
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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U.S. Supreme Court

Consent to search - co-tenants

When two co-tenants are present in a house and one refuses to permit a warrantless search of the home by law enforcement, the officers cannot conduct a search even if the other tenant does consent, the U.S. Supreme Court held.

Georgia residents Scott and Janet Randolph were having problems in their marriage. One day in July 2001 Janet complained to the police that after a domestic dispute her husband took their son away. When officers responded to the Randolph home, Janet complained that Scott abused drugs and said there was evidence in the house. She told the officers they could come into the house and look, but Scott refused to give consent to let the officers in the house. Janet then said she would lead the officers to where they would find drug paraphernalia. Officers followed her into what she claimed was Scott's room, where they found evidence of cocaine use. Scott argued on appeal that the search was illegal because he refused consent. In a 5-3 decision, the justices concluded that when a co-tenant is physically present and refuses a search, officers do not have consent to enter the home and conduct a warrantless search.

"This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent," Justice Souter wrote for the majority. "Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all."

[\[Geogia v. Randolph, 3/22/06\]](#)

Use of Hobbs Act to stop abortion protests

The federal Hobbs Act does not prohibit acts or threats of violence that are unrelated to robbery or extortion, and therefore cannot be used by abortion clinics as a legal weapon against anti-abortion demonstrators, the U.S. Supreme Court ruled unanimously.

Ruling in two related cases, the justices (with new Justice Alito not participating) ordered a federal appeals court to enter a ruling in favor of anti-abortion demonstrators and their organizations. Abortion clinics had relied on the Hobbs Act in asserting claims that violence and threats of violence by the demonstrators were intended to shut down the clinics, and therefore amounted to violations of anti-racketeering laws. The Supreme Court rejected the clinics' claim, declaring that most acts of physical violence are not covered by the Hobbs Act.

"We conclude that Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies)," Justice Breyer wrote for the court. "We hold that physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act."

[\[Scheidler v. National Organization for Women and Operation Rescue v. National Organization for Women, 2/28/06\]](#)

Florida Supreme Court

Right to attorney at lineup

The Florida Supreme Court rejected all claims of a triple murderer, including the killer's claim that a police lineup violated his right to counsel because it was conducted before his attorney arrived.

Pablo Ibar was convicted and sentenced to death for the murders of Casmir Sucharski, Marie

Roger and Sharon Anderson. On appeal he raised numerous issues, including an assertion that hearsay testimony should not have been admitted and that a statement by his mother should not have been read in court. Ibar also contended that his right to counsel was violated when police conducted a lineup without waiting for his attorney as he requested.

In rejecting Ibar's claims, the justices concluded that because the state had not yet decided whether to prosecute Ibar at the time of the lineup, his right to counsel was not violated.

[Ibar v. State, 3/9/06]

Arrest warrant used after illegal stop
An outstanding warrant may overshadow a traffic stop made without proper reason sufficiently to allow the admission of evidence, the Florida Supreme Court held.

Anthony Frierson was convicted of possession of a firearm by a felon. Frierson was stopped for failing to use his turn signal and having a cracked taillight, and the officer then learned from a dispatcher that there was an outstanding warrant for Frierson. The officer arrested Frierson based on the information he had at the time, even though it was later determined that the warrant was for a different person. Based on the information about the outstanding warrant, the officer searched Frierson's car and found the gun that provided the basis for the firearm possession charged. Frierson challenged the traffic stop, claiming that the officer did not have authority to stop him for the reasons that led to the stop. The 4th DCA agreed that the initial stop was improper and therefore the subsequent search was invalid. The Supreme Court found that the stop was not made in bad faith of the officer and, in a 5-2 ruling, reversed that decision and reinstated Frierson's conviction.

"(T)he outstanding arrest warrant was an intervening circumstance that weighs in favor of the firearm found in a search incident to the outstanding arrest warrant being sufficiently distinguishable from the illegal stop to be purged of the 'primary taint' of the illegal stop. Crucially, the search was incident to the outstanding warrant and not incident to the illegal stop. The outstanding arrest warrant was a judicial order directing the arrest of respondent whenever the respondent was located," Justice Wells wrote for the court. "The illegality of the stop does not affect the continuing required enforcement of the court's order that respondent be arrested."

[State v. Frierson, 2/9/06]

1st District Court of Appeal

Agency authority to reclassify position following Service First

A woman who was terminated by the Department of Education after her position was reclassified to Selected Exempt following passage of the Service First initiative incorrectly asserted that the Public Employees Relations Commission had exclusive jurisdiction over the classification of state employee positions, the 1st DCA said.

Nevertheless, the DCA ordered the woman reinstated to a Career Service position after concluding that the department improperly modified the recommendations of an administrative law judge, who determined that the woman's position was improperly reclassified to Selected Exempt because the position was not managerial, confidential or supervisory. In rejecting the woman's claim of PERC's exclusive jurisdiction, the DCA said the Legislature clearly directed the Department of Management Services to restructure the state's personnel system and gave state agencies responsibility for applying the new system, including reclassifying established positions.

"Because the legislature has expressly directed DMS to reclassify positions in accordance with the parameters set forth in sections 110.2035 and 110.205(2)(x) and charged state agencies with applying the classification system, we must reject appellant's argument that PERC has exclusive jurisdiction to determine the classification of state employees. Had the legislature intended otherwise, it would have set forth the reclassification provisions within the chapter over which PERC has authority, chapter 447, Florida Statutes," the DCA said.

[Fuller v. Department of Education, 3/27/06]

Falsification of official records - denial of unemployment benefits

Falsifying an official state record can be considered misconduct sufficient to deny unemployment benefits to a fired worker even if the actions addressed in the records would not have constituted misconduct on their own, the 1st DCA said.

