
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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U.S. Supreme Court

Defendant's Right to Introduce Evidence - Third-Party Guilt

A criminal defendant's federal constitutional rights are violated by a state evidence rule that prevents the defendant from introducing proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict, the U.S. Supreme Court held.

Bobby Holmes was charged and convicted of beating, raping, and robbing Mary Stewart, who later died from complications related to the crime. During pretrial motions in the South Carolina case, Holmes asked to introduce evidence he said would prove that a third party was guilty of the crime. The trial court excluded the evidence, concluding that the state's forensic evidence was so strong that the third-party guilt would not raise a reasonable presumption of Holmes' innocence. In the first opinion written by Justice Alito, the court unanimously held that the trial court's ruling improperly excluded possible evidence of another person's guilt.

"The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt," Justice Alito wrote in a ruling vacating Holmes' convictions and sentence.

[Holmes v. South Carolina, 5/1/06]

Warrantless Entry of Home

Law enforcement officers have grounds to enter

a home without a warrant when they have reason to believe an individual inside is being threatened with violence, the U.S. Supreme Court said, reversing an opinion from the Utah Supreme Court.

When two officers responded to a house from which loud music was playing at 3 a.m., they heard yelling coming from the back of the house and went to investigate. At the back of the house they could see a crowd inside restraining a juvenile, and also saw the juvenile hit another person. The officers announced their presence but were not heard over the noise, so they entered the house in order to stop the fight. Lower courts ruled that the officers violated the Fourth Amendment by entering the house without a warrant, finding that the officers did not have reason to believe anyone was in fear for his life and therefore should not have entered the house. The Supreme Court reversed, however, agreeing with the state that the officers had reason to enter the home after they witnessed the physical altercation and concluding that the officers' method of announcing their presence and then entering was proper.

"Under these circumstances, there was no violation of the Fourth Amendment's knock-and-announce rule. Furthermore, once the announcement was made, the officers were free to enter; it would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence," Chief Justice Roberts wrote for the unanimous court.

[Brigham City v. Stuart, 5/22/06]

Use of 911 Recording - Confrontation Clause

Prosecutors may use a recording of a victim's 911 telephone call as evidence even though the victim does not testify at trial, without violating the defendant's rights under the confrontation clause, the U.S. Supreme Court held.

In a 2001 incident in Washington State, Michelle McCottry called 911 seeking police assistance as she was being attacked during a domestic disturbance with her former boyfriend, Adrian Davis. Davis' presence at McCottry's home was in violation of a no-contact order. During the call McCottry described what was happening and asked for officers to be sent to her home. At trial Davis moved to prevent the taped 911 from being introduced as evidence because McCottry would not be testifying and, Davis said, use of the tape would violate his right to cross examine the witness against him. The trial court concluded that the statements made on the tape were not testimonial in nature and therefore did not violate Davis' right to confront the witness. The Supreme Court agreed, noting that McCottry was clearly in need of immediate assistance by police and the statements she made were intended to provide important information to police as they arrived.

"We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not *testifying*," the Court said.

[Davis v. Washington, 6/19/06]

11th U.S. Circuit Court of Appeals

Conspiracy - Government Informant Cannot be Only Co- Conspirator

In order to support a conspiracy charge involving a government informant, the state

must show that the defendant was conspiring with another person besides the informant, the 11th U.S. Circuit Court of Appeals said.

Mehrzah Arbane was convicted of conspiracy to import cocaine when he tried to arrange a drug import with a man he did not know was a government informant. At Arbane's trial, the informant testified about their conversations. On appeal, Arbane argued that his conviction was based on insufficient evidence because the only person he planned with was a government informant, a situation that does not satisfy the elements of a conspiracy. The 11th Circuit agreed, finding that in order for a defendant to be convicted of conspiracy, at least two culpable people must be involved and intend to carry out the illegal act.

"Although there is no doubt that Arbane had been involved in illegal conduct elsewhere, it was the government's burden to prove, beyond all reasonable doubt, that there existed a specific agreement between the defendant and at least one or more culpable co-conspirators to import narcotics into the United States. The government failed to meet this burden," the court said.

[United States v. Arbane, 4/21/06]

Out-of-Court Statements

A trial court in a drug trafficking case did not err in admitting an out-of-court statement by a co-conspirator, because the defense had ample opportunity to cross-examine the witness who gave the statement, the 11th U.S. Circuit Court of Appeals held.

Cesar Garcia and Hector Nunez were arrested and charged with possession with intent to sell drugs and possession of drug paraphernalia, following an investigation into a drug trafficking ring. At trial DEA Special Agent Keith Cromer testified about the events leading to the arrests. Cromer provided details about coded language that was used and said he learned the translation from a cooperative co-conspirator, who also testified to the same facts. Garcia and Nunez argue that Cromer should not

have been allowed to testify about an out-of-court statement made by a co-conspirator, claiming it violated their rights.

The 11th Circuit ruled that Cromer's experience and training qualified him as an expert witness in the case. His testimony about receiving information from a co-conspirator about the ring's coded language was not inadmissible because the co-conspirator testified at trial regarding his statement, the court said. Through their testimony, the court added, the DEA agent and the co-conspirator gave the defense a sufficient opportunity to cross-examine them regarding the statement. The court affirmed the convictions.

[*U.S. v. Garcia*, 5/3/06]

Qualified Immunity for Reasons, Method of Arrest

A Brevard County sheriff's deputy was not protected from civil suit by qualified immunity because there was no arguably probable cause to arrest a homeowner following an incident outside the man's home, the 11th U.S. Circuit Court of Appeals held.

Donovan Davis was hosting a family get-together when he saw a patrol car pull into his driveway. When he went to investigate, a deputy told him that if he did not leave the scene he would be arrested. Davis then tried to advise the deputy about a potential danger caused by the location of the patrol car and was told again to leave or he was going to be arrested. Davis alleges that after he asked to speak to the deputy's superior and turned to walk away, the deputy forcefully arrested him for obstruction. Davis claims he was injured during the arrest and transport and sued for civil damages, asserting that his constitutional rights were violated. A lower court held that the deputy was protected by qualified immunity but the 11th Circuit reversed, finding that any reasonable officer would consider the deputy's actions as clearly violating Davis' rights. Because the deputy did not have any probable cause to make any arrest of Davis, the 11th Circuit said, the lower court's finding must be reversed.

