LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

FRED O. DICKINSON, EXECUTIVE DIRECTOR VOLUME MMV, ISSUE 3

U.S. ELEVENTH CIRCUIT COURT OF APPEALS

Time frame for filing job discrimination complaint

The limitations period for filing an action under the Age Discrimination in Employment Act may begin to run when the complainant has actual knowledge that an investigation has found against her, and not just when she actually receives a written notice of her right to sue, the 11th U.S. Circuit Court of Appeals held.

Two Georgia women, both over age 50, filed a class-action age discrimination claim against McDonald's, but the fast-food company moved to dismiss on the grounds that the complaint was filed more than 90 days after the Equal Employment Opportunity Commission mailed right-to-sue letters. The women learned from EEOC that their complaints were being turned down in December 2002 and did not file their lawsuit until May 2003; EEOC said the right-to-sue letters were mailed in January 2003, but the women asserted that they did not receive them until a month later, which would have meant their lawsuit was filed within the 90-day window. The 11th Circuit said the women were not entitled to wait until they received the letters, especially because they knew the letters were coming yet made no attempt to find out why they had not arrived in the mail.

"We find that (the women), in failing to make any inquiry regarding their late or missing letters, failed to assume the minimal responsibility or to put forth the minimal effort necessary to resolve their claims in this case. Their failure to receive the letters was at least in part due to lack of diligence in following up their requests. A 90-day period beginning on 12 January would end in mid April. The 15 May 2003 claims were thus untimely filed by nearly a month," the court said.

[*Kerr and Smith v. McDonald's Corporation,* 10/6/05]

FLORIDA SUPREME COURT

Retroactivity of *Crawford* rule re: Hearsay testimony

The Florida Supreme Court affirmed a convicted killer's death penalty, again finding that the U.S. Supreme Court's recent *Crawford* ruling regarding hearsay testimony does not apply retroactively.

Jim Eric Chandler was convicted and sentenced to death for two murders. In his latest appeal, he argued that the *Crawford* rule applies retroactively and therefore he should be awarded a new trial. In *Crawford,* the nation's high court said a testimonial hearsay statement is inadmissible at trial unless the declarant is shown to be unavailable and the party against whom the statement is admitted had an opportunity for cross-examination. Rejecting Chandler's claim, the state court affirmed its earlier determination that the *Crawford* rule does not apply retroactively.

"(I)f *Crawford* applied retroactively, the administration of justice would be greatly affected. Retroactive application could require courts to overturn convictions and delve into stale records to determine whether defendants had a chance to cross-examine unavailable witnesses. When new trials were determined necessary to correct errors under *Crawford*, the justice system would then have to deal with a multitude of problems, including lost evidence and unavailable witnesses. Such retroactive application would destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit," the court said.

[*Chandler v. State*, 10/6/05]

FIRST DISTRICT COURT OF APPEAL

Agency's emergency suspension following company's indictment

The fact that a Miami-based pharmaceutical wholesaler was charged in a federal indictment with racketeering, money laundering and other charges related to unlawfully obtaining prescription drugs is not enough to demonstrate a threat to public health sufficient to justify an emergency suspension by the state Department of Health, the 1st DCA held.

Bio-Med Plus, Inc., was charged in a 288-count indictment in March, accused of engaging in illegal activities involving prescription drugs from November 1999 to January 2003. Based on the indictment, the department issued an Emergency Suspension Order (ESO) charging the company with several violations of the Florida Drug and Cosmetic Act. The company challenged the order, and the department asserted that because the actions alleged in the indictment are so contrary to the public health and safety and continued over a long period of time, they should be considered continuous and posing an immediate risk or danger to the public. The DCA disagreed.

"Although we do not question the seriousness of the allegations contained within the federal indictment or the Department's assertion that the drug industry warrants more intense regulation because it presents unique opportunities for immediate harm to the consuming public, the ESO does not contain a single, particularized allegation of a continuing public health or safety violation, or any allegations of harm or possible harm to any patient. The harm alleged in the Department's order is general and conclusory and relates to actions in excess of two years old," the DCA said. "Nothing in the Department's ESO demonstrates that, because Bio-Med is alleged to have been involved in racketeering, conspiracy, and fraud offenses involving actions from 1999 to 2003, those offenses or any other actions in violation of chapter 499 are continuing or now present an immediate serious danger to the public health."