A man employed by a private company providing guard services to the Department of Juvenile Justice was fired after he was caught falsifying

records purporting to show that he conducted rounds every 10 minutes, as required by regulations. The DCA said the detention officer's failure to conduct rounds according to the required schedule might have been deemed a one-time instance of poor judgment, and therefore not sufficient to deny benefits, but his falsification of officials state documents was the kind of misconduct that can prevent a terminated employee from receiving compensation.

“(C)laimant was observed making his rounds at intervals in excess of ten minutes and claimant’s log entries revealed at least two rounds that did not occur. Claimant admitted to making entries in the log book for rounds that did not occur,” the DCA noted. “Whether claimant made rounds close to (the required) times does not serve to mitigate claimant’s knowing misrepresentation in the log book. Claimant was aware that the ten-minute rounds were a critical part of his job. Claimant’s supervisor also informed him that falsification of official records constituted a critical offense that would result in termination.”

[*Sauerland v. Unemployment Appeals Commission*, 3/23/06]

PERC’s jurisdiction to resolve state-vs.-union dispute

A dispute between the state and a law enforcement labor union should have been resolved by the Public Employees Relations Commission and not by an arbitrator, the 1st DCA concluded in granting the state’s bid to have the arbitrator’s decision thrown out.

Although the DCA did not provide details of the particular dispute involved in the case, it said the labor union improperly skirted PERC’s jurisdiction by taking its complaint to an arbitrator. The DCA agreed with the state that the case involved a disagreement over whether a unilateral change took place in a term or condition of employment, a question that under the collective bargaining agreement put the matter squarely within PERC’s exclusive jurisdiction.

“While PERC may have the power to defer to arbitration, only it may make that determination. A party may not bypass PERC’s jurisdiction and proceed directly to arbitration,” the DCA said.

“(T)his is precisely what appellee did here.”

[*State v. International Union of Police Associations*, 3/14/06]

Admissibility of officer’s testimony

Testimony should not be excluded as hearsay if its purpose is to show inconsistent statements, the 1st DCA concluded.

C.L.W., a juvenile, was arrested and convicted of armed burglary with a firearm and grand theft of a firearm. During trial, the state introduced a witness who testified that he was with the defendant and watched him enter the home from the backyard. The defense, believing the testimony was false, called an Officer Gilyard to rebut the witness’ testimony. The state objected to the officer’s testimony as hearsay, and the trial court refused to allow the testimony. This was error, the DCA concluded, because the officer would have testified that the witness had told him he was not with the defendant at the time of the burglary.

“The testimony from Officer Gilyard should have been admitted into evidence because it was offered to impeach Mr. Aills’ testimony that he accompanied appellant into David Gatch’s backyard and observed appellant enter the victim’s home,” the DCA said. “The Florida Supreme Court noted that statements are not hearsay when offered merely for impeachment purposes to demonstrate inconsistent statements, and not to prove the truth of the matter asserted.”

[*C.L.W. v. State*, 1/20/06]

2nd District Court of Appeal

Need for Miranda warnings

When an incriminating response can be expected as a result of police questioning, officers should give the suspect proper *Miranda* warnings, the 2nd DCA said.

When officers arrived at the scene of a false domestic call at Crystal Shuttleworth’s house, they stopped a car they saw backing out of the driveway. Shuttleworth was the passenger in the car, which her boyfriend was driving. After conducting a patdown of the boyfriend, an officer asked if Shuttleworth knew of any contraband in the car. Shuttleworth admitted that there was cocaine under her seat. Two officers conferred and agreed that they had enough evidence to arrest Shuttleworth, but they asked her to let them into the house so they could investigate the call about a domestic dispute. Once the officers were in the house they saw contraband in plain view and arrested Shuttleworth. Shuttleworth moved to have the contraband in the house suppressed because

she was already in custody and had not been given *Miranda* warnings. The trial court granted the motion to suppress the evidence and the state appealed, asserting that Shuttleworth consented to the officers entering the house and so they did not need to give her *Miranda* warnings. The DCA determined that the motion to suppress was properly granted.

“The evidence before the trial court and the record before us demonstrate that Ms. Shuttleworth was entitled to *Miranda* warnings before she let the officers search her bedroom. Her alleged consent to such a search was made under circumstances reflecting coercion or acquiescence to police authority during her detention. The officers knew of Ms. Shuttleworth's involvement with contraband. Yet, while continuing to detain her during what apparently became a drug investigation, they failed to provide her the constitutional protections of *Miranda*,” the DCA said.

[*State v. Shuttleworth*, 3/31/06]

Deputies' lack of grounds for stop
Deputies did not have a reason to stop and arrest the defendant because his actions clearly did not meet the elements of the loitering and prowling statute, the 2nd DCA held.

Gary Rucker was stopped and questioned after he was seen walking down a street wearing wet and muddy pants. Deputies said the area where the arrest took place was a known area for burglaries, and the time of day they saw Rucker walking gave them reason to stop and question him. The deputies arrested Rucker for loitering and prowling, but on appeal Rucker said the deputies did not have reason to stop him.

The DCA agreed, finding that the circumstances did not give the deputies probable cause to stop and arrest Rucker and that the deputies clearly did not meet the elements needed to arrest someone for loitering and prowling. The court reversed the conviction and remanded the case for further proceedings.

[*Rucker v. State*, 3/8/06]

Officer's probable cause to search
A law enforcement officer had probable cause to believe contraband was in a suspect's mouth and the suspect's refusal to open his mouth did not withdraw his previous consent to be searched, the 2nd DCA held.

Wallie Witherspoon was approached by an officer and agreed to answer some questions,

eventually agreeing to a patdown search. During the patdown the officer felt a bulge in Witherspoon's pocket, which the suspect admitted was marijuana. The officer called for backup and told Witherspoon to keep his hands on the car, but saw Witherspoon move his hand from his pocket to his mouth. When the officer checked Witherspoon's pocket it was empty, so he repeatedly asked Witherspoon to open his mouth. Witherspoon refused these requests, but eventually he spit out the baggie of marijuana that originally had been in his pocket. The trial court granted Witherspoon's motion to suppress the marijuana, concluding that the suspect withdrew his consent to be searched by refusing to open his mouth. The DCA reversed, concluding that the circumstances gave the officer probable cause to believe that the item in Witherspoon's mouth was contraband.