"Neither an owner's simple inquiry as to why officers are present on his property nor a person's attempt to bring a dangerous situation to the officer's attention can be construed as obstruction of justice or disorderly conduct. Nor can a citizen be precluded by the threat of arrest from asking to speak to an officer's superior or from asking for an officer's badge number. Those inquiries likewise do not constitute obstruction of justice or disorderly conduct. Under the facts as alleged by Davis, we find that there was no arguable probable cause to arrest Davis, and, therefore, we reverse," the 11th Circuit said. "Accepting Davis' version of the facts, a reasonable jury could find that (the deputy's) actions in effectuating the arrest constituted excessive force."

[*Davis v. Williams*, 6/7/06]

Officers' Obstruction, False Statement Convictions Upheld

The 11th U.S. Circuit Court of Appeals rejected the appeal of a group of South Florida law enforcement officers who had been convicted of conspiracy to obstruct justice relating to several incidents involving unjustified deadly force.

The Miami-Dade police officers were convicted of planting evidence and making false statements to investigators after several suspicious incidents involving the unrelated use of deadly force. On appeal the officers argued that the state failed to prove their false statements were intended for the federal investigators, that the trial court should have allowed the fleeing felon rule into the jury instructions and that the evidence was insufficient to support the convictions.

Although the officers' false statements were made to state investigators, the 11th Circuit held, it was reasonably likely that the statements would be transferred to the federal investigators and therefore the officers were correctly charged with federal violations of obstructing justice. The court reasoned that the officers knew there would be an investigation, and that is what motivated their decision to plant evidence. The

convictions and sentences were affirmed. The 11th Circuit also rejected the officers' other arguments and affirmed their convictions.

[*United States v. Ronda, et al.*, 7/13/06]

Expectation of Privacy - Pond Area is Not Curtilage

An open view area that is not attached to a house and is separated by other structures on the property is not considered curtilage and therefore an individual does not have a expectation of privacy there, the 11th U.S. Circuit Court of Appeals held.

Warren Taylor was convicted of possession of a firearm by a felon after deputies were dispatched to his house after someone at the residence dialed 911 and abruptly hung up. The deputies entered Taylor's property through a closed gate and were approaching the door when Taylor came around a barn on the property and confronted them. A deputy asked for Taylor's consent to search the area he had come from, in order to make sure no one was injured. Taylor consented to a search around the barn. While looking around the barn, the deputy observed a trailer and saw fresh footprints from the trailer leading to a pond. Near the pond, the deputy found a pack with a knife, shotgun and cartridges. When questioned about the gun, Taylor said he threw it in the pond when he saw police approaching his house because he was a felon and didn't want to be caught with a disallowed weapon. Taylor was convicted of the weapons possession charge and appealed, arguing that the deputy was not given consent to search the area around the pond and so the evidence should be suppressed.

The 11th Circuit disagreed; citing precedents holding that property not attached to the house and separated by other structures is not considered part of the house. The deputies had legal authority to be on property and were given consent to search around the barn, and what the deputy found while searching around the barn was in plain view, the court said. As a result, the court said, the search around the pond did not violate Taylor's expectation of privacy.

[*U.S. v. Taylor*, 7/28/06]

Florida Supreme Court

Admissibility of Voluntary Statements

The Florida Supreme Court upheld a death sentence after finding that the defendant voluntarily submitted to questioning and the evidence found as a result of the interview was properly seized.

Randy Schoenwetter pled guilty and was sentenced to death for the stabbing murders of Ronald and Virginia Friskey. While investigating the murders, detectives asked Schoenwetter to go with them to the police station for questioning about the incident. Schoenwetter was given *Miranda* warnings after he made incriminating statements that implicated him in the murders. He eventually admitted to the crimes, and his statements led police to additional evidence. Schoenwetter filed motions to have his statements and the evidence suppressed, asserting that he was under arrest as a result of the detectives asking him to come in for questioning but was not given proper *Miranda* warnings at that time. He said his incriminating statements were not voluntary and therefore the evidence found was a result of an illegal interrogation. The trial court denied all the motions to suppress, and the Supreme Court affirmed.

"Schoenwetter . . . voluntarily agreed to accompany the officers to the station when asked, rode in the back of the police car without handcuffs, and exited the car when officers stopped for a snack. Under these circumstances, a reasonable person would not feel a restraint on his freedom or that he was not free to terminate the encounter," the court said.

[*Schoenwetter v. State*, 4/27/06]

New Certification Area for Government Lawyers

Starting August 1, Florida attorneys will be able to obtain board certification as a State and

Federal Government and Administrative Practice Lawyer, following the Florida Supreme Court's adoption of a new rule for the Florida Bar.

The new practice area was suggested by the Bar and supported by the Bar's Government Lawyer Section. It was approved by the court as subchapter 6-15 of the Rules Regulating the Florida Bar. The justices also granted the Bar's request for a new certification for intellectual property law.

According to the new rules, the purpose of establishing the new certification area for government lawyers "is to identify those lawyers who practice law before or on behalf of state and federal government entities and have the special knowledge, skills, and proficiency, as well as the character, ethics, and reputation for professionalism to be properly identified to the public as certified state and federal government and administrative practice lawyers."

[In re: Amendments to the Rules Regulating the Florida Bar - Subchapters 6-25 and 6-26, 7/6/06]

1st District Court of Appeal

Application of Drop Benefits Following Divorce

Agreeing with a sister court's decision announced three weeks earlier, the 1st DCA held that DROP retirement benefits enjoyed by a public employee must also accrue to his ex-wife if their divorce settlement entitles her to a share of his State Retirement System pension.

Ruling en banc to resolve an internal conflict, the DCA concluded that the former wife of a Jacksonville city employee received an undivided individual property right in his retirement account that entitles her to a pro-rated share of his DROP fund. The DCA said the woman should receive the portion of the DROP fund she would have received

if not for her ex-husband's decision to defer retirement benefits by going through the Deferred Retirement Option Program.

