

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

“The police did not violate the Fourth Amendment when they made an arrest that was based on probable cause but prohibited by state law, or when they performed a search incident to the arrest.”

The Supreme Court ruled unanimously that police do not act unconstitutionally if they conduct a search following an arrest, even if the arrest violated a state law. The ruling, written by Justice Antonin Scalia, came in Virginia v. Moore (06-1082) involving the discovery of crack cocaine in a search of a driver who had been stopped for driving on a suspended license.

So long as the police had probable cause to make the arrest, the Court said, it makes no difference that a state law barred police from making an arrest when the crime involved was only a misdemeanor traffic offense. “An arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure” of evidence after the arrest, the opinion added.

In the circumstance that confronted David Lee Moore of Portsmouth, Va., in 2003, police were supposed to give him a ticket. Instead, they arrested him, took him to a hotel where they conducted a personal search of Moore, finding about 16 grams of cocaine in a jacket pocket and \$516 in cash in a pants pocket. The evidence was used to convict Moore of possession of cocaine with intent to distribute it. He was sentenced to five years in prison, with 18 months of the sentence suspended.

The Court noted that, with its policy on ticketing only after a traffic offense, “Virginia chooses to protect individual privacy and dignity more than the Fourth Amendment requires.” But, it added, that choice does not make a resulting search invalid under the federal Constitution.

“Moore would allow Virginia to accord enhanced protection only on pain of accompanying that protection with federal remedies for Fourth Amendment violations, which often include the exclusionary rule. States unwilling to lose control over the remedy would have to abandon restrictions on arrest altogether. This is an odd consequence of a provision designed to protect against searches and seizures,” Scalia wrote.

The opinion was joined by all of the members of the Court except Justice Ruth Bader Ginsburg. She supported the result only, saying she would read the historical record differently.

[Virginia v. Moore, 04/24/08]



USSC 07-1606VA v Moore.pdf

Eleventh Circuit Court of Appeals

Officer who used excessive force was not entitled to qualified immunity.

While high on drugs, Plaintiff Hadley had an encounter with Officers Guterrez and Ortivero. Stories of the encounter differed but at some point Officer Ortivero punched Hadley in the stomach. Hadley sued for excessive force and conspiracy. The officers in turn argued qualified immunity. The trial court found that Hadley was struck when he was not struggling against the officers and, therefore, the officers were not entitled to qualified immunity.

The Eleventh Circuit began its analysis noting that striking a criminal defendant when he is not struggling or resisting constitutes excessive force. The court found that excessive force is determined on an objective standard and that Officer Ortivero's blow did constitute excessive force. However, the court found that there was no evidence that Officer Guterrez could have anticipated the blow and intervened before hand. The court rejected the argument that Hadley's guilty plea constituted an admission to the lawfulness of officers' actions. "The court concluded," The district court did not err in denying Officer Ortivero qualified immunity on the excessive force claim. The district court did

err in refusing to grant Officer Guterrez qualified immunity on Hadley's excessive force claim and in refusing to grant qualified immunity to both Defendants on Hadley's conspiracy claim."

[Hadley v. Guterrez and Ortivero, 5/6/08]



11circvHadley.pdf

The burden was properly placed on the plaintiff to show why the litigation exception to the Driver's Privacy Protection Act did not apply.

The Hartz law firm purchased from the Florida Department of Highway Safety and Motor Vehicles the registration information of all individuals in Miami-Dade County who registered both new and used vehicles for a specific two-year period. One of the individuals sued pursuant to the Driver's Privacy Protection Act. Hartz argued that it used the information under the litigation exception. The district court granted summary judgment in favor of the Hartz law firm.

On appeal Thomas argued that the trial court erroneously placed the burden on him to show that the litigation exception did not apply. The Eleventh Circuit affirmed the district court stating, "In reading §2724(a) and §2721(b) together, we conclude that the DPPA is silent on which party carries the burden of proof and, as such, the burden is properly on the plaintiff."