“(T)he officer had more than a mere suspicion. The officer felt a bulge in Witherspoon's pocket he believed to be marijuana. Witherspoon admitted that it was marijuana. The officer then saw Witherspoon moving his hand from his pocket to his mouth, the bulge in Witherspoon's pocket was gone upon the officer's search, and Witherspoon's mouth was full. All of these circumstances combined to give the officer probable cause to order Witherspoon to spit out the contents of his mouth. Once the officer had probable cause, Witherspoon could no longer withdraw consent to the search,” the DCA said.

[*State v. Witherspoon*, 2/24/06]

Sovereign immunity - award of attorney's fees

A court award for attorney's fees and other costs is included in the “total amount of recovery” that is subject to the sovereign immunity protections enjoyed by government defendants, the 2nd DCA held.

The court rejected a plaintiff's assertion that the \$100,000 limitation on his recovery in a civil rights discrimination case does not pertain to the award of attorney's fees, and therefore he is entitled to recover a greater share of the overall judgment against his government employer. Jeffrey Gallagher filed a gender discrimination and retaliation suit against his employer Manatee County, and was awarded \$560,000 – including \$230,000 in compensatory damages and over \$310,000 for attorneys' fees, costs and expenses. Gallagher argued that the legal costs of pursuing his claim should be paid outside the sovereign immunity limitation, but the DCA disagreed.

“There is nothing in the meaning of *recovery* which suggests that some elements of an award are not part of the recovery which is subject to the cap on liability. The legislature employed a phrase – ‘the *total* amount of recovery’ – that is crystal clear in its inclusiveness. . . . It refers to all of the elements of the monetary award to a plaintiff against a sovereignly immune entity. This is the only plausible understanding of the statutory phrase,” the DCA said.

“We acknowledge that the denial of a full recovery of attorney's fees, costs, back pay, and compensatory damages limits the effectiveness of the remedy provided to a prevailing plaintiff in a civil rights case against an entity enjoying the benefit of sovereign immunity. But that is a matter of policy which is within the province of the legislature. The statute at issue here unequivocally reflects that in weighing the relevant policy issues the legislature gave priority to the policy of placing strict limitations on the waiver of sovereign immunity. We are bound by the legislature's decision on this issue of policy,” the court added.

[*Gallagher v. Manatee County*, 2/1/06]

Reasonable expectation of privacy in stolen objects

A defendant failed to show he had a reasonable expectation of privacy regarding a stolen laptop found in his car when it was searched by officers during a traffic stop, the 2nd DCA said.

Larry Hicks, who pled no contest to burglary and grand theft, argued on appeal that the laptop should not have been admitted into evidence because the police search went beyond his consent. Hicks was stopped after he was observed displaying abnormal behavior in a neighborhood. After Hicks agreed to a search, an officer found mail from the address of a nearby house, along with several other items. The officer determined that Hicks did not have permission to have the mail. A laptop was discovered in the back seat of the car, and Hicks claimed the computer belonged to his uncle. Another officer began to search the laptop files in order to determine its owner, and Hicks argued that the officer did not have probable cause to search the laptop's files. The DCA held that Hicks failed to meet the standard for proving that his rights had been violated.

“We affirm the trial court's judgments . . . not because of a bright line rule that thieves never have a reasonable expectation of privacy in stolen property but because Hicks failed to carry

his burden of proof that his Fourth Amendment rights were violated,” the DCA said.

[*Hicks v. State*, 1/27/06]

Nonverbal withdrawal of consent for search

An individual who consents to a search may withdraw that consent through nonverbal actions, but only if the actions are clear and unmistakable such that his intent can be clearly understood, the 2nd DCA said in refusing to rule an officer's consent invalid based on the suspect's nonverbal actions.

Robert Haselier was legally stopped by an officer who asked to search his vehicle and person. Haselier consented to the search and complied when the officer asked him to empty his pockets, but then tried to return a breath mint container to his pocket. The officer saw the container and asked Haselier to hand it over. Haselier hesitated and sighed, but then gave the container to the officer, who found methamphetamine inside it. Haselier contended on appeal that his action in putting the container back in his pocket amounted to withdrawal of his consent to be searched, but the DCA concluded that Haselier did not exhibit enough action for someone to conclude he was revoking his consent.

“Mr. Haselier voluntarily removed the container from his pocket, returned it to the pocket, and gave it to the officer upon request. His sigh was just a sigh. His compliance with the officer's request for the (mint) container was not done with the clarity of withdrawal . . .,” the DCA said. “Mr. Haselier consented to the search. He did not physically interfere with the officer's search; he did not attempt to leave; he said nothing to indicate a withdrawal of consent. He willingly complied with the officer's request.”

[*Haselier v. State*, 1/13/06]

Illegal warrant - omitted information

An affidavit that omitted material facts did not provide probable cause to issue a warrant to search defendant's residence for drugs. The affidavit did not disclose that the confidential informant (CI) had last seen drugs in the residence six months before date of affidavit, did not mention that the CI had reported that defendant lived at a different location than that given in affidavit, and did not reveal that defendant's prior arrest for possession of marijuana had occurred nine years previously, and the detective's observations on the day that he obtained the warrant did not connect

defendant to possession of marijuana by a subject who was seen leaving defendant's residence with a bag, the 2nd DCA said in ruling a search warrant issued in response to the affidavit to be illegal and reversing a conviction.

Jeffrey Young was arrested for trafficking in and possession of drugs following a warrant search of his home. Young contended that the warrant did not provide sufficient probable cause for the search of his home, arguing that the officer who provided information for the warrant knowingly omitted pertinent information and provided other information that was stale. After reviewing the contents of the affidavit used to obtain the search warrant, the DCA ruled that the warrant was not supported by probable cause and reversed the conviction.