With five of the 15 judges dissenting in the decision part, the DCA certified the question to the Florida Supreme Court for resolution. The specific question posed by the DCA was: "Is a spouse who is awarded a portion of the other spouse's pension at the time of dissolution entitled to share in a DROP account created, including interest and COLAs, sometime after the dissolution has become final?"

[Pullo v. Pullo, 4/13/06]

Objective Basis for Stop of Motorist

In this case, the First District Court of Appeal denied certiorari review, and in a concurring opinion, the Court noted:

The constitutional validity of a traffic stop depends upon purely objective criteria. *See Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 1774 135 L.Ed.2d 89 (1996). The subjective knowledge, motivation or intention of the individual officers involved is irrelevant. *See id.* Under any other standard, application of the Fourth Amendment would vary from citizen to citizen, depending upon the officer's knowledge or experience. Consequently, the subjective knowledge or intent of an individual officer can never invalidate otherwise objectively justifiable police conduct under the Fourth Amendment. The concurring opinion was cited with approval by the 3rd DCA in *DHSMV v. Jones, infra.*

[DHSMV v. Utley, 4/24/06]

Reasonable Expectation of Privacy

A driver has no reasonable expectation of privacy regarding the contents of his passenger's pockets and therefore lacked standing to have the evidenced seized suppressed, the 1st DCA held.

David Ingram was arrested and charged with drug and paraphernalia charges. During a stop of Ingram's vehicle, a state trooper asked Ingram's passenger about a container in his

pocket. After the passenger held out the small glass container, the trooper was able to determine that it likely contained crystal methamphetamine. This gave the trooper a basis to search Ingram's vehicle, leading to additional drug-related evidence. The trooper then arrested Ingram, who claimed on appeal that the trooper illegally seized the passenger's container and therefore the subsequent search was not valid. The DCA upheld the trooper's actions and denied Ingram's appeal.

"Because Appellant showed no reasonable expectation of privacy in the contents of his passenger's pocket and . . . the searches were proper, the trial court correctly denied Appellant's motion to suppress," the DCA said. [\[Ingram v. State, 4/27/06\]](#)

Reasonable Suspicion for Stop— Failure to Maintain a Single Lane

In this case the 1st DCA held that the evidence in a driver's license suspension case, arising from refusal of a breath test, supported the officer's stop of the defendant for failing to maintain a single lane; the record clearly established that defendant put the vehicle in the right lane in danger, whether or not the other driver knew it.

[\[Williamson v. DHSMV, 7/13/06\]](#)

Admission of Hearsay Statement - Completeness

When a portion of a statement is introduced as testimony by one side in a trial, the attorney for the other side may request that the full statement be introduced so jurors understand the complete context of the statement, the 1st DCA held.

George Whitfield was found asleep in an acquaintance's apartment after the landlord called the sheriff's department and said no one should be in the apartment because the owner had been arrested. When Whitfield was arrested he told officers he had permission to be in the apartment, but also made some incriminating statements. At trial the prosecution introduced the incriminating portions of Whitfield's statement, and the defense requested to have the

full statement disclosed because it supported his overall defense theory. The judge the other portions of the statement to be hearsay and did not allow the jury to hear them. Whitfield was convicted of burglary but appealed, arguing that the trial court should have allowed the defense to present the portions of Whitfield's statement in which he claimed to have permission to be in the apartment. The DCA reversed Whitfield's conviction, agreeing that the disputed portion of the statement was relevant to his defense of having permission to be in the apartment.

"The content of the excluded statement would have served to amplify or explain the subsequent statement because, even if appellant entered the apartment with the intent to smoke cocaine inside, if his related statement that he did so with John Wilson's permission was allowed to be elicited on cross-examination, such evidence may have convinced the jury that appellant was not guilty of burglary," the DCA said.

[\[Whitfield v. State, 7/20/06\]](#)

Public Agency's Accommodation of Obese Employee

Even though an obese public employee was able to meet the job requirements of her job as a jail detention officer, she was not entitled to keep the job when new standards were put in place and she was no longer able to meet the physical demands of the position, the 1st DCA held.

Bergita Evans was a detention officer with the Alachua County Sheriff's Office. When the agency imposed a requirement that employees be able to pass a physical agility test, Evans' doctor wrote a letter saying that her morbid obesity, osteoarthritis and hypertension would prevent her from taking and passing the agility test. The Sheriff's Office fired Evans one month after the deadline for passing the test, citing her inability to carry out her duties in a manner that ensured the safety and welfare of the inmates and correctional officers. Evans filed a claim of handicap discrimination, which the Florida Commission on Human Relations dismissed. The DCA affirmed that dismissal, rejecting

Evans' argument that because she had performed her job satisfactorily before the new physical requirements were imposed, she was able to perform the essential functions required of her position.

“(T)here was competent substantial evidence that the physical agility test measured the ability of detention officers to perform tasks essential to the job,” the DCA said. “Although (the Sheriff’s Office) had temporarily accommodated her disability, it was not required to redesign the work of a detention officer in a manner that would eliminate essential functions of the position. As a result, Evans failed to show she was qualified for the position.”

[*Evans v. Alachua County*, 7/31/06]

2nd District Court of Appeal

Probable Cause Affidavit - Totality of the Circumstances

An affidavit considered as a whole may provide sufficient probable cause for a search even though some portions of it taken alone would not constitute probable cause, the 2nd DCA concluded.

The court reversed an order suppressing drug evidence seized following the execution of a search warrant at the defendant’s home. Don Vanderhors was arrested on drug charges based on the search, and argued on appeal that the affidavit used to obtain the warrant did not have sufficient probable cause to support the search warrant. Vanderhors asserted that although the affidavit contained information from a confidential informant who bought cocaine from him, it did not specify when the purchase occurred. After considering the affidavit in its entirety, the DCA concluded it supported issuance of the warrant.

“Because the totality of the circumstances indicates that the affidavit presented the issuing

magistrate with probable cause to conclude that contraband would be found at the residence, there was no Fourth Amendment violation and the search warrant was valid,” the DCA said.

[*State v. Vanderhors*, 4/19/06]

Presumed Possession of Stolen Items

It is not reasonable to assume that the passenger in a vehicle containing stolen property knows the property is stolen, the 2nd DCA held.

