

LEGAL BULLETIN

PROVIDING HIGHWAY SAFETY AND SECURITY THROUGH EXCELLENCE IN SERVICE, EDUCATION, AND ENFORCEMENT

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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United States Supreme Court

Deputy was reasonable in his attempt to stop car chase.

The deputy in this case stopped a high speed chase by applying his push bumper to the rear of the speeding vehicle. The speeding vehicle eventually crashed off the road and the driver was rendered a quadriplegic from resulting injuries. The driver then sued pursuant to 42 USC §1983, arguing that the deputy used excessive force and; therefore, the event resulted in an unreasonable seizure. The district court denied the deputy's motion for summary judgment and was affirmed by the Eleventh Circuit.

The Supreme Court reversed, holding that, "Because the car chase respondent initiated posed a substantial and immediate risk to others, Scott's attempt to terminate the chase by forcing the respondent off the road was reasonable, and Scott was entitled to summary judgment."

[\[Scott v. Harris 4/30/07\]](#)

Execution of search warrant was reasonable.

Deputies of the Los Angeles County Sheriff's Department obtained a search warrant to search two homes and three African-American suspects for documents and computer files. The deputies, however, did not know that the first house to be searched was sold to Rettele and Sadler and that her 17-year-old son resided with them. The son, after answering the door, was ordered to lay face down on the ground. Rettele and Sadler were ordered out of their bed and held at gunpoint for one to two minutes before they were allowed to

get dressed. When the deputies realized they had made a mistake, they apologized to Rettele and Sadler and left the house. Ultimately, they went to the second home where they found the three suspects who were arrested and later convicted.

The homeowner's lawsuit, pursuant to 42 U.S.C. § 1983, alleging that their Fourth Amendment right to be free from "unreasonable searches and seizures" had been violated was resolved in the defendants' motion for summary judgment.

On appeal, Rettele argued that the deputies conducted the search in an unreasonable manner. The Ninth Circuit Court of Appeals reversed holding that the deputies were not entitled to "qualified immunity"; that a reasonable deputy would have stopped the search when he saw the residents were Caucasian, unlike their suspects; and that they did not pose a threat to the deputies safety.

The United States Supreme Court "rejected" the Ninth Circuit's conclusion that the presence of Caucasians did not eliminate the possibility that the suspects might also live in the residence and that a suspect might be present who was armed. The record established that the deputies left the residence approximately fifteen minutes after arriving once they were satisfied that "no immediate threat was presented." The Court held that the Fourth Amendment is not violated when "officers execute a valid warrant and act in a reasonable manner to protect themselves from harm."

[\[Los Angeles County, California v. Rettele, et al., 05/21/07\]](#)

If a passenger is in the vehicle when police make a traffic stop, the passenger is seized for Fourth Amendment purposes and is entitled to challenge the constitutionality of the stop.

Brendlin was a passenger in a vehicle that was stopped by police for the sole purpose of verifying that the temporary operating permit belonged to that vehicle. The officers later admitted that there was “nothing unusual about the permit or the way it was affixed.” While obtaining the driver’s license (Karen Simeroth), Deputy Sheriff Brokenbrough recognized the passenger as “one of the Brendlin brothers” and requested he identify himself. Brokenbrough called for backup and received verification that Brendlin had violated his parole and had an outstanding no-bail warrant for his arrest. Brendlin was ordered, at gunpoint, to get out of the vehicle, arrested, and searched. An orange syringe cap was found on his person. A pat-down search of the driver revealed syringes and a plastic bag with a green leafy substance and after arresting the driver, the vehicle was searched and other drug related items were found.

Brendlin, charged with possession and manufacture of methamphetamine, moved to suppress the evidence found on his person and in the car, arguing “fruits of an unconstitutional seizure” because the officers lacked “probable cause or reasonable suspicion” to make the traffic stop. The trial court denied Brendlin’s suppression motion holding that the traffic stop was legal and that Brendlin was not seized until he was “formally arrested.” Brendlin pled guilty and was sentenced to four years in prison.

On appeal, The California Court of Appeals reversed the denial of the suppression motion, holding that Brendlin was seized by the traffic stop, which it declared was unlawful. Granting review, the Supreme Court of California reversed holding that a passenger is not seized during a traffic stop, and therefore, cannot challenge the validity of the traffic stop. Reasoning that once the car was pulled over the passenger would not have to submit to the officer’s “show of authority” because the stop was directed at the driver, therefore, the passenger would feel free to leave.

The United States Supreme Court granted certiorari and observed that the question of whether a passenger is also seized in a traffic stop has never been “squarely answered” by the Court. The Court had held, “over and over in dicta,” that everyone in the vehicle is seized when an officer makes a traffic stop. The Court concluded that during a traffic stop a “reasonable passenger” would not believe they were free to leave the scene without the permission of the police. The Court held that Brendlin was seized the moment the car was

stopped and it was “error to deny his suppression motion on the ground that seizure occurred only at the formal arrest.”

[\[Brendlin v. California, 06/18/07\]](#)

United States Eleventh Circuit Court of Appeals

Public officials from the Florida DHSMV were not entitled to qualified immunity from claims under the Driver Privacy Protection Act and 42 U.S.C. §1983 for selling driver information to mass-marketers.

Class of individuals sued executives at Florida Department of Highway Safety and Motor Vehicles, pursuant to the Driver Privacy Protection Act (DPPA) and 42 U.S.C. §1983, for selling personal information to mass-marketers without consent from individuals. The federal district court granted Defendants motion to dismiss on the basis of qualified immunity.

The Eleventh Circuit reviewed whether the plaintiffs had a cause of action under each of the statutes. The court found that §2724 of the DPPA unambiguously established a cause of action. Using a three part test for determining whether a federal statute is enforceable under 42 U.S.C. §1983, the court also found that the plaintiff’s rights were also enforceable under a §1983 claim.