"When considering an application for a search warrant, an issuing court must determine whether, based on the totality of the circumstances, the information contained in the application establishes a reasonable probability that evidence of a crime will be found at a particular place and time. The reviewing court must ensure that the magistrate had a substantial basis for concluding that probable cause existed, and this determination must be made by examining the four corners of the affidavit. However, when material information has been omitted from the affidavit and the omitted information might undermine the probable cause determination, the reviewing court must evaluate the sufficiency of the affidavit as though the omitted facts were included," the DCA said.

[*Young v. State*, 1/11/06]

3rd District Court of Appeal

Exigent circumstances - evidence in plain view

A warrantless search that turned up drugs and a weapon in a tenant's apartment was valid because the apartment building owner gave officers permission to enter the building and exigent circumstances were present for the apartment search, the 3rd DCA held.

Dominique Cartwright was arrested on drug and weapon charges but argued on appeal that his motion to suppress the evidence should have been granted because police officers did not have a warrant to search his apartment. The officers were given permission to enter the building by its owner, Sergio Garcia, because they had information that prostitution was

occurring in the building. Cartwright rented an apartment in the building and opened his door to ask officers what was happening. While talking to Cartwright, an officer saw drugs sitting on a refrigerator and told Cartwright to step outside. He was arrested and the officer went inside the apartment to seize the drugs, where he found other items including drug paraphernalia and firearms in plain view. Cartwright conceded that the owner of the building gave the officers the right to be in the building, but said the search of his apartment was illegal. The DCA concluded that because the officers had the legal right to be in the building and then voluntarily encountered Cartwright, the search of his apartment was legal after the drugs were plainly seen.

"As the defendant conceded Mr. Garcia's ownership of the building, the State did not have to prove Mr. Garcia's authority to grant permission to law enforcement to enter the common areas of the second floor," the DCA said. "Once Detective Mead was legally in the defendant's apartment, based on the exigent circumstances, he properly seized the drug paraphernalia, marijuana, and firearms that were in plain view."

[*State v. Cartwright*, 1/11/06]

4th District Court of Appeal

School board's immunity - violent student
A public school teacher who was injured by a student with a propensity for violence may proceed with her lawsuit against a county school board because the board failed to clearly establish that it qualified for worker's compensation immunity, the 4th DCA held.

In order to qualify for such immunity, the DCA explained, the school board would have to show that a reasonable person would not have viewed its conduct as "substantially certain to result in injury" to the employee. The teacher, Stacy Patrick, was injured by a severely emotionally disturbed student after the school board placed him at her school without informing the school that the student had been committed under the Baker Act after an act of violence against his mother.

"The placing of him in this school, and not warning the teachers, made it substantially certain that someone would be injured," the DCA noted. "(T)he school board did not, on its motion for summary judgment, establish that there were no genuine issues of material fact as to whether

the employer's behavior satisfied the intentional tort exception."

[*Patrick v. Palm Beach County School Board*, 3/29/06]

Admissibility of taped conversations

A recording of a telephone conversation between an alleged rape victim and a witness is not admissible as evidence because it does not meet the wiretap law's requirements that it was recorded in order to obtain evidence of a crime, the 4th DCA held.

Kenneth Atkins was convicted of committing a sexual battery for his role in an alleged gang rape at a party. The alleged victim, identified only as A.S., was advised by detectives to record conversations with the suspects, and she also recorded a conversation with a friend who accompanied her at the party. On the tape the witness made comments indicating she believed that the rape had occurred, but at trial she appeared as a defense witness and gave contradictory testimony. The state introduced the recording to impeach the witness' live testimony. Atkins appealed the admissibility of the recorded tape, arguing that it was not covered under the statute because it was not obtained to show evidence of a crime. The DCA agreed, noting that the error in admitting the tape was not harmless because the recording went to the heart of the credibility of both the witness and A.S.

"We conclude that a conversation surreptitiously recorded with a mere witness is not the type of conversation allowed under section 934.03(2)(c). In this case, (the witness) was not even a witness to the crime but instead encountered A.S. after the incident. Recording her conversation was not for the purpose of obtaining evidence of a criminal act," the DCA said.

[*Atkins v. State*, 3/22/06]

Commission's authority to ignore request

While the state Unemployment Appeals Commission has sole discretion whether to accept newly discovered evidence in considering the outcome of a case, it cannot completely ignore a properly filed request to consider that new evidence, the 4th DCA said.

A fired Boynton Beach police sergeant prevailed when he appealed the initial denial of unemployment benefits. The city then appealed to the Unemployment Appeals Commission,

including in its brief a request that the commission consider newly discovered evidence – specifically, the internal report on the event that led to the sergeant's discharge. The commission ruled in the sergeant's favor without ruling on whether it would consider the newly discovered evidence. This failure to consider the new evidence was error and requires reversal, the DCA said.

The commission has the authority to decide whether to accept the evidence, but cannot act – or fail to act – on such a request without accountability, the DCA said. The court remanded the case, directing the commission to consider the city's request, provide it a ruling and reconsider the merits of the appeal if warranted. [*City of Boynton Beach v. Unemployment Appeals Commission, et al.*, 3/22/06]

Class action over employee termination procedures

Public employees may proceed with a class action alleging that the procedures used by their employing agency for terminating or demoting employees violated the Sunshine Law, the 4th DCA held in a ruling that potentially opens the door to numerous challenges of employment actions.

The DCA held in 2004 that the Sunshine Act was violated when a panel deliberating the termination of a Palm Beach County employee met in private. Subsequently, two other county employees who went through the same process sought to pursue a class action against the county on behalf of all other county employees who were fired or demoted through similar secret meetings. The trial court rejected the request, concluding that the circumstances of the discipline taken against the two plaintiffs were not typical of the claims of the other members of the potential class. The DCA, reversing the lower court, said the real issue was whether the secret meetings violated the Sunshine Law, not whether the reasons for disciplinary action were similar.

