
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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VOLUME MMV, ISSUE 2

U. S. SUPREME COURT

Ten Commandment displays on public property

Displays of the Ten Commandments are not inherently unconstitutional and are therefore allowed on public property as long as they do not specifically amount to promotion of religion, the U.S. Supreme Court held in a pair of sharply divided opinions.

The court prohibited a display of the religious document on the wall of courthouses in two Kentucky counties, but found no constitutional violation in the placement of a Ten Commandments monument on the grounds of the state Capitol building in Austin, Texas. In the Kentucky case, the court said its ruling does not mean that a sacred text can never be integrated into a governmental display on law and history, but said the displays in Kentucky were improperly motivated by a religious purpose. In the Texas case, however, the court said the display of the Ten Commandments was permissible because it was part of a broader display of important historical documents that provided the foundation of law.

“Of course, the Ten Commandments are religious – they were so viewed at their inception and so remain. The monument, therefore, has religious significance,” Chief Justice Rehnquist wrote for the court in the Texas case, *Van Orden v. Perry*. “But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning . . . Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”

[*Van Orden v. Perry*, 6/27/05]

[*McCreary County v. ACLU of Kentucky*, 6/27/05]

U.S. ELEVENTH CIRCUIT COURT OF APPEALS

Sovereign immunity - Florida sheriff acting as arm of state

A Florida sheriff, acting to enforce a county dance hall ordinance, is not an arm of the state entitled to the benefits of the state’s Eleventh Amendment immunity from suit in federal court, the 11th U.S. Circuit Court of Appeals held.

The court ordered further proceedings in a civil rights lawsuit against the Hillsborough County sheriff filed by the owner of a private night club after the Sheriff’s Office began enforcing a new county dance hall ordinance. The owner, Elias Abusaid, was arrested and convicted of violating the ordinance and was sentenced to probation, but then sued the county and the sheriff over the constitutionality of the ordinance and how it was enforced. The trial court dismissed the lawsuit on Eleventh Amendment grounds, but Abusaid appealed. The 11th Circuit conducted an extensive analysis in concluding, as it has in the past, that a Florida sheriff is not an arm of the state when enforcing a county ordinance.

“Abusaid’s claim arises out of the actions taken by the Sheriff in enforcing a Hillsborough County ordinance on behalf of the County . . . (T)he County’s Dance Hall Ordinance specifically provides that “[t]he Sheriff is responsible . . . for enforcing the Rave/Dance Hall Ordinance.” And it was pursuant to this express grant of authority by the County that the Sheriff, acting on behalf of the County, enforced the Ordinance against Abusaid. . . . Simply put, this Court’s function-by-function approach to Eleventh Amendment immunity compels the conclusion that the Sheriff cannot be deemed to be acting under the state’s control when enforcing a local ordinance,” the 11th Circuit held. “(T)he fact that a judgment against the Sheriff in this case would not be paid out of the state treasury is, in itself, a clear marker that the Sheriff is not an arm of the state.”

[*Abusaid v. Hillsborough County, etc.*, 4/15/05]

Reasonable suspicion to detain vehicle occupants

Reversing a trial court order suppressing

evidence, the 11th U.S. Circuit Court of Appeals said two motorists' suspicious behavior from the start of a traffic stop gave a law enforcement officer a reasonable basis to conduct a more detailed stop that eventually turned up illegal drugs.

An Alabama trooper stopped a speeding vehicle in which Joanna Hernandez was riding as a passenger. The trooper questioned Hernandez and the driver about the purpose and destination of their trip and other matters, and testified that their inconsistent answers aroused his suspicions. The trooper eventually gained permission to search the vehicle and found cocaine in a hidden compartment, and arrested Hernandez and the driver. A trial court suppressed the drug evidence, concluding that the search went beyond the scope of the traffic stop and saying the trooper had no reasonable suspicion to detain Hernandez and the driver for more than 15 minutes. The 11th Circuit reversed, rejecting the lower court's reasoning that the questioning had nothing to do with officer safety or the traffic stop.

“(R)ight from the start, the Trooper had reason to suspect that he was not dealing with just a speeding case and, thus, reason to detain Defendant longer than perhaps a traffic stop, in itself, would allow. Once the Trooper developed this reasonable suspicion, he had a duty to investigate more,” the 11th Circuit said. “Even *if* the duration of the pre-consensual detention in this case did extend beyond what might have been reasonable for just a routine traffic stop, the facts that came to light from the beginning of the stop – facts giving rise to reasonable suspicion that an additional crime was being committed – were more than sufficient to justify this detention of no more than seventeen minutes.”

[*United States v. Hernandez*, 7/29/05]

Admissibility of complaints against arresting officer

Evidence of prior investigations into an arresting officer was irrelevant to a criminal defendant's case and the trial court correctly refused to allow it to be admitted during trial, the 11th U.S. Circuit Court of Appeals held.

David Taylor was arrested in Atlanta on drug possession and firearm charges. Taylor advised the court that he wanted to introduce reports that one of the arresting officers, Matthew Strevel, was previously investigated following citizen complaints of harassment, planting evidence and brutality. Taylor contended that the

reports would prove that Officer Strevel planted the drugs on him. The trial court found that Taylor only referenced one report and ruled that it could not be introduced because it could create prejudice and confuse the issues.

The 11th Circuit agreed, finding that there were various reasons the reports should not have been admitted during trial. Among other reasons, the court noted that all the allegations against Officer Strevel were deemed to be unfounded and no discipline was assigned. The court affirmed Taylor's conviction and sentence.
[*United States v. Taylor*, 7/19/05]

FIRST DISTRICT COURT OF APPEAL

Insurance exclusion for criminal acts

A provision of an automobile insurance policy that prevents coverage for losses caused while the insured person is committing or attempting a felony goes against public policy and therefore is invalid, the 1st DCA said.

The court did not conduct a detailed analysis of the public policy implications, but instead only concluded that a trial court correctly applied a 2001 decision by the 2nd DCA, in the absence of any prior determination on the question by the 1st DCA or Florida Supreme Court. As a result, the court affirmed the trial judge's decision invalidating the policy exclusion, which appeared to block innocent victims – including the estate of one deceased man – from collecting for losses caused by the criminal actions of another individual.

[*Mercury Insurance Company of Florida v. Coatney, et al.*, 8/16/05]

Probable cause to stop vehicle - windshield crack

A crack in car's windshield provides a valid reason for police to pull the car over to inspect it for safety purposes, the 1st DCA said.

Tomesha Howard was charged with various drug-related offenses stemming from a traffic stop caused by a crack in her vehicle's windshield. The trial court granted Howard's motion to suppress evidence from the consensual search, agreeing with Howard that the crack in the windshield did not give the arresting officer a legitimate reason to pull her over, and therefore Howard's consent to the vehicle search was irrelevant. The state

appealed, and the 1st DCA concluded that the vehicle stop based on a crack in the windshield was valid. Therefore, the DCA said, any evidence found as a result of the stop may be used in court.

“(The officer) had an objective reasonable suspicion to stop Appellee’s car and inspect the windshield, so that the evidence discovered after the stop should not have been suppressed,” the DCA said, certifying conflict with a contrary June ruling by the 4th DCA.

[*State v. Howard*, 8/5/05]

Jury instructions - resisting deadly force

A suspect may lawfully resist an officer who is using excessive force, and therefore a trial court erred in not instructing the jury to that effect, the 1st DCA held.

