
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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U.S. Supreme Court

Sovereign immunity - state liability under ADA

States are not immune from being sued under the Americans with Disabilities Act by disabled citizens seeking to gain access to courthouses, a divided U.S. Supreme Court held.

The court held that Title II of the ADA is a proper exercise of Congress' power under the Fourteenth Amendment and therefore validly abrogates states' sovereign immunity in cases involving the "fundamental right of access to the courts." The court ruled in favor of two Tennessee residents, both of whom are paraplegics confronted with obstacles as they sought access to local courthouses. The two sued under the ADA, claiming the state failed to accommodate their disabilities. The State of Tennessee sought to have the case dismissed on Eleventh Amendment immunity grounds but the Supreme Court held 5-4 that states are not entitled to immunity under such circumstances.

"(O)rdinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end," Justice Stevens wrote for the court.

[*Tennessee v. Lane*, 5/17/04]

Search incident to arrest

Under the "search incident to arrest" exception to the Fourth Amendment, police may search the passenger compartment of a parked car even though the suspect gets out before officers reach the vehicle, the U.S. Supreme Court held.

Marcus Thornton pulled into a parking lot and exited his car before a police officer could stop and issue him a traffic ticket. After finding two bags of drugs on Thornton, the officer searched the car and found a gun. Thornton challenged the firearm conviction on grounds that the gun was obtained through an unconstitutional search. He argued that the officer

did not make contact with him until after he left the vehicle and therefore the search did not fall within the warrant exception that allows police to search the person being arrested and the area within the arrestee's immediate control. The Supreme Court had previously established that officers may conduct searches when arresting someone inside the vehicle, and by a 7-2 vote the justices said the same reasoning applies when the person is near the vehicle.

"In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle," Chief Justice Rehnquist wrote for the court. "It would make little sense to apply two different rules to what is, at bottom, the same situation."

[*Thornton v. United States*, 5/24/04]

Miranda warnings - juvenile interrogations

Police are not automatically required to take into account a minor suspect's youth in deciding whether to give a *Miranda* warning, a sharply divided U.S. Supreme Court held.

The court said a Los Angeles detective did not violate 17-year-old Michael Alvarado's constitutional rights when she questioned him for two hours at a police station before advising him that he could end the interview or have an attorney present. During the interrogation Alvarado admitted to stealing the victim's truck and helping the killer hide the murder weapon. A state court affirmed Alvarado's conviction on the basis that *Miranda* warnings were not required because he was not in custody during the interview. A federal trial court agreed, but the 9th U.S. Circuit Court of Appeals reversed, concluding that it was error for the lower court to fail to take into account Alvarado's youth and inexperience when evaluating whether he felt free to leave the interview. In a 5-4 vote, the Supreme Court justices disagreed. Justice Kennedy delivered the majority opinion, finding that the 9th Circuit was "nowhere close to the mark" when it granted Alvarado habeas relief. According to the majority, that court "ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics – including his age – could be viewed as creating a subjective inquiry." The dissent

asserted that it was not reasonable to conclude that Alvarado would have known that he was not actually in custody and was therefore free to leave the police interrogation at any time.

[*Yarborough v. Alvarado*, 6/1/04]

Nevada "stop and identify" law upheld

Individuals do not have a constitutional right to refuse to identify themselves when stopped by police under reasonable suspicion, the U.S. Supreme Court held in a 5-4 decision.

The justices affirmed a Nevada man's misdemeanor conviction for refusing to give his name or show identification to police during a valid *Terry* stop.

Larry Dudley Hiibel was arrested after an officer asked him eleven times for identification and Hiibel refused each time. Hiibel was convicted of obstructing the officer in the discharge of his duties and fined \$250. Hiibel appealed on Fourth and Fifth Amendment grounds. The court concluded that the conviction did not violate the Fourth Amendment.

"Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment," Justice Kennedy wrote for the court. "Obtaining a suspect's name in the course of a *Terry* stop serves important government interests."

In resolving the Fifth Amendment issue, the court said, "Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances." The justices left unresolved a determination of the circumstance in which there is a substantial allegation that furnishing identity at the time of a stop would have given police a link in the chain of evidence needed to convict the individual of a separate offense.