Ricky Bronson was charged with burglary and theft of items found in the van in which he was a passenger. Bronson argued that he did not know the items were stolen and contended the state had no reason to believe he was involved in the crimes. The state argued that Bronson’s proximity to the items and the fact that they were recently stolen was enough to support burglary and theft charges against him. The DCA disagreed with the state, ruling that the state failed to meet the elements to show Bronson had possession of the stolen items.

“We conclude that the evidence here failed to establish exclusive possession and, therefore, the State is not entitled to the statutory presumption. The possession must be more than superficial; it must be conscious and substantial. And, most important, it must be both personal and exclusive,” the DCA said.

[*Bronson v. State*, 4/28/06]

Miranda Warnings Given to Juveniles

A juvenile with no prior experience dealing with law enforcement needs extensive explanation of his *Miranda* rights, and it cannot be considered sufficient that the warnings are simply read to the juvenile, the 2nd DCA held.

A Tampa middle school music teacher noticed that her lemonade smelled unusual and suspected someone had placed a cleaning solution in the drink. A city police detective – not a school resource officer – was assigned to investigate, and eventually a young girl identified as B.M.B. confessed to poisoning

food or water with the intent to harm or kill a person. The detective tape-recorded his second interview with the girl. During the interview the tape recorder was stopped, during which time the detective claims he read B.M.B. her *Miranda* warnings. After the machine was turned back on, she confessed to poisoning the drink. At no time did the detective attempt to contact the girl's parents. B.M.B. argued on appeal that her confession and statements should have been suppressed because she was not given full information about her rights and could not knowingly waive them before her confession.

The DCA agreed with B.M.B., finding that a girl of her age and experience requires more than just a mere reading of the *Miranda* warnings. The court found that the girl could not fully appreciate the nature of the consequences of her confession, and found that the detective should have attempted to contact the girl's parents so they could be present for the questioning. The DCA reversed the conviction and remanded for further proceedings.

[*B.M.B. v. State*, 5/3/06]

Insufficient Evidence to Show Driver's Knowledge of Drugs

The 2nd DCA reversed a defendant's drug convictions, concluding that the state failed to prove the defendant knew of the drugs and had actual control of them at the time they were found in the truck he was driving.

Jerry Links was stopped for speeding while driving a company truck. After he told the deputy he did not have any weapons or contraband in the truck, he consented to a search. Within the glove compartment next to a document addressed to Links, the deputy found a pipe with traces of methamphetamine. Another pipe was found in the toolbox in the back of the truck. Links appealed, asserting that he didn't know about either pipe and pointing out that anywhere from eight to 15 people have access to the truck. The DCA found that there was not substantial evidence to support the conclusion that Links was the person who put the pipes in the truck, since the pipes were

found in a company vehicle that was used by numerous individuals.

"The only evidence connecting Links to the pipes was the court notice sent to him that was next to the pipe in the glove box. However, that notice was for a court date more than three weeks prior to the stop. The State presented no evidence of when Links put the notice in the glove box or whether the pipe was in the glove box when he did so and he knew of its presence. Accordingly, we reverse Links' convictions," the DCA said.

[*Links v. State*, 5/5/06]

Knock and Announce - Use of Distraction Device

The use of a "distraction device" in the moments after law enforcement officers knock and announce their presence at a home significantly reduces the occupants' ability to voluntarily open the door and therefore violates proper procedures for executing a search warrant, the 2nd DCA held.

James Spradley was arrested for armed trafficking of cocaine and running a cocaine house. During evening hours a team of officers planned to execute a search warrant on Spradley's house. According to procedure the officers are instructed to knock on the front door, announce their presence and give the owner time to allow peaceful entry into the home. However, the officers knocked on a door that was separated from Spradley's house by another door, and within seconds detonated a distraction device inside the house. Within 15 seconds the officers had knocked down the doors and were in the house. Spradley argued that the method used to enter his house was unreasonable because he was not given proper time to willingly let the officers enter. The DCA agreed and reversed Spradley's conviction.

"By intentionally detonating the distraction device during the few seconds that the occupants had to go to the front door and open it, the police could not reasonably expect the occupants to accomplish that which was expected of them," the DCA said. "Although in

some circumstances a fifteen-second wait may be sufficient to satisfy the knock-and-announce requirement, the use of a ‘distraction device’ during the fifteen seconds, as its name suggests, dramatically diminishes the ability of the occupants of a home to permit peaceable entry within the allotted time.”

[*Spradley v. State*, 5/19/06]

Illegal Stop

The need to talk to an individual about an incident does not give officers sufficient reason to stop and detain the person without his consent, the 2nd DCA held.

After gathering information about an incident at a convenience store and obtaining a description of a vehicle seen leaving the area, St. Petersburg Police Officer Troy Achey stopped a truck matching the description. Danny Keeling was driving the truck when the officer pulled him over. Achey, who have not been told to stop the vehicle or detain the driver for questioning, noticed that Keeling was impaired and subsequently arrested him for driving under the influence. Keeling contends on appeal that Officer Achey had no reasonable suspicion to pull him over, and therefore the stop was illegal. The DCA agreed and reversed the denial of Keeling’s motion to suppress evidence against him.

“(I)t is clear that the officer lacked a founded suspicion to stop and detain Keeling or his vehicle. The commotion at the convenience store did not support the stop, and indeed the officers at the scene did not request a BOLO for Keeling or his vehicle. Officer Achey's independent observations did not, and could not, give rise to anything more than a mere suspicion of unlawful activity. If the officers desired to question Keeling concerning the alleged brawling incident, they should have waited for him to park and voluntarily exit his vehicle. At that point, a consensual citizen encounter would have occurred, and the odor of alcohol emanating from Keeling might then have served as probable cause to ultimately effectuate a valid DUI arrest,” the DCA said.

[*Keeling v. State*, 6/7/06]

Probable Cause to Conduct Pat-down

An officer responding to a call related to vandalism did not have probable cause to conduct a pat-down search of one of the juvenile vandals, and therefore a weapons conviction based on the result of the search must be reversed, the 2nd DCA held.