[*Bio-Med Plus, Inc. V. Department of Health,* 10/20/05]

Motion to disqualify ALJ

Several hospitals reasonably feared they might not get a fair decision from an administrative law judge who had recently been hired as a lobbyist by a rival hospital company, and the ALJ improperly tried to refute their assertion when he denied their motion for disqualification, the 1st DCA held.

A group of hospitals in Southwest Florida opposed an application submitted to the state for construction of a new hospital in the area. The Agency for Health Care Administration rejected the application, but after an administrative hearing the ALJ recommended that it be approved. The existing hospitals then sought to have the ALJ disqualified because at some point after the hearing but before rendering his order, the ALJ accepted a job lobbying for Tenet, a competing company. Although Tenet was not involved in the hospital application, it was involved in an unrelated federal court case in which the other hospitals were involved. The ALJ agreed to complete work on his outstanding cases, but the hospitals said they feared that due to his involvement with Tenet, the ALJ might be biased against them. The ALJ attempted to refute the hospitals' allegations in denying their motion to disqualify, but the DCA said this was improper.

"Courts have repeatedly held that a judge who is presented with a motion for disqualification 'shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification.' When a judge has looked beyond the mere legal sufficiency of a motion to disqualify on the basis of prejudice and bias and attempted to refute such charges, he has exceeded the proper scope of his inquiry," the DCA said. "In the order denying the motion to disqualify, the ALJ did not merely find the motion to disqualify legally insufficient. The ALJ specifically stated that the motion 'lacks merit.' The ALJ also specifically refuted petitioner's contention that there was bias on the ALJ's part in connection with Tenet and the federal lawsuit. The ALJ looked beyond the mere legal sufficiency of the motion and refuted the charges of partiality. Thus, this basis alone establishes grounds for disqualification."

[*Lee Memorial Health System, et al., v. Agency for Health Care Administration, et al.,* 9/2/05]

SECOND DISTRICT COURT OF APPEAL

Illegal search - lack of probable cause

Police officers did not have probable cause to search a man prior to arresting him, and therefore the drugs at the heart of his possession conviction should have been suppressed, the 2nd DCA held.

Deatrick Rock pled no contest to drug possession, but argued on appeal that the search that led to his arrest was conducted without probable cause. An officer received an informant's tip about drug sales, and the officer went to the location determined to handcuff those present in order to protect officer safety, before determining whether charges would be appropriate against particular individuals. When Rock came out of a bathroom, the officer forced him to the ground and searched his pockets, finding drugs. The officer acknowledged that his search of Rock was not to determine whether he had weapons, and Rock claimed the officer did not have probable cause to arrest and subsequently search him. The DCA agreed.

"Certainly the detectives had grounds to detain Rock and question him. Indeed, that was their plan. And they may have been justified in performing a weapons patdown. But instead of investigating and developing probable cause, they proceeded directly to an arrest and search," the DCA said. "Rock's arrest was not justified by probable cause, and the State proved no other justification for the search. Therefore, the circuit court erred by denying Rock's motion to suppress." [*Rock v. State*, 10/26/05]

Defendant's intent to sell cocaine near child care facility

The state did not need to show that a defendant intended to be within 1,000 feet of a child care facility when he possessed or sold cocaine in order to charge him with violating statutes establishing the distance requirement, the 2nd DCA held.

Torrie Spry was arrested and convicted of possession of cocaine with intent to sell within 1,000 feet of a child care facility. Spry was stopped by officers for a citizen encounter, but attempted to flee. A witness to the pursuit told the officer that Spry had dropped a can in nearby bushes, and the can turned out to hold 5.2 grams of cocaine when it was found some 540 feet from a child care facility. Spry was convicted but argued on appeal that he did not intend to sell cocaine in that location and therefore should not have been charged with the intent to sell within 1,000 feet of a child care facility. The DCA disagreed, concluding that the state did not need to prove that Spry intended to sell at that location in order to sustain the charge.

