to have "carried" the automobile as a deadly weapon for purposes of enhancing the conviction, the Florida Supreme Court held.

Daniel Burris was charged with stealing a woman's purse as he drove by her in a store parking lot, dragging the woman some distance before she released the purse. Burris pled nolo contendere to robbery with a deadly weapon and received an enhanced conviction. He then appealed the denial of his motion to dismiss, which was based on the fact that the charging document alleged that he "used" rather than "carried" his truck as a deadly weapon. The 5th DCA agreed and held that an automobile could not be carried as a deadly weapon under the robbery statute. The state appealed, but the Supreme Court affirmed while disapproving contrary holdings by the 1st DCA.

"(T)he plain and ordinary meaning of 'carry' precludes an automobile from being 'a firearm or other deadly weapon' that an offender 'carries' in the course of committing a robbery. Thus, Burris is entitled to the construction most favorable to him, i.e., that he cannot be charged . . . with robbery with a deadly weapon based on his use of an automobile while committing a robbery," Justice Bell wrote for the unanimous court.

Assistant Attorneys General Kellie A. Nielan and Wesley Heidt represented the state on appeal.

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

DUI testing - formal rule promulgation for testing procedures

The Florida Department of Law Enforcement, in order to administer the state's implied consent law for drunk driving cases, was not required to adopt rules in accordance with the Administrative Procedures Act to direct the collection, preservation and analysis of urine samples obtained by law enforcement officers, the Florida Supreme Court held.

A man who had been charged with driving under the influence argued that results of a urine test, which indicated the presence of a controlled substance,

should be excluded as evidence because no regulatory criteria for testing had been promulgated in accordance with Chapter 120, F.S. The defendant argued that part of Florida's implied consent law requires that any scientific test conducted pursuant to that law, including a urine test, be an approved test. A county court judge concluded that the implied consent law required that urine testing procedures be promulgated in accordance with the APA, and on appeal the question was certified to the Supreme Court. Narrowly reading the language of the statute, the justices concluded that section 316.1932(1)(a), which requires that blood and breath tests be approved, does not similarly require that urine tests be approved through formal rule promulgation in accordance with the APA.

"(T)he implied consent law for operators of motor vehicles does not require that urine testing methods be approved in accordance with the APA. We emphasize that we do not decide whether it would be preferable for urine tests to be approved through rule promulgation. Rather, we resolve this case by applying well-established principles of statutory construction to effectuate the legislative intent of the statute," Justice Pariente wrote for the court.

Assistant Attorneys General Robert J. Krauss and Jenny Scavino Sieg represented the state on appeal.

[*State v. Bodden*, 4/15/04]

DUI testing - formal rule promulgation for testing procedures

The Florida Department of Law Enforcement, in order to administer the state's implied consent law for drunk driving cases, was not required to adopt rules in accordance with the Administrative Procedures Act to direct the collection, preservation and analysis of urine samples obtained by law enforcement officers, the Florida Supreme Court held.

A man who had been charged with driving under the influence argued that results of a urine test, which indicated the presence of a controlled substance, should be excluded as evidence because no regulatory criteria for testing had been promulgated in accordance with Chapter 120, F.S. The defendant argued that part of Florida's implied consent law requires that any scientific test conducted pursuant to that law, including a urine test, be an approved

test. A county court judge concluded that the implied consent law required that urine testing procedures be promulgated in accordance with the APA, and on appeal the question was certified to the Supreme Court. Narrowly reading the language of the statute, the justices concluded that section 316.1932(1)(a), which requires that blood and breath tests be approved, does not similarly require that urine tests be approved through formal rule promulgation in accordance with the APA.

"(T)he implied consent law for operators of motor vehicles does not require that urine testing methods be approved in accordance with the APA. We emphasize that we do not decide whether it would be preferable for urine tests to be approved through rule promulgation. Rather, we resolve this case by applying well-established principles of statutory construction to effectuate the legislative intent of the statute," Justice Pariente wrote for the court.