11circvThomas.pdf

Florida Supreme Court

Certified question resolved; defendant's right of confrontation was violated under *Crawford*.

When the 4th DCA reversed and remanded for a new trial it certified the following question of great importance: "Does admission of those portions of the breath test affidavit pertaining to the breath test operator's procedures and observations in administering the breath test constitute testimonial evidence and violate the sixth amendment's confrontation clause in light of the United States Supreme Court's holding in Crawford v. Washington, 541 U.S. 36 (2004)?"

At issue was the county court's admission of the breath test affidavit of the breath test technician, Rebecca Smith, who did not testify at trial and over the defendant's objection who argued his right to confrontation, per Crawford, was violated by Smith's non-appearance at trial. When affirming the conviction, the circuit court held "the breath test affidavit was not testimonial in nature and that Crawford did not preclude its admission." Noting that "breath test affidavits are usually prepared by law enforcement agencies for use in criminal trials or driver's license revocation proceedings," the 4th DCA reversed and remanded for a new trial finding that "such affidavits qualify as statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial."

The Court referred to the decisions rendered in Crawford and in Davis v. Washington, 547 U.S. at 822 (2006), and concluded that the breath test affidavit is testimonial. The State, who met its burden proving the technician was not available for trial, argued there is no Crawford violation because "Belvin waived his opportunity to cross-examine her prior to trial by failing to depose her under Florida Rule of Criminal Procedure 3.22(h)(1)(D)." In its review of Blanton and Lopez, the Court concluded "that the exercise of the right to take a discovery deposition under rule 3.220 does not serve as the functional substitute of in-court confrontation of the witness." See State v. Lopez, 974 So. 2d 340, 349-50 (Fla. 2008; Blanton v. State, 33 Fla. L. Weekly S184, S186 (Fla. Mar. 13, 2008). Thus, the Court held that Belvin did not waive his opportunity to cross-examine the technician by failing to depose her under rule 3.220(h)(1)(D). Further, while "the defendant has the right to subpoena the breath test operator as an adverse witness at trial, the statutory provision does not adequately preserve the defendant's Sixth Amendment right to confrontation." The Court further held the "4th DCA did not err in concluding that the circuit court violated a clearly established principle of law by deciding the case contrary to the holding in Crawford."

(Note: The Supreme Court opinion is limited to the right to confrontation under the 6th Amendment in criminal cases and a speeding citation involves a civil infraction. This case should have no application to Administrative Suspension cases. In short, Belvin does not apply outside the criminal arena.)

[State v. Belvin, 05/01/08]

1st District Court of Appeals

Even though the consent to search was found to be involuntary, the denial of the suppression motion was appropriate based on the application of the inevitable discovery doctrine.

Brian and Christopher McDonnell (appellants), appealed the denial of their motions to suppress “evidence recovered from a search of their home and statements they made while in police custody” asserting that “Christopher’s consent to search the home was involuntary.”

Investigator Mathis testified at the suppression hearing that he was investigating the theft of an ATM from the Bay Point Marriott; he had the tag number of the truck used in the theft of the ATM and that truck was registered to appellants’ father. He further testified they also had a video of an earlier crime committed at the Marriott where an employee identified the appellants as the men in that video. The father told Investigator Mathis that his son Eric had the truck. Mathis and other officers went to appellants’ home at 4:00 in the morning and when Christopher answered the door in a bath towel, Mathis told him

they were investigating an ATM theft at the Marriott and asked if “he had anything in the house linking him to the theft.” After Christopher said he did not, Mathis requested permission to search the home and Christopher refused. Mathis “left to obtain a warrant while the other officers stayed behind.” Christopher remained on the front porch, in his bath towel, for approximately an hour and a half to two hours. During that time another officer requested and received permission to search the house. A warrant was never obtained and the search revealed “incriminating items linking appellants to a number of offenses.” The trial court denied the motion to suppress the evidence and the statements ruling that “even though a search warrant was never obtained, the police were in the process of getting a warrant, and would have done so because they had sufficient probable cause.”