Kelvin Parker was convicted and sentenced for drug possession and resisting an officer with violence. Parker argued that he was merely defending himself from what he called excessive force used by two arresting officers. The trial court found that Parker failed to prove he had resisted in response to being put in a chokehold. However, both officers testified that they used a chokehold on Parker and he did not stop resisting until they handcuffed him.

The DCA disagreed with the trial court, concluding that the officers’ testimony supported Parker’s claim. The DCA said the trial court erred by not instructing the jury that it is lawful to use non-deadly force to resist deadly force. The court affirmed Parker’s convictions for drug possession but reversed his conviction for resisting.

[*Parker v. State*, 7/20/05]

Impermissible routine pat down

An officer did not have the authority to conduct a pat down of an individual he planned to cite for trespassing because the pat down was conducted as a matter of routine and was not based on reasonable suspicion, the 1st DCA ruled.

Anthuan Estevez was convicted of possession of a firearm by a convicted felon and resisting arrest without violence. When Estevez was asked to leave a department store, an officer asked Estevez to follow him to his vehicle so he could give Estevez a trespassing citation. The officer testified that once they got to his car he conducted a pat down, in keeping with his routine practice, so he could place Estevez in the

back of the patrol car while writing the citation. The officer found a firearm during the pat down and proceeded to arrest Estevez. Estevez argued on appeal that the pat down was illegal because the officer did not have reasonable suspicion that he was doing anything illegal. The DCA agreed, finding that the officer did not have any reason to believe Estevez was involved in any crimes or that he was in any danger to justify a pat down.

“Because the evidence is undisputed that the police officer lacked a reasonable suspicion that Estevez was armed, we agree the trial court erred in denying the motion to suppress,” the DCA said. [*Estevez v. State*, 6/23/05]

Class action lawsuit over Crown Victoria police vehicles

A trial judge improperly allowed Florida law enforcement agencies to proceed with a class action lawsuit against the maker of Crown Victoria Police Interceptor vehicles, because the judge did not clearly establish that a class action was the best way for the case to proceed, the 1st DCA held.

An Okaloosa County circuit court judge certified a class made up of all law state and local enforcement agencies in Florida that bought or leased the vehicles since 1992. Crown Victorias are among the most common police vehicles but have been plagued by reports of exploding gas tanks and other problems. After the trial court certified the class, Ford Motor Company argued on appeal that the judge erred in certifying the class because he failed to engage in the rigorous analysis for class certification required by Florida Rule of Civil Procedure 1.220. Ford argued that each law enforcement agency brought different facts and circumstances to the case, and therefore individual claims overwhelmed any questions of law or fact that would apply to the entire class. Ford also argued that the police agencies had not shown that a class action trial would be the best way to resolve the disputed issues. The DCA agreed and sent the case back to the trial court, decertifying the class. Noting that the trial court’s order contained not findings of fact as required by rule, the DCA instructed the trial court to reconsider the issues in accordance with procedural requirements.

“Absent specific findings, we cannot discern whether the trial court applied the correct analysis when making its decision,” the DCA said.

[*Ford Motor Company, et al., v. Morris, et al.*, 6/21/05]

Officers' deception to obtain DNA sample

Deception by law enforcement officers does not negate a suspect's consent to provide a DNA sample, the 1st DCA said in ruling that a DNA sample was admissible even though it was obtained under false pretenses.

While Earl Wyche was detained for a probation violation, he was asked to submit a DNA sample. Officers suspected that Wyche was involved in a sexual assault, but told him they were requesting the DNA sample in connection with a burglary they made up in order to obtain the sample. Wyche consented and provided a DNA sample, but the sample did not match one from the sexual assault. While that investigation proceeded, another officer asked for a sample of Wyche's DNA in connection with a robbery in a different area. The DNA samples turned out positive for the robbery, leading to Wyche's conviction on burglary, grand theft and criminal mischief charges. Wyche contended on appeal that because the officers lied about the burglary to obtain his DNA, the results should have been suppressed during his robbery trial.

"Absent coercion, threats or misrepresentation of authority, the courts have long recognized deception as a viable and proper tool of police investigation. In the case before this Court, appellant was clearly aware of the fact that the officer wanted the DNA sample in order to investigate a crime, and the officer did not misrepresent the fact that he had no search warrant. The officer did not indicate that appellant had no choice regarding whether to provide a DNA sample," the DCA said.

[*Wyche v. State*, 6/20/05]

"Plain smell" doctrine - probable cause

The fact that a law enforcement officer smells marijuana on an individual does not give the officer probable cause to search everywhere the individual may have gone, the 1st DCA held.

Douglas Smith was arrested for having contraband in his home. Officers received an anonymous tip that Smith was growing and selling marijuana out of his house and were at Smith's home when he and his girlfriend pulled in the driveway. An officer smelled marijuana on Smith's girlfriend and asked for consent to search the house, which she refused. Smith and the girlfriend left the residence and the officers set up surveillance on the home while one officer went to get a warrant. During the time Smith was

gone the officers conducted a thermal-imaging scan, which provided no evidence. When Smith returned home the officers refused to let him in, explaining that they believed they had probable cause to obtain a warrant. At that point, Smith negotiated with the officers and agreed to a search. The DCA found that the officers did not have probable cause to search the residence or to obtain a warrant. The anonymous tip was not proven to be reliable and therefore could not be used to establish probable cause, the DCA said, and the only remaining evidence was the smell of burnt marijuana on the girlfriend.

"The odor on the girlfriend, by itself, does not give the officers probable cause to believe marijuana was present in the home," the DCA said. "If it did, the deputies could search anywhere the girlfriend went, even after she was no longer present. In that case, the deputies would be able to search the home because she was there, and then the car after she entered the car, and one would have to conclude, if she stopped at a neighbor's house, the deputies could search that home as well. We decline the State's invitation to stretch the 'plain smell' doctrine into a de facto, roving proxy for probable cause."

[*Smith v. State*, 5/25/05]

Inevitably discovered evidence

Evidence found during a patdown conducted for officer safety may be admitted in court because it eventually would have been discovered due to the events surrounding the offense, the 1st DCA held.

A vehicle driven by Orie Kennard was pulled over by two officers. A passenger in the vehicle shoved an officer and took off running after giving false information to the officers. While one of the officers chased the passenger, the other officer handcuffed Kennard and conducted a patdown for officer safety. During the patdown the officer found cocaine, and a subsequent search of the car revealed more drugs. Kennard challenged the use of the drug evidence, but the DCA found that because of the felony the passenger committed in shoving the officer before fleeing, the officers had probable cause to search the vehicle, which in turn would have led to a search of Kennard's person.

"The passenger committed a felony on the officer performing the vehicle stop, then fled the scene. Another officer at the scene testified that after witnessing the passenger's assault on the first officer and subsequent flight, he felt

additional criminal activity had taken place. His firsthand knowledge of these events justified this belief and amounted to sufficient probable cause to search Appellant's vehicle," the DCA said. "A valid arrest due to the cannabis in the passenger compartment would have also revealed the cocaine in Appellant's pocket, allowing him to be subject to the charges for which he was convicted."

[*Kennard v. State*, 4/29/05]

Former state agency heads' immunity from depositions

Former state agency heads are entitled to the same protection from giving compelled testimony as are incumbent agency heads, the 1st DCA held in a case of first impression.