[*State v. Bodden*, 4/15/04]

Standard of proof for unlawful compensation of public official

Florida's unlawful compensation act, which prohibits public officials from seeking or accepting unauthorized benefits in return for certain official actions, may be proven through circumstantial evidence and does not require the state to present direct evidence of an improper agreement, the Florida Supreme Court unanimously ruled.

Resolving a conflict between the 3rd and 4th DCAs, the justices ruled against Miami-Dade County Police Officer Fernando Castillo, who was convicted of unlawful compensation and official misconduct stemming from an incident in which he engaged in sexual relations with a woman he pulled over for speeding and drunk driving. Castillo did not arrest the woman or give her a ticket. The 3rd DCA reversed the conviction for unlawful compensation, focusing on the woman's testimony that the officer never specifically stated that he would arrest her if she did not have sex with him. The DCA concluded that because of the "absence of any spoken understanding," the state had failed to establish an agreement. The DCA required direct evidence of a specific agreement in order to prove unlawful compensation, but the Supreme Court disagreed.

"(W)e hold that circumstantial evidence can establish a violation of the unlawful compensation statute. The district court's requirement of a "spoken understanding" imposes too high a burden on the State and would prohibit prosecution of all but the most blatant violations. Public corruption has become sophisticated enough at least to expect that public officials soliciting or accepting unlawful compensation ordinarily will not be so audacious as to explicitly verbalize their intent," Justice Cantero wrote for the court. "Castillo demonstrated the

causal relationship of his actions when he told (the woman), after having intercourse with her, that she was lucky he did not give her a ticket. Thus, the competent, substantial evidence in this case demonstrates that Castillo acted with corrupt intent in accepting an unauthorized benefit – sex – in exchange for his exercising his discretion not to issue a traffic citation."

[*State v. Castillo*, 4/22/04]

1st District Court of Appeal

Justification for agency's emergency order

The 1st DCA reversed a state agency's emergency order to suspend a business' license because the agency never said why a less drastic remedy wouldn't resolve the problem the agency was trying to address.

The Department of Highway Safety and Motor Vehicles suspended the business license of a recreational vehicle dealer, acting without a hearing to order the dealer to stop selling RVs and to surrender its license due to allegations of violations during transactions. The order, which said the business' continued activity would constitute an "immediate, serious threat" to the public, was stayed by the DCA pending its decision in the appeal. "(E)mergency orders revoking a license to conduct business must explain why less harsh remedies, such as probation, a fine, or a notice of noncompliance would have been insufficient to stop the harm alleged," the DCA said. "The emergency order in the instant case does not explain whether other remedies were tried and failed or why other remedies available to the Department would not take care of the public concern. Absent these factual allegations we are required . . . to quash the emergency order of the Department."

[*Preferred RV, Inc., v. Department of Highway Safety and Motor Vehicles*, 4/6/04]

DUI - Driving record from another state

A computer printout of a motorist's driving record from another state is sufficient to prove convictions for driving under the influence, the 1st DCA held. Joseph Littman's driver license was revoked pursuant to section 322.28, Florida Statutes, because he had two convictions for DUI in Florida and four convictions for DUI in Virginia. A computer printout of his driving record from Virginia was used as evidence. Prior to this, a computer printout of a driving record had been found to be sufficient evidence to establish that a defendant was driving under a suspended license by both the 2nd and 4th DCAs. The circuit court denied Littman's first petition, finding that the computer printout was sufficient to revoke his license, and the DCA upheld this judgment.

[*Littman v. Department of Highway Safety and Motor Vehicles*, 4/6/04]

Dismissal of bid protest - bond deficiencies

Due process requires that an unsuccessful bidder for a state contract be given an opportunity to cure a bond deficiency before its bid protest is dismissed on that basis, and proper notice of the deficiency must come from the agency involved rather than a third party, the 1st DCA held.