Officers responded to a call about a group of individuals throwing rocks at a house. When the officers arrived at the house, they saw some suspects run away and others remain standing by the house. One officer confronted the youths remaining near the house, including the defendant identified only as D.L.J. The officer approached D.L.J. and conducted a pat down, which uncovered a gun magazine. The officer asked where the gun was and D.L.J. responded that it was in his left shoe. The gun was seized and D.L.J. was arrested on a concealed firearm charge. Following his conviction, D.L.J. argued on appeal that the officer did not have probable cause to believe he had a dangerous weapon on him. The DCA agreed, holding that the officer did not have reason to believe the juvenile was carrying any dangerous weapons.

“(T)he State offered no testimony from the officers indicating that . . . they believed that D.L.J. was armed,” the DCA said. “(A) valid stop does not necessarily give officers the right to search an individual for weapons. Under the circumstances, the motion to suppress should have been granted.”

[*D.L.J. v. State*, 6/16/06]

Remedy for failure to set hearing in forfeiture case in this case the 2nd DCA held that the proper remedy for failure of state Department of Highway Safety and Motor Vehicles to set adversarial preliminary hearing after receiving actual notice of car owner's request for hearing was to set case for adversarial preliminary hearing with proper notice, not to return car to owner, in proceeding in which Department sought forfeiture of car

after owner allegedly left scene of accident with serious injuries, citing F.S.A. s. 932.703(2)(a). [\[In re forfeiture of 2003 Chevrolet Corvette, 7/7/06\]](#)

Lawsuit for Malicious Prosecution

A state attorney's decision not to prosecute a man charged with trespass and other offenses arising from a contentious city council meeting does not prevent the man from suing the city manager for malicious prosecution, the 2nd DCA held.

The DCA reinstated Venice resident Herb Levine's lawsuit against City Manager George Hunt, who was present at the council meeting when Levine was arrested for trespass after warning, disturbing a lawful assembly and resisting arrest without violence. The DCA said the trial court erroneously concluded that an arrest without further prosecution could not support a claim for malicious prosecution. The DCA noted that the first essential element of an action for malicious prosecution is the commencement of an original civil or criminal judicial proceeding.

"Under the facts alleged in the complaint, it is clear that Levine's criminal proceeding commenced with his arrest at the city council meeting. Thus, the State Attorney's subsequent declination to prosecute did not affect, as a matter of law, the presence of the first element," the DCA said.

[\[Levine v. Hunt, 7/19/06\]](#)

Liability - Claim of False Arrest, Malicious Prosecution

Law enforcement officers must be allowed some room for error in determining that probable cause exists to make an arrest and cannot be held liable for failing to eliminate all possibility that the suspect is innocent, the 2nd DCA held. The court reversed a jury finding that the City of Clearwater and one of its detectives were liable for malicious prosecution, false arrest and imprisonment and intentional infliction of emotional harm. A man whose former girlfriend accused him of molesting her 2-year-old

daughter sued the city and officer. The detective conducted a multi-day investigation, during which he found some evidence – including medical reports – that seemed to support the man's guilt and other evidence that refuted it. The DCA, noting that the case hinged on the "fluid concept" of probable cause, concluded that the detective did have probable cause to charge the man, and therefore reversed the lower court judgment.

"To establish probable cause, an officer is required to conduct a reasonable investigation, but the officer does not have to take every conceivable step to eliminate the possibility of convicting an innocent person," the DCA said. "A prudent person could have reasonably believed the information provided by (the mother), the physician, and the (Child Protective Team) investigator. The information obtained through the course of the investigation would lead a reasonable officer to conclude that the offense of a lewd act on a minor child had likely been committed."

[\[City of Clearwater, et al., v. Williamson, 7/28/06\]](#)

Definition of Dwelling Being Renovated

A structure that was once inhabited but at the time in question was under major construction with walls torn down cannot be considered a dwelling for purposes of the burglary statute, the 2nd DCA said.

George Munoz was convicted of burglary of a dwelling when he entered a house that was unoccupied and being renovated. On appeal he argued that the structure he entered could not be considered a dwelling, although he conceded that he was guilty of the lesser included offense of burglary of an unoccupied structure.

The DCA agreed that the more serious charge could not apply, finding that the house was "missing interior walls, sheetrock, and insulation. It was undergoing a total restoration, and the inspections of it were not yet completed. The facts that the construction workers used a temporary power pole, a minifridge, and an old

microwave, . . . surrounded by stacks of garbage, buckets, and work supplies, did not make this construction site suitable for lodging by any stretch of the imagination.”

[*Munoz v. State*, 7/28/06]

Requirement that Officer Observe Misdemeanor Violation

A deputy made an unlawful misdemeanor arrest because the offense was not committed in his presence, and therefore any evidence found after the arrest must be suppressed, the 2nd DCA held.

A deputy responding to a call about a neighborhood disturbance encountered a woman accusing Edward Baymon of being irate and loud toward her. Baymon approached the deputy with his hands in the air but then put his hands in his pocket. The deputy ordered Baymon to take his hands out of his pockets, which he did and then agreed to sit in the back of the patrol car. After speaking with the woman, the deputy placed Baymon under arrest for disorderly conduct. A search of Baymon turned up two bags of cocaine. Baymon was convicted but appealed, arguing that the deputy did not have a right to arrest him. Baymon reasoned that none of his actions in the deputy’s presence constituted disorderly conduct and therefore the drugs found during the search should have been suppressed. The DCA agreed and reversed.

“An officer is authorized to make a warrantless arrest for a misdemeanor only when it is committed in the officer’s presence. In this case, (the deputy) did not observe conduct constituting the crime of disorderly conduct. Although the deputy observed Baymon yelling and screaming, there was nothing to suggest that Baymon was inciting an immediate breach of the peace or was yelling the equivalent of ‘fire’ in a crowded movie theater,” the DCA said.

[*Baymon v. State*, 7/28/06]

3rd District Court of Appeal

Imposition of Ignition Interlock Device Following Hardship Hearing

In this case the 3rd DCA held that Department of Highway Safety and Motor Vehicles (DMV) had statutory authority to order placement of ignition interlock device on vehicle as a condition of reinstating driver's license for employment purposes, but DMV could order requirement only at the time DMV reviewed reinstatement application and granted the hardship license; once the restricted license was reinstated, DMV could not later impose additional requirements or restrictions that were not set forth at the hearing.

