
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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11th U.S. Circuit Court of Appeals

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]

Constitutionality of search of protestors

Despite the desire for increased safety in the post-9/11 world, protestors cannot be required to pass through metal detectors and other security measures next month when they hold an annual rally against the School of the Americas, the 11th U.S. Circuit Court of Appeals held.

The court said the searches conducted by Columbus, Georgia, police violate the First and Fourth Amendment rights of the protestors, who

have been gathering annually for 13 years to protest the school, a U.S. training academy for military leaders from Latin American nations. The city argued that its decision to conduct mass searches of protestors, even though no weapons had ever been found among the 15,000 protestors at each previous rally, was based on the nation's elevated threat level and other security concerns. This was not sufficient justification, the court said.

"We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country. Furthermore, a system that gave the federal government the power to determine the range of constitutionally permissible searches simply by raising or lowering the nation's threat advisory system would allow the restrictions of the Fourth Amendment to be circumvented too easily," the 11th Circuit said. "While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment's protections in any large gathering of people. In the absence of some reason to believe that international terrorists would target or infiltrate this protest, there is no basis for using September 11 as an excuse for searching the protestors."

[*Bourgeois, et al., v. Peters, et al.*, 10/15/04]

Florida Supreme Court

Use of wiretaps against prostitution RICO activity

Violations of the Florida RICO statute constitute crimes "dangerous to life, limb, or property" and therefore wiretaps may be used to intercept communications related to organized prostitution rings, the Florida Supreme Court held.

In a 6-1 decision, the court upheld the authorization in section 934.07, F.S., for a judge to order the interception of communications to obtain evidence of "any violation of chapter 895," and said the state does not need to separately allege and demonstrate a danger to life, limb or property in order to obtain a wiretap order. The court previously held the Florida statute invalid in authorizing wiretaps to investigate prostitution because that crime is not identified in the

federal wiretap law. Ruling against defendant James Otte, the court held that wiretaps may be used against prostitution when it involved RICO violations. "(T)he state is not required to make a separate showing of danger to life, limb, or property in its application to intercept communications in the investigation of alleged RICO violations. Thus, the Florida statute's authorization for a wiretap for the investigation of 'any violation of chapter 895' does not contravene the federal statute," Justice Cantero wrote for the court.

Assistant Attorneys General Belle B. Schumann and Kellie A. Nielan represented the state on appeal.
[*State v. Otte*, 10/7/04]

1st District Court of Appeal

Vehicle stop - consensual encounter

A trial court erroneously concluded that a sheriff's deputy lacked probable cause for a vehicle stop that led to a drug arrest, because the deputy didn't actually stop the vehicle but instead dealt with a driver who was already stopped, the 1st DCA said. A Wakulla County Sheriff's Deputy spotted a vehicle behind the county jail in a non-parking area with its headlights off at night. When the vehicle's driver, Joseph Raker, saw the deputy approaching, he turned on the headlights and moved the vehicle. While the vehicle was stopped at a stop sign, the deputy pulled up next to the driver's window and engaged Raker in conversation, during which he offered identification and acknowledged that his driver's license was suspended. After one of the two small children in the vehicle began to cry, the deputy got out of her car and approached the vehicle in an effort to calm the children. The deputy then smelled marijuana and searched the vehicle, discovering cocaine and marijuana. The trial court granted Raker's motion to suppress this evidence, concluding that the deputy lacked probable cause to stop Raker. This was error, the DCA concluded, because no "seizure" occurred for Fourth Amendment purposes.

"Rather, it is apparent that what occurred was a consensual citizen encounter," the DCA said. "There was no 'stop' initiated by the deputy because appellee was already stopped at a stop sign. There was no evidence whatsoever that appellee was not perfectly free to discontinue the consensual encounter and go on about his business until at least the point when appellee told the deputy that his driver's license had been suspended. At that point, the deputy clearly had probable cause to arrest appellee for driving while his license was suspended, and to conduct a search incident to that arrest. Accordingly, the trial court should not have suppressed the fruits of that search."

Assistant Attorney General Shasta W. Kruse represented the state on appeal.