[*Hiibel v. Sixth Judicial District Court of Nevada*, 6/21/04]

Requirements re: *Miranda* warnings

Where police used the tactic of deliberately withholding *Miranda* warnings, obtaining a confession and then giving a *Miranda* warning before eliciting a second confession, both confessions violate the Fifth Amendment and are inadmissible, the U.S. Supreme Court held. In a pair of rulings, the court said the two-step interrogation process of deliberately questioning a suspect twice, the first time without *Miranda* warnings, is usually improper and warned police to stop utilizing the strategy. The court said the interrogation practice is sometimes used by law enforcement because suspects are considered more likely to talk before being warned of their right to remain silent, not realizing that the initial confession can be used against them. In a case from Missouri,

officers questioned Patrice Seibert and obtained a confession, then gave her a 20-minute break, provided a *Miranda* warning and then resumed the interrogation. Officers confronted Seibert with her prewarning statements and got her to repeat the information. The justices, in a 5-4 decision, said deliberately questioning a suspect twice – once without a *Miranda* warning – is usually improper. In a separate case from Colorado, the court held that failure to give a suspect full *Miranda* warnings does not require the suppression of the physical evidence derived from the suspect's unwarned but voluntary statements. In that case, officers began reciting the warning but the suspect stopped them, saying he knew his rights. He then directed officers to a gun he was not supposed to possess. An appeals court said the gun could not be used as evidence because the suspect had not been given a proper *Miranda* warning, but the Supreme Court said that failure did not automatically render the evidence inadmissible.

[*Missouri v. Seibert*, 6/28/04]

[*U.S. Patane*, 6/28/04]

11th U.S. Circuit Court of Appeals

ADA - policy prohibiting outside jobs for "disabled" employees

Police officers classified as "disabled" by their government employer and thus assigned to light or limited duty are not automatically covered by the protections of the Americans with Disabilities Act, the 11th U.S. Circuit Court of Appeals held.

The court upheld a judge's decision to throw out a \$160,000 jury award in favor of five Miami police officers who claimed they were discriminated against by a city policy prohibiting light and limited duty officers from holding off-duty jobs. The officers claimed the policy discriminated against them based on their disabilities, but the 11th Circuit said the officers showed no evidence that their impairments substantially limited any major life activity, which is a requirement under ADA.

"Assuming . . . that the Officers were precluded by their impairments from working as police officers, or alternatively that the City perceived them as being so precluded, the only question remaining is whether 'police officer' is a 'class of jobs' or 'broad range of jobs' for ADA purposes. If so, then the Officers were indeed disabled under the ADA, and we should reinstate the jury's verdict," the 11th Circuit said. Citing cases from other circuits, the court held that "police officer" is too narrow a range of jobs to constitute a "class of jobs" as that term is defined in federal regulations.

[*Roszbach, et al., v. City of Miami*, 6/7/04]

Florida Supreme Court

Death case affirmed

The Florida Supreme Court upheld the death sentence Paul Howell received for the bombing murder of a Florida Highway Patrol trooper, rejecting all claims raised in Howell's postconviction appeal. In 1992, Howell placed a pipe bomb in a gift-wrapped microwave oven and paid to have it delivered to a woman he feared could link him to a prior murder. Trooper Jimmy Fulford was killed when he opened the package during a search of the vehicle carrying the bomb. In his Rule 3.851 appeal, Howell contended that his trial attorney was deficient in failing to assert that the trooper contributed to his own death by violating FHP policies when he opened the package. The justices unanimously rejected Howell's argument.

"(I)t was almost certain that Howell's actions would result in the death of someone, if not his intended victim. Therefore, the alleged policy violation by the trooper in searching the package's contents would not have negated any of the elements of first-degree murder, including that the death was caused by Howell's criminal act," the court said.

Assistant Attorney General Charmaine M. Millsaps represented the state on appeal.

[*Howell v. State*, 5/6/04]

DUI - driver's license revocation

A trial court had authority to permanently revoke a defendant's driver's license for a second DUI, the Florida Supreme Court said, affirming a decision of the 2nd DCA.