The DCA said the question of immunity for former officials had never been addressed before. The court granted former Education Commissioner Jim Horne's motion to quash a trial court order compelling him to give a deposition regarding school funding decisions that occurred during his tenure as commissioner. Horne and the Department of Education contended that as a former commissioner, Horne should be immune from deposition absent a showing that his testimony would be necessary, relevant and unavailable from another source. The DCA agreed.

"(T)he rule prescribing that agency heads and other high-ranking officials should not be compelled to testify unless it has been established that the testimony to be elicited is necessary, relevant, and unavailable from other sources is equally applicable to former agency heads and high-ranking officials in circumstances such as these involving past official conduct. Not only would subjecting the former officials to depositions without satisfying the necessary requirements be unduly burdensome for the officials, it could very well . . . serve as a significant deterrent to qualified candidates seeking public service positions," the DCA said.

[*Horne v. School Board of Miami-Dade County*, 4/18/05]

Culpable negligence standard

Evidence of excessive speed and intoxication, without more, does not establish a conclusive case for culpable negligence, the 1st DCA held.

Kent Sexton was convicted of manslaughter after being involved in a car accident in which

the driver of the other vehicle died. Evidence showed that Sexton, age 20, was going 7 to 10 mph over the speed limit and was across the center line when the accident occurred. Although Sexton had been drinking some time before the accident, his blood alcohol level was only .034, less than half the legal threshold for intoxication.

"Here, Sexton was not shown to be intoxicated; his speed did not greatly exceed the posted limit; and while his crossing of the center line into oncoming traffic was evidence of negligence or recklessness, which resulted in the death of another person, this combination of facts does not establish willful or wanton misconduct, or describe behavior that was so gross and flagrant as to render it likely that his driving would cause the death of another," the DCA said, concluding that the trial court should have dismissed the manslaughter charge against Sexton.

[*Sexton v. State*, 4/7/05]

Evidence sufficient to support finding of probable cause for DUI arrest

In this case, the petitioner sought certiorari review of a circuit court order which overturned the hearing officer's order sustaining the administrative suspension of respondent's driver's license. The 1st DCA held that the circuit judge should have, but did not, limit her inquiry to whether "there was competent, substantial evidence to support the hearing officer's findings." Instead of focusing solely upon the admissibility of certain statements made by respondent to the investigating officer, the circuit court, under the relevant law, should have focused upon all the factors and circumstances known to the investigative officer in making a probable cause determination as to whether respondent was the driver of the vehicle in question. The 1st DCA held that the record contained ample evidence that, when viewed in its totality, supported the hearing officer's probable cause determination.

[*Department of Highway Safety and Motor Vehicles v. Brass*]

SECOND DISTRICT COURT OF APPEAL

Improper order sealing agency records

Because suspension of a driver's license is an administrative proceeding rather than a criminal sanction, a circuit court judge does not have the authority to seal the record of the suspension,

the 2nd DCA held.

Michael Rigau's driver's license was suspended after he was stopped for DUI and refused a breathalyzer test. The underlying DUI charge was later dismissed, but the license was suspended based on his failure to take the breath test. Rigau sought certiorari review of the suspension in circuit court, and when that effort failed he persuaded the judge to invoke two sections of Chapter 943, F.S., to seal the record of his license suspension. This was error, the DCA said, because the statutory provisions cited by the judge specifically refer to the sealing and expunging of "criminal history information."

"Since the suspension of a license is not criminal in nature, these records do not fall within the scope of sections 943.0585 and 943.0589. The only way to remove these records is to successfully challenge the issuance of the suspension by obtaining certiorari relief from the circuit court. Rigau attempted this and failed. Since he did not seek review of that decision, he has waived the benefit of that procedure," the DCA said. [*Department of Highway Safety and Motor Vehicles v. Rigau*, 5/4/05]

Public records - identity of alarm permit holders

Agreeing with the reasoning of a recent Attorney General's Opinion, the 2nd DCA held that private security companies are not entitled to obtain, through a public records request, documents that could be used to determine which homes and businesses are protected by alarm systems.

The DCA affirmed a trial court decision denying the company's petition for a writ of mandamus that would have compelled the City of Clearwater to provide the information. The city previously complied with a request for information on the total number of alarm permits issued in the city for a given year and how many warnings or citations were issued for violations of the city's ordinance governing false alarms. However, the city refused to comply with a second request for more detailed information including the identity of certain permit holders. The company asserted that statutes do not provide an exemption for such information, but the DCA – embracing a 2004 Attorney General's Opinion that cited, among other things, the "need to protect public and private infrastructure from terrorist attack" – said disclosure of the information is not required.

"Sections 281.301 and 119.071 prohibit public

disclosure of the names and addresses of applicants for security system permits . . . because disclosure would imperil the safety of persons and property," the DCA said.

[*Critical Intervention Services, Inc., v. City of Clearwater*, 8/31/05]

Inevitable discovery of evidence

A pat-down search that resulted in the discovery of a weapon was not supported by reasonable suspicion, but because the officer knew the defendant may have committed a crime the weapon inevitably would have been found and therefore should not have been suppressed at trial, the 2nd DCA held.

The juvenile defendant, referred to only as D.D.D., was charged with several counts of possession of a weapon and drugs. An officer saw the defendant shortly after learning from a dispatcher that an individual matching D.D.D.'s description had possession of a gun. The officer saw D.D.D. drop a heavy silver object and then, after seeing the marked police car, walk in the opposite direction from the officer. The officer called the defendant over and conducted a pat-down search, which led to the discovery of a knife hanging around D.D.D.'s neck. The officer then recovered the object dropped by D.D.D. – which turned out to be a gun – and found drugs in the youth's shoes in a search incident to arrest. The trial court granted a motion to suppress the evidence, concluding that the officer did not have reasonable suspicion to conduct the initial search. The DCA agreed that the officer did not have a basis to search D.D.D. the first time, but said because the officer could legally recover the gun he saw being dropped, the knife would have been discovered inevitably and should not have been suppressed.

"The impropriety of the pat-down search, however, does not negate the lawfulness of the initial stop, nor does it taint D.D.D.'s arrest," the DCA said. "Because the officer had a reasonable suspicion that D.D.D. had committed a crime, he was well within his authority to stop and detain him and even to bring him over to the tree to retrieve the gun. Once the officer discovered the gun, he had the probable cause necessary to arrest D.D.D."

[*State v. D.D.D.*, 8/26/05]

Improper order overruling state agency's action

A trial court incorrectly overruled a state agency when it restored the driver's license of a man

who pled no contest in one of the cases that led to his license revocation, the 2nd DCA held.

The Department of Highway Safety and Motor Vehicles revoked Larry Rosenthal's license for five years after determining that he was a habitual traffic offender. That determination was based on Rosenthal's one DUI and two offenses of driving while his license was suspended (DWLS). However, Rosenthal noted that he pled nolo contendere with adjudication withheld in one of the DWLS cases, and argued that it could not be considered a "conviction" for purposes of labeling him a habitual traffic offender. The DCA disagreed, concluding that a 2000 Florida Supreme Court decision made it clear that Rosenthal's situation did not fall under a narrow statutory exception that allows a small number of no-contest cases to not count as convictions.

"In failing to follow (that case), the circuit court failed to apply the correct law and violated a clearly established principle of law. The resulting miscarriage of justice – the restoration of Rosenthal's driver's license when the law clearly required that the license be revoked for his habitual violations of the law – justified the granting of the Department's petition," the DCA concluded.