[*State v. Raker*, 10/1/04]

Reasonable suspicion for vehicle stop

A deputy lacked justification to stop a vehicle that was moving slowly at night on a bumpy road in the driver's neighborhood merely because there had been burglaries a few miles away on previous nights and the vehicle's slow speed could have involved alcohol or mechanical problems, the 1st DCA said. Jeffrey Faunce pled no contest after a search of his truck turned up cocaine, but appealed the validity of the stop and subsequent search that found the drugs. The DCA said the fact that Faunce was driving slowly is not, by itself, sufficient to give rise to reasonable suspicion. As a result, the DCA granted Faunce's motion to suppress the evidence.

"When the speculation is eliminated, all that remains is that a police officer saw a man driving a pickup truck rather slowly on a dirt road at 11:00 p.m. We are unwilling to say that this observation is sufficient in itself to justify an investigative detention. The standard is not high, but it does require something more specific than the good hunch the officer had in this case," the DCA said.

Assistant Attorney General Shasta W. Kruse represented the state on appeal.

[*Faunce v. State*, 10/11/04]

Miranda warnings - juvenile suspect

A 13-year-old boy's conviction for a sexual assault on a pre-teen must be reversed because the state failed to establish that the boy's waiver of his *Miranda* rights and subsequent confession were given freely and knowingly, the 1st DCA held. The youth, identified only as J.G., was placed in an interview room a half-hour after midnight and remained there for 2½ hours before questioning began. The boy, who was enrolled in exceptional student classes for emotionally handicapped students, read his *Miranda* warnings from a piece of paper and said he understood them, but the DCA said there is no way to be certain he comprehended the full import of the words on the page.

"The State had the burden to prove that Appellant's waiver of *Miranda* rights was knowing, intelligent, and voluntary. When, as in this case, the person is a juvenile, the State has a 'heavy burden' to show a knowing, intelligent waiver of the privilege against self-incrimination and the right to counsel. Just as the State had the burden to show a valid waiver of *Miranda* rights, it also had to prove that Appellant's subsequent incriminating oral statements to the police were freely and voluntarily made, and not compelled," the DCA said. "Merely reading the *Miranda* rights form to a 13-year-old like Appellant, or having him read the rights form, by itself, does not

establish that he understood and comprehended the rights he was giving up and the real consequences of his waiver. Having carefully considered the totality of the factual circumstances presented to the trial court, we are constrained to conclude that the State failed to meet its heavy burden to show that Appellant knowingly, intelligently, and voluntarily waived his rights.”

Assistant Attorney General Philip W. Edwards represented the state on appeal.

[*J.G. v. State*, 10/11/04]

2nd District Court of Appeal

Probable cause for search warrant

Law enforcement had sufficiently reliable information for probable cause to obtain a search warrant where two girls called police to report that their parents had cocaine and drug paraphernalia in a bedroom safe, the 2nd DCA held.

A judge had granted the parents' motion to suppress contraband found in their home, ruling that an affidavit was insufficient to establish probable cause. Police acted after receiving a telephone call from two sisters, ages 17 and 14, informing them that they had seen baggies with white powder, some of which had "cocaine" written on them, in their parents' safe. Officers found numerous objects in the safe that tested positive for cocaine residue. The trial court granted the motion to suppress and dismissed the charges against the parents and another man, but the DCA reversed.

"An affidavit's reliance on hearsay does not render it insufficient as long as there is a substantial basis for crediting the hearsay," the DCA said. "(T)he daughters here qualify as citizen-informants. Their identities were readily ascertainable because they gave their names and location, and their statements to the police that they were the suspects' daughters demonstrated the basis of their knowledge and veracity. . . . (T)here is no indication the daughters were motivated by anything other than concern for the safety of their parents and others."

Assistant Attorney General Susan M. Shanahan represented the state on appeal.

[*State v. Gonzalez, et al.*, 9/10/04]

DUI manslaughter - withholding adjudication

Trial courts have discretion under the youthful offender statute to withhold adjudication of a minor who is convicted of DUI manslaughter, the 2nd DCA held.

The DCA reversed a judge's determination that he did not have the authority to circumvent mandatory adjudication for DUI because of statutory language prohibiting that action "for any violation" of section 316.193, F.S. The DCA concluded that the trial court

was mistaken, noting that if the trial court classifies a defendant as a youthful offender, the statutory prohibition does not apply. The DCA remanded the case so the trial court could properly exercise its discretion to determine whether withholding adjudication is appropriate.