Nicole Stoletz was convicted of DUI and felony driving while license suspended. The DUI conviction was her second in five years. Stoletz was sentenced to five years in prison for driving with a suspended license, followed by a year of probation for the DUI. In addition, her license was permanently revoked under section 316.655(2), F.S., which generally provides for the revocation of driver's licenses. On appeal, Stoletz challenged the lifetime revocation, arguing that the trial court lacked the authority to permanently revoke her license under the statute. Instead, Stoletz contended that a more specific statute, section 322.28(2)(a)(2), applies and only authorizes a revocation for five years, but no longer. The justices disagreed.

"Although we find that when a defendant is convicted of a DUI, a trial court should utilize the statute which specially applies to DUI convictions to determine the permissible license revocation period for the DUI conviction, in this case, section 316.655(2) is also applicable because the defendant was convicted of another driving offense," the court said. "When a defendant is convicted of another offense in chapter 316 or any other law of this state

regulating motor vehicles, and the totality of the circumstances merits a suspension or revocation, a trial court may utilize section 316.655(2) to suspend or revoke the defendant's license."

[*Stoletz v. State*, 5/20/04]

Agency's duty of care

In the context of governmental tort litigation, written agency protocols, procedures and manuals do not create an independent duty of care on the part of the agency toward individual Floridians, the Florida Supreme Court said in a sovereign immunity case arising out of a fatal highway accident.

The court said a written policy or manual may be instructive in determining whether the alleged tortfeasor acted negligently in fulfilling an independently established duty of care, but by itself does not establish such a legal duty toward individual members of the public. The court ruled in favor of the Florida Highway Patrol in a lawsuit brought by the families of two women who were killed when their vehicle slammed into a stalled tractor-trailer after an FHP dispatcher received a phone call about the stalled vehicle but failed to send a trooper to the scene.

"We in no way condone FHP's failure to take prompt action when it was alerted to the potential danger caused by the stalled tractor-trailer. However, under settled principles of Florida law, having not responded to the scene to become directly involved in the roadway circumstances, FHP had no legally recognized particular tort duty which would generate or impose governmental tort liability with regard to responding to the scene, the issuance of warnings of the potential danger, or provision for the removal of the tractor-trailer under the circumstances presented in this case," the court said in a 5-2 decision.

In a concurring opinion, Chief Justice Anstead observed, "(O)ur case law suggests that government can make the public policy decision to provide emergency services without the government also assuming liability for the reasonableness of the response in each of the thousands of incidents that occur each day in Florida. . . . The potential situations are endless, and, of course, no one wants to see these tragedies. But the reality is they are possible every time 911 is called, and that is the specter we face if we are to recede from our prevailing law. So, of course the police and other emergency responders have a duty to respond to emergencies and they carry a heavy burden each time they are called. To date, however, we have declined to recognize the government's liability in tort each time a call for help is received."

[*Pollock and Leeds v. Florida Highway Patrol*, 6/10/04]

1st District Court of Appeal

Constructive possession of cocaine

Trial evidence, even when viewed in the most favorable light to the state, failed to prove that a defendant found sleeping in a bedroom when police executed a search warrant was in constructive possession of the entire amount of cocaine found in the apartment, the 1st DCA held.

John Hill was convicted of trafficking in between 200 and 400 grams of cocaine. Hill was arrested after police officers found sizable caches of cocaine hidden in dresser drawers. A smaller amount of powdered cocaine, 4 grams, was seized from a window sill near where police found Hill sleeping. An officer testified that during the search of the entire apartment Hill, who was in the living room at the time, was overheard to tell a companion "they found it." On appeal, Hill contended that the trial court erred in denying his motion for judgment of acquittal, arguing that his statement could have referred to the smaller amount on the window sill. The DCA agreed and reversed.

"Hill's statement, even when coupled with the items in plain view, such as a wire whisk and scales, neither permits the inference that Hill knew of the presence of the entire amount of cocaine seized from the hidden location in the apartment nor permits the inference that he controlled the entire amount," the DCA said. "The evidence, however, does support a conviction for the lesser offense of possession of cocaine."

Assistant Attorney General Sherri T. Rollison represented the state on appeal.

[*Hill v. State*, 5/13/04]

2nd District Court of Appeal

Search and seizure - vehicle stop

A police officer was not justified in frisking a passenger during a valid vehicle stop where he could not articulate any factual basis for believing the passenger was armed, the 2nd DCA held.