[*Department of Highway Safety and Motor Vehicles v. Rosenthal*, 8/19/05]

Improper reversal of agency's license suspension

A trial judge improperly reweighed the evidence in reaching a decision to set aside a state agency's administrative order suspending a driver's license, the 2nd DCA held.

The Department of Highway Safety and Motor Vehicles suspended James Kurdziel's license after he was pulled over for weaving "significantly" outside his lane, then failed a field sobriety test and refused to submit to a breath-alcohol test. A hearing officer concluded that the stop was proper and sustained the suspension of Kurdziel's license, finding that the officer conducted a traffic stop based on a concern that Kurdziel might have been impaired, was ill or experienced mechanical problems. A circuit court judge reversed, concluding that the evidence did not show specifically why the arresting officer pulled over Kurdziel's vehicle. The DCA reinstated the department's order, saying the lower court improperly substituted its view of the evidence for the hearing officer's.

"In this case, the circuit court reweighed the

evidence, which was beyond the scope of its certiorari review," the DCA said.

[*Department of Highway Safety and Motor Vehicles v. Kurdziel*, 8/19/05]

Probable cause during police stop

An officer should not have arrested a passenger in a vehicle that contained a bag with drug paraphernalia without first questioning the man to determine whether he knew anything about the contents of the bag, the 2nd DCA held.

Tom Allen Perry Jr. was arrested for constructive possession of drug paraphernalia and possession of drugs. Perry was arrested for being a passenger in a car where a bag containing drug paraphernalia rested between him and the driver. When the officer searched Perry incident to the arrest, the officer found a small amount of drugs in Perry's pocket. The state dropped the constructive possession charge but proceeded with the drug possession charge. Perry argued on appeal that the officer lacked probable cause to arrest him and therefore the drugs found in the search should be suppressed, and the DCA agreed that the officer should have determined Perry's knowledge of the bag's contents.

"Certainly the officers may have had a reasonable suspicion that Mr. Perry's presence in the car was not accidental but perhaps a form of protection for (the driver) against arrest or violence," The DCA said. "The police were certainly free to question Mr. Perry about these circumstances and to obtain his identification and continue their investigation to develop probable cause. They may have been justified in performing a patdown to make certain Mr. Perry was not armed. However, that did not occur in this case and nothing in the record convinces us that the drugs would have been located in a patdown for weapons. . . . (B)ased upon the limited information obtained by law enforcement prior to the arrest, the possibility that Mr. Perry knew the contents of the black bag did not rise to the level of probable cause."

[*Perry v. State*, 8/3/05]

Collection of evidence

The seizure of evidence following a fatal traffic accident was legal because the evidence was seen and collected by an officer who was not involved in the disputed actions that led to the accident, the 2nd DCA held.

Adam Jacoby was arrested for vehicular

homicide and DUI manslaughter after he was involved in a single-car crash in which his passenger was killed. Jacoby claimed the accident was caused by a high-speed chase instigated by the pursuing officer, Polk County Sgt. Scott Lawson. Jacoby moved to suppress all evidence from the accident scene based on his claim that Lawson caused the fatal crash and therefore the evidence was the fruit of the poisonous tree. The trial court denied Jacoby's motion because another officer who was not involved in the accident, traffic investigator David Hooyman, saw the evidence scattered in plain sight and collected it after Lawson left the scene.

“(S)ince Hooyman conducted the search and seizure after Lawson had left the scene, the admissibility of the items seized must be determined based on whether Hooyman's seizure was proper, not based on Lawson's behavior,” the DCA said. “As the trial court properly noted, when Hooyman arrived on the scene, he observed a number of items strewn about in open view in an area where Jacoby had no reasonable expectation of privacy. Given the proximity of the items to the two halves of the car, we conclude that Hooyman had probable cause to associate the property with criminal activity.” [State v. Jacoby, 7/29/05]

Officers' search of uninvolved person

As long as officers are legally inside a residence, they may check uninvolved individuals for weapons to ensure officer safety, the 2nd DCA held.

The court granted the state's request to overturn a trial judge's order suppressing drug evidence against William Michael Yule. Yule's roommate, Stacy Ellison, was on probation when probation officers, escorted by sheriff's detectives, arrived at their residence to conduct a search for evidence that Ellison was violating her probation by selling drugs. During the search the detectives asked Yule if he had any weapons on him. When Yule lifted his shirt, the officers found drug paraphernalia and arrested him. The trial court suppressed the evidence, saying the detectives' search should have been confined to Ellison and any evidence of her probation violation. The DCA disagreed, finding that the detectives had the legal authority to enter the residence and, in order to ensure their own safety, to question Yule about any weapons he may have had.

“We conclude that the interest in officer safety

provided an adequate justification for Yule's initial detention and the detective's inquiry concerning weapons,” the DCA wrote in their opinion,” the DCA said. “To secure the premises and ensure officer safety, the detectives properly detained and questioned Yule. At each step along the way, the probation officers and the detectives acted based on proper legal authority.” [State v. Yule, 6/29/05]

Illegal detention - motion to suppress

Officers conducted an illegal detention when they asked a defendant to remove his wallet even though the officers had no reason to believe he had committed or was about to commit a crime, the 2nd DCA held.

Mario Bautista was convicted and sentenced for carrying fraudulent identification. During a traffic stop of a vehicle in which Bautista was riding as a passenger, the driver was arrested for failing to have a driver's license. In order to avoid having the vehicle towed, the officers asked Bautista if he had a license but were told he did not. When Bautista got out of the car, the officer noticed a wallet in his back pocket and asked Bautista to take it out. When Bautista opened the wallet the officer saw a fraudulent resident alien card, and arrested him. Bautista argued that the encounter with the officer was not consensual once the officer asked him to remove his wallet, and therefore his motion to suppress the resident alien card should have been granted. The DCA agreed.

“The record reflects that the officers had no basis to ask for Bautista's wallet and detain him because, at the time, they did not have a reasonable suspicion that Bautista had committed, was committing, or was about to commit a crime,” the DCA said, reversing the order that had denied Bautista's motion to suppress. [Bautista v. State, 5/27/05]

Illegal stop - air fresheners constituting traffic violation

Officers did not have reasonable suspicion to pull over a vehicle just because air fresheners are hung from the rearview mirror, and therefore evidence found in the trunk of a car was inadmissible in a drug case, the 2nd DCA ruled. Dwight Gordon was convicted of trafficking in cocaine, which was found in his car after he was stopped for driving with two air fresheners on his mirror. The state argued that the air fresheners constituted a traffic infraction because they were disrupting Gordon's view of

the highway, and therefore the traffic stop that led to the discovery of the drugs was valid. The DCA disagreed.

“The alleged traffic infraction arising from Gordon's driving with two air fresheners hanging from his rearview mirror was the only ground relied on by the State to justify the stop of Gordon's Cadillac. Because the traffic stop was unlawful, the evidence obtained as (a) result of it should have been suppressed. Although (deputies) apparently had a good faith belief that driving with an air freshener or other object hanging from the rearview mirror is a traffic infraction in Florida, the deputies' misapprehension of the law did not establish the existence of probable cause to stop Gordon's vehicle,” the DCA said.

[*Gordon v. State*, 5/13/05]

Fellow officer rule - citizen informants

The fellow officer rule, through which one officer calls another for assistance and their combined observations establish probable cause, does not apply when the information was supplied by citizen informants, the 2nd DCA ruled.