"The State did not have to establish that Mr. Spry intended to sell the cocaine within the 1000-foot safety zone. Where the offense occurs affects only the degree of the crime and the extent of the potential sentence. Read as a whole, the statute establishes that the place of the possession with intent to sell controls, not the defendant's subjective intent concerning the ultimate place of sale," the DCA said.

[*Spry v. State*, 10/19/05]

Illegal detention during traffic stop

Law enforcement officers conducted an illegal detention when they ran an identification check on a driver after the completion of the reason for the traffic stop, the arrest of a passenger on an outstanding warrant, the 2nd DCA held.

Cameron Lanier was driving when he was pulled over by a deputy, who had already confirmed that a passenger in Lanier's vehicle was wanted on outstanding warrants. Officer Ryan Shea later acknowledged that Lanier had not committed any traffic violations. Once he pulled the vehicle over, Shea immediately arrested the passenger and then engaged Lanier, asking the driver for identification and informing him that he would run an identification check. Lanier got out of the car, but was ordered back in. When Lanier refused, he and a deputy began to struggle. A search of the area where the struggle took place turned up cocaine, and Lanier was arrested. On appeal, Lanier contended that the evidence of any crime was illegally obtained because he should not have been detained, and the DCA agreed.

"There is no dispute that the only reason for the stop was to effectuate the arrest of Lanier's passenger, and there is no dispute that that reason was completely satisfied before Shea approached Lanier and requested identification. Once the passenger was arrested, the reason for the initial stop was satisfied, and the only contact Shea was permitted was to tell Lanier the reason for the stop and allow him to be on his way. By requesting Lanier's identification and requiring him to remain in his vehicle while Shea checked for outstanding warrants, Shea violated the provisions of the Fourth Amendment and . . . the trial court erred in denying Lanier's motion to suppress," the DCA said.

[*Lanier v. State*, 10/7/05]

Disclosure of confidential DCF information in deposition

A trial court acted properly when it refused to halt a deposition until it could first conduct an in camera review of potentially confidential abuse information, but the court should have taken

steps to ensure that no one present for the deposition improperly divulged confidential information, the 2nd DCA held.

A former Department of Children and Families employee filed a whistleblower suit after he was fired by the agency. During discovery, former employee John Patterson sought to take depositions of two supervisors, but the supervisors asserted that the presiding judge should first conduct an in camera review of information in order to prevent the disclosure of any statutorily protected information. The trial judge issued an order that would have the supervisors submit to the depositions, with the judge reviewing the material afterward to ensure no public disclosure of confidential information. The department then filed a petition for certiorari seeking an order from the DCA requiring the judge to perform the in camera inspection prior to allowing its disclosure in the deposition. The DCA concluded that the judge could allow the deposition to take place prior to the in camera inspection, but said the judge should also issue a confidentiality order to ensure that no one present at the deposition discloses the confidential information.

"The circuit court's order attempted a balancing act between going forward with the deposition and fair prosecution of Mr. Patterson's suit on one hand and the Department's well-founded confidentiality concerns on the other. The court's order falls short, however, of the necessary protection. While it seeks to segregate the disputed material for its later in camera review, it fails to adequately prevent inadvertent or intentional disclosure by deponents or others present at the deposition. Once the protected information is divulged in the deposition, without a confidentiality safeguard in place there is no way further disclosure can be avoided. A confidentiality order is required to ensure statutory compliance until the trial court completes its in camera review," the DCA said.

[*Department of Children and Families v. Patterson,* 10/7/05]

THIRD DISTRICT COURT OF APPEAL

Probable cause to seize motor vehicle for contraband forfeiture proceedings

On November 28, 2004, a highway patrol officer stopped David Tarman for speeding and cutting off another vehicle. Upon questioning, Tarman admitted he had consumed several alcoholic drinks and smoked marijuana earlier in the evening. The officer arrested Tarman after he failed road sobriety and breathalyzer tests. The officer then ran a computer check and discovered that Tarman had a revoked license for a previous DUI conviction. The Department seized Tarman's vehicle, pursuant to sections 322.34(9)(a), and 932.701(2)(a)(9), Florida Statutes (2004), which provide for the forfeiture of a vehicle driven by a person under the influence of alcohol whose license has been suspended for a prior DUI conviction. See §§ 322.34(9)(a), 932.701(2)(a)(9), Fla. Stat. (2004).