Adrian Moore was a passenger in a vehicle that was involved in a low-speed chase following a traffic stop. After police were able to stop the car, they searched Moore even though he showed no suspicious bulge in his pockets and made no furtive movements. Moore was arrested for possession of an altered driver's license. The trial court denied a defense motion to suppress the driver's license, and Moore appealed his conviction. The DCA reversed and remanded for further proceedings.

"(T)he officer articulated no basis that would justify the need to frisk Moore," the DCA said. "The officer's mere belief, not grounded in any factual support, did not justify a frisk of Moore. However, even if the frisk

were justified, nothing justified the officer's removing items from Moore's pockets without his consent after the initial patdown assured the officer's safety." Assistant Attorney General Patricia A. McCarthy represented the state on appeal.

[*Moore v. State*, 5/7/04]

Search and seizure - investigatory stop

A trial court erred by using a probable cause standard of review instead of reasonable suspicion where an encounter between officers and the defendant was an investigatory stop and not an arrest, the 2nd DCA held.

Russell Bell was charged with possessing or capturing an alligator, and moved to suppress evidence relating to the search and seizure.

Evidence showed that wildlife officers responded to an area where gunshots had been reported and saw Bell exiting a boat with two bags. Bell dropped the bags on the boat when the officers called out for him to stop. Live baby alligators were discovered in the mesh bags and Bell was arrested. The trial court granted Bell's motion to suppress the evidence, but the DCA reversed.

"(I)t is not clear to this court whether the trial court has actually decided that the alligators were seized 'as a result of the stop.' These alligators were visible and audible through the mesh bags. There was another man in the boat who had received no orders from the officers when the alligators in the boat were discovered. Thus, it is not clear to this court that all of the alligators were seized as the fruit of an illegal detention. On remand, the trial court may need to clarify the scope of suppression if it again decides to suppress evidence," the DCA said.

Assistant Attorney General Marilyn Muir Beccue represented the state on appeal.

[*State v. Bell*, 5/12/04]

Search and seizure - abandonment of jacket

A search of a defendant's jacket was legal because he abandoned it as police officers attempted to grab him by the jacket as he attempted to flee during an investigatory stop, the 2nd DCA said.

The state challenged the trial court's order suppressing drug contraband found in Robert Collins' jacket. Officers conducting surveillance at a location known for drug sales observed a hand-to-hand transaction between Collins and another individual. As officers approached and asked Collins to step away from a group, Collins attempted to flee. Officers reached to stop him but grabbed his jacket instead. Collins fled, essentially running out of his jacket. Contraband was found in a jacket pocket, but the trial court suppressed the evidence on the grounds that police pulled the jacket off and lacked probable cause to search it. The state appealed, and the DCA reversed.

"Here it can be inferred by Collins' action of leaving his jacket behind in an attempt to flee from police that he did not intend to retrieve it," the DCA said. "(B)ecause Collins abandoned the jacket, the search was legal."

Assistant Attorney General John M. Klawikofsky represented the state on appeal.

[*State v. Collins*, 6/09/04]

Search and seizure - traffic stop for cracked windshield

Police were not justified in stopping a car for a cracked windshield because the crack neither blocked the driver's view nor made the car unsafe, the 2nd DCA held, noting that Florida law does not prohibit driving with a cracked windshield.

Police found marijuana after they stopped Tristan Hilton's car because it had a seven-inch crack in the upper, tinted corner of the windshield. At a suppression hearing officers testified that they intended to issue Hilton a traffic citation for a cracked windshield. The trial court denied a defense motion to suppress the marijuana, and Hilton appealed. The DCA held that the evidence should have been suppressed because officers lacked reasonable suspicion or probable cause to believe Hilton had violated the Florida traffic code.

"Because section 316.2952 merely requires a car to have a windshield, but does not contain requirements for the 'proper condition' of the windshield, driving with a cracked windshield would be a traffic violation only if it violated the unsafe condition portion of (statutes)," the DCA said.

"(U)nder the circumstances of this case the officers had no authority to stop the car."

Assistant Attorney General Marilyn Muir Beccue represented the state on appeal.