The court reversed a Department of Transportation order dismissing General Electric's bid protest. The department dismissed the challenge after determining that the company's bonds were deficient because they listed the principal as "GE Industrial Systems," which is a separate corporate entity from the actual bidder. DOT dismissed the company's protest based on a motion from the successful bidder, Florida Drawbridges, but General Electric argued in its appeal to the DCA that it did not receive adequate notice of the deficiency in the bonds and that the bonds were not deficient because it and GE Industrial Systems are the same entity. Citing its 1994 decision in *ABI Walton Insurance Company v. DMS*, the court agreed that notice and an opportunity to cure are required before a bid protest is dismissed solely due to a deficient bond, and said General Electric should have been given these opportunities before the department dismissed its appeal.

"The Department argues that Appellant received sufficient notice of the deficiency from the motions for summary dismissal filed by Florida Drawbridges. However, this Court specifically stated in *ABI Walton* that the agency must give the protestor both notice of a bond deficiency and an opportunity to cure such deficiency. Thus, notice in the instant case is insufficient as it did not come from the Department, and such failure cannot be cured by the allegations of Florida Drawbridges' motions for summary dismissal," the DCA said.

[*General Electric v. Department of Transportation, et al.*, 4/19/04]

Agency decision abating administrative action

A state agency improperly abated action in an administrative case in order to allow appellate review, even though the parties had agreed that administrative action would be held in abeyance only while a circuit court declaratory relief action was pending, the 1st DCA concluded.

In a dispute over which of two competing businesses was the proper Tallahassee franchise holder for a line of trucks, the Department of Highway Safety and Motor Vehicles entered a final order in favor of one business – Ward International Trucks – but then agreed to abate the order while an action for declaratory relief was being heard in Leon County

Circuit Court. After the circuit court also concluded that Ward was the proper franchise holder, the department issued a brief order declining to make its order in Ward's favor final because it would not be "appropriate" to do so until the competing company's appeal to the DCA was resolved. This was error, the DCA held.

"(T)he circuit court's decision that respondents enjoy no franchise rights. . . is final. The agency's action here, without explanation or basis in law, denied petitioners the benefit of the final order they had already obtained," the DCA said. "The very nature of the damage caused by the abatement here is delay, with the attendant loss of the immediate enjoyment of rights to which the challenging party would otherwise be entitled."

[*International Truck and Engine Corporation, et al., v. Capital Truck, Inc., et al.*, 4/28/04]

2nd District Court of Appeal

Collateral impeachment testimony

An officer's testimony about whether the brakes on the defendant's vehicle were functional constituted improper impeachment on a collateral issue, the 2nd DCA held.

Michael Foster appealed his conviction for leaving the scene of a crash with injury. Foster told police he was unable to stop at the intersection because his brakes failed. An officer testified that based on his testing and inspection, Foster's brakes were functional. The trial court allowed the testimony, concluding that it went to Foster's credibility. Foster appealed on the basis that the testimony amounted to impermissible impeachment testimony. The DCA agreed and reversed for a new trial.

"The effect of the collateral impeachment testimony was to give the impression that Foster's poor driving rather than defective brakes caused the accident. However, the cause of the accident was not relevant to the crime charged, and the testimony impeaching Foster as to the cause of the accident could have swayed the jury to find Foster guilty for an improper reason," the DCA said.

Assistant Attorney General Jenny Scavino Sieg represented the state on appeal.

[*Foster v. State*, 4/7/04]

Search warrant and probable cause

A search warrant was rendered invalid for lack of probable cause because the supporting affidavit was based on speculation rather than a fair probability, that cocaine was located inside the defendant's home, the 2nd DCA held.

Convicted on cocaine-related charges, Nestor Garcia appealed the denial of his motion to suppress in which he challenged the warrant authorizing a

search of his home. An affidavit in support of the search warrant was based on information provided to a detective by a confidential informant, and the affidavit failed to mention that the detective had only used the informant on one prior occasion. The affidavit omitted the fact that the informant had never been in Garcia's home and that it had been two months since the informant had purchased cocaine from Garcia. The DCA reversed the conviction and remanded for further proceedings.