David Sawyer was arrested on a misdemeanor charge of driving under the influence, and was subsequently charged with possession of marijuana following a search incident to the DUI arrest. The initial arrest came after two citizens observed Sawyer driving erratically and called 911 to report it. An officer responded to the calls and spoke with both citizen informants. The officer spotted Sawyer resting against a building. After conducting a field sobriety test on Sawyer, the officer placed him under arrest and found marijuana while searching his pockets. Sawyer filed a motion to suppress, arguing that the statements from the citizens did not establish probable cause for the officer to make an arrest. The DCA agreed, concluding that a report by citizens to an officer does not contain the same credibility as when one officer relays information to another officer.

“The circuit court incorrectly applied the fellow officer rule to the information supplied by the two citizen informants,” the DCA said, noting that the “fellow officer rule” operates to impute the knowledge of one officer in the chain of investigation to another. “The rule does not impute the knowledge of citizen informants to officers.”[*Sawyer v. State*, 4/8/05]

THIRD DISTRICT COURT OF APPEAL

Firing of state supervisor - sexual misconduct

The Florida Commission on Human Relations incorrectly ruled that a state agency committed gender discrimination when it fired a supervisor, because the evidence showed the woman was discharged for acts of sexual harassment and not because of her gender, the 3rd DCA held. Supervisor Gloria Garcia was fired by the Department of Children and Families after she allegedly engaged in objectionable sexual behavior toward two female employees. Garcia claimed the agency used those grounds as a pretext to fire her for gender-based reasons, and the commission agreed with an administrative law judge that the agency violated the Florida Civil Rights Act in firing her. The DCA, however, said the department presented legitimate non-discriminatory evidence of misconduct and therefore had proper grounds to terminate Garcia.

“Simply put, (Garcia) sought to prove that she was fired although male employees who had committed equivalent misconduct were not. We hold that the record does not contain such evidence, or anything close to it,” the DCA said. “(T)here is no evidence supporting the administrative law judge's factual findings. To the contrary, there is no doubt that Garcia was not unjustly discharged because of her gender, but was justly discharged for her misconduct.”

[*Department of Children and Families v. Garcia*, 8/24/05]

Public disclosure of police security plans

A police department may withhold emergency security plans from a citizen review board even though the emergency it dealt with has long since passed, because some of the tactics and procedures included in the plan might be used in future emergencies, the 3rd DCA said.

Miami's official Civilian Investigative Panel, preparing a report on the city's response to the November 2003 Free Trade Area of the Americas (FTAA) summit, sought to review the city police department's operational plan for security surrounding the event. The Police Department refused to provide the plan for review. In a case that drew amicus briefs from the U.S. Attorney, the ACLU and the U.S. Justice Department, the DCA agreed that the security aspects of the plan qualified it for an exemption from disclosure under the Florida Public Records Law.

“The FTAA summit is long over, there is no

longer the threat of violence surrounding that meeting, thus no present emergency exists in relation thereto. This does not mean, however, that no exemption exists. The Operational Plan is a comprehensive plan compiled by a criminal justice agency pertaining to the mobilization, deployment, and tactical operations involved in responding to the FTAA emergency. While it contains security plans from the past FTAA summit meeting, the plans are not unique to that event. It is clear that at least some of the procedures, general and specific, will continue to be used for future events. The language of Section 119.07(6)(d), leads us to believe that the legislature intended to keep such security information exempt after an immediate emergency passes," the DCA said.

[Timoney v. City of Miami Civilian Investigative Panel, 8/17/05]

Court order required for ignition interlock device

Following a second conviction for DUI, motorist filed a verified complaint for emergency and permanent injunctive relief, prohibition, and declaratory relief, alleging that the Department of Highway Safety and Motor Vehicles lacked the authority to condition the reinstatement of his driver's license on the installation of an ignition interlock device. The Circuit Court, Monroe County, ordered the Department to remove the ignition interlock device designation from motorist's driving record and to immediately reinstate his driving privilege. Department appealed. The 3rd DCA held that Department lacked the authority to require the installation of an ignition interlock device in motorist's vehicle absent a court order.

[Dickinson v. Aultman, 3/9/05, rehear. den. 7/13/05]

Unemployment - temporary reassignment of state worker

Most state workers would be willing to endure a commute of an hour or more for a short period of time while their office is rebuilt following a fire, the 3rd DCA agreed in denying a request for unemployment benefits filed by a woman who quit her job rather than make the long daily trip. When the Department of Corrections office in southwest Miami-Dade County in which Elsy Lozano worked as a data entry clerk was damaged by a fire, she was temporarily reassigned to a downtown Miami office, which she estimated required a 60- to 90-minute commute. Faced with the daily commute while the damaged office was rebuilt, Lozano

voluntarily resigned. She sought unemployment compensation, and the issue was whether she left her job for good cause attributable to the Department of Corrections. An appeals referee and the Unemployment Appeals Commission concluded that the typical state worker would have agreed to the commute under those circumstances, and denied Lozano's request for benefits. The DCA affirmed.

"(T)he referee found, and the commission agreed, that an average, able-bodied, qualified worker would not have resigned in response to a temporary reassignment required after an unfortunate workplace fire. This conclusion is supported by competent, substantial record evidence," the DCA said.

[Lozano v. Unemployment Appeals Commission, et al., 5/4/05]

Forfeiture - standard for police action

Because a South Florida city was unable to establish that its police officer had reasonable suspicion to pull over a vehicle, more than \$21,000 in cash seized from the vehicle was taken illegally and must be returned to the driver, the 3rd DCA held.

The court disagreed with two of its sister courts on whether the appropriate standard should be probable cause or the less stringent reasonable suspicion of criminal activity, but said the facts of this case failed to rise to the level of either standard. The City of Hialeah sought forfeiture of the cash after an officer, conducting surveillance in an unrelated case, observed two men as they approached an unoccupied home in the middle of the day, walked around to the side of the home and then left. The officer testified that his experience led him to believe the two men were engaged in some form of criminal activity, which led him to make a traffic stop that led to the discovery of the cash. Because "at best, the stop was based on a hunch," the DCA concluded it was in illegal stop and any evidence seized as a result of the stop is inadmissible.

"(W)e conclude that notwithstanding (the officer's) extensive experience in law enforcement, there was nothing unusual or untoward about what he observed to create a reasonable or founded suspicion that the two men had committed, were committing, or were about to commit a crime," the DCA said.

[Alvarez v. City of Hialeah, 5/4/05]

Exigent circumstances - hot pursuit

Officers are permitted to pursue a fleeing individual even though the offense he is suspected of committing was a misdemeanor, the 3rd DCA ruled.

Ferrot Ulysse was convicted of possession of narcotics and possession of a firearm by a felon, after police observed the contraband when they entered his home during a hot pursuit. The officers saw the contraband in plain view and seized it. Ulysse argued that the officers did not have legal authority to be in his home because the individual they were chasing had only committed a misdemeanor, which Ulysse said did not give the officers probable cause to enter his home without a warrant.

The DCA found that officers may pursue an individual whether the crime committed was a felony or misdemeanor, ruling that the officers had probable cause to enter Ulysse's house. The DCA affirmed the trial court's decision to deny Ulysse's motion to suppress the evidence.

[*Ulysse v. State*, 4/20/05]

Miranda warnings - individual not in custody

Statements voluntarily given by an individual are not protected by *Miranda* warnings when the individual was not in custody at the time the statements were given, the 3rd DCA ruled.

