

# LEGAL BULLETIN

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ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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## 2nd District Court of Appeals

**Trial court erred in denying defendant's motion for acquittal on the charge of aggravated assault on a law enforcement officer with a deadly weapon because the evidence did not establish "the defendant had the requisite intent to threaten an officer when defendant backed his vehicle toward the officer."**

Swift was charged and convicted with aggravated assault on a law enforcement officer with a deadly weapon, resisting law enforcement officers without violence, and fleeing or attempting to elude a law enforcement officer in a marked patrol with siren and lights activated. At trial, defense moved for a judgment of acquittal on the aggravated assault charge, arguing there was "no evidence that [Mr. Swift] intentionally or knowingly threatened

Officer Sweat," and the trial court denied the motion. After the jury rendered its verdict, the trial court dismissed the charge of resisting without violence and adjudged Swift to be guilty on the remaining two charges. On appeal, Swift challenged "the sufficiency of the evidence to support his conviction on the aggravated assault charge" arguing that "the State failed to establish the elements of an assault."

The record revealed that Officer Sweat spotted the sports utility vehicle (SUV) parked illegally at a convenience store, after receiving a tip from a confidential informant that a suspect named in a felony arrest warrant was a passenger in the vehicle. After Officer Sweat activated the lights on his patrol vehicle, Swift moved the SUV into a driveway at a nearby residence. Officer Sweat informed Swift he had been parked illegally, requested Swift's drivers license and returned to his patrol vehicle, where he requested assistance. Sergeant Green responded and the two officers approached the SUV on the passenger side. The men inside the SUV did not respond to the officer's commands to get out of the vehicle. Swift started to back the SUV and then moved it forward to reposition the vehicle so he could then back out between the two police vehicles that had partially blocked him in the driveway. As the vehicle moved forward, Officer Swift ran behind the SUV and was behind the SUV when Swift backed out. Officer

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FEBRUARY 2008

LEGAL BULLETIN

Swift had to jump out of the way of the SUV to avoid being hit as it backed out of the driveway and then drove away. A chase ensued and Swift was apprehended, however, the passenger was no longer in the vehicle. Swift's departure from the driveway formed the basis of the aggravated assault charge.

The 2nd DCA determined that the State failed to establish that Swift "had a specific intent to do violence to the person of another." While Officer Sweat "was in fear of imminent violence" when Swift backed the SUV directly at him, "Officer Sweat's reaction was insufficient to establish that Mr. Swift intended to threaten him." Because the evidence did not establish that Swift knew that the Officer had run behind the SUV as he pulled the vehicle forward and before he backed the vehicle out of the driveway, the 2nd DCA held that the trial court erred in denying Swift's motion for judgment of acquittal on the aggravated assault charge; reversed Swift's judgment and sentence for aggravated assault on a law enforcement officer; and affirmed Swift's "judgment and sentence for fleeing and attempting to elude a marked patrol vehicle with siren and lights activated."

*[Swift v. State, 01/16/08]*



**Information regarding the nature of the complaint the officers were investigating is necessary to establish whether officers were**

**engaged in the lawful execution of a legal duty.**

Davis appealed his conviction and sentence for resisting an officer without violence arguing the trial court erred in denying his motion for judgment of acquittal because the "State did not establish that the officers were engaged in the lawful execution of a legal duty."

The record revealed that Davis was arrested for battery and resisting an officer with violence after a scuffle ensued between Davis and Officers Rizer and Milam at the Green Room Restaurant. The officers responded to a complaint by employees of the restaurant to investigate a "suspicious incident" involving Davis. Davis, charged with two counts of battery on a law enforcement officer and resisting an officer with violence was found guilty of the lesser offense of resisting an officer without violence; not guilty on one count of battery on a law enforcement officer and after sentencing, the State dismissed the other battery charge.

In its analysis, the 2nd DCA looked to the legal standards "governing the officer's duty at the point that the resistance occurred," for determining if the officers were "engaged in the lawful execution of a legal duty." See Tillman v. State, 934 So. 2d 1263, 1271 (Fla. 2006).

The 2nd DCA concluded there was no evidence presented to support the nature of the complaint or "suspicious incident" being investigated. Thus, "there was no way to determine whether the officers were engaged in the lawful execution of a legal duty when they detained Davis to investigate the complaint." Because it could not direct a

judgment for a lesser-included offense, the 2nd DCA reversed and remanded with instructions to discharge Davis. See § 924.34, Fla. Stat. (2005).

[*Davis v. State*, 02/20/08]



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## 4th District Court of Appeals

**It is fundamental error for the jury to be instructed by the court that the “defendant had the burden to prove the basis for self-defense beyond a reasonable doubt.”**

Novak appealed his conviction of aggravated battery with a firearm. Challenging the former standard jury instruction on self defense, Novak argued that fundamental error was created “when the trial court instructed the jury on the justifiable use of non-deadly force requiring the defendant to prove the defense beyond a reasonable doubt.” Novak also argued “that the jury instruction imposing a ‘duty to retreat’ on a defendant who employs self-defense while ‘engaged in unlawful activity’ was confusing under the circumstances because the defendant was not engaged in any unlawful activity other than the crimes for which he asserted the justification.”