In its lengthy analysis the 1st DCA first noted that it was “undisputed the police did not have a warrant to search the residence” and relied on Christopher’s consent to search. However, based on the totality of the circumstances, the 1st DCA concluded that Christopher’s consent to search was involuntary. The factors considered in this conclusion were: the hour the encounter took place with four police officers present; the fact that Officer Mathis left to get a search warrant while the other officers remained behind; two requests for permission to search; along with the fact that Christopher was informed that he was a suspect in a criminal investigation, which “exacerbated” any coercive effect of the police presence on his property.

Even though the 1st DCA found Christopher’s consent to search was not voluntary, it affirmed the trial court’s motion to suppress the evidence and statements based on the “inevitable discovery doctrine.” Noting that while the trial court’s

dismissal never “explicitly” mentioned the doctrine, it did find that “but for Christopher’s consent, the police would have obtained a search warrant because sufficient probable cause existed to support the issuance of a warrant.” The 1st DCA stated that the record contained “competent, substantial evidence” to support that “Officer Mathis was in the process of obtaining a warrant when Christopher consented to the search,” and the record demonstrated that “probable cause existed upon which a warrant could have been obtained.” The 1st DCA held that “[b]ecause the state has shown by a preponderance of the evidence that the search warrant would have been issued based on probable cause, the application of the inevitable discovery doctrine in this case is appropriate.” See Conner v. State, 701 So. 2d 441, 442 (Fla. 4th DCA 1977).

[McDonnell v. State, 05/12/08]



1D06-5731McDonnell.pdf

The officer’s continued search of defendant’s pocket exceeded the scope of the “plain-feel” doctrine.

Perkins, convicted of possession of cocaine, pled *nolo contendere* and reserved his right to appeal the trial court’s denial of his suppression motion. Perkins argued that the “plain-feel” doctrine does not apply to the cocaine found in his pants pocket during a pat-down following a traffic stop.

Officer Register testified at the suppression hearing that during a traffic stop, he

“observed a pocketknife” in Perkins front jeans pocket. Perkins was asked twice to keep his hands out of that pocket and twice he did not comply with the officer’s request. Officer Register then conducted a pat-down to search for other possible weapons. While removing the pocketknife, the officer felt another object and testified that he “. . . put his hand back on top of the object and ran the tips of his fingers over the edge of the object and could feel that it was a square object, like a folded piece of paper. He ran his finger tips back over the object, down its side and could feel a large lump in the middle.” He believed the lump was cocaine, based on his experience. When he removed the object it was a “folded up dollar bill with less than one gram of powder cocaine wrapped inside.”

The United States Supreme Court, in its decision in Minnesota v. Dickerson, 508 U.S. 366 (1993), applied the “plain-feel” doctrine and reasoned in the Dickerson case, that after the officer “determined that the pocket did not contain any weapons, the officer’s continued exploration of Dickerson’s pocket exceeded the scope of the search permitted by Terry. Id. at 378. Because the incriminating nature of the object was not ‘immediately apparent’ to the officer, who had to conduct a further search in order to determine it was, in fact, contraband, the Court held that the officer’s seizure of the contraband violated the Fourth Amendment.”

The 1st DCA determined that, as in Dickerson, the “plain-feel” doctrine does not apply in the instant case because it was only after the officer’s further exploration of Perkins’ pocket that he was able to determine the “lump was, in fact, contraband.” Thus, the 1st DCA reversed Perkins’ conviction for possession of cocaine and remanded “with instructions to the trial court to grant his motion to

suppress.”

[Perkins v. State, 04/23/08]



1D07-2062Perkins.pdf

2nd District Court of Appeals

Evidence was sufficient to support conviction for carrying a concealed weapon; trial court erred in dismissing that charge.

Lopez, charged with possession of a firearm by a convicted felon and carrying a concealed firearm, was found by the trial court to have violated his probation and was sentenced to a prison term on the felon in possession charge. The trial court dismissed the concealed firearm charge and the State appealed.