"(T)he trial court should have been concerned with whether the claims arise from the same course of conduct and are based on the same legal theory. None of the arguments raised by the county persuade us that the four requirements under Florida Rule of Civil Procedure 1.220(a) for class certification, numerosity, commonality, typicality and adequacy of representation, have not been met.

The order denying class certification is reversed,” the DCA said.
[*Deininger and Hackney v. Palm Beach County*, 3/22/06]

Application of DROP benefits following divorce

DROP retirement benefits enjoyed by a state worker must also accrue to his ex-wife if their divorce settlement entitles her to a share of his State Retirement System pension, the 4th DCA said.

Kathy and Barry Russell were divorced through a final judgment of dissolution that took effect in January 1998 and gave her a share of his pension benefits. The DROP program was established less than six months later, and Barry entered the program five years before his retirement. Kathy argued that her share of Barry’s pension should enjoy the same interest and cost-of-living increases as he received through the DROP program. The trial court denied her any benefits from her ex-husband’s participation in DROP, concluding that she should receive only what she bargained for under the divorce settlement. The DCA reversed, citing its similar conclusion in a 2004 case in which it held that the interest and cost of living adjustments should apply to the ex-wife’s share of the retirement benefits.

[*Russell v. Russell*, 3/22/06]

Illegal stop - validity of consent to search
A consensual stop improperly changed into an investigative stop even though officers did not have a reasonable suspicion that the defendant committed or was about to commit a crime, the 4th DCA held.

At 3:30 in the morning, an officer noticed Ronald Delorenzo asleep in the driver’s seat of a running car in a shopping center parking lot. The officer knocked on the window to make sure Delorenzo was not in need of assistance. Delorenzo put a hand in his pocket, prompting the officer to order him to remove his hand from the pocket. Delorenzo then got out of the car as requested and consented to a search that revealed a bag of cocaine in his pocket. Delorenzo was charged with possession of the drug but argued on appeal that the stop was illegal and his motion to suppress should have been granted. The DCA agreed, finding that the casual encounter escalated into an investigative stop when the officer ordered Delorenzo to take his hand out of his pocket.

“The state argues and the trial court found that during the investigatory stop Delorenzo consented to a search. Consent given after police conduct determined to be illegal is presumptively tainted and deemed involuntary, unless the state proves by clear and convincing evidence that there was a clear break in the chain of events sufficient to dissolve the taint,” the DCA said. “With no break in the events, any consent Delorenzo provided remained tainted and cannot vitiate the illegality.”

[*Delorenzo v. State*, 3/8/06]

State’s failure to show elements of charged crime

The state failed to prove that a juvenile defendant had the intent to use a screwdriver as a burglary tool and therefore failed to present all elements of the crime, the 4th DCA held.

A.W., a juvenile, was a passenger in a stolen car when a deputy pulled the care over. A.W. admitted to stealing the car and using a screwdriver to start the vehicle. He was charged with grand theft and possession of burglary tools. The juvenile’s attorney moved for a judgment of dismissal because the state failed to prove that A.W. had the intent to use the screwdriver to steal the car and therefore could not prove he possessed burglary tools. The trial court denied the motion, but the DCA agreed with the defense’s assertion that the state failed to prove the elements of the crime.

“There was no evidence presented at trial from which the trial court could determine that A.W. possessed the intent to use the screwdriver to gain access to the stolen car. While the evidence presented at trial supported the finding that A.W. used the screwdriver to start the vehicle, this is not the finding necessary to support a conviction for possession of burglary tools. Accordingly, we reverse A.W.’s conviction for possession of burglary tools,” the DCA said.

[*A.W. v. State*, 2/22/06]

Defendant denied opportunity to present defense theory

A man who was on trial for murder after an accomplice was killed by police during a robbery should have been allowed to show jurors a videotape in which the accomplice indicated suicidal tendencies the night before the deadly robbery, because the tape was relevant to the defendant’s “suicide-by-cop” defense, the 4th DCA held.

Miguel Wagner was convicted of the second-degree murder of his co-conspirator, Chris Pucci. Wagner and Pucci committed a robbery, and Pucci was fatally wounded by a law enforcement officer as they attempted to escape. Charged with Pucci's murder, Wagner argued that his accomplice was suicidal and acted in a way intended to get himself killed by an officer. Despite this "suicide-by-cop" theory, Wagner was denied the opportunity to introduce a video by Pucci made the night before the planned robbery in which he apologized to his family and specified the disposition of his belongings. Wagner argued that the video would have shown that Pucci was suicidal and was key to show his state of mind on the day he was shot. Wagner was also denied the opportunity to present testimony by a doctor explaining the "suicide-by-cop" theory. These rulings were in error, the DCA said in ordering a new trial.

"Under the facts presented in this case, appellant should have been allowed to present evidence to support his theory that Pucci was not in the process of fleeing, but rather was taunting the officer to fire a fatal shot," the DCA said. "Had the jury heard evidence of Pucci's state of mind on the day of the crime, they might have concluded that Pucci had, indeed, planned a suicide at the hands of the officer, an act which was separate and distinct from the common scheme to commit a robbery. In any case, appellant certainly had a right to present this theory for the jury's consideration and have the jury at least consider the possibility of an independent act."

[*Wagner v. State*, 1/25/06]

5th District Court of Appeal

Mutual ownership - consent to search
People who jointly share a hotel room have the right to give consent to a search of the room but not to the personal belongings of the other person, the 5th DCA said.

Hugo Marganet and his girlfriend Wilma Pinero were stopped in their car as part of a drug investigation. Pinero offered to cooperate and told officers she knew where Marganet kept his drugs. She led them to the hotel room the two were sharing, and said the drugs were in Marganet's shaving kit inside his suitcase. Pinero could not indicate what else was in the suitcase. Drugs were found in the shaving kit and Marganet was arrested. His motion to suppress was denied and he appealed, claiming that Pinero did not have the authority to give

consent to a search of his personal belongings because there was no mutual ownership. The DCA agreed, concluding that Pinero had no claim of ownership to the suitcase or shaving kit and therefore could not give consent to search them.