Assistant Attorney General Dale E. Tarpley represented the state on appeal.

[*Sloan v. State*, 9/10/04]

Battery on law enforcement officer

A defendant's conviction and sentence for battery on a law enforcement officer must be reversed because the jury instructions given at trial constituted fundamental error, the 2nd DCA held.

Under Florida law, battery on a law enforcement officer can be committed either by touching or striking an officer against his will or by intentionally causing bodily harm to the officer. The information charging Geronimo Vega only asserted that he "did knowingly, unlawfully, and intentionally touch or strike" an officer, but the trial court's instruction to the jury mentioned both forms of battery. This was error, the DCA concluded.

"Because Vega was not charged with committing battery on a law enforcement officer by intentionally causing bodily harm, it was error for the trial court to instruct the jury on this alternative. As the State rightly concedes, this error is fundamental because the jury returned a general verdict of guilt without specifying the basis for the conviction, making it impossible to know whether Vega was convicted of the form of battery with which he was charged rather than the form with which he was not charged," the DCA said.

Assistant Attorney General Deena DeGenova represented the state on appeal.

[*Vega v. State*, 9/17/04]

Student's knowledge of marijuana in backpack

The state failed to establish more than just a strong suspicion that a high school student knew of marijuana in her backpack and therefore did not sufficiently rebut her reasonable hypothesis of innocence, the 2nd DCA held.

The student, identified only as P.M.M., willingly agreed to a search of her backpack after her school's assistant principal received an anonymous tip that the girl had something she should not have in her backpack. The search, conducted by the assistant principal in the presence of a sheriff's deputy, turned up a small baggie of marijuana. The deputy testified that he did not know where the backpack had been prior to that occasion, and the baggie was not fingerprinted. The girl denied that the marijuana was hers and said it had been a week or two since she opened the pouch in which the

marijuana was found. She testified that the backpack had been in several locations that day where it had been left unattended. The DCA noted that convictions based on circumstantial evidence cannot stand unless the evidence is inconsistent with any reasonable hypothesis of innocence, and said the state produced no direct evidence to establish that P.M.M. knew of the marijuana's presence in her backpack.

"P.M.M.'s un rebutted and unimpeached testimony established that her backpack had been accessible to others. The State presented no evidence to show that P.M.M. knew there was marijuana in her backpack, other than the evidence that it was found in her backpack," the DCA said. "(T)his was not enough to support a conviction. Accordingly, we reverse."

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

[*P.M.M. v. State*, 9/29/04]

Consensual encounter - warrants check

During a consensual police stop, an officer may retain a person's driver's license long enough to run a check for outstanding warrants without turning the encounter into a stop that would require the officer to have a reasonable suspicion of criminal activity, the 2nd DCA held.

The court acknowledged conflict with decisions of the 4th DCA, whose two-year-old decision in *Baez v. State* is currently pending before the Florida Supreme Court. Since the 4th DCA decided *Baez*, the 5th DCA has reached a decision in harmony with the 2nd DCA's position. In this case, a deputy began a conversation with Madison Mays as he walked along a public street at 2:17 a.m. Mays complied when the deputy requested identification, and the deputy retained Mays' driver's license while he ran a warrants check. The warrants check revealed an outstanding warrant and the deputy arrested him and conducted a search that turned up cocaine. The DCA affirmed the arrest and search, but conceded that Mays would be entitled to suppression of the cocaine if the Supreme Court upholds the 4th DCA's contrary decision in *Baez*.

"We are compelled to uphold the denial of the motion to suppress because the entire encounter was a valid consensual encounter," the DCA said. "However, if the supreme court approves *Baez*, then the consensual encounter in this case could be viewed as one that was transformed into a stop that was illegal because it was done without a reasonable suspicion of criminal activity. Despite the existence of a valid warrant for Mays' arrest, Mays would then be entitled to the suppression of the cocaine because it was discovered as the result of an illegal encounter."

Assistant Attorney General Chandra Waite Dasrat represented the state on appeal.

[*Mays v. State*, 10/8/04]

Reasonable suspicion for vehicle stop

Because a vehicle's presence in an area of past criminal activity is not sufficient by itself to justify a police stop, a teenage girl's plea to a charge of resisting an officer without violence and possession of drug paraphernalia must be reversed, the 2nd DCA held.