Billy Jones Cotton was convicted of first-degree murder, robbery and the burglary of a UPS driver. Police officers approached Cotton and his co-defendant after they were seen approaching the vehicle, which was identified as being involved in the crime. Cotton consented to go to the police station to give a statement as a witness, and was treated the same as other witnesses during his time at the police station. Cotton finally provided a statement acknowledging that he knew who was involved in the crime. Two years later Cotton was arrested for the offense, and argued that his statements should be suppressed because he was never given *Miranda* warnings while he was at the police station. The DCA rejected his argument.

"The record evidence supports the trial court's conclusion that Cotton voluntarily agreed to go to the police station to give his statement as a witness. Not only was he told by the police that he was just a witness, but he was treated by the police at all times like the other witnesses who went to the police station. The actions by the police in this case never explicitly or implicitly

suggested that Cotton was in custody. Cotton was never confronted by the police with any evidence of his guilt during the course of the interviews. Under the totality of the circumstances, the fact that he was with the police for approximately nine hours and never told that he was free to leave did not elevate this otherwise consensual encounter into a formal arrest." [*Cotton v. State*, 4/20/05]

FOURTH DISTRICT COURT OF APPEAL

Use of non-lawyers as hearing officers in driver's license suspension hearings did not violate due process

Four motorists filed petitions for writ of certiorari after their driver's licenses were automatically suspended following their arrests for driving under the influence (DUI). The Circuit Court, Seventeenth Judicial Circuit, Broward County, and the Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, upheld three of the suspensions, but found that the fourth suspension violated due process. Department of Highway Safety and Motor Vehicles sought second-tier certiorari review and three of the motorists sought second-tier certiorari review of their cases. Cases were consolidated for review. On motion for rehearing, the District Court of Appeal held that:

- (1) the use of non-lawyers as hearing officers in driver's license suspension hearings did not violate due process; and
- (2) hearing officer in one of the suspension hearings impermissibly acted as an advocate for the Department; and these actions by the hearing officer violated motorist's due process rights. [*Department of Highway Safety and Motor Vehicles v. Griffin*, 8/31/05]

Search warrant - staleness of information

Where officers discovered illegal drugs while executing a search warrant for videotaped evidence of sexual abuse, the warrant was valid even though some five years had passed since the abuse victim saw the videotapes that were the basis for the warrant, the 4th DCA held.

Gary Brachlow reserved his right to appeal after pleading guilty to drug possession charges. The drugs were discovered by officers who, armed with a search warrant, entered his home looking for videotapes described by a young man who claimed Brachlow and another man had sexual abused him years earlier. The witness claimed to

have seen videotapes of some of the abuse incidents, and those videotapes were targeted in the search warrant. The warrant was issued after experts indicated that tapes of sexual abuse are often kept as “trophy” by the perpetrator and were more than likely still in the residence, even though approximately five years had passed. The drugs were found during the search, and both the trial court and DCA rejected Brachlow’s assertion that the evidence that supported the warrant was impermissibly stale.

“While appellant claims that the information provided in the affidavit for the search warrant was stale because the victim last observed the videotapes in December 1997 and the warrant was not obtained until January 2002, videotapes, unlike drugs, are non-consumable items. Therefore, it is more reasonable to assume that such an item will still be present in a defendant’s house even after a substantial passage of time,” the DCA said.
[*Brachlow v. State*, 7/27/05]

Roadblock for search of suspect - exigent circumstances

Law enforcement officers did not have to meet the usual standards for DUI and similar roadblocks when they established a perimeter to stop cars in key intersections due to the exigent circumstances of preserving evidence and finding a suspect who shot and killed two people, the 4th DCA said.

Paul McNamee was convicted of two counts of premeditated first-degree murder and other firearm-related charges. After two murder victims were discovered, police – with a description of the suspect – set up a perimeter at key intersections in hopes of finding the suspect, witnesses or evidence. McNamee was a passenger in a vehicle that was stopped during the operation, and an officer took down information on all the occupants in the car and let them leave. The investigation eventually led to McNamee becoming a suspect, and information obtained during the vehicle stop was used in the investigation. McNamee ultimately confessed to the murders, but on appeal asserted that information obtained as a result of the roadblock should have been suppressed because the roadblock failed to comply with the Florida Supreme Court’s 1996 decision in *Campbell v. State*, which requires written guidelines that comply with the Fourth Amendment prior to the establishment of a roadblock. The DCA rejected the claim.

“In such cases as this one, the exigent nature of the circumstances distinguishes the stop from a DUI or traffic safety roadblock. Because society has a great interest in the apprehension of those who criminally shoot people, written guidelines are not required in these circumstances,” the DCA said. [*McNamee v. State*, 6/29/05]

Breathalyzer test consent form

Reading the administrative and criminal consequences portion of the consent form associated with a breathalyzer test is not mandatory if the individual consents to the test, the 4th DCA said.

In separate incidents, Margaret Iaco and Kwang Kim were stopped and arrested for DUI. The defendants were taken to the Broward County Blood and Alcohol Testing Center, where they were read partial consent forms for a breathalyzer test. Each then filed a motion to have the results suppressed because they were not read the full consent, specifically the portion explaining the consequences of refusing to consent to the test. In each case the trial court granted the motion to suppress, but the state arguing on appeal that the sections explaining the consequences were not necessary because each defendant consented to the test. The DCA agreed.

“(T)he administrative and criminal consequences apply only if the defendant refuses the breathalyzer test. When the defendant consents to the test, those consequences do not apply. Thus, failing to be advised of them does not warrant suppression of the test results,” the DCA said.

[*State v. Iaco and Kim*, 6/22/05]

Defendant's opportunity to question alcohol test technician

A defendant is prejudiced when he is not given the opportunity to cross-examine a witness whose written affidavit was admitted as evidence against him, the 4th DCA said.

Bruce Belvin was found guilty of driving under the influence. During his trial an affidavit was introduced as the only evidence of his actual blood alcohol level, but the technician who administered the test did not testify at trial. Belvin argued that his constitutional rights were violated because he was unable to cross-examine a witness whose out-of-court statement was entered as evidence, and the DCA

agreed.

“(B)ecause petitioner was prevented from confronting the only evidence of his blood alcohol level presented at trial, admission of the breath test affidavit was serious enough to constitute a violation of a clearly established principle of law resulting in a miscarriage of justice,” the DCA said.

[*Belvin v. State*, 6/8/05]

Child support - requirement for purge provision

Acknowledging that its decision could cause “considerable uncertainty” in the use of driver’s license suspensions to enforce the payment of child support obligations, the 4th DCA nonetheless held that a court cannot impose that sanction unless they also provide the targeted parent with an opportunity to purge the sanction.

The court reversed a driver’s license suspension imposed on a father who fell behind on child support payments. The suspension order allowed him to purge the sanction by paying \$2,500. Because the suspension of a driver’s license constitutes a civil sanction, the trial court must give the father a chance to purge the sanction, the DCA said, but the trial court made no determination of the father’s ability to pay as required by the Florida Supreme Court’s *Bowen* decision in 1985, which was reconfirmed in 1999 in *Gregory v. Rice*. The father had signed an agreement allowing for the suspension if he missed a support payment, but the agreement did not provide language detailing how he could purge the sanction. Without a purge provision, the DCA said, the coercive sanction became a criminal contempt sanction that required the same due process protections as a criminal proceeding.

“We recognize that this opinion may cause considerable uncertainty in the use of driver’s license and other license suspensions in child support proceedings without the setting of a purge amount in accordance with the dictates of *Bowen*. However, we are bound by the clear language of *Gregory*,” the DCA said.