The court concluded by saying that defendants were not entitled to qualified immunity.

[\[Collier v. Dickinson 2/12/07\]](#)

Plaintiff was not required to prove which officer injured him.

Velazquez sued the City under 42 USC §1983, claiming that two police officers used excessive force while he was handcuffed. The district court granted summary judgment in favor of the city because Velazquez failed to prove which of the officers actually caused the injuries that he alleged.

The Eleventh Circuit reversed saying, “The law of this circuit is that ‘an officer who is present at

the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable for his nonfeasance...Therefore, an officer who is present at such a beating and fails to intervene maybe held liable though he administered no blow."

[Velazquez v. City of Hialeah,
3/14/07]

Reasonable suspicion for vehicle stop; Subsequent search upheld.

Lindsey appealed his conviction of being a felon in possession of a firearm; being a felon in possession of one or more rounds of ammunition; and he also appealed his sentence of 300 months' imprisonment. He claimed alleged errors at trial and sentencing, along with several violations of his Fourth, Fifth, and Sixth Amendment rights.

Lindsey argued the police engaged in an unlawful search and seizure; the police lacked reasonable suspicion of illegal activity before stopping and detaining him; the police had no probable cause to arrest him; the police illegally obtained a warrant to search his SUV because the warrant was not supported by probable cause; the destruction of the fingerprint card with incomplete prints constitutes reversible error under Brady v. Maryland, 83 S.Ct. 1194 (1963); the testimony of a jailhouse acquaintance was improperly introduced as evidence of bad character; the district court improperly sentenced him as an armed career criminal and the sentence of 300 months' imprisonment was unreasonable under Booker v. United States, 125 S.Ct. 738 (2005).

The courts have determined in many instances what constitutes "reasonable suspicion". In United States v. Powell, 222 F.3d 913, 917 (11th Cir. 2000), the court held that for an officer to conduct a stop the officer must "have a reasonable, articulable suspicion based on objective facts that the person has engaged in, or is about to engage in, criminal activity." In Terry v. Ohio, 88 S.Ct. 1868, 1883 (1968), the court held that "The 'reasonable suspicion' must be more than 'an inchoate and unparticularized suspicion or hunch.'"

The "totality of the circumstances" demonstrated to this court that the police had more than a "hunch" to work with. Along with the circumstances that supported a "reasonable suspicion of illegal behavior to

support the initial stop," the following factors established there was probably cause to arrest Lindsey: the specific information provided in the 911 call; the background check revealing all four men were convicted felons; Lindsey was the owner of the SUV; and the binoculars and the bag that they believed might be a rifle bag that was spotted inside the SUV.

The court did not have an issue of whether the warrant was valid. The court concluded that the warrant was not necessary for searching Lindsey's SUV. They looked to the automobile exception that "allows police to conduct a search of a vehicle if (1) the vehicle is readily mobile; and (2) the police have probable cause for the search. United States v. Watts, 329 F.3d 1282, 1286 (11th Cir. 2003)." Having met the requirements for the automobile exception "the validity of the search warrant is not important; and the evidence obtained from the SUV was properly admitted," said the 11th Circuit.

Lindsey stated that he owned the gun and placed it in the vehicle. Also, Lindsey could not produce any evidence that the fingerprint examiner acted in bad faith when he destroyed the fingerprint card. Based on this, Lindsey did not have any evidence to show a Brady error existed.

Regarding the testimony of the jailhouse acquaintance who said that Lindsey admitted to planning the bank robbery. "Evidence of a plan to rob a bank was inextricably intertwined with possession of the firearm and was necessary to complete the story of the crime. Admission of this evidence for these purposes is valid under Fed. R. Evid. 404(b)," the 11th Circuit said.

The 11th Circuit said the following: "In this case, the district court complied with Booker by treating the sentencing guidelines as advisory and examining the section 3553(a) factors to determine a proper sentence. We conclude, therefore, that the district court did not abuse its discretion in considering Defendant's prior convictions and an alleged conspiracy to commit bank robbery. We also conclude that Defendant's sentence of 300 month's imprisonment was reasonable."

[United States v. Lindsey, 03/27/07]

Application of collateral estoppel to a partial verdict.

The question presented was whether an acquittal on a charge of an attempted drug offense requires, under the Double Jeopardy Clause of the Fifth Amendment, a dismissal on a charge of

a drug conspiracy when the jury was unable to reach a verdict.

Ohayon was arrested and tried on charges of attempt to possess with intent to distribute and conspiracy to possess with intent to distribute MDMA, a/k/a ecstasy. Ohayon's only defense at trial was that he was not aware that the bags he was picking up for a friend contained drugs. In closing, the government argued that Ohayon "knew exactly what was going on" and was "aware there are people up in Canada from whom he is getting that ecstasy." Ohayon, in his closing, argued that there was no evidence that showed he knew he was picking up drugs for his friend.

During deliberations, the jury asked several questions and finally returned with an acquittal on the attempt count but could not reach a verdict on the conspiracy count. The jury was asked to continue with their deliberations and Ohayon filed motions for acquittal and to bar retrial on the ground of collateral estoppel. The jury later announced they could not reach a verdict on the conspiracy count and the court declared a mistrial and scheduled a new trial as to the conspiracy count.

Based on the jury instructions and the fact that Ohayon relied on a "no knowledge" defense, the court determined that the government failed to prove that Ohayon knew there were drugs in the bags. Because the court determined that it would be "logically inconsistent" to conclude that Ohayon did not know there were drugs in the bags but was aware of and participated in the conspiracy to possess those drugs, the court held "that the government was collaterally stopped from retying Ohayon and dismissed the indictment."

"The Party asserting estoppel bears the burden of persuasion that the jury found the facts on which the defense of estoppel rests and that those facts bar another trial about them." United States v. Quintero, 165 F.3d 835 (11th Cir. 1999).