The juvenile was a passenger in a car pulled over after an officer saw it coming out from behind a closed business at 3:30 a.m. The officer testified that the business had suffered a series of burglaries in the previous two weeks, and he suspected the vehicle occupants of committing a burglary. The stop led to the charges against the girl, who entered a no contest plea but reserved the right to appeal the denial of her motion to suppress evidence. The DCA concluded that the state failed to meet its burden of showing that the officer had a reasonable suspicion of criminal activity necessary to justify the stop, granting the girl's motion to suppress and ordering the case dismissed.

"The question here is whether the officer's suspicion was reasonable based on the totality of the circumstances. Case law indicates that being in an area of past criminal activity during late and unusual hours is not enough to justify a founded or reasonable suspicion," the DCA said.

Assistant Attorney General Deena DeGenova represented the state on appeal.

[*L.N.D. v. State*, 10/13/04]

Constructive possession - glove compartment

A teenager's adjudication of delinquency for possession of drug paraphernalia cannot stand because the state failed to prove that the paraphernalia had been in her direct control prior to an auto accident that led to the discovery of the items, the 2nd DCA held.

A juvenile identified only as K.A.K. was driving her vehicle with three friends when it was involved in a serious accident. When a sheriff's deputy arrived at the scene, the driver's door was open and the deputy saw a glass pipe of the kind often used to smoke drugs. The deputy then searched the vehicle and found what appeared to be marijuana scattered about on the driver's floorboard and in the driver's seat, and in the open glove compartment found a box of rolling papers and a pair of scissor-type tweezers. After an adjudicatory hearing at which only the deputy and K.A.K. testified, the trial court concluded that the state had failed to prove beyond a reasonable doubt that K.A.K. possessed the marijuana and glass pipe, but adjudicated her

delinquent based on constructive possession of the two items found in the glove compartment. This was error, the DCA said, as the trial court should not have drawn a distinction between the marijuana and pipe on the one hand and the rolling papers and tweezers on the other.

"As K.A.K.'s small car was jointly-occupied, the open glove compartment was accessible to each occupant before and after the accident," the DCA said. "The trial court's correct evaluation of the State's imperfect case about the marijuana and glass pipe should have extended to the items in the glove compartment. The fact that the rolling papers and the tweezers were found in that glove compartment, rather than in the passenger area itself, was not sufficiently distinctive factually or dispositive of the case because the compartment was open to all at the time the deputy searched. No more evidence tied K.A.K. to the items inside the glove compartment than to the marijuana and the glass pipe."

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

[K.A.K. v. State, 10/15/04]

Miranda warning - motion to suppress

Two deputies' questioning of a drug suspect did not require *Miranda* warnings because the deputies did not use a show of authority beyond their vehicle's overhead lights and the defendant's actions and demeanor showed that he did not perceive himself to be in custody at the time he admitted to possession, the 2nd DCA held.

The court reversed a suppression order won by Joseph Poster, concluding that Poster was not in custody at the time he told the deputies he had methamphetamine in his vehicle. Poster was stopped after deputies received a reliable tip that he would be delivering the drugs to a particular residence. The deputies used emergency lights to stop Poster, but Poster stopped immediately, voluntarily exited his car and walked back to talk to the deputies, one of who he was acquainted with. During the non-confrontational conversation, the deputy asked Poster if he was in possession of methamphetamine, and Poster admitted that he was. The defense agreed that the deputies had made a valid investigatory stop, but contended that Poster had been subjected to a custodial interrogation without being informed of his *Miranda* rights. The trial court granted Poster's motion to suppress, but the DCA reversed.

"The deputy testified that he used a normal tone of voice during their conversation. His style was not confrontational. The entire exchange comprised two or three questions; it was not a long, drawn-out

interrogation. The deputies were in uniform, but they never brandished a firearm. There is no record of any display of police authority except for the use of overhead lights, and Poster's conduct demonstrated that he did not believe that he was at the mercy of the law enforcement officers," the DCA said. "(T)he relevant inquiry is how a reasonable person in the suspect's position would understand the situation. . . . Poster's actions and demeanor demonstrated that he did not perceive that he was in custody."

Assistant Attorney General Richard M. Fishkin represented the state on appeal.