[*Larsen v. Larsen*, 5/4/05]

Double jeopardy - administrative penalty after criminal sanctions

A state agency cannot administratively add a condition to the sentence imposed against a DUI defendant if a trial court fails to order it, even if the condition is required by law, the 4th DCA

held.

When Peter Doyon received his second DUI conviction, the trial court suspended his license for 12 months and imposed 12 months of probation. Under a 2004 law, the court was also supposed to require Doyon to have ignition interlock devices installed on any vehicle he drives. The court failed to include that requirement in Doyon’s sentence, and after Doyon completed his sentence the Department of Highway Safety and Motor Vehicles issued an administrative order imposing the condition. This was improper, the DCA held, because the statute specifies that the ignition interlock device is imposed as part of the criminal punishment, not as an administrative decision by an agency empowered to do so when it finds facts warranting the decision.

“Once the time for filing a motion to correct such an error in sentencing has elapsed, the sentence is final and may not be ‘corrected’ by the addition of new conditions or provisions,” the DCA said. “Because Doyon completed his sentence before DMV sent him the order requiring the installation of ignition interlock devices, upholding the DMV’s order subjects Doyon to double jeopardy.”

[*Doyon v. Department of Highway Safety and Motor Vehicles*, 4/20/05]

Consent to search - consensual encounter

A consensual encounter does not turn into a stop when officers question an individual or ask for consent to search, the 4th DCA said.

A juvenile referred to as R.H. was arrested for cocaine possession after being approached by officers in an empty parking lot. The state argued that the encounter was consensual and the evidence found in R.H.’s pocket was a result of receiving his consent to search. R.H. disagreed, asserting that the officers had no reasonable suspicion to stop and question him. The trial court agreed with R.H. and granted the motion to suppress the evidence.

The DCA reversed, ruling that based on the totality of the circumstances the encounter did not amount to an investigatory stop and therefore the consent to search was valid. The court ordered that R.H.’s motion to suppress be granted and ordered further proceedings.

[*State v. R.H.*, 4/20/05]

Equitable tolling - default license revocation

A licensed insurance agent is entitled to a formal administrative hearing on his appeal of a default revocation, because he may have mistakenly believed the time frame for him to respond to an adverse action was on hold while he waited for a state agency to reply to his request for additional information, the 4th DCA held.

Eric Brown was the subject of a license revocation entered by default by the Department of Financial Services when he failed to request an administrative hearing within 21 days of receiving a copy of an administrative complaint against him. After receiving the complaint, Brown wrote back to request additional information about the complaining customers, so that he could analyze the allegations against him and better respond to the administrative complaint. The department said it responded to that request several weeks later, but Brown asserted that he never received the response and assumed he did not need to request an administrative proceeding while he waited for DFS' response. The default order resulted from his inaction, but the DCA said fairness requires that he be given a chance to fully present his case.

"We find appellant has made allegations which could create a situation where the doctrine of 'equitable tolling' of his obligation to timely respond to the administrative complaint might be applicable," the DCA said. "Because factual issues were raised in the motion and accompanying affidavit, which should have been resolved via an administrative hearing, we reverse and remand."

[*Brown v. Department of Financial Services*, 4/20/05]

FIFTH DISTRICT COURT OF APPEAL

Medical records obtained illegally

Investigating officers acted outside of their authority when they obtained blood alcohol results regarding a patient under investigation for DUI manslaughter without satisfying the necessary requirements, the 5th DCA held.

Zachary Frank was involved in a two-car accident in which one person died. While Frank was hospitalized recovering from injuries related to the accident, officers secured results of a blood alcohol level test that showed Frank was

legally intoxicated at the time of the accident. Frank moved to have the results of the test suppressed because they were obtained without his knowledge. The DCA ruled that the officers acted outside the scope of the statute covering such test results, and therefore the results should have been excluded from the trial. The court reluctantly reversed Frank's conviction and ordered a new trial.

"While we do not believe that the officer set out to violate Frank's privacy rights, Florida law holds that police officers are charged with knowledge of the law," the DCA said. "We take no pleasure in reaching this result, knowing that a retrial will be painful for the survivors of the victim killed in the crash. However, the law of our state compels this result."

[*Frank v. State*, 8/26/05]

Vehicle search - contents of passenger's purse

A police officer acted within his legal authority when he searched inside the purse of a vehicle passenger, and therefore drug evidence found inside the purse should not have been suppressed, the 5th DCA said.

A vehicle in which Deborah Jo Casey was riding was stopped for not having a functioning tag light on her car. The officer ran a check and learned that the driver had a suspended license and no registration. The officer arrested the driver and advised Casey that he was going to search the vehicle. She exited, leaving her purse behind on the passenger seat. During his search the officer looked inside Casey's purse and found oxycodone pills in a pill bottle, and she was arrested for possessing the drug without a prescription. Casey successfully moved to have the pills suppressed, but the state argued on appeal that the purse was subject to be searched because it was in the vehicle. The DCA agreed, reversing the lower court's decision.

"In (1981), the Supreme Court adopted a bright line rule that when an officer arrests an occupant of a vehicle, the interior of the vehicle is within the scope of a search incident to the arrest. The search may include the passenger compartment of the vehicle and any container found within the passenger compartment regardless of whether it is open or closed," the DCA said. "(T)he officer here was clearly justified in searching Casey's purse, which was left on the passenger seat."

[*State v. Casey*, 8/19/05]

Consent to search - containers found in pockets

Once an officer receives general consent to search an individual, the officer may open containers found in the individual's pockets, the 5th DCA said in rejecting a defendant's argument that drug evidence should have been suppressed.

Charles C. Allen was stopped while riding his bicycle at about 3:30 a.m., because the bicycle did not have a working light. Once stopped, Allen consented to a search of his person. The veteran deputy found several Chapstick containers which, when opened, were found to conceal marijuana and cocaine. Allen was arrested on several drug-related charges, but argued on appeal that the deputy should not have been allowed to open the containers found in his pockets. The DCA disagreed, finding that Allen was legally stopped and gave consent to be searched.

“(B)ecause Allen gave (the deputy) his general consent to search his person and made no effort to limit or withdraw his consent, the Deputy was authorized to withdraw the Chapstick from Allen's pocket and open it to discover the contraband. Further, we do not think that the Deputy needed probable cause to believe that contraband was in the container in order to open it, although in this case, based on the Deputy's experience, he probably had sufficient cause to suspect it contained contraband,” the DCA said. [*Allen v. State*, 8/19/05]

Validity of search warrant - insufficient information

A probable cause affidavit lacked adequate information about a confidential informant to establish that the informant was participating in a controlled buy under the supervision of law enforcement, and therefore a subsequent search warrant was invalid, the 5th DCA held.

Delbert Martin pled no contest to various drug offenses after officers searched his home on what he contended was an invalid search warrant. Martin claimed that the affidavit used to obtain the search warrant lacked probable cause. Specifically, he argued that the affidavit lacked information about the confidential informant who was used to conduct a controlled buy. Martin also asserted that because the transaction between him and the informant was not a controlled buy, the affidavit lacked probable cause and the search warrant was

invalid. The DCA agreed, finding that the affidavit lacked the information necessary to establish the reliability of the informant and law enforcement's level of supervision over the transaction.