The record revealed that Lopez, during a valid traffic stop, consented to a search of his vehicle. Lopez was asked to exit the vehicle and the search revealed a firearm under the driver’s seat. When dismissing the concealed firearm charge, the trial court relied on Gehring v. State, 937 So. 2d 169 (Fla. 2d DCA 2006), where Gehring’s conviction for carrying a concealed firearm was reversed because “the evidence ‘did not show that the firearm was simultaneously carried by Gehring and concealed.’” In that case the police were waiting at Gehring’s home to arrest him for aggravated stalking. When Gehring drove into his driveway and got out of his vehicle, the police arrested him, placed him in the patrol vehicle and then searched Gehring’s

vehicle where a shotgun was found on the passenger seat underneath a jacket.

The 2nd DCA referred to J.E.S. v. State, 931 So. 2d 276 (Fla. 5th DCA 2006), where that court held “the evidence was sufficient to support a conviction for carrying a concealed firearm where the defendant was ordered out of his vehicle during a valid traffic stop and a legal search of the vehicle revealed a firearm hidden under the seat.”

The 2nd DCA concluded that in the instant case, as in J.E.S., Lopez had the firearm under the seat of his vehicle when the officer first encountered him. Further, “the charge against Mr. Lopez alleged sufficiently that the firearm was simultaneously on or about his person and concealed.” The 2nd DCA reversed the dismissal of the concealed firearm charge and remanded for further proceedings.

[State v. Lopez, 05/09/08]



2D07-482Lopez.pdf

3rd District Court of Appeals

Trial court erred; defendant’s current felony DUI cannot be sustained because the trial court did not dismiss the misdemeanor DUI.

Hernandez, pled guilty to a felony DUI and reserved his right to appeal based on the “expiration of the speedy trial period in an

underlying misdemeanor DUI in county court.”

The record revealed that Hernandez was arrested and charged by citation with driving under the influence of alcohol pursuant to section 316.193, Florida Statutes (2005), driving in violation of imposed restrictions, and driving with a suspended driver’s license and these charges were filed as three separate case numbers in county court as misdemeanors. At the hearing on these charges (October 7, 2005), the State announced it was filing a felony information in the circuit court based on the same offenses and “orally asked the court to transfer the misdemeanor cases from the county to the circuit court.” The court issued “what appears to be a blanket ‘order to transfer cause/bond,’ which states that the listed misdemeanors have been ‘upgraded’ to felony and transferred to circuit court, and assigned case number F05-32389.” Hernandez filed (December 5, 2005) a notice of expiration of the ninety-day speedy trial period on the DUI citation filed in county court and on March 21, 2006 he filed a motion to dismiss the felony DUI count of the information arguing the State “failed to move to consolidate the pending DUI misdemeanor with the felony DUI . . . or nolle prosequere the misdemeanors when it filed the felony information.” Hernandez argued “the county court did not lose jurisdiction, the ninety-day speedy trial period expired, and as the State failed to bring the defendant to trial the misdemeanor DUI charge must be dismissed.”

The 2nd DCA concluded that “[w]ithout a proper motion to consolidate . . . the county court retained jurisdiction and should have dismissed the misdemeanor DUI when the ninety-day speedy trial period expired.” See State v. Psomas, 766 So. 2d at 1085-86 (Fla. 2d DCA 2000). Further, the 2nd DCA referred to State v. Woodruff, 676 So. 2d

975 (Fla. 1996), where the Florida Supreme Court held that “dismissal of the misdemeanor DUI does not bar or estop litigation of the felony DUI because they are not the same offense.” However, the Woodruff court concluded that “section 316,193(2)(b) requires that there be a conviction for the current DUI misdemeanor to establish the crime of felony DUI after three previous misdemeanor DUI convictions.” Thus, the felony conviction “is obtained by proving a misdemeanor DUI conviction on the present charge as well as proof of three or more prior misdemeanor DUI convictions.” Id. at 978.