[State v. Poster, 10/22/04]

Probable cause - use of vehicle turn signal

Because there was no evidence that a young driver's failure to use a turn signal affected any other driver, a police officer lacked probable cause to pull him over and contraband discovered as a result of the illegal stop must be suppressed, the 2nd DCA held.

The juvenile, identified as S.A.S., was pulled over after failing to use his signal when making a left turn after the light at a T-intersection changed to green. The DCA noted that the design of the intersection prevented vehicles from going straight and there was no possibility of oncoming traffic. An officer pulled S.A.S. over for failure to use his signal, and seized a small container of marijuana and a marijuana pipe. The DCA noted that the Florida Supreme Court has determined that use of a signal is required only when another vehicle is affected by a turn from a highway, and said that condition does not apply in this case.

"(W)e do not think section 315.155 requires automobile operators to contemplate all hypothetical situations that would warrant using a turn signal in that brief moment before the decision to use the signal is made. Instead, there must actually be other vehicles affected by the turn. Because there was no evidence that another driver was actually affected by S.A.S.'s left turn, the officer lacked probable cause to stop S.A.S. and therefore the stop was illegal," the DCA said.

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

[S.A.S. v. State, 10/29/04]

Founded suspicion for vehicle stop

A defendant's action in driving away from a scene just as a police vehicle approaches does not give the officer a founded suspicion to make a stop if the officer doesn't know whether the driver actually saw the police car before leaving, the 2nd DCA said.

The court said the standard for such a stop was changed by the U.S. Supreme Court's *Wardlow* decision in 2000. Prior to that decision, the DCA said, the officer's stop in this case would have been justified. *Wardlow* authorized stops in high-crime areas where the suspect resorts to "unprovoked flight upon noticing the police." In this case, the officer did not know if the driver saw him before accelerating quickly and making an "aggressive" turn away from a neighborhood in which several burglaries had taken place. All the circumstances aroused the deputy's suspicions, so he activated his blue lights and stopped the car. Passenger Cornell Cunningham was searched and arrested for possession of cocaine. The DCA concluded that because it could not be determined whether the driver saw the police car, *Wardlow* did not apply and therefore the officer did not have a founded suspicion for the stop. Cunningham's motion to suppress should have been granted, the DCA said.

"(T)he facts surrounding Mr. Cunningham's departure from the scene do not rise to the level of 'headlong flight.' There was no evidence that Mr. Cunningham or the driver actually observed the police before the car left the area, which in our view is a critical factor," the DCA said. "(T)here is no factual basis for the legal conclusion that the defendant intentionally evaded law enforcement."

Assistant Attorney General William I. Munsey Jr. represented the state on appeal.

[*Cunningham v. State*, 10/22/04]

3rd District Court of Appeal

Police pursuits - duty of care to passengers

A police officer does not owe a duty of care to a passenger in a fleeing vehicle unless the officer knew or should have known of the passenger's presence in the vehicle, the 3rd DCA held in ruling against the plaintiff in a negligence lawsuit. The DCA acknowledged that such a duty is owed to innocent bystanders and drivers of fleeing vehicles, but said Florida cases generally do not support such a duty when it comes to passengers in a vehicle being pursued by the police. The DCA affirmed a lower court ruling against the family of a man who was riding in a car driven by a friend and was killed when the vehicle crashed at the conclusion of a 100-120 mph police chase. The family asserted that the police owed a duty of care to the man, but the DCA disagreed.

The DCA said its ruling recognizes "the overwhelming burden placed on the police to perform the impractical, if not impossible task of

determining, even if they knew a passenger was in a car, whether that passenger was a participant in a crime. By requiring police officers to first determine if there was a passenger and then determining if the passenger was involved in a crime would essentially halt any police pursuit. That result makes no sense considering that the police are our thin blue line protecting society."

[*Fisher v. Miami-Dade County*, 9/9/04]

Standing to challenge forfeiture of seized cash

The 3rd DCA has asked the Florida Supreme Court to resolve whether a person in mere possession of property at the time it is seized by police has standing to challenge the seizure at an adversarial preliminary hearing without showing a proprietary interest in the property.