[*Hilton v. State*, 6/18/04]

3rd District Court of Appeal

Public employees - lawsuit after pursuing administrative remedies

A public employee who utilized her civil service administrative remedies is not entitled to bring a separate action in circuit court to challenge the validity of the disciplinary action taken against her, the 3rd DCA held.

The court ruled against Sherry Moreland, a former Miami-Dade County jail guard who was suspended and demoted after she became romantically involved with an ex-inmate who she met at the jail. Moreland was at first fired and appealed her termination pursuant to the county's civil service appeals process, which resulted in the suspension and demotion. A year after she was reinstated, Moreland filed a civil complaint in circuit court. The

county asked the DCA to prohibit part of Moreland's complaint because she voluntarily utilized the administrative review process provided by the county, and the DCA agreed.

"Where a civil service employee pursues civil service administrative remedies, the employee is precluded from bringing an independent action in Circuit Court to challenge the propriety of the discharge," the DCA said.

[*Miami-Dade County v. Moreland*, 5/26/04]

Administrative hearing - right to counsel

Because there is no constitutional right to counsel in state administrative proceedings involving discipline of a licensed professional, an adverse administrative action cannot be appealed on the grounds of ineffective assistance of counsel, the 3rd DCA said. The court rejected the argument of Antonio Prieto, whose real estate appraiser license was suspended for five years with a \$3,000 fine after an administrative hearing. Contending on appeal that his attorney at the administrative hearing was ineffective, Prieto requested relief from the suspension order based on ineffective assistance of trial counsel.

Denying Prieto's request, the DCA cited a year-old Florida Supreme Court decision regarding a similar argument in the context of dependency proceedings. Because there is no constitutional right to counsel under the circumstances of the case, the court found, there is no right to collaterally challenge the effectiveness of counsel.

[*Prieto v. Department of Business and Professional Regulation*, 6/16/04]

4th District Court of Appeal

Agency's denial of professional license

Minor technical infractions that mar an application for professional licensure by a state agency do not amount to clear and convincing evidence of a lack of good moral character sufficient for the agency to deny a license, the 4th DCA held.

The court overruled a decision by the state Construction Industry Licensing Board to deny a license for a man who wanted to open a swimming pool/spa business in Palm Beach County. The board, part of the Department of Business and Professional Regulation, denied the license application after holding what the DCA called a "very brief" informal hearing. Reviewing the record, the DCA found that Michael Lapp had committed a small number of minor or technical violations, but none that constituted statutory grounds for denying him a license.

"A review of the record indicates that the alleged misstatements of fact made on Lapp's application were insignificant and not intended to mislead the

Licensing Board. These technical misstatements do not constitute clear and convincing evidence of a lack of good moral character," the DCA said.

[*Lapp v. Department of Business and Professional Regulation*, 5/12/04]

Search and seizure - investigatory stop

An encounter between an officer and a defendant was transformed from a consensual encounter to an investigatory stop when the officer shone his flashlight in the defendant's face, approached with a hand on his weapon and ordered the defendant to stand, the 4th DCA held.

An officer first saw Michael Williams sitting on a couch at a neighborhood hang-out. At first, the officer testified, he did not suspect Williams of any criminal activity but was put on guard when Williams lifted his leg and tossed an item under it. The officer discovered drug contraband when Williams complied with the officer's instruction and stood up. The trial court denied Williams' motion to suppress on the basis that the officer lacked reasonable suspicion, but the DCA reversed.

"We find that a reasonable person would not feel free to end the encounter and to leave under circumstances where an officer shines a flashlight in his or her face, approaches with his hand on his weapon, and directs him or her to stand. Since the contraband in the instant case was discovered as a consequence of a stop that was not supported by reasonable suspicion, the evidence should have been suppressed," the DCA said.

Assistant Attorney General Jeanine M. Germanowicz and Certified Legal Intern Cherish De La Cruz represented the state on appeal.

[*Williams v. State*, 5/12/04]

Adequacy of Miranda warning

Because police officers failed to tell a suspect that she was entitled to have an attorney present during questioning or that she could stop the interrogation at any time, her confession was inadmissible, the 4th DCA held.