[*DHSMV v. Gonzalez-Zaila*, 2/22/06]

Union Members’ Right to Security Clearance

Union longshoremen working at the Port of Miami were not deprived of property interests without due process when the county, acting under a Coast Guard directive, seized their cargo area identification cards in order to bolster port security, the 3rd DCA held.

The union sued Miami-Dade County after the identification cards were taken for several weeks while the port improved security measures. The union claimed that, by temporarily suspending their security clearances at the port, the county denied their constitutional rights. The DCA disagreed, noting that the U.S. Supreme Court has declared that no one has a “right” to a security clearance and that the union workers were not denied the opportunity to work in their chosen field – they were only denied the opportunity to do so at a specific port for a limited period of time.

“Although we recognize that there is a constitutionally protected interest in an individual’s ability to follow a chosen trade or profession, we conclude that this interest was not implicated in the instant case,” the DCA said. “Appellants were denied access to the port while their security clearances were being verified. Appellants were not deprived of their right to engage in a chosen trade or profession as they were not precluded from obtaining

employment at another port facility. Moreover, Appellants' access to the Port was only temporarily restrained while the Port was undergoing certain security verifications, which were mandated by the Coast Guard. Therefore, the County was not required to provide Appellants with individual due process hearings."

[International Longshoremen's Association, etc., v. Miami-Dade County, etc., 4/5/06]

Compelled Disclosure of Strike Force Documents

A Florida judge considering a civil case correctly ruled that a Florida law enforcement strike force should not be required to turn over sensitive documents to defendants in a New York criminal case, the 3rd DCA said.

A New York court certified that certain documents of the South Florida Money Laundering Strike Force were to be produced in New York. The strike force produced some of the documents but objected to the production of other documents containing the strike force's operating structure, strategy and techniques for detecting and combating drug trafficking and money laundering. The Florida judge determined that production of the sensitive information would be unduly burdensome to the strike force and denied the production request. The DCA affirmed, agreeing with the strike force that compelling disclosure of its internal operating procedures would put the blueprint of a money laundering task force in the hands of an accused money launderer and the public at large.

"It is clearly good public policy to keep such information where it belongs, with the Strike Force," the DCA said.

[Mastrapa, et al., v. South Florida Money Laundering Strike Force, 4/26/06]

Use of Mug Shot for Identification

Even though officers improperly used what was clearly a mug shot when they asked witnesses to identify the suspect in a murder, there was no

chance the "unnecessarily suggestive" photo influenced the identifications because both witnesses were already familiar with the suspect, the 3rd DCA said.

Nickulis Gillis was convicted of second-degree murder and armed robbery for shooting Daniel Martin while trying to rob him. When officers showed Gillis' photo to two eyewitnesses, each positively identified Gillis, with whom they were already familiar. Gillis argued on appeal that because the only photo shown to the witnesses was a mug shot, it was impermissibly suggestive and could have led to misidentification. The DCA agreed that the use of the mug shot was improper, but rejected Gillis' motion to have the identifications thrown out because the witnesses knew what Gillis looked like before the shooting.

"While we agree, as did the trial court, that the procedure employed was unnecessarily suggestive, we conclude that, because there is no substantial likelihood of irreparable misidentification, the trial court did not err in denying the motion to suppress the identifications," the DCA said.

[Gillis v. State, 5/31/06]

Reasonable Basis for Stop of Motorist

In this case the 3rd DCA held that the objective test, determining whether particular officer who initiated stop had objectively reasonable basis for making stop, rather than subjective test, was the correct test to be applied for purposes of determining validity of traffic stop, for purposes of administrative driver's license suspension for refusal to take breath test.

[DHSMV v. Jones, 5/31/06]

Unlawful Detention - Suspicion of Criminal Activity

An officer cannot stop or detain an individual without reason to believe a crime has been or is about to be committed by the person, even though the person is a know friend of another man being sought by officers at the time, the 3rd

DCA held.

A Key West police officer was following a trespassing suspect through an alley when he came across Rudolph Manuel jogging in the opposite direction. Knowing Manuel was friends with the other man, the officer stopped both individuals because he thought it was suspicious that Manuel was running in the alley and the location was a high crime area. The officer later admitted that he had no suspicion that Manuel had committed a crime prior to the stop. The officer found cocaine on Manuel and arrested him on possession charges. Manuel argued on appeal that the officer did not have any reason to believe he was doing anything illegal and therefore the cocaine evidence should have been suppressed. The DCA agreed and reversed the conviction.

“An officer may conduct an investigatory stop of an individual when the officer has a reasonable, articulable suspicion that a person has committed, is committing, or is about to commit a crime. A mere or bare suspicion is insufficient,” the DCA said. “(T)he arresting officer admitted ... that at the time he detained Manuel, he did not believe that Manuel had committed, was committing, or was about to commit a crime. Because the initial stop was not based on reasonable suspicion, the subsequent seizure of the cocaine which Manuel threw away after the illegal detention should have been suppressed.”

[*Manuel v. State*, 6/14/06]

Excited Utterance - Concocted Story

A statement cannot be considered an excited utterance when the individual had ample time to corroborate a fictitious story to tell police, the 3rd DCA stated.

Martin Walters was convicted of attempted second degree murder and other charges after an incident in which he and his girlfriend, Charlotte Briggs, had an altercation that culminated in a firearm being shot and both of them sustaining minor injuries. They concocted a story to tell

police that they were robbed in their home. However, during the investigation they accused each other of shooting the gun. Following an investigation, Walters was arrested. At trial, statements the girlfriend made to the officers were admitted as hearsay under the excited utterance exception. On appeal, Walters argued that the woman’s statements should not be considered excited utterances because three hours had passed before she spoke to officers and she had corroborated with Walters on a story. The DCA agreed that Briggs’ statements could not be considered excited utterances and reversed Walters’ convictions, ordering a new trial.

“Here, three hours had elapsed since the startling event and, more importantly, Briggs, the declarant, had in fact misrepresented what had occurred by concocting a story that she and the defendant had been victims of a home invasion robbery,” the DCA said.