The 2nd DCA determined that “because the trial court should have dismissed the misdemeanor DUI, the current felony DUI cannot be sustained” and reversed the trial court’s order and “remanded for further proceedings consistent herewith.”

[Hernandez v. State, 05/14/08]



3D06-2645Hernandez.pdf

Crawford issue and the changes in the confrontation law.

On remand from the Florida Supreme Court, the Court “quashed this Court’s opinion in State v. Brocca, 842 So. 2d 291 (Fla. 3d DCA 2003), and remanded for reconsideration in light of State v. Hosty, 944 So. 2d 255 (Fla. 2006).”

Brocca was charged with sexual battery of a thirty-two-year-old, mentally disabled adult. The State filed a notice of intent to introduce the victim’s statements made to the mother and “to an interviewer at the Children and Special Needs Center of the

State Attorney's office (State Attorney interviewer)," under § 90.803(24), Florida Statutes (2001), "which provides a hearsay exception for out-of-court statements of a disabled adult under certain circumstances." The trial court held that § 90.803(24) was unconstitutional. Both the 3rd and 4th DCA certified conflict as to the "question of the statute's constitutionality."

The 3rd DCA analyzed the changes in the confrontation law starting with the decision rendered in Crawford v. Washington, 541 U.S. 36 (2004), where the Supreme Court held that "the admission of testimonial hearsay complies with the Confrontation Clause only if the declarant testifies at the trial, or is unavailable and the accused had a prior opportunity for cross-examination." However, the Crawford court did not define "testimonial statements" except as "it applies at a minimum to prior testimony . . . and to police interrogations." In Davis v. Washington, 547 U.S. 813 (2006), the Supreme Court "explained the difference between testimonial and nontestimonial statements that arise from police interrogations." In Hosty, the Court used a traditional hearsay analysis for the victim's nontestimonial statement to her teacher noting that under such analysis "hearsay must either fall under a firmly rooted exception to the hearsay rule" or "[t]he circumstances must be considered 'so trustworthy that adversarial testing would add little to its reliability.'" 944 So. 2d at 259. In the instant case, the Court found that "the same reliability factors applied in child hearsay exception cases can also be applied in mentally disabled declarant cases," and provided an additional ten factors (from those set out in the statute) to be considered when determining to admit hearsay statements of a mentally disabled declarant.

The 3rd DCA determined that the victim's statements to his mother were

"nontestimonial" because they were not made to a government agent or taken under police interrogation. The statements to the mother "arose naturally under the circumstances" and must be evaluated "under the hearsay analysis stated in Hosty." On remand, the State "must establish a proper factual predicate, and the witness must either testify or be determined to be unavailable under the statute" and the trial court must "make specific findings on the record indicating the basis for determining the reliability of the victim's statement to his mother." § 90.803(24)(a), Fla. Stat. (2007); Hosty, 944 So. 2d at 263.

The 3rd DCA further determined that the victim's statements to the State Attorney interviewer were "testimonial" because they were made to a government agent, there was no ongoing emergency when the statements were taken, and the primary purpose of the "interrogation was to establish or prove past events in connection with the criminal prosecution." As such, those statements would violate Brocca's "right to confront his accuser, unless the victim (1) testifies at trial, or (2) is determined to be unavailable, and the accused has an opportunity for cross-examination." Because the State's notice of intent did not specify "whether it intends to call the victim as a witness," on remand, the trial court "must determine whether the victim will testify." Unavailability will not be an issue if the victim testifies. However, if the victim is not available, "before these statements may be admitted at trial, Brocca must have an opportunity to cross-examine the victim."

Based on Hosty, the 3rd DCA reversed the trial court's order and remanded for the trial court to "conduct appropriate inquiries as to the admissibility of the victim's statements consistent with this opinion."

[State v. Brocca, 04/23/08]

4th District Court of Appeals

Officer's testimony that the amount of marijuana found on the defendant was "sufficient to allow the issue of intent to reach the jury."