Reaching a conclusion that conflicts with an earlier decision by the 4th DCA, the court held that a trial court properly denied Walter Velez the opportunity to contest the forfeiture of \$489,000 in cash. The money was seized during a police stop of a vehicle being driven by Velez in Miami-Dade County, but Velez said at the time that the money did not belong to him but had been given to him by a person he did not know. At a hearing, Velez' attorney argued that because it was admitted in the sworn complaint in the forfeiture action that the money was in Velez' possession at the time of the seizure, he was "entitled to notice" and therefore had standing. The DCA disagreed, saying this alone did not give Velez standing and that probable cause existed to seize the cash based on allegations made in the sworn complaint.

"Velez came forward with no sworn proof on the question of standing. Thus, the trial court properly denied Velez the opportunity to participate at the adversarial preliminary hearing," the DCA said. However, because its decision directly conflicts with a 1998 ruling by the 4th DCA, the court certified the question to the Supreme Court.

[*Velez v. Miami-Dade County Police Department*, 9/15/04]

Police chief's embezzlement of public-use funds

A former Miami police chief is not entitled to collect a pension because the funds he used improperly were earmarked for public use, even if the chief first arranged to have them routed through a private not-for-profit corporation, the 3rd DCA held.

The court rejected former Chief Donald Warshaw's appeal of an unfavorable ruling by the board of directors of the City of Miami Firefighters' and Police Officers' Retirement Trust. The board forfeited Warshaw's pension as a result of his conviction of one count of mail fraud stemming from his use of

money belonging to Do the Right Thing (DTRT), an organization headed by Warshaw to supplement the city's practices of recognizing individuals who made significant contributions to the community. As much as 90 percent of the organization's funding came from proceeds of the city's criminal forfeitures. Warshaw argued that he was not disqualified from receiving the pension because he did not embezzle or steal public funds, meaning his federal conviction was not for a specified offense that would deny his pension. By a 2-1 vote, the DCA disagreed. "In simple parlance, Warshaw argues, no city public funds were embezzled or stolen by him, just DTRT's private funds. We reject this thoroughly disingenuous argument. Warshaw, as city police chief, arranged through the city commission for public city funds to be transferred to DTRT, which was mandated to use these city funds to carry out city functions, effectively as an alter ego of the city, and certainly as its agent. The funds never lost their character as public funds. Warshaw simply took two steps in order to have access to the public funds by (1) arranging to have the city funds transferred to DTRT, then (2) arranging for the city funds to be transferred from DTRT to him. Whether the funds remained with the city's law enforcement trust fund or were transferred to DTRT, the funds always were slotted for public uses," the DCA concluded.

[Warshaw v. City of Miami Firefighters' and Police Officers' Retirement Trust, 9/15/04]

Obstruction - lookout's warning of police presence

A person cannot be convicted of obstructing for yelling out a warning that police are in the area when the people who receive the warning have not yet committed any illegal acts and therefore the officers are not engaged in the lawful execution of a legal duty, the 3rd DCA said.

The DCA reversed the obstructing conviction of a minor identified as R.E.D., who was charged after he warned two males "99 that's the police there" as the men approached a house under surveillance by undercover narcotics Officer Raymond Robinson. The men fled following R.E.D.'s warning, and the juvenile was charged with obstructing. The DCA agreed with the youth's argument that he did not resist or obstruct police because Officer Robinson was not engaged in the lawful exercise of a legal duty.

The DCA said the officer "was not involved in the process of detaining anyone when he encountered R.E.D., and he was thus not engaged in the lawful execution of any legal duty. When R.E.D. warned the two unnamed males of the police's presence, Officer Robinson was not yet prepared to arrest the

two unnamed males and had no other basis upon which to prevent the escape of the unnamed males as suspects. The unnamed males had simply approached the target house, were not involved in any criminal activity, and were never arrested. . . . Officer Robinson was thus not involved in the execution of a legal duty when R.E.D. warned the two unnamed males of the police's presence."

Judge Shepherd dissented: "No one yells '99 police' to signal that the ice cream truck is coming. Forecasting '99 police' is meant to alert all nearby hearers of police presence, so that any illegal acts can quickly come to a close, evidence can be flushed, and law enforcement can be frustrated. . . . R.E.D. has cast his lot in siding with and assisting his criminal brethren; but for his statements, the official police operation would not have come to a halt. This is sufficient to support a conviction."

Assistant Attorney General Richard L. Polin and Certified Legal Intern Joseph N. De Vera represented the state on appeal.