[*Walters v. State*, 7/19/06]

4th District Court of Appeal

Admissibility of Driving Record

In this case the 4th DCA held that a driving record is not testimonial in nature, and therefore the defendant did not have a Sixth Amendment right to confront and cross-examine a witness concerning the compilation of that record, citing *State v. Kronich*, 128 P.3d 119 (Wash. App. 2006) (holding defendant was not denied his Sixth Amendment confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004), when the court allowed admission of a Department of Licensing record custodian’s certification regarding the status of defendant’s driving privileges, since *Crawford* did not change the law pertinent to admission of nontestimonial hearsay that falls within a hearsay exception); *State v. N.M.K.*, 129 Wash. App. 155, 118 P.3d 368 (2005) (holding that certified copy of the absence of a driver’s license is not testimonial under *Crawford*).

[*Sproule v. State*, 3/29/2006]

Validity of Pat-Down Search

Because an officer personally saw a suspect assault another individual with a dangerous item, the officer had reason to conduct a pat-down search for other weapons, the 4th DCA held.

Danny Smith was arrested for possession of drugs, which were found after an officer conducted a pat-down search of Smith. The search followed an incident in which the deputy saw Smith hit someone with a stick. Smith complied with the deputy's order to drop the stick, and Smith was then placed in handcuffs. Even though Smith was not under arrest, the deputy conducted a pat-down search before placing Smith in a vehicle. The deputy found drugs and paraphernalia in Smith's pockets, and Smith was arrested for possession. Smith was convicted and appealed, claiming the deputy had no reason to think he was armed because he saw Smith drop the stick used in the assault. The DCA concluded that the deputy had reasonable suspicion to conduct a pat-down for general safety in order to make sure Smith did not have any other weapons.

"The officer saw an assault and saw that the appellant was armed with an instrument, which could cause harm. The mere fact that the suspect is visibly armed with one weapon or instrument being used in a violent way would create reasonable suspicion to conduct a further weapons pat-down," the DCA said.

[*Smith v. State*, 4/12/06]

Right to Counsel

A defendant's right to an attorney was not violated because at the time he requested an attorney he was not being questioned and officers cannot be required to anticipate a suspect's invocation of *Miranda* rights, the 4th DCA held.

Raymond Pardon was arrested on robbery, assault and battery charges. During the time he was being processed into the jail he asked if he was going to see his attorney. A few hours later an investigator began interviewing Pardon and

asked Pardon to read his rights out loud. Pardon told the investigator that he had asked another officer if he was going to get to speak to his attorney, but twice indicated he would talk to the investigator without his attorney present. Pardon argued on appeal that his right to counsel was violated, but the DCA disagreed.

"(T)he interrogation of Pardon was not imminent. He was merely being booked into detention, albeit on the same charge on which he was later questioned. Questioning did not occur until a few hours later. Any request for an attorney at this point was an anticipatory invocation of his *Miranda* rights, which would not prevent the officers from later reading him his rights preparatory to interrogation. He could have easily asserted his right to an attorney when Moore asked him about it, but he did not. No constitutional violation is present," the DCA said.

[*Pardon v. State*, 4/26/06]

Irrelevant Evidence and Hearsay Testimony

The judge presiding over an attempted murder trial should not have admitted improper collateral evidence used to impeach the defendant's credibility or allowed statements made to officers by the victim as excited utterances, the 4th DCA held.

Frank Mariano was charged with attempted murder of his former girlfriend, Ann Schaab, after he pulled a knife on her in a car. Officers were able to stop the car and safely remove Schaab, and about 10 minutes later she was able to describe what happened even though she was still shaken by the incident. Separately, several months later Mariano sent threatening letters to Schaab's current boyfriend. The trial court allowed testimony about the letters to be introduced and allowed a deputy to testify about what Schaab told him. Mariano appealed, and the DCA said the letters should not have been admitted at trial because they were irrelevant to the attempted murder case, and said Schaab's statements to officers should not have been considered for the excited utterance exception to

normal hearsay rules. The DCA reversed Mariano's conviction.

"(I)t is the state's burden to show that the statement is an excited utterance. The state does not do this merely by showing that the statement was made close to the startling event and the declarant was upset. The deputy testified that the statements made by Schaab were prompted by his questioning. On this record, the court abused its discretion in admitting (the deputy's) testimony regarding Schaab's statement," the DCA said.

[*Mariano v. State*, 5/31/06]

Constitutionality of Lemon Law Condition for Appeal

In a dispute over a vehicle under Florida's Lemon Law, a provision allowing a court to block a manufacturer's appeal until it has paid the consumer's attorney's fees unconstitutionally violates the Florida Constitution, the 4th DCA held.

The court said the provision violates the manufacturers' constitutional right to appeal under Article V, section 4(b)(2), and the access-to-courts provision of Article I, section 21. The provision fails to provide manufacturers with an alternative remedy for appeal and gives the manufacturer no benefit from paying the fees.

"If a manufacturer prevails on appeal, there is no simple mechanism for the recovery of the attorney's fees already paid out as a condition of the appeal," the DCA said. In addition, the court said, "(W)e do not believe that imposing an onerous attorney's fee requirement on the right to appeal is the only method that a statute could utilize to encourage a timely resolution of a consumer problem with a motor vehicle."

[*T.A. Enterprises, Inc., v. Olarte, Inc.*, 6/7/06]

Unemployment Comp After Accepting Worker's Comp Settlement

Workers are not entitled to unemployment benefits when they voluntarily give up their jobs

either to receive a lump-sum settlement after being injured on the job or to accept early retirement, the 4th DCA said.

The court affirmed the denial of benefits to a former K-Mart employee who was injured on the job and, rather than return to work on light duty, accepted a lump-sum settlement of her worker's compensation claim, which provided that she would not return to work for the company. The woman then sought unemployment benefits but was rejected when an appeals referee found that she had voluntarily left her employment in order to accept the worker's compensation settlement. The DCA agreed with the referee's reasoning, pointing out that the 3rd DCA had reached a similar outcome in a 1978 case where workers accepted early retirement rather than continue working until the employer moved to another state.

"It follows . . . that claimant in the present case also left her employment voluntarily, when she agreed to the settlement which terminated her employment, and we accordingly affirm the denial of benefits," the DCA said.

[*Lake v. Unemployment Appeals Commission, et al.*, 7/5/06]

Admission of Testimony by Lay Witness

A lay witness' testimony about the purpose of a hollow-point bullet should not have been admitted in an attempted murder trial, the 4th DCA held.