"The affidavit in this case fails to establish a nexus between the object of the search, cocaine, and Garcia's residence," the DCA said. "The state argues that the search can be upheld on the good faith exception to the exclusionary rule. . . We disagree. Where, as here, the supporting affidavit fails to establish probable cause to justify a search, Florida courts refuse to apply the good faith exception."

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

[*Garcia v. State*, 4/14/04]

Standing to challenge search

A defendant had no standing to challenge the search and seizure of contraband found next to her in a home where she was a casual guest with no legitimate expectation of privacy, the 2nd DCA held. Georgette Washington was arrested for possession of contraband with the intent to distribute. Washington was arrested after officers entered a residence and found 10 baggies of marijuana in plain view next to Washington. She told officers she was a guest of the owner and planned to stay only a few more hours while she enjoyed the party that was in progress. The evidence was suppressed but the state appealed, arguing that Washington lacked standing to challenge the search pursuant to a search warrant. The DCA agreed.

"Ms. Washington, enjoying only the status of a short-term, nonovernight, casual guest, possessed no legitimate expectation of privacy in the residence where she was arrested. Therefore, because she lacked standing to object to the search of the home and the seizure of the contraband found next to her in plain view on the floor, the trial court erred in granting her motion to suppress," the DCA said. Assistant Attorney General Sonya Roebuck Horbelt represented the state on appeal.

[*State v. Washington*, 4/23/04]

3rd District Court of Appeal

DUI - Inadmissibility of a police officer's testimony

The smell of alcohol on a driver's breath, his observably bloodshot and watery eyes, and the

uncontested fact that he had just crashed his car into a parked police vehicle, were more than sufficient to establish probable cause for a lawful DUI arrest, the 3rd DCA held.

Alessandro Possati was arrested and cited for DUI after failing field sobriety tests. When he chose not to submit to a breath test, his license was suspended under statutory authority. During his formal review hearing, one of the arresting officers was unable to recall Possati's performance on the sobriety tests or his arrest, but the hearing officer sustained the suspension. However, when Possati petitioned the circuit court for review, they quashed his suspension on the basis of a due process violation.

The DCA decided that the circuit court seemingly went astray in its analysis by addressing violations that were wholly unnecessary for a probable cause determination and by so doing, made Possati exempt from the requirements of the DUI statute. Given the uncontested observations made by the other arresting officer, the arrest for DUI and subsequent driver license suspension for refusal to submit to a breath test were justified.

[*Department of Highway Safety and Motor Vehicles v. Possati*, 2/11/04]

Probable cause for SWAT assault - informant

Police officers lacked probable cause to make an arrest where they failed to confirm that the defendant was an informant's drug supplier and was not in possession of drugs or weapons at the time of his arrest, the 3rd DCA held.

Michael Gonzalez was arrested and charged with trafficking in heroin based on an informant's description of him as her drug supplier. After being arrested for heroin possession, the informant cooperated with police and arranged to meet Gonzalez at a fast-food restaurant parking lot to buy heroin. Police saw a man matching the general description given by the informant as he went through the drive-through and parked his car to eat lunch. The SWAT team rushed in at gunpoint, exploded a stun grenade to distract Gonzalez, then handcuffed him and forced him to the ground. After officers searched the car and found heroin, the informant identified Gonzalez as her supplier. The trial court granted Gonzalez's motion to suppress on the basis that the detention constituted an arrest and the arrest was not based on probable cause. The DCA agreed and affirmed.