Nneka West was arrested in connection with a murder and confessed during police questioning. At a suppression hearing, a detective testified that he read West her rights from a standard Miranda form used by the Broward County Sheriff's Office. The detective also testified that he explained to West, "You have the right to talk to a lawyer and have a lawyer present before any questioning and if you cannot afford a lawyer, one will be appointed . . ." However, the detective did not explain that West could have a lawyer during the actual questioning or that she could stop the interrogation at any time. Evidence during the hearing focused on whether West, who is mildly retarded, had the ability to waive her rights. The DCA reversed the conviction and

ordered a new trial.

"The problem . . . (is) that appellant was not informed that she was entitled to have counsel present during interrogation or that she could stop the interrogation at any time. Nor did the state produce evidence that appellant knew this and knowingly waived these rights. Her confession should accordingly have been suppressed," the DCA said.

Assistant Attorney General Sue-Ellen Kenny represented the state on appeal.

[*West v. State*, 6/16/04]

Search and seizure - use of drug-sniffing dog

The use of a drug-sniffing dog, which alerted at the defendant's front door, constituted an illegal search of a private residence for Fourth Amendment purposes, the 4th DCA held.

Drugs were found in James Rabb's home pursuant to a search warrant, which had been issued based on a dog-sniff at the exterior door. While investigating a tip that Rabb was growing marijuana in his home, law enforcement officers found marijuana in Rabb's vehicle, along with books and videos on how to grow cannabis. A detective subsequently walked his drug-sniffing dog by Rabb's residence and the dog alerted at the front door. Officers obtained a search warrant for the residence and found an operation to grow cannabis inside. The trial court suppressed evidence taken from Rabb's home, but the state appealed. The DCA affirmed the suppression order.

"(T)he use of a dog sniff to detect contraband at a house does not pass constitutional muster. The use of such a technique by law enforcement constitutes an illegal search," the DCA said. "Based on the reasonable expectation of privacy recognized by both law and society to be associated with a house, law enforcement's use of the dog sniff without a warrant constituted a search that was not permitted by the Fourth Amendment. Furthermore, absent the dog sniff, there was no independent lawful evidence establishing probable cause to issue a warrant, irremediably tainting the evidence obtained by the search of Rabb's house based on an invalid warrant."

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

[*State v. Rabb*, 6/23/04]

5th District Court of Appeal

Timeliness of administrative appeal

In an unemployment compensation appeal, as long as the appellant was properly notified of the unfavorable decision and the deadline for appealing, the case cannot proceed if the appeal was filed too late – no matter how good the reason for being late,

the 5th DCA held.

A woman who sought to appeal an adverse order by the Unemployment Appeals Commission missed the filing deadline because, she said, she accidentally left her file in her desk at work and her employer was closed for a holiday. Ruling against the woman, the DCA noted that the timely filing of the notice is what gives the commission its jurisdiction.

"In the absence of timely filing, UAC lacks the power to act. The quality of the excuse does not matter so long as she was notified of the referee's decision, thereby satisfying due process," the DCA said.

[*Suarez v. Unemployment Appeals Commission*, 5/7/04]

Workplace sexual harassment

Sexual harassment in the workplace is no less improper just because the victim and other workers fail to complain or on-site supervisors choose to ignore policies against the misconduct, the 5th DCA said.

The court denied unemployment compensation benefits to an aerospace worker who was discharged for five weeks stemming from incidents of mutual sexual "horseplay" with two coworkers, a male and a female. At issue was whether the worker was properly discharged for misconduct – violating the employer's sexual harassment policies – and therefore was ineligible for unemployment benefits. An appeals referee ruled in the worker's favor, concluding that his actions did not amount to misconduct because the on-site supervisors disregarded it, the victim and other employees failed to complain and the incident happened two years before the worker was discharged. None of those reasons offsets the fact that the worker's actions amounted to misconduct, the DCA said.

"(T)he victim's acquiescence in or the failure of on-site supervisors to enforce the policy does not constitute a waiver or estoppel against the employer. Historically, this type of behavior has been condoned by supervisors or has gone unpunished in the workplace. A key reason such policies were made express and emphasized through training is to make clear that such behavior is misconduct, without regard to complaint by the victim or rebuke by the on-site manager. This is essential because such conduct adversely affects others in the workplace, not just the victim or participant," the DCA said.