[R.E.D. v. State, 10/20/04]

Responsibility for transportation of "forensic clients"

A trial court improperly ordered the state Department of Children and Families to transport a mentally retarded man from the Panhandle to South Florida for a court hearing, because such transportation is the responsibility of local sheriffs, the 3rd DCA held.

David Everette had been charged with first-degree felony attempted murder among other charges, but after a delay of approximately two years the trial court dismissed the charges because Everette was mentally incompetent to proceed. The court committed Everette to DCF for secure residential placement. Two months ago, the program to which Everette was assigned was relocated from Miami to Marianna. During the relocation, Everette's case was called for its annual hearing, and the trial court directed DCF to transport Everette to Miami for evaluations. The department objected, but the trial court rejected the agency's argument that the local sheriff is responsible for transporting Everette. Because Everette is a "forensic client," the DCA concluded, the statute requiring the sheriff to handle transportation applies.

In a lengthy dissent, Judge Ramirez said the sheriff is not a party to the case and should not be required to pay for transportation, and suggested the majority decision would allow DCF to avoid unwanted court orders by simply relocating individuals. "By our decision today, we are seriously undermining the authority of our circuit courts to administer justice

and enforce the rights of the least powerful in our legal system, the incompetent," the judge wrote. "The department, when confronted with an uncooperative judge, can simply move people to the furthest location in the state during the middle of the judicial proceeding and thereby thwart the court's jurisdiction. After today, this statutory grant of jurisdiction will be subject to the whims and arbitrary actions of the department."

[*Department of Children and Families v. Everette*, 10/27/04]

4th District Court of Appeal

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]

Agency's Use of Immediate Final Order

An Immediate Final Order issued by a state agency against a viatical insurance company was proper because the agency demonstrated an "immediacy, necessity and fairness" in issuing the order, the 4th DCA held.

The court upheld the cease and desist order issued by the state Office of Insurance Regulation, which accused Robin Hood Group, Inc., of conducting viatical settlements without a license. The company challenged the agency's action in issuing the emergency order, but the DCA said the agency established the propriety of the order.

"(W)e affirm the entry of the immediate final order because the facts alleged are sufficiently specific and particularized to demonstrate the risk of immediate and ongoing harm to the insurance buying public," the DCA said.

[*Robin Hood Group, Inc., et al., v. Florida Office of Insurance Regulation*, 10/13/04]

Sovereign immunity - lawsuit for negligent retention

A lawsuit alleging that a local government was negligent in its hiring of a code inspector may proceed because the city does not enjoy sovereign immunity protection from the plaintiff's claim for negligent retention or supervision, the 4th DCA said. The DCA reversed a lower court's dismissal of Joe Slonin's claim of negligent training, supervision and retention of a code inspector hired by the City of West Palm Beach. Slonin alleged that inspector Ray Leighton threatened him physically and with enforcement actions because Leighton allegedly did not like the fact that Slonin rented rooms in his motel to tenants from Guatemala. The DCA affirmed a defense verdict and judgment on Slonin's assault and battery claims against the city and Leighton, but reversed the dismissal of the negligent retention claim.

"Here, the plaintiff alleged the City knew of: (1) the assault and battery by Leighton, (2) the plaintiff's previous complaints against Leighton, and (3) Leighton's abusive conduct toward other members of the public. He also alleged the City took no action to ensure public safety, and due to the City's negligent retention, training and supervision, he suffered damages. This was sufficient to state a claim against the City. The court erred in dismissing this claim," the DCA said.

[*Slonin v. City of West Palm Beach, et al.*, 10/20/04]

Testimony re: refusal to take blood-alcohol test

The accident report privilege that usually protects the confidentiality of information about motor vehicle accidents does not apply to a refusal to submit to a blood-alcohol test because such refusal is not compelled by law enforcement, the 4th DCA held.

The court ruled against Terence Evans, the plaintiff in a lawsuit arising from an auto accident. Evans argued that the trial court erred in allowing him to be cross-examined about his refusal to submit to a blood-alcohol test, noting that section 316.066(4), F.S., provides that statements made by a person involved in an accident in order to complete a statutorily required crash report are not admissible as evidence in any civil or criminal trial. The DCA said that the Florida Supreme Court in 1984 limited the exemption to information a person is compelled to provide in order to comply with the statutory duty regarding accident reports. In addition, the DCA said, the U.S. Supreme Court has held that refusal to submit to a blood-alcohol test may be admitted into evidence without violating the Fifth Amendment because the state does not compel a defendant to refuse to take a test by giving him a choice whether to submit to the test or not.