"Gonzalez was not simply detained, he was subjected to a full-blown arrest of the type one would expect surrounding the capture of a dangerous terrorist. When combined with a SWAT team converging on a lone, unarmed individual having lunch at Wendy's, the net result is more akin to Iraq than the United States of America. An investigatory

stop is not generally accompanied by a stun grenade, followed by an assault SWAT team operation whereby an individual is thrown to the ground at gunpoint, and handcuffed faced down on a parking lot. At that point, the individual has effectively been placed under arrest even if not told he has been placed under arrest. Our review of the record leaves no doubt that this was an arrest," the DCA said. "Although we appreciate the difficult and dangerous work that police officers do on a daily basis, it appears that the officers jumped the gun in making the arrest based solely on the description given to them by (the informant)."

Assistant Attorney General Frank. J. Ingrassia represented the state on appeal.

[*State v. Gonzalez*, 3/10/04]

4th District Court of Appeal

DUI - police use of urine test

Approval of urine testing procedures by the Florida Department of Law Enforcement is not required before police can administer tests for driving under the influence, the 4th DCA held.

In two consolidated cases, the state appealed a trial court's suppression of urine test results obtained under Florida's implied consent law. The DCA ruled in favor of the state and reversed the suppression order. In reaching its decision, the court agreed with an earlier decision by the 5th DCA and cited a 2003 statutory amendment that exempts urine testing from FDLE approval.

Certifying conflict with the 2nd DCA, the court concluded, "In 2003, the legislature amended section 316.1932(1)(a) in a way that unambiguously reflects the legislative intent to exempt urine testing from any FDLE approval requirement."

Assistant Attorneys General Richard Valuntas and Donna L. Eng represented the state on appeal.

[*State v. Montello and Costa*, 3/10/04]

Sufficiency of affidavit supporting search warrant

Although an affidavit failed to state with specificity the date an informant saw contraband at the defendant's home, it was not rendered fatally defective because it set forth sufficient circumstances justifying the search warrant, the 4th DCA held.

Boyd Johnson appealed the denial of his motion to suppress on grounds that the search warrant was illegal because the supporting affidavit did not specify the time when he met with an informant. The affidavit stated that "during the week ending 3/22/02," the informant witnessed Johnson as he engaged in a drug transaction. The affidavit also set forth the basis for accepting the reliability of the informant. The DCA upheld the warrant, noting that

even if the warrant was facially invalid, it qualified for the good faith exception to the exclusionary rule.

The DCA affirmed.

"(I)t is plausible to conclude that the phrase, 'during the week ending 3/22/02,' refers to the time when the informant went to defendant's residence where the informant saw the contraband and drug transaction. Yet it may also mean something else. In this regard the affidavit is merely ambiguous. If so, we are charged to defer to the trial court's probable cause determination," the DCA said.

Assistant Attorney General Donna L. Eng represented the state on appeal.

[*Johnson v. State*, 4/14/04]

5th District Court of Appeal

Validity of security changes after 9/11 attacks

The need for heightened security in the wake of the 9/11 terrorist attacks justified an aviation authority's unilateral decision to deny access badges to a broader group of employees who had been charged with certain crimes, despite federal standards that were less restrictive, the 5th DCA held.

The court rejected a labor union's appeal of the actions of the Greater Orlando Aviation Authority (GOAA), which adopted a new employee security policy three months after the terror attacks. In denying access badges to a wider range of employees, the authority effectively terminated them because all employees were required to have an access badge in order to keep their jobs. Federal regulations called for denial of access to secured areas for employees who had been convicted of any of a list of disqualifying offenses or had been found not guilty by reason of insanity. The aviation authority unilaterally expanded the policy to include cases where there was a no-contest plea or adjudication was withheld, prompting the union to file an unfair labor practice charge. The state Public Employees Relations Commission concluded that the aviation authority's action was justified, and the DCA agreed.

"Because GOAA's employees are entrusted with public safety, and all GOAA employees must have access to all secured areas, exigent circumstances warranted a unilateral decision by GOAA," the court said. "Given that the purpose and mission of GOAA is to provide public safety and promote safe and efficient air commerce, GOAA was justified in acting unilaterally in this case."