The 11th Circuit affirmed the dismissal of the indictment against Ohayon observing that "...the second stage of estoppel analysis requires only that we determine whether the facts found at the first trial are an essential element of conviction of the second offense."

[\[United States v. Ohayon, 04/12/07\]](#)

Florida Supreme Court

Certified Question to The Florida Supreme Court regarding a Jury Instruction on BOLEO.

Weaver was charged and convicted of battery on a law enforcement officer (BOLEO). He was only charged with one form of battery (intentionally touching or striking a law enforcement officer) and there was never any evidence presented at trial, nor did the State alleged in the information, that Weaver caused any "bodily harm" to the law enforcement officer. The jury was instructed on both forms of battery without any objection from counsel.

On appeal, the 2nd DCA reversed and held that the jury instruction on both forms of battery constituted fundamental error and certified the following question: "Does a trial court commit fundamental error when it instructs a jury regarding both 'bodily harm' battery on a law enforcement officer and 'intentional touching' battery on a law enforcement officer when the information charged only one form of the crime and no evidence was presented nor argument made regarding the alternative form?" Weaver v. State, 916 So. 2d 895, 898-99 (Fla. 2d DCA 2005).

The Florida Supreme Court concluded the jury instructions are "subject to the contemporaneous objection rule, and absent an objection at trial, can be raised on appeal only if fundamental error occurred." Reed v. State, 837 So. 2d 366, 370 (Fla. 2002) (quoting State v. Delva, 575 So. 2d 643, 644 (Fla. 1991)). Without objections to the disputed claim of error regarding the instruction, "a claim of error based on the instruction may only be reviewed on appeal if it constitutes fundamental error. Id."

Following a discussion of its decision in Reed and Delva for determining whether a defective jury instruction rises to the level of fundamental error, the Court also noted that the 2nd DCA did not use the standard "articulated" in Delva.

Because bodily harm was never at issue in Weaver's case, the Court answered "no" to the certified question and quashed the 2nd DCA's decision disapproving Vega and Dixon to the extent they are inconsistent with this opinion.

[\[State v. Weaver, 04/10/07\]](#)

Law enforcement officers cannot stop a vehicle with a cracked windshield unless the crack renders the vehicle in “such unsafe condition as to endanger any person or property.”

During a traffic stop for a cracked windshield, officers, who had already determined that Hilton was on probation for a previously committed felony, spotted what appeared to be a rifle in plain view in the back of the vehicle. An odor of marijuana was also detected and after a pat-down search of Hilton, approximately forty-two bags of marijuana were found on his person. Hilton was arrested and charged with possession of marijuana with intent to sell. After the rifle was seized, it was determined to be a “Daisy pump action air rifle.”

At trial, Hilton filed a motion to suppress arguing that the stop was improper because the crack in the windshield was “barely visible” and “did not obstruct any view of the driver.” After the suppression hearing, the trial court denied the motion and Hilton subsequently pled no contest to the possession charges and reserved his right to appeal the denial of the motion to suppress.

On rehearing, en banc, the 2nd DCA affirmed Hilton’s conviction holding that because a windshield is required on every vehicle, per section 316.2952, F.S., it is a violation of section 316.610, F.S., to “drive a vehicle with a windshield that is not in proper condition.” Officers may stop a vehicle to give a driver a written notice to “repair a vehicle equipment defect even where that defect does not present unduly hazardous operating conditions,” as per section 316.610(2), F.S. The Court certified the following question: **WHETHER A LAW ENFORCEMENT OFFICER MAY STOP A VEHICLE FOR A WINDSHIELD CRACK ON THE BASIS THAT THE CRACK RENDERS THE WINDSHIELD “NOT IN PROPER ADJUSTMENT OR REPAIR” UNDER SECTION 310.601 OF THE FLORIDA STATUTES (2001).**

The Supreme Court of Florida concluded that section 316.610, Fla. Stat. (2001), does authorize law enforcement officers to stop vehicles for equipment “not in proper adjustment or repair,” however, the statute does not “encompass windshield cracks.” The Court held that the only time an officer may stop a vehicle for a cracked windshield, is when the officer “reasonably believes” that the crack renders the vehicle “in

such unsafe condition as to endanger any person or property,” as per section 316.610, Fla. Stat. (2001).

[Hilton v. State]

1st District Court of Appeals

Trial Court fails to apply correct law; Fourth Amendment rights not violated.

During Kennedy’s criminal prosecution of conspiracy to manufacture methamphetamine (meth), he filed a motion to suppress evidence and statements. In his motion and at the hearing, Kennedy argued his Fourth Amendment rights had been violated because law enforcement officers (the Tri-County Drug Task Force) did not have a warrant, nor did they have “exigent circumstances” when they went onto his property.

Garrison and Hines (two other people involved in manufacturing meth) told the Task Force that Kennedy was also manufacturing meth; that Kennedy had stolen some anhydrous ammonia from Garrison and the two were feuding over the theft of that chemical; and that Garrison intended to place a bomb in Kennedy’s residence.

The task force went to Kennedy’s house and while they did not believe a bomb had been placed at the residence or that “exigent circumstances” existed to go onto Kennedy’s property, they did want to warn Kennedy of the threat. They also wanted to investigate the possibility that Kennedy was manufacturing meth. The front yard was not fenced. As the task force leader approached the front door, he “smelled odors of anhydrous ammonia and ether, which he knew were consistent with the manufacture of methamphetamine.” Kennedy was arrested when he opened the door and was told about the bomb plot. A “protective sweep” was done on the house. During the sweep, the operation of a meth lab was discovered so the house was secured and a search warrant was obtained.

Kennedy argued that his Fourth Amendment rights had been violated because the task force did not have a warrant or “exigent

circumstances” to enter his property and that the bomb threat was a pretext for the task force to investigate whether he was manufacturing meth. The trial court agreed and granted the motion to suppress.