"(T)he evidence is . . . insufficient to establish apparent authority on the part of Pinero to consent to a search. Rather, the facts known to the agents were such that they could have no objectively reasonable belief that she had authority over these items," the DCA said in reversing Marganet's conviction.

[*Marganet v. State*, 3/31/06]

Seizure - encounter in public place
Because a law enforcement officer does not automatically detain a person when encountering him in a public place, a plainclothes officer in an unmarked car did not conduct an illegal seizure of a car that was already parked in public when the officer observed contraband, the 5th DCA said.

Glen Houston was arrested for cocaine trafficking. House was sitting in his vehicle, which was parked at a gas station, when a passenger entered the car. A plainclothes officer who was observing Houston pulled up behind his car and approached the driver's side window. The officer saw a substance and money being exchanged in the car, and based on his training and experience he arrested Houston on drug charges. A subsequent search found contraband in a storage facility rented by Houston. Houston claimed the officer seized him without probable cause, asserting that the officer could not have known there were drugs in the car and therefore he did not have probable cause to pull in behind Houston and block him from leaving. The trial court rejected Houston's motion to suppress, and the DCA affirmed.

"(T)he officers here did not use their emergency lights or sirens as a show of authority. . . . The officers' actions in pulling behind Houston and walking up to Houston's truck were so unobtrusive that neither he nor (the passenger) was even aware of the officers," the DCA said. "Moreover, the officers were in plain clothes and not in uniforms. Even after he noticed the men, (the passenger) did not realize they were law enforcement officers. The officers did not give any commands or display their weapons. Up until this point, no reasonable person would have believed he had been seized."

[*Houston v. State*, 3/31/06]

Reasonable suspicion - totality of circumstances

A trial court's order suppressing evidence of a police stop failed to take into account the totality of the circumstances and all the information that led the arresting officer to make the stop, the 5th DCA said in reinstating the criminal case.

William Lopez was on community control when his community control officer informed police that Lopez was driving on a suspended license. The information was relayed to Casselberry Police Lt. Gordon Pleasants, who confirmed that the license was suspended. Pleasants obtained a photograph of Lopez and his address, and then observed a jeep parked outside of Lopez's address in order to see if Lopez would drive it. At one point the jeep left its parking spot, but Pleasants could not determine who was driving. When the jeep's driver saw Pleasants, the vehicle abruptly turned around and headed back toward the apartment. Pleasants stopped the vehicle and discovered that Lopez was driving. Lopez argued that Pleasants did not have reasonable suspicion to stop him because he could not determine who was driving the jeep before it was pulled over. The trial court granted Lopez' motion to suppress but the state appealed, arguing that the trial court failed to look at all the information provided to the officer. The DCA concluded that under the totality of the circumstances, the officer had more than a hunch to pull over the vehicle.

"The test is not whether Pleasants had probable cause to stop the vehicle. Rather, it is whether he had enough objective data to form a well-founded, articulable suspicion that Lopez was driving the jeep," the court said. [State v. Lopez, 3/24/06]

Suspect's right to have preliminary question answered
The failure of detectives to immediately answer a suspect's question regarding the charges against him does not render the subsequent statement involuntary and therefore subject to suppression, the 5th DCA held.

Chad Barger was arrested and eventually charged with counts of battery, kidnapping, sexual battery and robbery. Barger argued that his statements made during questioning should have been suppressed because the interviewing detective failed to answer when Barger asked what he was being charged with. Barger also claimed that he indicated he did not want to

continue the interview without counsel being present. The trial court rejected both assertions and the DCA affirmed, finding that the question regarding the charges against Barger did not address his constitutional rights and therefore did not have to be answered before questioning could proceed. In addition, the court noted that the detective did answer Barger's question immediately after establishing that the suspect would talk without an attorney present.

"The transcript clearly shows that immediately after Barger asked his question, the detective confirmed that Barger wanted to continue the interview without his attorney, and then began to answer Barger's question by explaining the allegations to the best of his knowledge. After learning the factual basis for the custodial interview, Barger elected to continue speaking with the detectives. Based on these facts, it is clear that Barger knowingly, voluntarily, and intelligently waived his privilege against self-incrimination. Therefore, the motion to suppress was properly denied," the DCA said.

[Barger v. State, 3/24/06]

Required disclosure of lawsuit's backers
Citizens suing to protest a government action cannot be forced to disclose the names of individuals contributing to their effort without a showing by the government that the information is relevant, the 5th DCA said.

The court said an order requiring the citizens to divulge the information would have a chilling effect on the citizens' litigation. The DCA, reversing a lower court order, ruled in favor a Maitland couple who waged a campaign against a development order by which the city authorized a seven-story multi-use structure in a neighborhood. The couple advocated their position on a website, and individuals could use the website to contribute money to support the protest and the lawsuit. The city requested the names of persons or entities who participated in the creation of the website and supported the lawsuit, arguing that those individuals might work for developers with a vested interest in the case. The city asserted that the motivation of the protest's supporters was relevant and said it was entitled to discover whether the lawsuit was motivated by competing business interests. The DCA rejected the city's argument, concluding that the funding of the lawsuit is not relevant to any issue in question.

"The City has failed to show any relevancy of the discovery to the pending issues. To allow the

discovery would require the petitioners to defend against claims that may be raised but are currently unstated. The compelled disclosure of the names of citizens exercising their right to participate in the democratic process would create a chilling effect on their rights to organize and associate. The harm the petitioner seeks to avoid would arise; disclosure of contributors' identity would subject them to possible intimidation or coercion," the DCA said.

[Matthews v. City of Maitland, et al., 3/24/06]

Right to sue after criminal no-contest plea
A person who has pleaded no contest to resisting arrest cannot then sue law enforcement authorities claiming that the very arrest was unlawful and he therefore is entitled to damages for false arrest and other claims, the 5th DCA said.