Mark Kolp was convicted of three counts of attempted second-degree murder resulting from an incident in which he fired three gunshots at two men. Kolp asserted that he was defending himself during the shooting. A trial witness testified that Kolp used hollow-point bullets in the gun and that the only purpose of those bullets was to kill people. Kolp appealed his convictions, claiming the witness was not qualified to make such a conclusion and that the testimony was prejudicial to his case. The DCA reversed Kolp's conviction, finding that the testimony from a lay witness about the purpose

of hollow-point bullets should not have been allowed.

“The jury was left with a pure credibility issue as to subjective intent, for the essence of the charge against defendant related to his motive in firing his weapon,” the DCA said. “We cannot say with any certainty that the error in admitting the testimony about the purpose of hollow-point bullets was harmless.”

[*Kolp v. State*, 7/19/06]

5th District Court of Appeal

Miranda Warnings - Suspect in Custody

After a suspect is in custody, she must be given full information of her rights before she may be asked questions or have a statement taken, the 5th DCA said.

Josette Octave was arrested for aggravated manslaughter of a child. She filed motions to suppress two separate statements she made at different times. Before she was in custody, Octave made statements to officers regarding the incident. She then made another statement after she was taken into custody. Before the second statement officers gave her a partial *Miranda* warning of her general right to counsel, but did not tell her specifically that she had the right to have an attorney present before she made statements.

The DCA upheld the admissibility of the first statement because it was made voluntarily before Octave was in custody. However, the court found that the officers should have informed Octave of the rights to which she was entitled while she was in custody. The court ruled that because the second statement was taken before Octave was informed of her rights, it should have been suppressed.

[*Octave v. State*, 4/13/06]

Liability for False Arrest - Mistaken Warrant

Because the enforcement of a validly issued arrest warrant is a duty owed by government to the general public and not to particular individuals, a city and its police officers cannot be held liable for false arrest after officers detained a man as the result of an identity theft, the 5th DCA held.

Donald Willingham was arrested on a facially sufficient and validly issued arrest warrant, although he had not committed any offense and was named in the warrant because the actual offender had misused his name. In a lawsuit, Willingham asserted that he offered to show the arresting officer documents clearing him of involvement in the offense but that the officer refused to look at the documents. Willingham claimed the officer owed him a duty to ensure that he was making a valid arrest. The DCA disagreed, concluding that the officer acted reasonably under the circumstances in fulfilling the nondiscretionary requirements of his position under the warrant, even if it was mistakenly issued. “The enforcement of facially sufficient and validly issued arrest warrants are duties that law enforcement and the governmental entities associated with them owe to the general public and not to any individual person. There was no exercise of discretion involved. The warrant was validly issued, and it was the duty of the agencies to see to it that the warrant was given full effect. Thus, we conclude that under these circumstances, there was no special duty owed to Mr. Willingham by either the City or the County, and that they were not liable for his arrest or detention,” the DCA said.

[*Willingham v. City of Orlando, et al.*, 5/12/06]

Staleness of Warrant - Totality of Circumstance

The fact that a search warrant is more than a month old does not automatically render it stale if the totality of the circumstances shows that law enforcement pursued the case appropriately during the delay, the 5th DCA said.

Cornelius Paige was charged with various drug offenses after officers executing a search warrant at his residence found evidence of drug sales. The trial court found that the search warrant was stale because it was more than 30 days old, and therefore the evidence found during the search could not be used at trial. The state appealed the decision, arguing that investigators had continued observing Paige's activities between the time the search warrant was obtained and the time it was executed. The DCA ruled for the state, finding that the trial court failed to consider the facts of the full investigation.

"Whether the allegations in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case and probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit," the DCA said. "When an affidavit establishes the existence of a widespread, firmly entrenched, and ongoing narcotics operation, which is observed to be continuing, a staleness argument loses much of its force."

[*State v. Paige*, 7/ 21/06]

Attorney General Opinions

NUMBER: AGO 2006-30
DATE: July 20, 2006
SUBJECT: Public Records, access by static website--ss. 119.01, 119.07, Fla. Stat.

This formal opinion holds that a municipality may respond to a public records request requiring the production of thousands of documents by composing a static web page where the responsive public documents are posted for viewing if the requesting party agrees to the procedure and agrees to pay the administrative costs, in lieu of copying the documents at a much greater cost.

NUMBER: AGO 2006-27
DATE: June 29, 2006
SUBJECT: Dual Office Holding, police chief as city manager--Art. II, s. 5(a), Fla. Const.

This formal opinion notes that the Supreme Court of Florida recognized a limited exception to the constitutional dual office holding prohibition in *Vinales v. State*, which concerned the appointment of municipal police officers as state attorney investigators pursuant to statute. Since the police officers' appointment was temporary and no additional remuneration was paid for performing the additional criminal investigative duties, the Court held that the officers were not simultaneously holding two offices and thus the constitutional dual office holding prohibition did not apply. The Second District Court of Appeal in *Rampil v. State*, following the *Vinales* exception, concluded that it was not a violation of Article II, section 5(a), Florida Constitution, for a city police officer to act in the capacity of deputy sheriff since that officer received no remuneration for such duties.

The opinion further notes that the above exception, however, has been only been applied when both offices have related to criminal investigation or prosecution and not to the exercise of governmental power or performance of official duties on a disparate board or position. Thus, in considering the *Vinales* and *Rampil* exception, the Attorney General has stated that the exception is limited and does not apply to a member of a municipal board of adjustment serving as a part-time law enforcement officer or to a police officer that serves as a law enforcement officer. Accordingly, the opinion concludes that the exception to dual office holding recognized by the courts in *Vinales v. State, supra*, and *Rampil v. State, supra*, does not permit a police chief to serve as acting city manager without resigning his or her office.

NUMBER: AGO 2006-25
DATE: June 29, 2006
SUBJECT: Law Enforcement Officers' Bill of Rights--triggering of beginning of time

period in which an investigation must be completed--ss. 112.532 and 112.533, Fla. Stat.

This formal opinion holds that the receipt of the notice of the allegation by the person authorized by the agency to initiate the investigation is the "triggering" event that begins the statutorily prescribed time-frame (180 days) in which to conduct the investigation of a complaint against a law enforcement or correctional officer.

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