Reversing, the 1st DCA stated that “the state correctly argued, appellee’s Fourth Amendment rights were not violated when law enforcement personnel crossed the unenclosed front yard to reach the front door.”

Since the front yard was not fenced and there were odors coming from the house that were consistent with the manufacturing of meth, any reasonable law enforcement officer would have acted in the same manner. The 1st DCA further stated that the protective sweep did not last longer than necessary; that its use was to “dispel the reasonable suspicion of danger and clear the house of other individuals, at which point the house was secured while a warrant was sought.”

[\[State v. Kennedy, 3/30/07\]](#)

Arresting officer did not have reasonable suspicion of criminal activity to justify his stop and detention.

On appeal, Armatage challenged the denial of his motion to suppress evidence seized during the search of his truck.

The record showed that Armatage and his passenger were considered detained when the arresting officer pulled behind his truck with the flashing red and blue lights of the patrol car activated. The officer’s testimony conceded two facts; (1) that Armatage and his passenger were not free to leave and (2) that the officer did not have any reason to believe that Armatage or his passenger “...had committed, or was about to commit, any crime.”

The Court in United States v. Hensley, 469 U.S. 221, 226 (1985), held that if a law enforcement officer has a “reasonable suspicion” that the occupants of a moving vehicle are involved in criminal activity, he may briefly stop the vehicle. In United States v. Cortez, 449 U.S. 411, 417-18(1981), the Court held that to have a reasonable suspicion, “the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity”.

Based on the record, the 1st DCA held the trial

court’s failure to grant Armatage’s motion to suppress constituted reversible error, because that ruling was dispositive.

[\[Armatage v. State, 04/11/07\]](#)

2nd District Court of Appeals

Beware of False Friends and Miranda.

Was Halm subjected to custodial interrogation by a state agent after he invoked his rights under Miranda v. Arizona, 384 U.S. 436 (1966), when a detective enlisted the aid of Halms friend to talk with him following the invocation his right to remain silent? The friend got Halm to talk about the crime and, during these conversations, Halm implicated himself in the murder. Halm sought to suppress the videotapes of the conversation between the two, which was denied by the trial court.

Relying upon Illinois v. Perkins, 496 U.S. 292 (1990), the court found that the conversations between the defendant and his friend did not constitute custodial interrogation, and therefore, did not violate the defendants right to remain silent. The court refused to consider whether defendant was denied due process since defendant did not raise the issue.

[\[Halm v. State, 03/02/2007\]](#)

No proof of “control” over cocaine; judgment and sentence reversed and remanded with instruction to be discharged .

Person and three other codefendants were charged with one count of trafficking in cocaine by possession. Police had a duplex under surveillance. Because of the suspicious activity they obtained a search warrant, which was served via a SWAT team. Of the twelve people in the residence, three tried to run and nine, including Person, fell to the ground near the door and were apprehended. Large amounts of cocaine, crack cocaine and some weapons were found. No drugs were found on Person. None of the suspects, drug packages or weapons were checked for fingerprint residue because a water pipe had burst leaving everyone and everything

wet.

Person adopted a codefendants motion for a JOA, arguing the State had not presented sufficient evidence of constructive possession as to any of the defendants. The jury found Person and the three codefendants guilty as charged. The Court agreed with Person that the State failed to present a prima facie case of constructive possession of the cocaine found in the residence (control over the cocaine and knowledge of its presence). While the State could show he was there, it could not prove Person had control over the cocaine and discharged the defendant.

[\[Person v. State, March 21, 2007\]](#)

Not enough evidence to prove “control”.

Edison, charged and convicted with one count of trafficking in cocaine by possession and one count of possession of MDMA, appealed his judgment and sentence for the conviction on the cocaine charge only.

After the State rested, the trial court denied defendant’s motion to move for acquittal, which was based on the argument that the State had not presented sufficient evidence of “constructive possession” as to any of the defendants.

On appeal, Edison argued the State failed to prove that Edison had any constructive possession over the large amount of cocaine that was found in the kitchen of a residence that was searched by the SWAT team. Edison also argued that the trial court should have granted his motion for acquittal, which would then allow the issue of control to go to the jury.

While there was a plethora of circumstantial evidence that would suggest Edison had control over the large amount of cocaine that was found, there was no evidence established to prove that he had control over the cocaine in the residence.

[\[Edison v. State, 04/20/07\]](#)

3rd District Court of Appeals

Miranda rights not required where defendant not in custody.

Lorenzos convictions resulted from two armed robberies and four separate burglaries. A police officer who knew defendant's family was told by his mother that she was concerned her son was involved in some robberies. The officer went to speak with Lorenzo, who agreed to speak about one of the robberies and to go to the police station, where he provided further information.

At no time was he advised of his Miranda rights. Lorenzo was interviewed at the police station with the interview room door open and was told that he was not in custody and could leave at any time. Lorenzo acknowledged on videotape that he knew he was not under arrest and was free to leave.

The following day, the police advised him of his Miranda rights. After waiving his rights, Lorenzo admitted to committing a second armed robbery and four burglaries. The Third District held Lorenzos initial statements were not the product of custodial interrogation, thus, the motions to suppress those statements and the subsequent Mirandized statements the following day, were properly denied.

[\[Lorenzo v. State, 2/2/07\]](#)

Encounter did not prevent police from asking question without Miranda.

The State argued the trial court erred when it granted Olaves motion to suppress, and the Fourth DCA agreed finding that the trial court erred because Olave was not subjected to custodial interrogation. His admitted possession of Xanax provided probable cause to search him. The initial stop of Olave for driving with a broken taillight was proper and was not contested. In addition, the officer did not violate the Fourth Amendment by asking defendant to exit his vehicle for safety reasons. The police pulled defendant over for a valid reason and then discovered another possible violation (a restricted driver's license) that provided a legitimate reason to detain and further investigate. While the trial court found the encounter turned into an investigatory stop, the District Court concluded that did not prevent the police from asking defendant questions without giving Miranda warnings.