Rawlings appealed the trial court's denial of his motion for judgment of acquittal arguing the "State failed to prove the intent element of the charge of possession of cannabis with intent to sell or deliver."

The record revealed that Rawlings had been picked up with "31 individual bags of marijuana on him with a total weight of 28.8 grams" by veteran narcotics officer, Sergeant Tim Gahn. Sergeant Gahn testified at trial that "he had never known a buyer to purchase more than 5 bags at a time for personal use," that the amount Rawlings was picked up with "was consistent with possession with intent to sell rather than possession for personal use," that he based this conclusion on the "quantity and the amount of money it took to buy the quantity," and that "this was how marijuana was normally packaged for sale and that he'd never seen a person purchase 31 baggies for his personal use." Rawlings argued that Gahn's testimony "was not enough to meet the State's burden" and cited to Phillips v. State, 961 So. 2d 1137 (Fla. 2d DCA 2007). The Phillips case was similar where the defendant was picked up with 26.6 grams

of marijuana packed in ten small baggies and that court determined that "the totality of the testimony of the officers was not enough to meet the State's burden since one of the officers also testified the amount was not inconsistent with personal use."

The 4th DCA determined that Gahn's testimony that "given the amount of marijuana and the facts of the case . . . it was more consistent with possession for sale." Gahn, unlike the testimony in Phillips, testified that the amount of marijuana found on Rawlings was "inconsistent with personal use."

When affirming the trial court's denial of Rawlings' motion for judgment of acquittal, the 4th DCA found "Officer Gahn's testimony sufficient to allow the issue of intent to reach the jury" and "to the extent we may conflict with the second district's holding in *Phillips*, we certify conflict."

[Rawlings v. State, 04/30/08]

Trial court erred when it shifted the burden to the defendant to prove he did not consent to the search.

Lewis pled *no contest* to the charges of possession of drug paraphernalia and possession of cocaine after the trial court denied his suppression motion based on Lewis' assertion that the evidence was the product of an illegal search.

The record revealed that Lewis was stopped at night by Officers Gillette and Oliver for riding a bicycle with no headlight. The officers were patrolling the area as part of a "street level narcotics crime operation."

At the suppression hearing it was agreed that the “pat down was not supported by reasonable suspicion or probable cause.” The trial court found that “the initial stop for riding a bicycle with no headlight was valid.” The “validity turned on whether Lewis freely and voluntarily consented” to the pat down. Gillette testified he asked for and received permission to do the pat down from Lewis. Oliver testified he heard Gillette ask for permission. However, on cross-examination, defense counsel “brought out the fact that the arrest affidavit written that night stated that ‘Detective Gillette *advised* the subject that he was going to pat him down for weapons.’” Detective Oliver, who wrote the report, testified that “advised to me is actually asking the Defendant a question . . . all my reports are written that way.” Lewis never testified at the suppression hearing. The trial court, when denying the motion to suppress, voiced its concern over the conflicting testimony provided by the officers and expressed “its wish that Lewis had testified to clarify what went on at the stop.” Defense counsel objected saying that the Court should not be considering defendant’s “Fifth Amendment right not to testify” when rendering its decision. Further, defense counsel stated that the burden is on the State and “the Court just said that nothing was offered to the contrary. That’s burden shifting and placing the burden on the Defendant.”

The 4th DCA determined that the “trial court did not conduct the necessary fact-finding but merely shifted the burden to the defense to produce some affirmative evidence to disprove the testimony of the officers. The defense did not have that burden, and the trial court erred in failing to weigh the evidence and determine the facts.” The 4th DCA reversed and remanded for further proceedings with the instruction that “[i]f this case will be heard by the original judge, the matter may be

decided on the same record, should the judge determine that his recollection of the proceedings is sufficient to make the necessary findings; otherwise, a new hearing will be required.”

[Lewis v. State, 04/23/08]



4D07-976.opC042208Lewis.pdf

Warrantless search of probationer’s residence, based on reasonable suspicion, was reasonable under the Fourth Amendment.