The Department then filed a complaint for probable cause, with a verified affidavit from the arresting officer, and a final order of forfeiture. The trial court found that it was "fundamentally unfair" for Florida to revoke Tarman's license two years after the Georgia DUI conviction. The court also noted, however, that the Department's record showed that Tarman's license had been revoked and that the court *could* find probable cause. Regardless, the court ultimately decided that Tarman's license was not properly revoked at the time of the instant DUI. Therefore, due to the fundamental unfairness, the trial court determined there was insufficient probable cause to constitute a violation of the Florida Contraband Forfeiture Act.

The Third DCA held that Tarman was still driving with a revoked license. See State v. Green, 747 So. 2d 1007 (Fla. 3d DCA 1999)(a driver's license remains revoked until the driver takes affirmative steps to get driving privileges reinstated). The DCA stated: "Further, the question of whether probable cause exists involves 'whether the information relied upon by the state is adequate and sufficiently reliable to warrant the belief by a reasonable person that a violation had occurred.'" Cox v. Dep't of Highway Safety & Motor Vehs., 881 So. 2d 641 (Fla. 5th DCA 2004). "Here, Tarman admitted that he had a prior conviction for DUI, that he was driving under the influence of alcohol and marijuana, and at the very least, he was driving without a valid license." "The trooper testified that Tarman was clocked at eighty five miles per hour and failed roadside sobriety and breathalyzer tests." "Given Tarman's admissions, the trooper's testimony and the Department's records which show that Tarman's license was revoked and had never been reinstated, the Department had probable cause for the seizure of Tarman's vehicle."
[*DHSMV v. Tarman,*10/19/05]

Traffic stop of vehicle driving in "unsafe condition"

A trial court incorrectly suppressed drug evidence after finding that a state trooper had no basis to pull over a vehicle, the 3rd DCA held, concluding that the vehicle was operating unsafely even though it had two functioning tail lights.

Luis Perez-Garcia was pulled over because for one of his three tail lights was not properly working. During the stop a state trooper determined that Perez-Garcia's license was suspended and placed him under arrest, and a subsequent search incident to the arrest found drugs in Perez-Garcia's pocket. Perez-Garcia argued that state law only requires a vehicle to have two functioning tail lights, which he did, and said the drug evidence should be suppressed because the trooper had no legal reason to pull him over. The trial court agreed but the DCA reversed.

"Because Perez-Garcia's vehicle was in an 'unsafe condition' within the meaning of section 316.610 of the Florida Statutes, the trial court erred in granting the motion to suppress evidence obtained as a result of the stop," the DCA said.

[*State v. Perez-Garcia*, 10/12/05]

Court's authority to order services for disabled person

A trial court exceeded its authority when it ordered a state agency to provide immediate services to a disabled Floridian despite a hearing officer's earlier recommendation, and a state agency's determination, that the autistic boy does not meet the criteria for such services, the 3rd DCA held.

The Agency for Persons with Disabilities (ADP) placed a juvenile identified only as J.M. on a waiting list for services in 2001 after a hearing officer concluded the child did not meet the criteria for crisis services. Three months ago, a judge hearing an unrelated dependency proceeding involving J.M. issued an order finding J.M. to be in need of emergency expedited services and ordering the agency to change his status to provide crisis emergency services immediately. The agency filed an emergency motion for prohibition, which the DCA granted.

"The determination of which persons with disabilities are eligible for the Medicaid Waiver Program and the criteria for such determination has been statutorily delegated to the APD. The trial courts have not been delegated any such decision-making authority. A trial court may not interfere with and does not have the authority to enter into the decision-making process which is delegated to a state agency, in this case the APD. The trial judge in this matter has neither the jurisdiction nor the authority to make the determination of whether or not J.M. meets the 'crisis' criteria or to order APD to provide services to J.M. through the Medicaid Waiver Program. Such decision-making power lies only with the APD," the DCA said.