“When, as here, the affidavit simply states the transaction was under the supervision of law enforcement, it is insufficient to establish probable cause because the informant's reliability is unknown and the level of supervision by law enforcement is unstated,” the DCA said. The court ordered that all evidence discovered as a result of the search warrant be suppressed, and remanded the case for further proceedings.

[*Martin v. State*, 7/15/05]

Resisting arrest charge - ability to identify officer

A trial court should have granted a motion to acquit a juvenile of a resisting arrest charge because the officer who approached her had no identifying clothes or ID to enable the girl to recognize him as an officer, the 5th DCA said.

The 14-year-old defendant, identified only as A.F., was approached by Officer Ronald Kelly after he received a complaint that people were swimming in a community pool after hours. At the time Officer Kelly was working part-time as a security officer and was dressed in sweat pants and a T-shirt, neither of which identified him as a police officer, and he did not have his badge with him. After Officer Kelly identified himself as a police officer, A.F. ran from him. She was caught and charged with resisting an officer with violence. A.F. argued that she did not know Kelly was an officer and therefore should not have been charged with resisting an officer. The DCA agreed, finding that conviction on such a charge requires that a defendant knowingly and willfully resist an officer.

“(T)here was nothing about Kelly's appearance that would reasonably indicate he was a police officer. He was not wearing his uniform, badge, or a shirt that said ‘Titusville Police Department.’ He did not have any other identification to show that he was a police officer. Except for his announcement that he was a police officer there was nothing whatsoever to indicate that he was a law enforcement officer,” the DCA said. “(A) citizen should not be required to respond with submission any time someone claims to be a police officer,” the DCA said.

[*A.F. v. State*, 7/1/05]

Reasonable pat down

The collective knowledge and observations of two officers was enough to justify a pat down search following a traffic stop, the 5th DCA held.

Michael Dewberry pled nolo contendere to a firearm possession charge. Dewberry was riding as a passenger in a vehicle that was stopped for driving erratically. The officer observed Dewberry and another passenger jumping around inside the car, so the officer called for backup. Based on the information the first officer provided, the backup officer conducted a pat down to protect his own safety and because he had a reasonable suspicion that Dewberry had a weapon on him. The backup officer found a gun and arrested Dewberry. The DCA found that the pat down was warranted under the circumstances.

“The collective knowledge and observations of the officer who stopped the vehicle and the officer who conducted the search are sufficient to support the finding that the officer had a reasonable suspicion that the occupant was armed,” the DCA said.

[Dewberry v. State, 6/24/05]

Administrative hearing officer not required to be a lawyer

Motorist who was arrested for driving under influence of alcohol sought certiorari review of decision of Department of Highway Safety suspending her driver's license for six months. The Circuit Court, Seminole County, affirmed decision. Motorist petitioned for writ of certiorari.

The 5th District Court of Appeal held that:
(1) evidentiary inspection reports authorizing breathalyzer did not contain handwritten signature of inspector did not serve to overturn suspension;
(2) motorist received notice of grounds upon which her license was suspended; and
(3) propriety of revocation proceedings was not affected by fact that administrative hearing officer was not a lawyer.

[Gurry v. Department of Highway Safety and Motor Vehicles, 5/27/05]

Government responsibility for inmate's medical care

The 5th DCA reversed a lower court order that had allowed a county to sidestep its legal obligation to pay the hospital costs of a sick jail inmate by “furloughing” the prisoner for the

period of his hospital stay – in effect removing him from the ranks of jail inmates and therefore removing him from the county's responsibility.

Brevard County Jail inmate Horace Mitchell ran up a bill for more than \$56,000 during a 16-day stay at Parrish Medical Center. When Mitchell, who was serving a drug sentence, became ill, the sheriff obtained a court order to furlough Mitchell to the hospital as an inpatient and then return him to the jail upon his release from the hospital. Mitchell was transported to and from the hospital by sheriff's deputies. Nonetheless, the trial court concluded that Mitchell was not technically in the sheriff's custody during his hospitalization, and therefore was not the county's financial responsibility during his treatment. The hospital appealed, saying the county is liable for the bill under section 901.35, F.S. The DCA reversed and remanded for proceedings to consider how Mitchell's medical bills should be paid.

“One cannot fault Brevard County or the trial court in its attempt to circumvent section 901.35. The implications of the statute can be financially devastating to a local government in view of the ever increasing cost of medical care, especially when the Legislature has not placed a cap on the liability of government,” the DCA said. “Of course, the other consideration is the cost to the medical provider who renders services to a prisoner. Why should it bear the costs of providing services to a prisoner? The solution, albeit a most difficult one, is solely within the hands of the Legislature, not the courts.”

[North Brevard County Hospital District v. Brevard County Board of County Commissioners, 4/15/05]

Legal authority to detain motorist

After issuing an oral warning to a driver for a cracked windshield and an expired registration, a law enforcement officer no longer had the legal authority to detain the driver or ask for permission to search the car without further suspicion of illegal activity, the 5th DCA held.

After Kevin McNichols was stopped and received a verbal warning for the windshield and registration, he was handcuffed and asked to consent to a search of his vehicle. During the search, contraband was found and McNichols was arrested. The officer who asked for consent testified that he had no suspicion of illegal activity to provoke the search. McNichols argued that he consented to the search only because he felt he had no choice. The DCA concluded that

when an officer fulfills the purpose for the vehicle stop and there are no other acts to raise suspicion, the officer no longer has a reason to further detain the motorist.

“The record demonstrates that after issuing a verbal warning, the deputy continued to engage McNichols in discussion that was unrelated to the purpose of the traffic stop. The deputy testified that at the time he issued the verbal warning he was not concerned for his safety, that McNichols did not make any threatening gestures or in any way act suspiciously, and that he did not detect anything else to indicate that there were drugs or weapons or anything illegal in McNichols' vehicle. Because the deputy had no justification for further detention after issuing the warning, absent proof that the continued detention and search was consensual, anything more than an explanation of the stop constitutes a violation of McNichols' Fourth Amendment rights,” the DCA said, vacated the conviction and sentence. [*McNichols v. State*, 4/15/05]

ATTORNEY GENERAL'S OPINION

Number: AGO 2005-41

Date: July 12, 2005

Subject: Authority to use unmanned traffic-signal cameras to issue citations for violators

Affirming a 1997 Attorney General Opinion requested by Palm Beach County, the Attorney General's office considered whether the City of Pembroke Pines could enact an ordinance authorizing the use of unmanned cameras at traffic intersections for the purpose of issuing citations for violations of section 316.075, Florida Statutes. Attorney General Opinion 97-06 concluded that the use of unmanned cameras to detect vehicles that do not remain stopped and standing at a steady red light as required by section 316.075(3)(a), Florida Statutes, would appear to come within the scope of statutory provisions authorizing local governments to monitor traffic by security devices on public streets and highways. However, in order for citations for violations of traffic control laws to be issued, the statutes appear to require that an officer enforcing the traffic law personally observe or have personal knowledge of the particular infraction that serves as the basis for issuing the citation. The opinion concludes that nothing precludes the use of unmanned cameras to record violations of section 316.075, Florida Statutes, but a photographic record of a vehicle violating traffic control laws may not be used as

the basis for issuing a citation for such violations. The opinion concludes: “This office continues to be of the opinion expressed in Attorney General Opinion 97-06 that legislative changes are necessary before local governments may issue traffic citations and penalize drivers who fail to obey red light indications on traffic signal devices.”
[AGO 2005-41, 7/12/05]

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