As in Hewitt,[v. State, 920 So. 2d. 802, 803 (Fla. 5th DCA 2006)], police in this case pulled over Olave for a valid reason and then discovered another possible violation that provided a

legitimate reason to detain and further investigate. The trial court found that the encounter turned into an investigatory stop. Like the Fifth District in Hewitt, we find that this did not prevent the police from asking Olave questions without giving Miranda warnings. See Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); United States v. Shabazz, 993 F.2d 431, 436 (5th Cir. 1993) (holding that because mere questioning is neither a search nor a seizure, an officer does not violate Fourth Amendment by asking questions unrelated to the traffic stop so long as traffic stop is not unduly prolonged as a result); State v. Poster, 892 So. 2d 1071, 1072 (Fla. 2d DCA 2004); Dykes, 816 So. 2d at 180. We conclude that Olave was not subjected to custodial interrogation and his admission that he possessed Xanax provided probable cause to search him.

[\[State v. Olave, 3/9/07\]](#)

The County was not liable for police officer's failure to detect a crime in progress.

A homeowner sued the county for negligence after a police officer responding to a burglar alarm arrived at the home and failed to discover a burglary in progress. The trial denied the county's motion to dismiss on the basis of sovereign immunity.

On appeal the Third District reversed the trial court finding that the County remained immune from tort liability under both the public duty doctrine and the discretionary function doctrine. "The negligent failure to detect, deter, or prevent criminal activity will not, however, subject a governmental entity to liability for injuries which follow such neglect. This is so because the courts have primarily taken the view that the fundamental police function in enforcing the criminal law would be unduly hampered if law enforcement decisions were generally subject to after-the-fact judicial review through private tort litigation

[\[Miami-Dade County v. Fente, 2/7/2007\]](#)

There is a rebuttable presumption that the rear driver in a rear-end collision is considered the proximate cause of the accident.

Saleme and a state trooper were involved in an

automobile collision where Saleme rear-ended the state trooper. Saleme then filed a negligence action against Florida Highway Patrol claiming the officer had operated his vehicle improperly. After trial the jury assigned 85% of fault to Saleme and 15% to FHP, resulting in an \$ 81,250 award to Saleme. FHP moved for a directed verdict and later moved for a judgment notwithstanding the verdict both of which were denied by the trial court.

Noting that there is a presumption that the rear driver in a rear-end collision is considered the proximate cause of the accident, the Third District reversed the trial court. The appellate court carefully reviewed the facts in detail and determined that Saleme failed to rebut the presumption by showing that he had a mechanical failure, or that the officer stopped or changed lanes suddenly, or that the officer had been stopped illegally. The court concluded by saying that the trial court erred by denying FHP's motion.

[\[Department of Highway Safety v. Saleme, 2/21/07\]](#)

Trial Court erred excluding statements made by defendant.

On appeal, the State argued that the trial court erred in excluding the second statement, "I know this is unusual but unfortunately I'm guilty of this....right now I'm guilty," made by the defendant during arraignment in open court, as "inadmissible offers" for a plea agreement.

The 3rd DCA stated that at the time Calabro made the second statement admitting his guilt, "neither side was in any position to negotiate a plea." Calabro had met his counsel for the first time when the public defender was appointed to defend him; his counsel did not know the facts of the case; the State never indicated it wanted to enter into a plea bargain with Calabro; and Calabro made the statement without any prompting or inducement.

The 3rd DCA concluded that "given the totality of the objective circumstances, Calabro could not have had a reasonable subjective belief that his statement was a part of any plea negotiation." See Owen, 854 So. 2d at 190.

[\[The State of Florida v. Calabro, 04/18/0\]](#)

Objected-to hearsay evidence was not admitted.

On appeal Lidiano, convicted and sentenced to two counts of attempted second-degree murder, claims that the trial court erred in denying his peremptory challenge of juror Abadin and erred in denying his motions for mistrial made during the testimony of Detective Elosegui.

Lidiano argued that the trial court erred in denying his peremptory challenge of the juror Abadin because it failed to orally perform a “genuineness analysis and to articulate the basis for its ruling denying defense counsel’s peremptory challenge.”

The 3rd DCA said that while it would be “wise to articulate its finding of genuineness, or lack of genuineness,” the trial court is not required to do this. Lidiano did not preserve his other issues for appellant review regarding his peremptory challenges to Ms. Abadin.

Lidiano also claimed that the trial court erred in denying several of his motions for mistrial during the testimony of Detective Elosegui. Lidiano argued that the “injection of inadmissible hearsay through an experienced detective in this case requires reversal as it substantially affects Lidiano’s right to a fair trial.” The 3rd DCA disagreed and found that the “objected-to hearsay was not admitted in this case.”

The record showed that at one point in the testimony, Detective Elosegui inferred that the second victim provided information regarding the shooting. The 3rd DCA concluded that the trial court did not err in its denial on the motion for mistrial based on an “improper statement” made by the detective. “The objected-to evidence, which was not admitted, was not so prejudicial as to vitiate the entire trial.” Duest v. State, 462 So. 2d. 446, 448 (Fla. 1985). The record showed that it was clear that Retureta knew Lidiano; that Lidiano frequented Retureta’s restaurant several times a week; that Retureta positively identified the defendant and that he even directed Detective Elosegui to the car wash where the defendant worked. The 3rd DCA said it was “this evidence” that the jury was asked to weigh against the defendant’s testimony that he didn’t know Retureta; that he had never been in his restaurant; and that he was not involved in the shooting incident.

[\[Lidiano v. State, 05/09/07\]](#)

Ignition interlock requirement.

Butler sought a hardship reinstatement of his driving privileges after being revoked for 10 years following his third conviction of DUI. The court ruled that DHSMV could not require installation of the ignition interlock device since he does not own a car and that, should Butler purchase a vehicle, then the device had to be installed. DHSMV appealed the lower court’s order.

