

LEGAL BULLETIN

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

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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Florida Supreme Court

“The exclusionary rule is not a remedy for a violation of section 901.211 unless a constitutional violation has also occurred.”

After the hearing on his motion to suppress was denied, Jenkins, pled guilty to “possession of cocaine with intent to sell or deliver” and appealed the denial of his suppression motion. The 2nd DCA affirmed holding that the officers had probable cause to search Jenkins and his vehicle, the search incident to the arrest was valid, and that the scope and manner of the search was “reasonable under the Fourth Amendment.” Concluding that the search “qualified as a ‘strip search’ under section 901.211 of the Florida Statutes, the 2nd DCA stated that “because the legislature explicitly addressed the issue of remedies in section 901.211(6) but failed to make any mention of the exclusion of evidence as a remedy,” it held that the “exclusionary rules does not apply to violations of section 901.211.” The 2nd DCA certified conflict between its decision in the instant case and D.F. v. State, 682 So. 2d

149 (Fla. 4th DCA 1996), where the 4th DCA “held that suppression of evidence is the appropriate remedy for violation of the strip search statute.”

The record revealed conflicting testimony as to the search of Jenkins. Jenkins contended that the officers, after finding no drugs during a pat down and inspection of his vehicle, “strip searched” him in a public place to recover drugs. The officers testified that Jenkins was “not required or forced to lower his trousers and boxer shorts in public while the officers conducted a search.” The officer “merely pulled the boxer shorts away from his body at the waist,” saw the plastic bag containing the drugs, and “reached in” the boxer shorts and removed the bag containing the drugs.

The Court determined that “nothing equivalent to a strip search occurred in the instant case.” The search qualified as “a ‘reach-in’ search, where the suspect remains clothed during the search and the suspect’s genitals are not visible to onlookers.” See United States v. Williams, 477 F.3d 974, 977 (8th Cir.), cert. denied, 128 S. Ct. 237 (2007). When affirming the decision of the district court, the Court further concluded that the “plain language of section 901.211 does not expressly provide for exclusion of evidence as a remedy for a violation of the statute.” Noting that “[t]he only references to remedies in the statute before us is

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located in subsection (6), and those remedies are civil and injunctive in nature.”

[*Jenkins v. State*, 03/06/08]



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1st District Court of Appeals

Trial court erred; officer’s stop of a vehicle based on a cracked windshield that was not a safety hazard was unlawful.

Swagerty, convicted and sentenced for possession of cocaine, appealed the denial of his motion to suppress alleging the officer’s stop of his vehicle, based on his vehicle having a cracked windshield, was unlawful.

The record revealed that the stop of Swagerty’s vehicle was based on a cracked windshield; however, “the trial court could not find that the cracked windshield constituted a safety hazard.”

The 1st DCA referred to the decision of the Florida Supreme Court in Hilton v. State, 961 So. 2d 284 (Fla. 2007), where that Court concluded that “the provision of section 316.610 which “authorizes vehicle stops for equipment that is ‘not in proper adjustment or repair,’ § 316.610(1), Fla. Stat. (2001), does not encompass windshield cracks. Thus, a stop for a cracked windshield is permissible only where an officer

reasonably believes that the crack renders the vehicle ‘in such unsafe condition as to endanger any person or property.’” Based on this decision, the 1st DCA reversed.

[*Swagerty v. State*, 03/18/08]



1D07-0097Swagerty.pdf

2nd District Court of Appeals

Trial court erred dismissing the information; there was a material fact in dispute and the State “established a prima facie case of guilt based on constructive possession.”

Holland, charged by information with trafficking in illegal drugs, possession of cannabis (less than 20 grams), and possession of drug paraphernalia, filed a motion to dismiss the information arguing that “based on the undisputed facts, the State failed to establish the first element of constructive possession, dominion and control over the contraband.” After the trial court dismissed the information, the State sought review of that order.