"Such misconduct does not dissipate with the passage of time any more than would an employee's theft, breach of confidentiality or other misdeed."

[*Lockheed Martin Corporation v. Unemployment Appeals Commission*, 5/28/04]

Search and seizure - traffic stop

Despite the absence of a traffic violation, a vehicle stop was justified where an officer observed the

vehicle cross the "fog line" on the Florida Turnpike three times, the 5th DC held.

While on patrol, a deputy sheriff saw a vehicle driven by Alejandro Yanes weave across the fog line three times within a mile. Believing the driver to be impaired, the deputy stopped the vehicle. The deputy smelled alcohol on Yanes' breath, and a canine unit was called, leading to the discovery of drugs in the vehicle. Yanes pled guilty to trafficking in cocaine. On appeal, Yanes argued that the stop was improper because he crossed the line without endangering anyone and therefore did not violate the single-lane statute or provide police with reasonable suspicion. The DCA disagreed.

"Here, there was evidence that Appellant deviated from his lane by more than what was practicable. To do so is a violation of the statute, irrespective of whether anyone is endangered," the DCA said.

"(E)vidence was adduced that Appellant's abnormal driving caused the deputy to suspect that Appellant was impaired or otherwise unfit to drive."

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

[*Yanes v. State*, 5/28/04]

Possession of cocaine - motion to dismiss

A trial court erred in granting a motion to dismiss where the defendant's possession of contraband could reasonably be inferred based on the undisputed facts of the case, the 5th DCA held. Officers stopped Raymond Williams and asked him to exit the car he was driving. An officer testified that at the time there was nothing on the ground near the vehicle. However, after Williams exited the vehicle police noticed a cigar tube lying on the ground. The tube contained crack cocaine and similar tubes were found inside the car. No other evidence connected Williams to the contraband. The trial court granted Williams' motion to dismiss a cocaine possession charge, concluding that the undisputed material facts did not support a prima facie case of guilt. The DCA disagreed.

"In this case, we think the undisputed facts are sufficient to support a reasonable inference that the cigar tube found on the ground came from Williams or from inside his vehicle, which was (under the stated facts), in his sole possession. Thus, Williams' possession of the contraband immediately before it was discovered by the officer, can reasonable be inferred from the undisputed facts in this case," the DCA said.

Assistant Attorney General Carmen F. Corrente represented the state on appeal.

[*State v. Williams*, 5/28/04]

Inventory search illegal

An inventory search of a defendant's automobile was not justified because the record lacked sufficient

evidence of standardized procedures used by police to conduct such searches, and the one procedure that was established was disregarded by the police, the 5th DCA held.

Adrian Leary appealed his conviction and sentence for possession of a firearm by a convicted felon.

Following his lawful arrest for trespass, police searched Leary and the passenger compartment of his car, which was parked safely in a motel parking lot. No contraband was found at that time, but after the car was impounded a search of the trunk revealed a firearm. On appeal, the state contended it had authority to search the trunk based on an inventory search. The DCA disagreed and reversed. "The deputy who conducted the search testified only that the vehicle 'was going to be towed' from the premises and it is the sheriff's policy to inventory vehicles before towing. However, no tow sheet was apparently filled out, in this case. Nor did the state present any other testimony concerning the sheriff's standardized procedures for when to tow vehicles after an arrest for minor charges – without regard to their location," the DCA noted.

Assistant Attorney General Timothy D. Wilson represented the state on appeal.

[*Leary v. State*, 6/25/04]

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DHSMV Legal Opinion

Hardship license issuance

In cases involving the suspension or revocation of a driver's license for persons convicted of certain drug offenses, pursuant to s. 322.055 and 322.056, Florida Statutes, the statute provides for the issuance of a restricted driver's license for business purposes. However, if the court directs the Department to issue a restricted license, it is imperative that the Department first schedule a hardship hearing, and determine the individual's qualifications, fitness and need to drive. Only upon this determination should the Department, in its discretion, reinstate the driving privilege of the individual. The Department is never required to issue a restricted license solely on the basis of the court-issued order.

[*DHSMV docket #DDL-04-09*, 6/16/04]

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