The 3rd DCA found that section 322.27(2)(d) Fl. Stat, authorizes the department to require installation of the ignition interlock device when considering a hardship driver’s license and that there was nothing faulty in its procedures to enforce the device installation requirement.

[\[DHSMV v. Butler, 07/05/07\]](#)

4th District Court of Appeals

Evidence seized as a result of an outstanding arrest warrant is not the fruit of an illegal seizure.

Falls appealed an order denying his motion to suppress drugs (oxycodone and methadone pills) that were seized during a search incident after he was arrested because of an outstanding warrant.

Officer Propser, in full uniform, was lawfully at an industrial park around 9:00 p.m., and noticed Falls cutting through the grass and walking to the rear of the businesses. Falls presence in that area, at the time of night, was unusual so Officer Propser approached Falls and asked, “man, how you doing, what are you up to tonight?” Falls responded that “his cousin’s cutting through here, coming home from work, just things like that.” He gave the officer his name and offered his drivers license. The officer ran a warrants check and discovered an outstanding warrant for Fall’s arrest. Falls was arrested and searched. During the search the officers found on Falls six and one-half oxycodone pills, two methadone pills, and a pill bottle.

At trial, Falls moved to suppress the evidence, however, the trial court denied the motion finding that the circumstances justified the officer’s encounter with him, along with the request for his identification.

Falls argues that Officer Prosper unlawfully stopped him; that the encounter was not consensual because he did not believe he was free to leave; that the officer discovered the outstanding warrant because he had unlawfully stopped him and thereafter searched him. Falls contends that “discovery of the outstanding warrant did not attenuate the taint of the illegal stop.”

Citing, United States v. Green, 111 F.3rd 515, 1143 (7th Cir. 1997), the court observed “the court must consider three factors in deciding whether unlawfully obtained evidence should be excluded:

(1) The time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.”

“In sum, the record supports a finding that appellant’s contact with the police officer was a consensual encounter. The encounter did not become a seizure when the officer obtained appellant’s voluntarily produced driver’s license for a warrants check. The evidence seized as a result of discovery of the outstanding arrest warrant, arrest of appellant, and search incident to the arrest is not the fruit of an illegal seizure.

[\[Falls v. State, 03/28/07\]](#)

Insufficient evidence was presented to support conviction of “obstruction or resistance” without violence.

Jones, convicted of resisting an officer without violence and possession of cocaine with intent to sell or deliver, only appealed on one conviction arguing that the State did not present sufficient evidence to prove that he resisted an officer without violence.

In order to support a conviction under section 843.02 for resisting an officer without violence, the State must show: (1) the officer was engaged in the lawful execution of a legal duty and (2) the action by the defendant constituted obstruction or resistance of that lawful duty. The record shows that at trial the testimony of the officer consisted of several vague statements and descriptions of what the officer thought was going to happen. The officer testified that after the defendant was ordered to stop, Jones turned and faced him and then turned away again “like he was going to leave, run the scene or drop the

cocaine.” In another statement the officer said that it “appeared” to him that the defendant was going to run or drop the cocaine. The officer also gave a demonstration in court as to what Jones did that day when he was ordered to stop, however, the record is silent as to what the officer actually demonstrated in court. When asked directly if Jones ever got anywhere or if Jones ever took off anywhere, the officer responded that Jones never had a chance to take off or that Jones didn’t have time to take off.

The 4th DCA determined that actual “flight” was never presented into evidence; that many of the descriptive statements made by the officer did not give a “clear picture” of what actually happened; that they could not rely on what was “demonstrated” to the trial court by the officer in the courtroom; and that there was actual testimony from the officer that Jones never took a single step away from the officer.

Based on the record, testimony and evidence presented, the 4th DCA held that “the State failed to present a prima facie case that Jones committed the crime of resisting an officer without violence,” and therefore, reversed.

[\[Jones v. State, 05/09/07\]](#)

After a citation has been issued, a law enforcement officer may validly ask for consent to search a person and/or their vehicle without an objective justification or reasonable suspicion being required.

After issuing a citation to Nash for leaving his vehicle unattended, with the motor running, in a convenience store parking lot, the investigating officer asked Nash for consent to search his person for weapons and/or narcotics. Nash gave his consent. During the pat-down search, the officer found a cigarette box in Nash’s pocket that contained cocaine. Nash moved to suppress and the trial court granted the motion saying that once the traffic stop was completed the officer needed “reasonable suspicion or any need for safety concerns” before asking for a consent to search.

The state appealed and the 4th DCA held that the trial court erred because “the court did not address the voluntariness or the scope of the consent.” During a legal traffic stop, a law enforcement officer may ask, without any justification or reasonable suspicion, for consent

to search and once the traffic stop is completed, the “detention may continue if the driver has freely given consent to a search of himself or the vehicle,” relying on State v. Jones, 920 So. 2d 1156, 1158 (Fla. 2d DCA 2006).

[\[State v. Nash, 05/23/07\]](#)

The use of handcuffs does not automatically turn an investigatory stop into a *de facto* arrest, for which probable cause is necessary.

Studemire, who was convicted of possession of a firearm by a felon, on motion for rehearing challenged the order denying his motion to suppress his statements to the police officer after he was placed in handcuffs.

After hearing gunshots being fired, Officer MacVane went to the area from which he believed the shots originated and found Studemire and Chappelle, standing in the driveway next to a vehicle. Casings and shells were on the ground and Chappelle admitted to MacVane that he was the one that fired the shots. He then consented to the officer searching the house, where two more guns were found. When additional officers arrived Studemire gave a false name when asked about his identity. He finally gave another false name to MacVane, which turned out to be an alias. MacVane detained Studemire, handcuffed him, placed him in the back of the patrol car, and read Studemire his *Miranda* rights. Other officers found an automatic handgun, in plain view, on top of the front tire on the passenger side of the vehicle. MacVane asked Studemire if he had fired the weapon and Studemire admitted he did. He also admitted that he was a convicted felon. Studemire signed a written confession that he, along with some other persons, had fired the guns.