The record revealed that during a valid search of Holland’s home the officers found in the master bedroom belonging to Holland, in plain view, mail addressed

to Holland, a plastic bag containing marijuana on Holland's bed, "41 hydrocodone pills in a separate plastic bag, 3 hydrocodone pills located in a plastic cup on Holland's headboard, and, in the same cup, a Cigna Health Insurance card bearing Holland's name." At the hearing on the motion to dismiss Holland "presented the possibility" that her daughter also occupied the master bedroom, which was "contrary to the State's allegation of Holland's exclusive occupancy."

In its analysis the 2nd DCA noted that a motion to dismiss must establish that "(1) there are no material facts in dispute and (2) the undisputed facts do not establish a prima facie case of guilt against the defendant." In addition, all facts and inferences are viewed in the "light most favorable to the State." State v. Kalogeropoulos, 758 So. 2d 110, 112 (Fla. 2000).

The 2nd DCA concluded that "it was undisputed that the narcotics were discovered by detectives in the bedroom that belonged to Angela Holland." When Holland asserted the possibility that her daughter also occupied the room, she "created a dispute of the material fact as to exclusive occupancy, thus the motion to dismiss was not proper." Because "the inference could be made from the evidence that Holland, the owner of the home, resided alone in the master bedroom, . . ." the 2nd DCA held the State met its burden "as to the element of dominion and control and established a prima facie case of guilt based on constructive possession."

[*State v. Holland*, 03/05/08]



2D07-1091Holland.pdf

Citizen's arrest by officer outside of his jurisdiction was permissible.

Petitioner had his driver's license suspended for a year. He sought relief, arguing that the stop and arrest were illegal because the arresting officer was outside of his jurisdiction.

Citing to a number of Florida district court opinions which permitted a citizen's arrest, the Second District denied his petition.

(Thomas C. Mielke, DHSMV Assistant General Counsel represented the agency.)

[*Roberts v. Department of Highway Safety and Motor Vehicles* 3/28/08]



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3rd District Court of Appeals

Trial court erred; defendant was not illegally detained when he gave consent to enter his residence.

The trial court, granting Triana's motion to suppress, found that Triana was "illegally seized and, as such, a subsequent consent to search by Triana was involuntary, resulting in the

suppression of certain evidence.” The State appealed.

The record revealed that a confidential informant (CI), who was personally known by the police and who had previously provided reliable information, informed Detective Delguitiz that Triana was growing marijuana at his two-acre residence. Detective Delguitiz and three officers went to the residence and waited outside the gate for Triana to appear. Once Triana appeared at the gate, Sergeant Falcon introduced himself, determined Triana was the owner of the residence, and explained they received a complaint that marijuana was being grown in the residence and requested for consent to search the residence. Triana agreed and opened the gate. Once inside the home, Falcon saw another building in the back and requested for consent to search the back building. Triana agreed. Falcon took out a written consent to search form, read it to Triana, Triana signed the written consent form and proceeded to take the officers to the building in the back. Inside the building the officers found a “hydroponics lab for growing marijuana.” The officers seized 103 pounds of marijuana at the residence. The trial court held that “the officers ‘effectively seized Mr. Triana’ and that, at the time of the encounter, the detectives did not have reasonable suspicion that Mr. Triana had committed a crime.” The trial court further held that based on its holding, “Triana’s consent to search given after this illegal detention was involuntary.”

In its analysis, the 3rd DCA noted that “no level of suspicion was required before the officers arrived at the gate of Mr. Triana’s residence and questioned him.” The “knock and talk,” is

considered a legitimate procedure “as long as the encounter does not evolve into a constructive entry.” At the initial meeting with Triana, the officers were outside Triana’s property, supporting the conclusion that “the defendant was not in custody.” No drawn weapons nor “coercive demands” were made of Triana. The 3rd DCA concluded the officers presence outside the gate “does not render the encounter non-consensual.” Reviewing the “totality of the circumstances,” the 3rd DCA held no “constructive entry” occurred. Based on the facts presented, there is “no basis for concluding that a reasonable person in Mr. Triana’s situation would believe that he was either under arrest or otherwise compelled to leave the house.”

The 3rd DCA found the initial entry into Triana’s residence “occurred through a consensual encounter with police followed by consent to enter the residence.” Triana was “not illegally detained when he gave consent to search his residence and the outside building.”