"Because a refusal to take a blood-alcohol test is not compelled, and admission of such refusal does not violate the Fifth Amendment, the trial court did not err in finding that section 316.066 does not prevent the admission into evidence of Mr. Evans's refusal to submit to a blood-alcohol test," the DCA said.

[*Evans v. Hamilton*, 10/27/04]

Stun gun status as deadly weapon

Because the state failed to offer evidence that a stun gun is a deadly weapon, a defendant's conviction of sexual battery with a deadly weapon must be overturned and replaced by a conviction for the lesser offense of sexual battery, the 4th DCA held.

Willie Jones was convicted of sexual battery with a deadly weapon, among other charges. During the incident he displayed a stun gun and at one point pulled the trigger, making the device emit a blue light and a buzzing sound. The victim testified that Jones told her to be quiet or he would kill her, before he sexually assaulted her. Noting that the 1st DCA has said no Florida case supports the idea that a stun gun qualifies as a deadly weapon, the court overturned the more serious sexual battery conviction.

"The State failed to meet its burden since there was no evidence in the record to support a finding that the stun gun was a deadly weapon by its ordinary use or in the manner in which it was used on the victim," the DCA said.

Assistant Attorney General Jeanine M. Germanowicz represented the state on appeal.

[*Jones v. State*, 10/27/04]

5th District Court of Appeal

ALJ's refusal to grant continuance

A state administrative law judge did not abuse her discretion by refusing to grant a continuance to a psychiatrist who sought to delay an administrative hearing until related criminal charges against him were resolved, or by refusing to allow witnesses other than the psychiatrist to testify once the criminal case was over, the 5th DCA held.

The state Board of Medicine moved to revoke psychiatrist Ronald Malave's license after he was accused of inappropriate sexual activity with a patient. At the same time the administrative complaint was filed, the state began criminal proceedings against Malave arising from his treatment of the woman. Malave requested a continuance of the administrative proceedings so that any testimony he gave in that case would not

threaten his Fifth Amendment rights in the criminal case. The administrative law judge (ALJ) denied this request, and after Malave was acquitted of the criminal charges she reopened the administrative proceeding solely to allow Malave to present his own testimony but refused to allow him to present other evidence or witnesses in his defense. Malave's medical license was revoked, and he argued on appeal that the ALJ abused her discretion by denying the continuance and refusing to allow other evidence after the conclusion of the criminal case. The DCA rejected his arguments.

"While reasonable judges could certainly disagree about the propriety of the ALJ's decision to deny Dr. Malave's continuance, we cannot say that no reasonable judge would have taken the position adopted by the ALJ. That being the case, it cannot be said that the ALJ abused her discretion," the DCA said. Regarding the additional witnesses, the DCA added, "(T)he ALJ ruled that because those witnesses could have been put on at the original hearing without any Fifth Amendment concerns, Dr. Malave's failure to call witnesses or put on evidence waived his right to do so. That decision was within the discretion of the ALJ."

[*Malave v. Board of Medicine*, 8/27/04]

Suppression - substantial basis for warrant

The 5th DCA reversed an order suppressing evidence against two accused counterfeiters, citing a July ruling in concluding that a judge issuing a warrant had a substantial basis for inferring that items associated with the counterfeiting operation were probably at the suspects' home.

The DCA overturned the trial judge's ruling in favor of Randy Beasley and Kerry Wilson, who were suspected of producing counterfeit driver's licenses and checks. A search conducted pursuant to a warrant found items that could be used in a counterfeiting scheme, as well as drugs and drug paraphernalia. The trial judge suppressed the evidence, but the DCA said the judge did not have benefit of the DCA's July decision in *State v. Weil*. Because the facts in this case were indistinguishable from those in *Weil*, the DCA explained, it was reversing the suppression order and remanding for further proceedings.

Assistant Attorney General Kellie A. Nielan represented the state on appeal.

[*State v. Beasley and Wilson*, 9/17/04]

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