Karl Behm pleaded no contest to resisting arrest following an incident in which officers investigating a reported shooting tried to detain him. Behm sued the Putnam County sheriff and the three deputies involved in the incident, claiming battery, false arrest/imprisonment and trespass. The DCA determined that Behm's no contest plea to resisting the arrest in the criminal case foreclosed him from suing the sheriff and deputies in a civil action for damages arising from the same incident.

"Behm was convicted of resisting arrest without violence, a conviction which established the legality of his arrest. In order to prevail in his civil action for false arrest/imprisonment, trespass and battery, he would have to negate an element of the offense of which he has been convicted. Such a collateral attack on the conviction through the vehicle of a civil suit is not permitted," the DCA said.

[Behm v. Campbell, et al., 3/10/06]

Validity of confession - defendant's request to speak with mother

A young killer's request to speak to his mother after his police interview was finished was not an invocation of his right to stop the interview until a parent could be present and therefore his rights were not violated, the 5th DCA held.

John Davis was convicted of the 2003 first-degree murder of Paul Prescott. Shortly after the murder, Davis, who was 16 at the time, was apprehended for questioning and asked to speak to his mother before officers took him to jail. Davis's mother was properly notified that he was

being interrogated and did not ask to see him, did not ask for questioning to cease and did not ask that her son have an attorney present. Davis confessed to the murder, but argued on appeal that his statements were invalid because the interview should have been stopped when he asked to see his mother.

The DCA found that Davis clearly asked to see his mother after he was finished with his statements. According to the transcripts, Davis repeatedly asked to see his mother when he was finished but before they took him to jail. The DCA concluded that the officers did not violate Davis' rights and affirmed the conviction.

[Davis v. State, 3/10/06]

Validity of search - acquiescence to police authority

A search conducted by a sheriff's deputy was invalid because the suspect did not explicitly consent to the search and instead merely acquiesced to the deputy's actions, the 5th DCA held.

Andrew Tyson was in a vehicle when it was pulled over in a valid stop. Tyson told the deputy he did not have any contraband on him. Trial testimony indicated that when the deputy asked if he could conduct a search, Tyson never provided a clear answer. The deputy proceeded with the search and found cocaine in Tyson's pocket. Tyson moved to have the cocaine suppressed, but the trial court refused. The DCA reversed, concluding that the traffic stop was valid but the search was not.

"The failure to object to a search does not equal consent to a search. While consent need not be expressed in a particular form it is not established by a showing of acquiescence to a police officer's authority. Here, the deputy's testimony suggests that the deputy was not necessarily seeking affirmative assent to conduct a search, but rather, that he would conduct a search unless the defendant affirmatively told him not to do so. The essence of a consensual search is more than simply an acquiescence to police authority," the DCA said.

[Tyson v. State, 2/24/06]

State's liability for damages from fight against wildfires

A trial court correctly applied existing precedents when it held that the state is not liable to property owners who suffered damages as a result of the state's efforts to extinguish the

wildfires that burned out of control in Central Florida during the summer of 1998, the 5th DCA held.

A property owner who filed suit against the state in Flagler County appealed a summary judgment order entered against him. The owner, Marcus Strickland, claimed the trial court erred in finding the state immune from liability in tort for its firefighting activities and in ruling that the state was not liable under the takings clause of the federal and state constitutions for trees, fences and a dike damaged to create a fire line on his property. The DCA cited cases dating back as long ago as 1879 in support of the view that the government is not liable under either legal theory.

Citing a 1985 Florida Supreme Court in rejecting Strickland's first point, the DCA said, "(T)he Court very clearly held that government is immune from tort liability to individual property owners for damage resulting from the discretionary actions of fire fighters in combating fires."

[*Strickland v. Department of Agriculture and Consumer Services*, 2/17/06]

Agency's suspension of license

The 5th DCA said a state administrative agency acted properly when it took disciplinary action against a licensee, rejecting the man's assertions that the agency did not give him proper notice that his request for a hearing had been granted.

The Florida Real Estate Appraisal Board issued a one-year suspension of the license of Timothy Keen for unspecified acts of misconduct. Keen requested a formal hearing on two counts against him that were subsequently dropped, and an informal hearing on two other counts in which he did not dispute the factual allegations. Even though Keen signed a registered mail receipt indicating that he had received notice of the hearing, neither he nor his attorney showed up for the hearing at which his license was suspended.

"If Keen had any objection to the notice he received, he should have attended the hearing and raised that objection," the DCA said. "Substantial competent evidence is contained in the record showing that Keen had ample notice of both the time of the informal hearing and the charges filed against him. If Keen had any objections to the informal hearing process he

should have raised his objections at or prior to the hearing."

[*Keen v. Department of Business and Professional Regulation, etc.*, 2/17/06]

Religious freedom - veiled driver's license photo

An individual's religious beliefs do not outweigh the state's need to properly identify everyone who holds a Florida driver's license, the 5th DCA held in upholding a state agency's decision to cancel a Muslim woman's driver's license because she refused to have her picture taken without having her face concealed by a veil.

The DCA said the state may require a full facial photograph on a state driver's license in order to ensure proper identification of the driver. The DCA rejected the arguments of Suldaana Freeman, who said this legal requirement was in conflict with her religious freedoms. The DCA determined that the Department of Highway Safety and Motor Vehicles acted within its authority, concluding that regulations that impact some individuals' religious practices are acceptable as long as they do not single out those individuals for special, unfavorable treatment.

"We recognize the tension created as a result of choosing between following the dictates of one's religion and the mandates of secular law. However, as long as the laws are neutral and generally applicable to the citizenry, they must be obeyed," the DCA said.

[*Freeman v. Department of Highway Safety and Motor Vehicles*, 2/13/06]

Invalid search warrant

Officers lacked probable cause and did not have a valid warrant to search a drug suspect's home, and therefore the evidence should have been suppressed, the 5th DCA held.