[*Laborers' International Union of North America v. Greater Orlando Aviation Authority*, 3/5/04]

DUI and speedy trial

A traffic citation did not begin the running of a speedy trial period where the defendant was neither

arrested nor issued a notice to appear, the 5th DCA held.

Daniel Coughlin was in a traffic accident and fell during a field sobriety test. A blood sample from Coughlin revealed unlawful alcohol levels. A month later, the investigating officer issued and mailed Coughlin a Uniform Traffic Citation that specified the date and nature of the violation, but did not indicate any date, time or place for Coughlin to appear. The citation indicated that Coughlin would be notified when he was required to appear in court. Coughlin's DUI prosecution was dismissed on speedy trial grounds, but the DCA concluded that the trial court failed to apply the correct law and quashed the dismissal order.

"All the traffic citation indicated was 'to be notified.' There was no requirement that Coughlin respond in any way. Thus, for the purposes of Rule 3.191, he was not taken into custody, so the speedy trial time had not expired when he filed his motion for discharge," the DCA said.

Assistant Attorney General Belle Schumann represented the state on appeal.

[*State v. Coughlin*, 3/26/04]

Search and seizure - prolonged detention

A 35-minute traffic stop was unreasonably prolonged where the initial stop exceeded the time necessary to write a citation, and therefore evidence obtained through a canine search was inadmissible, the DCA held.

Zarek Williams appealed his conviction for trafficking in cocaine and firearms-related charges. Williams was stopped for a window tint and tag violation. Four minutes after initiating the stop, the officer requested a drug dog unit. Thirty-five minutes after the stop, Williams was issued the citation and the dog alerted during a search of the vehicle. Williams claimed the trial court erred by denying his motion to suppress on the basis that he was illegally detained after being issued the citation. The DCA agreed.

"(W)e cannot ignore the fact that the officer actually had completed the citation and handed it to Williams before the drug dog performed the search of the vehicle. Even if it was reasonable to take thirty-five minutes to obtain the necessary information and issue the citation, the stop had ended before Williams was directed to step to the median, citation in hand, so the dog could proceed with the search," the DCA said.

Assistant Attorney General Rebecca Rock McGuigan represented the state on appeal.

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

Traffic stop - continued detention illegal

Continued detention following a valid traffic stop became illegal once the officer had satisfied the purpose of the stop by verifying the validity of the

defendant's driver's license, the 5th DCA held.

Gregory Hoover appealed his conviction for possession of cocaine. During a routine traffic stop, a record check revealed that Hoover was not the owner of the vehicle he was driving. Officer Marcus Bullock, who made the stop, testified that Hoover appeared nervous and fidgeted, sweated and stumbled in his speech. After verifying that Hoover's driver's license was valid, Bullock asked Hoover to step out of the vehicle. Cocaine fell to the ground as Hoover exited. On appeal, Hoover challenged the denial of his motion to suppress the cocaine, and the DCA reversed.

"We agree that Bullock's initial stop of Hoover was valid. However, absent a well-founded suspicion of criminal activity, once a police officer accomplishes the purpose of a traffic stop, a continued detention is illegal," the DCA said. "Bullock satisfied the purpose of his stop once he verified that Hoover had a valid driver's license."

Assistant Attorney General Anthony J. Golden represented the state on appeal.

[*Hoover v. State*, 4/30/04]

Approved by: Enoch J. Whitney
General Counsel

Edited by: Heather McLellan

Judson M. Chapman
Assistant General Counsel

Michael J. Alderman
Assistant General Counsel

Heather Rose Cramer
Assistant General Counsel

Rosena H. Finklea
Assistant General Counsel

Kathy A. Jimenez
Assistant General Counsel

Bryan T. Pugh
Assistant General Counsel

Carlos J. Raurell
Assistant General Counsel

Jason Helfant
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 care to review other Legal Bulletins, please note the web site address: DHSMV Homepage <http://www.hsmv.state.fl.us/> or FHP Homepage (www.fhp.state.fl.us)