The record revealed conflicting facts

surrounding a neighborhood dispute which resulted in the defendant’s conviction for aggravated battery with a firearm. The jury was instructed on the charge of aggravated battery with a firearm and then read the standard self-defense jury instructions on justifiable use of deadly and non-deadly force. The jury was then instructed that the defendant “would be justified in using non-deadly force against [the victim] if the following two facts are proved beyond a reasonable doubt.” (The two facts were listed in a footnote in the opinion.)

The 4th DCA noted that neither the trial court nor defense counsel had the benefit of its future decision in Murray v. State, 937 So. 2d 277 (Fla. 4th DCA 2006), holding fundamental error for the jury to be instructed by the court that the “defendant had the burden to prove the basis for self-defense beyond a reasonable doubt,” (*Id.* at 282), or to the future amendment by the Florida Supreme Court “in the Standard Jury Instructions to delete the words ‘beyond a reasonable doubt’ from the self defense instruction.” *See In re Standard Jury Instruction in Criminal Cases (2006-3)*, 947 So. 3d 1159 (Fla. 2007).

The 4th DCA relying upon Giles v. State, 831 So. 2d 1263 (Fla. 4th DCA 2002), that “an instruction on the ‘forcible felony’ exception to self-defense is erroneous unless ‘the person claiming self-defense [was] engaged in another, independent ‘forcible felony.’” For the same reason as in Giles, “a jury charged with the ‘unlawful activity’ instruction might confuse the charged crimes with ‘unlawful activity’ that precludes the justification of self-defense unless the defendant has retreated.” *Id.* at 1266. Because its decision in Murray “is

controlling,” along with the reasoning set forth in Giles, the 4th DCA reversed the conviction and remanded for a new trial.

*[Novak v. State, 02/06/08]*



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## 5th District Court of Appeals

**Motion for judgment of acquittal should have been granted; evidence did not support that the defendant was driving in a reckless manner “sufficient to prove vehicular homicide.”**

Challenging his vehicular homicide conviction, Berube contends the trial court erred in denying his motion for judgment of acquittal arguing “the State failed to show that he was driving in a reckless manner sufficient to prove vehicular homicide.”

The record reflected that Berube (driving his minivan) approached a busy intersection in the center through lane with a green light; that the vehicles in the two left turn lanes were stopped for the red left turn light; that Berube stopped his minivan unexpectedly in the center through lane and the driver of the dump truck that was behind him slammed on his breaks, blasted his horn and stopped approximately one to two

feet behind the minivan. After pausing for a few seconds, Berube made an improper left hand turn across the opposite lanes of oncoming traffic. Berube’s minivan collide with an oncoming vehicle driven by Tracy Dunham and the front seat passenger in Dunham’s vehicle later died from her injuries sustained from the collision. Mrs. Berube testified that as the dump truck was bearing down on them, she and the other passengers in the minivan screamed at her husband to “move to avoid a collision.” Moving for a judgment of acquittal, Defense contended that the evidence was “insufficient to prove that Berube had operated a motor vehicle in a reckless manner likely to cause death or great bodily harm sufficient to support a charge of vehicular homicide.” Denying the motion, the court stated “the evidence showed that Berube violated the red turn signal and the jury would make a determination whether his act demonstrated a willful, wanton, or reckless disregard.”

“Vehicular homicide is the killing of a human being, . . . caused by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm, to another. § 782.071, Fla. Stat. (2005).”

The 5th DCA noted that “[v]ehicular homicide cannot be proven without also proving the elements of reckless driving.” State v. Del Rio, 854 So. 2d 692, 693 (Fla. 2d DCA 2003). Evidence must be introduced to show “conduct at least sufficient to constitute reckless driving, defined as involving a ‘willful or wanton disregard for the safety of persons or property.’” See § 316.192, Fla. Stat. (2005). Citing to McCreary v. State, 371 So. 2d 1024, 1026 (Fla. 1979), the 5th

DCA stated that “the Florida Supreme Court describes recklessness as a degree of negligence that falls short of culpable negligence but is more than a mere failure to use ordinary care.”

The 5th DCA concluded that “cases showing culpability for vehicular homicide show a level of recklessness far exceeding Berube’s conduct.” That as per the rulings in McCreary and Del Rio, the evidence did not show that Berube, “in an intentional, knowing, and purposeful manner, made an improper left turn with a conscious and intentional indifference to consequences and with knowledge that damage is likely to be done to persons or property. The 5th DCA held the trial court erred in denying Berube’s judgment of acquittal motion because the evidence “falls short” of proving that level of conduct to support recklessness. Reversing Berube’s conviction, the 5th DCA directed the trial court to discharge him.

**NOTE: Stating that the majority opinion “accepts as fact testimony which the jury may have rejected in deciding the case,” and that the opinion fails to “address a controlling case issued by this court which reaches a result contrary to the result reached by the majority opinion,” Justice Palmer respectfully dissented.**

*[Berube v. State, 02/08/08]*



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## **The finder of fact is not required to believe testimony of any witness, even if unrebutted.**

The finder of fact is not required to believe testimony of any witness, even if unrebutted.

*[City of Orlando v. Rose 2/15/08]*



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**Please note that that entire court opinion may be available on the PDF or Word link provided with the case summary.**

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