[*Agency for Persons with Disabilities v. J.M.*, 9/14/05]

Judge's authority to order state agency to explain decision

A trial court does not have constitutional authority to order officers of a state agency to produce records and reports detailing how the agency decided whether to provide certain services to a Florida citizen, the 3rd DCA said. The DCA granted a writ of prohibition sought by the Agency for Persons with Disabilities blocking a subpoena duces tecum, through which a trial court required three agency employees to appear in court and produce records concerning why a particular person was not approved for services under the Medicaid Waiver Program.

"The determination of which persons with disabilities are eligible for the Medicaid Waiver Program and the criteria for such determination lies with APD," the DCA said. "The trial court lacks constitutional or statutory authority to subpoena duces tecum (the employees), officers of state government, concerning a matter that is within their executive authority."

[*Agency for Persons with Disabilities v. F.G.*, 9/7/05]

Probable cause for arrest

Although an officer did not have sufficient basis to support the loitering charge on which the defendant was initially arrested, the officer did not have cause to believe the defendant had committed some crime and therefore the arrest – which eventually led to a grand theft conviction – was valid, the 3rd DCA held.

Andrew Freeman and a co-defendant were spotted riding bicycles while carrying a large amount of commercial-quality lawn maintenance equipment and towing a third bicycle. The

officer, aware of a recent rash of lawn tool thefts from garages and lawn sheds in the vicinity, asked Freeman for information that would show the equipment and bicycles were his. Freeman could not give basic identifying facts about any of the objects he had in his possession. When the officer determined that Freeman lied about the reason he was transporting the equipment, the officer arrested him for loitering and prowling. Freeman eventually was charged and convicted for grand theft, and argued on appeal that the officer did not have reason to believe he was loitering or prowling. Because he was never formally charged or convicted of loitering or prowling, Freeman said the arrest was illegal and therefore all the seized evidence should be suppressed. The DCA disagreed, finding that even though the officer did not have reason to believe Freeman was loitering or prowling, under the circumstances he did have reason to believe Freeman committed a crime.

"Thus, while the circumstances of this case and Freeman's behavior may not have been sufficient to support a loitering and prowling conviction, a crime for which he was neither tried nor convicted, they were more than adequate to support his arrest," the DCA said. [*Freeman v. State*, 8/31/05]

Probable cause for forfeiture of $17,600 as contraband

In this case the 3rd DCA held that the State had probable cause to believe that money seized during a traffic stop was connected to narcotics so as to seize money and maintain forfeiture action, where trooper detected marijuana odor emanating from the vehicle, motorist admitted he smoked marijuana earlier that day, trooper found a plastic bag containing $17,600, which was rolled into packs of bills and separated by denomination, motorist's explanation was that he had won a lawsuit and was on his way to purchase a condominium, trained narcotics-detection dog twice alerted to the money, and state's expert stated that the dog alerted to the money because it had recently been in the presence of a large quantity of illegal drugs. [*DHSMV v. Holguin*, 8/31/2005]

FOURTH DISTRICT COURT OF APPEAL

Incriminating statements after *Miranda* rights invoked

A trial court should have granted a motion to suppress a defendant's incriminating statement made in response to a leading question asked by an officer after the defendant had already invoked his right to remain silent, the 4th DCA held.

Joseph Origi was pulled over for speeding after he was clocked doing 90 mph in a 65 mph zone. The officer noticed that Origi's eyes were bloodshot and he smelled like alcohol, so the officer called for DUI backup. After Origi refused to perform sobriety tests or taking a breathalyzer test, he was arrested for DUI. During a search of Origi's vehicle, officers found a cooler containing drugs in the back seat. Origi was read his *Miranda* rights and invoked his right to remain silent. As they arrived at the jail with Origi, one of the offices commented on the amount of drugs inside the cooler, and Origi responded in a manner that admitted the drugs were his. Origi moved to have both the cooler and the statement suppressed, but the trial court denied the motion.

The DCA agreed that the cooler was properly admitted, but held that the trial court should have granted Origi's motion to suppress the statement he made on the way into the jail. The DCA found that Origi's statement came in response to a direct comment made to him, and led him to make an incriminating statement about the drugs. The DCA reversed and ordered a new trial. [*Origi v. State*, 9/28/05]

Constitutionality of unwarranted dog sniff at defendant's home

A warrantless "sniff" search by a police dog outside a private home violates a defendant's Fourth Amendment rights, the 4th DCA reaffirmed in granting a motion to suppress evidence.