Benya appealed the trial court’s revocation of probation arguing the officers did not have probable cause thereby making the search of his residence improper.

The record revealed the Benya’s probation order “provided for warrantless searches of the probationer’s residence without probable cause.” A confidential informant informed the police that Benya was in possession of illegal drugs and had a firearm. The police informed Benya’s probation officer that they had a reasonable suspicion of criminal activity and the probation officer agreed to “set up a search” of Benya’s residence with the participation of the police. On the date of the search, the surveillance team that was already in place watched Benya back his van out of the driveway and park it on the street. As Benya walked back to the residence, the van rolled backwards and hit the vehicle parked behind it and the surveillance team immediately approached Benya and began talking with him about the matter. It was during this mishap that the probation officer

and investigating officer arrived and it was then that the officer investigating the matter announced to Benya they were there to conduct a search of his residence. The search resulted in “enough drugs to charge and convict for trafficking and a firearm to charge and convict for possession by a convicted felon.” Benya argued that “all of this was a pretense for police officers to do an improper search of his residence without probable cause.”

In its analysis, the 4th DCA referred to Soca v. State, 673 So.2d 24 (Fla. 1996), where the Court held “that the evidence obtained in a warrantless search of a probationer’s residence by a probation supervisor, although tipped-off and accompanied by a police investigator, was admissible in a probation revocation hearing, even though it would not be admissible in the criminal case unless that search met all the usual constitutional search and seizure requirements.” The United States Supreme Court in United States v. Knights, 534 U.S. 112 (2001), held that “warrantless searches of a probationer’s residence, supported by a reasonable suspicion but not probable cause, are reasonable under the Fourth Amendment.” Thus, the evidence seized would be admissible “even in resulting criminal prosecutions.”

The 4th DCA found that the search of Benya’s residence was proper and noted that “[i]n light of Knights, it is no longer necessary for police armed with a reasonable suspicion to go through the subterfuge of having the probation officer perform a routine, ‘administrative’ search of the residence under the warrantless search provision in the probation order.”

[\[Benya v. State, 04/23/08\]](#)



4D06-4636.opC0422088Benya.pdf

ATTORNEY GENERAL ADVISORY LEGAL OPINIONS

Determination of what constitutes a completed report for Criminal Justice Standards and Training Commission and the time frame in which the Commission must take administrative action based on the report.

The Attorney General was asked two questions by the Florida Department of Law Enforcement’s Criminal Justice Standards and Training Commission. The Attorney General opined that receipt of the employing agency’s *completed report* starts the six-month period in which the commission must complete its investigation into the revocation of the officer’s certification. While the commission must complete its investigation within six-months of the receipt, however, Florida courts have held that a “agency’s failure to meet procedural benchmarks such as investigation deadlines will not prevent the disciplinary action unless the delay has prejudiced the employee

[\[AGO 2008-12, March 18, 2008\]](#)

[Opinion link](#)

As general rule patrol trip sheets of a police officer

are not generally exempt from the Public Records disclosure provisions in Chapter 119, Florida Statutes.

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The City of West Palm Beach Chief of Police asked the Attorney General if the patrol trip sheets and the information contained therein are exempt from public disclosure pursuant to section 119.071(2)(d), Florida Statutes. The AG stated that "Patrol trip logs indicate the movements and whereabouts of an officer from a historical perspective and do not constitute an operational or tactical plan that is to be followed in responding to such an emergency. While there may be instances where the information in a patrol trip log reflects the officer's compliance with an operational plan responsive to an emergency defined by section 252.34(3), Florida Statutes, patrol trip logs do not constitute an operational or tactical plan that is to be followed in responding to such an emergency." As general rule trip sheets and the information contained therein are public records and therefore, subject to disclosure.

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. If you care to review other Legal Bulletins, please note the website address: DHSMV Homepage (<http://www.flhsmv.gov/Bulletins>) or FHP Homepage (www.flhsmv.gov/fhp/).

[AGO 2008-23, May 9, 2008]

[Opinion link](#)

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