William Salyers was convicted of drug trafficking and possession. In early January 2004, officers received information that drugs were being brought into and sold out of Salyers' house. Near the end of the next month, officers finally acted on the information and went to Salyers' house. An officer was told that drugs *may* have been left behind by other people, but Salyers said he did not have knowledge of any drugs in the house at that time. If any drugs were in the house they would be in a particular bedroom, Salyers said, and he consented to the search of that room only. No drugs were found in the

room, and Salyers refused permission for officers to search any other room. Outside the home Salyers consented to the search of his car, where officers found pills in an unmarked container for which Salyers could not produce a prescription. Based on this information, officers obtained a search warrant for the house and found cocaine, hydrocodone and marijuana inside. Salyers claimed on appeal that the officers did not have probable cause to obtain a warrant, and the DCA agreed. The court said Salyers' statement that drugs might be in house was not an admission, and the pills found in his car were not pertinent to drugs in the house.

"Collectively, these facts indicate that the search warrant was not reasonably supported by probable cause, the search warrant should not have been issued and the trial court erred by denying Salyers' motion to suppress," the DCA said in ordering a new trial.

[\[Salyers v. State, 2/10/06\]](#)

ATTORNEY GENERAL'S OPINIONS

Number: 2006-11

Date: March 21, 2006

Subject: RE: TRAFFIC – UNIFORM TRAFFIC CODE – MUNICIPALITIES – LAW ENFORCEMENT OFFICERS – FIRE DEPARTMENT – AUTOMOBILES – ACCIDENTS – immediate access to crash report by fire department. s. 316.066, Fla. Stat.

This formal opinion holds that section 316.066, Florida Statutes, does not authorize the release of written crash reports to the City of Maitland Fire Department within 60 days after the report is filed, for purposes of requesting reimbursement from the at-fault driver in an accident for a fee assessed by the city. The opinion notes that section 316.066(3)(c), Florida Statutes, specifically provides that "crash reports required by this section . . . are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution for a period of 60 days after the date the report is filed." By providing specific exceptions allowing the distribution of these reports to specified individuals and entities, the opinion holds, the Legislature has prohibited the distribution of these crash reports to any other entity. The opinion notes that a legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way. The opinion concludes that the Attorney General's Office is without authority to

qualify or read into this statute an interpretation or define words in the statute in such a manner as would result in a construction that seems more equitable under circumstances presented by a particular factual situation; such construction when the language of a statute is clear would in effect be an act of legislation, which is exclusively the prerogative of the Legislature. The opinion suggests that the Legislature may wish to reconsider the provisions of section 316.066(3)(c), Florida Statutes, to address the issue.

Number: 2006-06

Date: March 8, 2006

Subject: RE: SHERIFFS – SEXUAL OFFENDERS – SEXUAL PREDATORS – MOTOR VEHICLES – authority of sheriff to require and enforce decal on registered sex offender's or predator's motor vehicle. s. 725.21; 943.0435, 944.606, Fla. Stat. Ch. 39, Fla. Stat.

This formal opinion holds that the Sheriff of Columbia County is authorized to develop a program for community notification of the presence of a sexual predator or offender utilizing the placement of a decal on the vehicle of these offenders. The opinion notes that the sheriff is a constitutional officer and a county administrative officer whose powers and duties are prescribed by statute like other county administrative officers, and he possesses such authority as has been expressly granted by statute or is necessarily implied in order to carry out some function expressly imposed or authorized by statute. The statutes noted above and discussed in the opinion provide the sheriff with broad discretion in public notification efforts and recognize that the sheriff can provide information to the public on sexual offenders and sexual predators who may live and work in the community "in any manner deemed appropriate." According to the opinion, "...[n]othing in those statutes would bar the sheriff from developing a program whereby the sheriff's office places decals on the automobiles of sexual predators or sexual offenders to provide community notification of the presence of these individuals."

Number: 2006-02

Date: January 25, 2006

Subject: RE: MOTOR VEHICLES–BLOOD TESTS–EMERGENCY MEDICAL SERVICES–use of advance life support non-transport vehicle to conduct legal medical blood draw in suspected DUI cases. s. 316.1932, Fla. Stat.

This formal opinion holds that an "Advance Life Support Pumper or Engine" that is permitted by the Bureau of Emergency Medical Services as an "Advance Life Support Non-transport vehicle" constitutes a "medical emergency vehicle" as that term is defined in section 316.1932(1)(c), Florida Statutes, to include ambulance or other medical emergency vehicles. According to the request for the opinion from the City of Pinellas Park Chief of Police, the city's "Advance Life Support Pumper or Engine" has been permitted by the Bureau of Emergency Medical Services of the Florida Department of Health. The vehicle is equipped with the same advanced life support equipment as an ambulance but is a "non-transport" vehicle. The opinion further holds that the intent behind the 1996 amendment expanding the definition of medical facilities does not appear to relate to emergency transportation but rather to expand those locations where a legal medical blood draw may be administered for the purpose of conducting an investigation into driving under the influence. Thus, the fact that the vehicle has been designated as "non-transport" would not necessarily remove it from the definition of "other medical emergency vehicle." The opinion further notes that the Legislature may wish to clarify its intent on this issue.

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The materials presented are a compilation of cases from the Attorney General's Criminal Law Alert and Appellate Alert as well as summaries from the Office of General Counsel. They are being presented to alert the Division of Florida Highway Patrol and the Division of Driver Licenses of legal issues and analysis for informational purposes only. The purpose is to merely acquaint you with recent court decisions. Rulings may change with different factual situations. All questions should be directed to the local State attorney or the Office of General Counsel (850) 617-3101, SunCom 278-1606. If you care to review other Legal Bulletins, please note the web site address: DHSMV Homepage <http://www.hsmv.state.fl.us/> or FHP Homepage (www.fhp.state.fl.us)