James Rabb was arrested after a tip led police to place his house under surveillance. Without a warrant, officers brought in a K-9 unit, and the dog alerted to the front door of Rabb's house. Rabb moved to have evidence seized as a result of the dog's alert suppressed, asserted that his rights were violated when officers brought the dog to the house to determine whether drugs were inside. The DCA reviewed the case on remand from the U.S. Supreme Court, which held earlier this year in *Illinois v. Caballes* that the Fourth Amendment is not violated by a dog sniff during a lawful traffic stop that points to a substance that no individual has a legal right to possess. In a 2-1 decision, the DCA reaffirmed

its earlier decision that the trial court correctly suppressed the evidence.

"At the end of the analysis, the Fourth Amendment remains decidedly about place and when the place at issue is a home, a firm line remains at its entrance blocking the noses of dogs from sniffing government's way into the intimate details of a person's life. If that line should crumble, one can only fear where future lines will be drawn and where sniffing dogs, or even more intrusive and disturbing sensory-enhancing methods, will be seen next," the court explained. [*State v. Rabb*, 9/14/05]

Search and seizure - containers in cars

After receiving consent to search a vehicle for drugs, an officer may search containers he sees in the car when he has reason to believe they may hold drugs, the 4th DCA held, reversing a lower court order suppressing the drug evidence.

A police officer approached defendant Delvin McCutcheon in a hotel lot known by police to be the scene of drug transactions. The officer asked for identification, which McCutcheon had to retrieve from the back seat of his car. When McCutcheon opened the back door of the car to get his ID, the officer noticed three key boxes. Knowing the such boxes are often used to conceal drugs, the officer obtained McCutcheon's consent to search him and the vehicle. When the officer opened the key boxes, he found drugs and placed McCutcheon under arrest. McCutcheon moved to have the drugs suppressed, arguing that the officer went beyond the scope of the search when he opened the boxes. The trial court agreed and suppressed the evidence but the DCA reversed, concluding that the officer did not need additional permission to search the boxes because he specifically said he was searching for drugs.

"The defendant did not attempt to withdraw or limit the scope of his consent or instruct the deputy that such consent did not extend to containers within the vehicle," the DCA noted. [*State v. McCutcheon*, 9/7/05]

FIFTH DISTRICT COURT OF APPEAL

Miranda rights - officers invited into defendant's home

When an individual invites an officer into his home and agrees to answer questions about situations he was involved in, he is not considered in police custody and therefore is not entitled to *Miranda* protections, the 5th DCA held.

John Snead was convicted of two counts or arson on occupied dwellings. When officers went to question Snead about the incidents, he invited them into his home and asked them to take a seat inside. Snead then carried on a conversation about the fires and voluntarily answered the officers' questions. He eventually was arrested after he admitted to setting the fires. On appeal, Snead argued that his statements should be suppressed because he considered himself in police custody and should have been read his *Miranda* rights. The DCA disagreed, finding that the fact that Snead invited the officers in and the demeanor of the conversation did not give the impression that Snead was in their custody.

"In order for a court to determine that a suspect is in custody, it must be evident under the totality of the circumstances that a reasonable person in the suspect's position would feel a restraint on his or her freedom of movement. In other words, a reasonable person in the position of the person being interviewed would not feel free to leave or to terminate an encounter with the police," the DCA said. "Thus, as here, when a person invites a law enforcement officer into his or her home and agrees to answer questions, the person is not ordinarily considered to be in custody for *Miranda* purposes." [*Snead v. State*, 10/28/05]

Search and seizure - passenger's purse

A sheriff's deputy acted properly in searching a purse inside a vehicle because he was conducting a search of the car incident to arrest, even though the purse was not owned by the person whose arrest led to the search in the first place, the 5th DCA held.