The 4th DCA concluded that Officer MacVane clearly had “reasonable suspicion” to conduct a *Terry* stop, however, the question was whether this became a *de facto* arrest for which probable cause was necessary.

Citing Reynolds v. State, 592 So. 2d 1082, 1084 (Fla. 1992) where the court held that the use of handcuffs “did not automatically turn an investigatory stop into a *de facto* arrest” and to Curtis v. State, 748 So. 2d 370, 372 (Fla. 4th DCA 2000), where the court held that an “officer may detain the individual even at gunpoint and/or by

handcuffs for the officer’s safety without converting the *Terry* stop into a formal arrest,” the 4th DCA determined that based on the totality of the circumstances, Studemire was lawfully detained and these circumstances did not turn it into a *de facto* arrest.

[\[Studemire v. State, May 23, 2007\]](#)

5th District Court of Appeals

Forfeiture action may be brought for third DUI.

Rife was arrested for driving under the influence in violation of section 316.193, Fl. Sta. Because Rife had twice previously, within ten years, been convicted of DUI, his third violation was deemed a felony pursuant to section 316.193(2)(b) 1., Fl. Stat. DHSMV imitated forfeiture proceedings to seize Rife’s motor vehicle under the Florida Contraband Forfeiture Act, alleging that Rife used his vehicle during the commission of a felony.

After conducting a hearing, the trial court dismissed the petition, concluding that no forfeiture could occur for the offense of DUI unless the offender’s license was suspended, revoked, or cancelled as a result of a prior DUI conviction. The trial court ruled that, pursuant to the rules of statutory construction, the specific forfeiture provision for DUI offenses set forth in section 932.701(2)(a) 9, Fl. Stat, controls over the general forfeiture provision contained in section 932.701(2)(a) 5.

The DCA opined that if either section is applicable, then forfeiture is allowed and the trial court erred.

[\[DHSMV v. Rife 03/23/07\]](#)

Plaintiff’s public records enforcement action failed because multi- agency law enforcement task force was not a suable entity.

Plaintiff made public records requests to the Metropolitan Bureau of Investigation (MBI), a multi-agency law enforcement task force in Central Florida. The Orange County Sheriff’s Department responded by filling some requests, redacting information in others, and refusing to fill others because they were exempt. Subsequently, Plaintiff filed suit against the MBI

seeking to obtain the information that had been redacted and the information that had not been produced. The State Attorneys office responded with a motion to quash service, alleging that the MBI was not a suable entity. The trial court granted the State Attorney's motion and dismissed the action with prejudice.

The Fifth Circuit affirmed, noting that there was no centralized budget and that each member agency retained control and responsibility over its own personnel. As a result the court found that there was nothing in the MBI Mutual Cooperation Agreement indicating that the member agencies intended to create a separate legal entity capable of being sued.

[\[Ramese's v. Metropolitan Bureau of Investigation 4/20/07\]](#)

Confession held to be voluntary.

Perez-Ortiz (Ortiz) who was convicted of first degree (premeditated) murder of his wife (Nilda Corsino) and given a life sentence, appealed arguing that the trial court erred in denying his motion to suppress his confession and that at trial there was insufficient evidence to create a jury question on the issue of premeditation.

Ortiz claimed that his Fifth Amendment right to counsel was violated when the detectives failed to immediately discontinue his interview when he requested a lawyer, as outlined in [Miranda v. Arizona](#), 384 U.S. 436 (1966).

The 5th DCA agreed with the trial court that Ortiz was not in custody at any time and he voluntarily agreed to drive himself to the police station for the interview. During the interview he was repeatedly told that he was not under arrest and free to leave at any time.

As to proof of premeditation, the record shows that Mrs. Corsino was found inside her home facedown in an inch of water in the tub. The autopsy report confirmed that she died from "manual strangulation with a contributing factor of immersion in scalding hot water." Therefore, "given the time and forethought that would have been required to prepare the water, or even move the victim into it, after strangling her, we find the evidence sufficient to support a conviction for first degree murder."

[\[Perez-Ortiz v. State, 4/27/07\]](#)

Traffic stop was justified.

Lee was stopped for driving a vehicle with a tag light that was not functioning. On patrol and

approximately forty to fifty feet behind defendants' vehicle, Deputy Gould noticed the tag light was not working. He briefly turned off his headlights to confirm that the tag light was out and then initiated a traffic stop. Deputy Gould detected the order of cannabis when he approached the vehicle and questioned Lee about the odor. Lee confirmed that he and his girlfriend, Takesha Perry, just finished smoking cannabis inside the vehicle. When Deputy Richter arrived at the scene and searched Lee's vehicle, based on the smell of cannabis, he found crack cocaine in both a container and a clear plastic bag in the vehicle. Deputy Gould arrested and charged Lee with possession of cocaine with intent to sell or deliver (a second-degree felony) and use or possession of drug paraphernalia (a first-degree misdemeanor).

At trial, Lee filed a motion to suppress the evidence of Deputy Gould's observations and investigation. At the hearing, Perry testified that later that evening she checked the tag light and it was working. She took pictures of the tag light working and they were admitted as evidence. When questioned by defense counsel, Deputy Gould testified that the reason he stopped Lee was because he observed from forty to fifty feet away that the defendant's tag light was not functioning; that he believed he told the defendant of the broken tag light after he stopped the car; that he did not check tag light after the stop because he had already determined it was not working before he initiated the traffic stop; and when he approached the vehicle he smelled the cannabis.