[\[State v. Triana, 03/19/08\]](#)



3D07-1388Triana.pdf

DHSMV Hearing Officers are entitled to ask clarifying questions at an Administrative Suspension Hearing.

The circuit court erroneously found that hearing officer departed from essential role of neutral and detached magistrate by his questioning of arresting officer. The 3rd DCA opined that the Hearing officer's questioning of officer sought nothing more than clarification of officer's testimony that only the breath test implied consent warning had been read to licensee. Further, hearing officer is empowered to examine witnesses. The circuit court's order granting Boesch's petition is quashed. "The hearing officer is not a potted plant."

(Thomas Mielke, DHSMV Assistant General Counsel represented the agency.)

[State of Florida, Department of Highway Safety and Motor Vehicles vs. Boesch, 3/05/08]

4th District Court of Appeals

Trial court erred in denying the motion for judgment of acquittal; no evidence produced to prove "intent to sell" the cocaine.

On appeal, Valentin, convicted for possession of cocaine with intent to sell within one thousand feet of a publicly

owned park, argued the evidence failed to prove his intent to sell. Thus, the circuit court erred when denying his judgment of acquittal motion.

The record revealed that Valentin was observed by Sergeant Curry of the Martin County Sheriff's Department of dropping a "white object into the bushes" before he entered the Lamar Howard Park playground. The Sergeant retrieved the object (a zip lock bag containing seventeen smaller bags; each containing a white powdery substance). Suspecting drugs, the Sergeant arrested Valentin and the substance in the bags tested positive for cocaine. The sergeant testified at trial (based on his education, training, and experience) the packaging was consistent with "cocaine that is packaged for sale on the streets." However, he also acknowledged on cross-examination that it was possible that the "quantity and packaging were consistent with personal use." He did not see Valentin talking with anyone or doing anything to suggest "an intent to sell in the park."

Because there was no evidence produced at trial "showing an intent to sell within the park," the 4th DCA held that the trial court erred in denying the motion for judgment of acquittal. The 4th DCA reversed and remanded with "directions to enter judgment for simple possession of cocaine."

[Valentin v. State, 02/27/08]



4D07-1785Valentin.op.pdf

5th District Court of Appeals

Single subject defect was cured when the legislature reenacted a later edition of the Florida Statutes.

Johnson, a four-time DUI offender, filed a declaratory judgment action after the Department refused to reinstate his license. Johnson argued that the pertinent provision of the 1997 Florida Statutes that the Department relied on was void under the single subject rule. The trial court granted his motion for summary judgment and determined that Johnson was not statutorily precluded from seeking reinstatement.

The Fifth District reversed saying that the single subject defect was cured when the legislature adopted the 2002 edition of the Florida Statutes.

(Timothy D. Osterhaus, Deputy Solicitor General represented the agency.)

[Department of Highway Safety & Motor Vehicles v. Johnson 3/7/08]



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The hearing officer should have considered whether arrest was lawful before suspending individual's license for refusing to take a breath test.

A police officer entered private property and ordered Plaintiff out of his car. When Plaintiff refused, officers removed him with force. The Plaintiff was arrested for DUI and later refused to take a breath test. Subsequently in an administrative proceeding suspending the Plaintiff's license for refusing the breath test, the ALJ declined to consider the lawfulness of the arrest in his the determination. The trial court quashed the hearing officer's ruling.

In denying the petition by the Department, the Fifth District concluded that the lawfulness of the arrest was appropriately within the hearing officer's scope of review. The court also certified the following question to the Florida Supreme Court as one of great public importance.

CAN THE DHSMV SUSPEND A DRIVER'S LICENSE FOR REFUSAL TO SUBMIT TO A BREATH TEST, IF THE REFUSAL IS NOT INCIDENT TO A LAWFUL ARREST? IF NOT, IS A DHSMV HEARING OFFICER REQUIRED TO ADDRESS THE LAWFULNESS OF THE ARREST AS PART OF THE REVIEW PROCESS?

**The Fifth DCA stayed their opinion pending the Florida Supreme Court's opinion.

(Heather Rose Cramer, DHSMV Assistant General Counsel represented the agency.)

[Department of Highway Safety & Motor Vehicles v. Pelham 3/14/08]



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