Seminole County Deputy William Morris arrested a woman inside a vehicle for drug possession and began a search of the vehicle. Dawn Hawley approached the vehicle demanding her purse, which was inside the vehicle, but Deputy Morris would not allow anyone inside the car until he completed his search. A K-9 dog alerted to more drugs in the vehicle, leading Deputy Morris to find drugs in a pill bottle in Hawley's purse. Hawley admitted the purse was hers, and she was arrested. On appeal, she argued that the officer did not have a warrant to search her purse and that the drugs should be suppressed

because they were illegally obtained. The DCA disagreed, finding that the deputy had sufficient reasons to search the purse.

Noting that the deputy could search the purse incident to the arrest of the first woman and the K-9 alerted to drugs, the DCA said, "(Deputy) Morris made a valid arrest of an occupant of the vehicle, at which point he had authority to search the vehicle and to refuse access to the vehicle until it had been searched."
[*Hawley v. State*, 10/21/05]

Illegal stop - voluntary encounter

A police officer improperly stopped and searched a man who showed he had no wish to be involved in a voluntary encounter, and therefore cocaine found on the man must be suppressed, the 5th DCA held.

Kervince Oslin was arrested and pled guilty to possession of cocaine and resisting an officer without violence. While Oslin and another man were walking in the street, they were approached by an officer who was responding to a call of suspicious individuals whose descriptions matched those of Oslin and the other man. The officer first shined a spotlight on the two men, who turned around briefly but continued to walk away. The officer then used an air horn to get their attention and, after existing his vehicle, started asking the men for information about their identities and destination. Because Oslin would not provide the officer the identification he requested, the officer asked for consent to search Oslin. Oslin gave consent, and the officer found cocaine in his pocket and placed him under arrest. On appeal, Oslin argued that the officer lacked a reason to stop and talk to the two men, and therefore the drugs found on him should be suppressed. The DCA agreed, finding that the stop went from a casual encounter to an investigatory stop without reason.

"A citizen encounter becomes an investigatory stop once an officer shows authority in a manner that restrains the defendant's freedom of movement such that a reasonable person would feel compelled to comply. The officer had already used his spotlight on the two men, who turned toward the light, observed the officer, turned away and resumed walking. This was a clear expression of a desire not to engage in a consensual encounter. The officer's use of the air horn, combined with the officer jumping out of his patrol car and hailing the two men, was designed to make the two men stop just as plainly as if the officer had yelled out, 'Halt!' . . . A stop without a reasonable suspicion of criminal activity occurred and Oslin's consent to the search of his person was invalid as a product of an illegal stop," the DCA said.
[*Oslin v. State*, 10/14/05]

Motion to suppress - no suspicion of crime

Because an officer had no reason to believe a suspect was committing a crime, the initial investigatory stop was unreasonable and the defendant's motion to suppress the evidence that resulted in his arrest should have been granted, the 5th DCA held.

An officer approached Simeon Williams, asking whether Williams was a resident of an apartment complex in order to determine whether Williams was trespassing on the property. During the stop Williams had his hands in his front pocket, and in order to ensure his own safety the officer asked him repeatedly to remove his hands. When Williams repeatedly put his hands back in his pocket, the officer asked for consent to search for weapons, which Williams refused. Williams then took off running and was taken down by the officer, at which time the officer discovered a cigar tube containing cocaine. Williams was arrested for possession of cocaine and resisting an officer without violence, but filed a motion to suppress claiming the stop was invalid. The trial court denied the motion, but the DCA agreed with Williams and reversed the denial of his motion to suppress.

"Officer (Anthony) Marchica failed to articulate any facts to support a founded suspicion that Williams was engaged in any crime," the DCA said. "It was not even apparent from the officer's testimony whether 'no trespassing' signs were posted in the complex. In fact, his testimony suggested that a crime could have been committed only if Williams refused to leave after receiving Marchica's warning," the DCA said.
[*Williams v. State*, 9/16/05]

DHSMV administrative hearing following remand required to be *de novo*

After circuit court quashed original administrative order suspending driver's license for driving under the influence (DUI) and remanded matter for further proceedings, on ground that the original administrative hearing violated driver's due process rights, Department of Highway Safety and Motor Vehicles had right to conduct a second hearing which met due process requirements, even though first hearing officer had retired; such hearing was to be de novo, allowing both parties the right to present

all evidence which either wanted the second hearing officer to consider.
[*Tynan v. DHSMV, 9/9/2005]*