The trial court concluded that Deputy Gould should have inspected the tag light after stopping the vehicle; that there was no evidence presented that the tag light was clearly visible at forty to fifty feet; there was no evidence presented or proffered as to Deputy Gould's "proficiency in determining distances"; that the deputy should have "paced out" forty to fifty feet from the vehicle just to make sure he could accurately tell if the tag light was not working and since he didn't the "accuracy and credibility" of his estimations was impaired, therefore, there was "insufficient competent evidence" to justify the Deputy stopping and detaining Lee.

After reviewing the record and the testimony provided, the 5th DCA concluded that the Deputy had probable cause to believe that a traffic violation had occurred (tag light not functioning); that the traffic stop was justified under section 316.221(2); and "whether or not the deputy further inspected the vehicle after

stopping Defendant, it was lawful for him to approach Defendant.”

[\[State v. Lee, 4/11/07\]](#)

Improper detention after a valid stop was cured by inevitable discovery of Contraband.

Cummings, convicted for trafficking in cocaine, possession of a firearm by a convicted felon, driving on a suspended license as a habitual offender and the revocation of his probation for previous crimes, appealed the trial court’s denial of his motion to suppress.

The record reflected that the defendant was legally stopped for a traffic infraction, which gave the officer the right to ask Cummings for his driver’s license. While the 5th DCA agreed with Cummings that the temporary detention turned into a seizure of his person without probable cause to arrest, the drugs and gun that were found in the car would have ultimately been found by the officer as a matter of routine police procedure. After the legal traffic stop the officer would have (1) discovered that the defendant was driving with a suspended license as a habitual offender, (2) the officer would have arrested the defendant, and (3) the officer would have located the gun and drugs after the arrest when he searched the vehicle.

[\[Cummings v. State, 5/2507\]](#)

Law enforcement officers had probable cause to stop and search the defendant’s vehicle.

Lassiter, convicted of trafficking in MDMA, appealed the trial court’s denial of his motion to suppress “all physical evidence gathered from his detention,” and “any and all statements made to law enforcement officers following his detention and arrest.” He argued that the warrant, which authorized the search of the Palm Coast residence, the “yard and curtilage thereof and any vehicles parked thereon,” along with any person on the premises, et al., did not authorize the stop and search of his vehicle, when he was miles away from the premises. He argued there was no “corroborating evidence” to create a “reasonable suspicion” for the authorities to stop him.

Testimony showed Lassiter was under investigation for a suspected MDMA manufacturing and distributing operation. An informant, his daughter, was working with the

police. Through monitored calls between the daughter and Lassiter, the investigating officers found Lassiter received packages of chemicals (necessary for the production of MDMA) at his home in Daytona Beach and that he would drive these items to a house in Palm Coast. Surveillance revealed criminal activity. Marijuana, a ledger and other documentation were discovered when the investigating officers performed a “trash pull” from the Palm Coast residence.

Lassiter’s daughter ordered more pills and on the date and time that she was to pick them up, the authorities obtained a warrant and began their surveillance of the Palm Coast residence. Testimony revealed that because of the “volatile nature of the chemicals” the officer’s elected to wait for all the people in the house to leave before they executed the warrant. When Lassiter left in his car, the authorities did not stop him until he was a safe distance from the premises. Lassiter was stopped approximately five miles away from the premises. He was advised of his *Miranda* rights. After a police dog alerted to the front and back of the vehicle for drugs, Lassiter told the officers that there were drugs under the hood of his vehicle and admitted his involvement with the manufacturing of the MDMA.

Probable cause existed for the stop and search of Lassiter because of the evidence that he was involved in the manufacture of MDMA at the Palm Coast premises and he was planning a “narcotic’s transaction with his daughter.”

The trial court found that probable cause existed and denied Lassiter’s motion to suppress. Based on “the body of the search warrant affidavit, monitored phone calls, various trash pulls, the training and experience of law enforcement involved, and surveillance of the defendant,” the officers had “sufficient facts to arrest Mr. Lassiter and to search the car.” The informant, Lassiter’s daughter, was very credible and Lassiter’s statements to the police, after receiving his *Miranda* rights, were given “freely and voluntarily.”

The 5th DCA determined the warrant was properly executed, acknowledging that the warrant could have been executed while Lassiter was at the residence or that the Camaro could have been searched before he left the premises. The Court determined that “this off premise’s search is permissible because of the peculiar and dangerous nature of the product involved, as well as the reasonable time and distance that elapsed before the search occurred.”

The 5th DCA held the police had “probable cause” to arrest Lassiter because they had “other evidence” which was obtained from the police surveillance, trash pulls, information from the informant (his daughter), that supported the fact that Lassiter was involved in the manufacturing and trafficking of MDMA.

[Lassiter v. State, 6/08/07]

Attorney General Opinions

Number: AGO 2007-21

Date: April 24, 2007

**Subject: Law enforcement
personnel’s photographs ss.
119.071(4)(d) 1. and 8., Fla. Stat.**

This formal opinion dealt with the question of who is included within the exemption afforded by section 119.071(4)(d) 1., Florida Statutes. Secondly, the opinion answers the question as to what limitations are placed upon the chief of police regarding the release of photographs of the police department’s law enforcement officers and employees.

Question One: While the sworn officers of the law enforcement agency would be included within the exemption, support personnel employed by the agency would not appear to be included.

Question Two: Section 119.071(4)(d) 1., Florida Statutes, makes the photographs of law enforcement personnel exempt rather than exempt and confidential, in determining whether such information should be disclosed, the head of the law enforcement agency as custodian of the records, or his or her designee, must determine whether there is a statutory or substantial policy need for disclosure. In the absence of a statutory or other legal duty to be accomplished by disclosure, an agency should consider whether the release of such information is consistent with the purpose of the exemption. The courts have previously held that an agency may not release booking photographs of a law enforcement officer when the officer makes a written request that the photograph be kept confidential. The photographs of employees of the department who are not sworn law enforcement personnel, however, would be

subject to disclosure in the absence of another statutory exemption.

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