Motorist required to have driver license photograph taken without wearing veil

The Fifth DCA held that the decision of Department of Highway Safety and Motor Vehicles, to cancel Muslim motorist's driver's license after she refused to have her identification picture taken without her veil, did not constitute substantial burden on motorist's religious freedom, and thus, Department did not violate Florida's Religious Freedom Restoration Act (FRFRA); motorist was required to be veiled only in the presence of men unrelated to her, motorist's veiling belief did not mean that she could never be photographed without her veil, and Department would have accommodated motorist's veiling beliefs by using a female photographer with no other person present. The Court further held that such decision did not violate motorist's right of equal protection, where statute governing issuance of driver's licenses clearly required "fullface" photographs on permanent licenses, and there was no evidence that the Department ever made any exception to that requirement for anyone.
[*Freeman v. DHSMV*, 9/2/2005]

Motorist's driving provided objectively reasonable basis for making traffic stop

The 5th DCA held that a stop may be justified even in the absence of a traffic infraction when the vehicle is being operated in an unusual manner. Citing prior DCA decisions, the Court noted that a legitimate concern for the safety of the public can warrant such a stop…such as a vehicle's abnormal movement in crossing fog line three times within one mile justified a traffic stop…a stop is justified where a vehicle weaved within its lane more than five times over a quarter mile distance…and a traffic stop was justified where vehicle was weaving within its lane and moving slower than posted speed. In this case, at 2:00 a.m., the deputy saw Rodriguez "bl[o]w" out of a driveway or past a stop sign near a bar at an excessive rate of speed, continue to drive down the wrong side of the road across a double yellow center line, and then take a wide swing into the driveway of an apartment complex. Based on these facts, the 5th DCA held that the trial court erred in ruling that the stop was not justified. Based upon these facts, the deputy would have been derelict in his duties if he did not stop Rodriguez because there was probable cause based upon objective evidence to believe Rodriguez violated several Florida traffic statutes. [*State v. Rodriguez,* 6/17/2005]

ATTORNEY GENERAL'S OPINIONS

Number: AGO 2005-51
Date: July 12, 2005
Subject: BOATS–constitutionality of statute exempting non-motored powered boats from registration. Art. VII, s. 1(b), Fla. Const.; s. 328.48, Fla. Stat.
In response to a request from the Marine Industries Association of Florida, Inc., the Attorney General held that section 328.48(2), Florida Statutes, clearly exempts non-motor-powered vessels from the registration requirements in that chapter. The Attorney General further held: "This office has no authority to either declare the statute unconstitutional or advise noncompliance with its direction or mandate…[r]ather it must presume the constitutionality of the statute until such time as it is declared invalid by a court of competent jurisdiction... [a]ccordingly, this office must presume the constitutionality of section 328.48(2), Florida Statutes, and advise that pursuant to section 328.48(2)(d), non-motor-powered vessels are exempt from the registration requirements of Chapter 328, Florida Statutes. Chapter 328, Florida Statutes. [*AGO 2005-51, 9/22/2005*]

Number: AGO 2005-45
Date: August 2, 2005
Subject: WEAPONS--LAW ENFORCEMENT OFFICERS--authority of retired law enforcement officers to carry concealed weapons under federal act in absence of statewide qualifications and training standards. s. 790.06, Fla. Stat.; 18 U.S.C. 926C
The Attorney General held under Florida law, which exempts active law enforcement officers from the requirements of the state's concealed weapons licensing statute, retired law enforcement officers were required to obtain a concealed weapons license, although section 790.06, Florida Statutes, exempts a retired officer, from the required fees and background investigation for a period of one year subsequent to the date of retirement of the officer. The Attorney General further held that the federal law, which permits retired law enforcement officers to carry concealed weapons provided that they meet the criteria specified in the federal act, would, in his opinion, preempt the state statute requiring retired law enforcement officers to obtain a concealed

weapons permit. This opinion concludes: "In light of these considerations, I am of the opinion that retired law enforcement officers may carry concealed weapons pursuant to 18 United States Code 926C even though the state does not currently have statewide firearms training and qualifications standards for active law enforcement officers."

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