

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

***Miranda* revisited; defendant was not clearly informed of his right to have counsel present during questioning.**

The Court had for review the following certified question of great public importance: “DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VIOLATE MIRANDA WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER ‘BEFORE QUESTIONING’ AND (B) THE ‘RIGHT TO USE’ THE RIGHT TO CONSULT A LAWYER ‘AT ANY TIME’ DURING QUESTIONING?” Miranda v. Arizona, 384 U.S. 436 (1966).

Kevin Dewayne Powell was given the following Miranda warning: “You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this

interview.” Powell, 696 So. 2d 1064 (emphasis added).

While the State contended that “since the Miranda decision, the United States Supreme Court has held that Miranda did not require of or impose upon law enforcement a rigid and precise formulation of the warnings to be given to a criminal defendant,” the Court concluded that “in this case the warning was misleading.” The Court determined that “there was nothing in that statement that suggests the attorney can be present during the actual questioning.” The State further contended the final warning, “You have the right to use any of these rights at any time you want during this interview,” “reasonably informed Powell of the right to have an attorney present during the interrogation.” The 2nd DCA held that “Powell was never unequivocally informed that he had the right to have an attorney present at all times during his custodial interrogation.” Agreeing with the 2nd DCA, the Court held that Powell should have been “clearly informed of his right to the presence of counsel during the custodial interrogation. The catch-all language did not effectively convey to Powell his right to the presence of counsel before and during police questioning.” Further, while the State also contended that Powell was aware of his rights because of his prior dealings with the law, the Court held “Powell’s prior dealings with law enforcement cannot substitute for adequate Miranda warnings.” The Court held that the evidence, absent the statement, “did not establish that Powell

committed the crime of possession of a firearm,” therefore, the Court held “the error is not harmless beyond a reasonable doubt.”

The Court, agreeing with the 2nd DCA when it stated that “to advise a suspect that he has the right ‘to talk to a lawyer before answering any of our questions’ constitutes a narrower and less functional warning than that required by Miranda,” and answered the certified question in the affirmative. “Both Miranda and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning.”

(Note: While we are reviewing the Florida Highway Patrol Miranda Warnings Card and any form that advises an individual of his or her rights, it is our opinion that the language contained on the FHP cards and forms are consistent with this Florida Supreme Court opinion. Continue using the forms until otherwise notified.)

[[State v. Powell, 09/29/08](#)]



Opinion: [sc07-2295Powell.pdf](#)

Police lacked reasonable suspicion to seize defendant.

Baptiste, convicted of unlawful possession of a firearm by a convicted felon, sought “review of the decision of the Third District Court of Appeal in Baptiste v. State, 959 So. 2d 815 (Fla. 3d DCA 2007), asserting it expressly and directly conflicts with a decision of the Second District Court of Appeal, Rivera v. State, 771 So. 2d 1246 (Fla. 2d DCA 2000), with regard to a

question of law.” The Rivera decision held that “an anonymous tip that a maroon Toyota . . . did not provide law enforcement with reasonable suspicion to stop the Toyota.”

In the instant case, the question at issue was “whether the anonymous 911 telephone call to police—that an individual waved a firearm in front of a supermarket—provided officers with reasonable suspicion to believe that Baptiste, who matched the description provided in the call, was armed and presently dangerous to the officer or to others, thereby permitting the officers under the Fourth Amendment to conduct a search of the clothing of Baptiste in an attempt to discover weapons which might be used to assault them.” See Terry v. Ohio, 392 U.S. at 24, 30 (1968).

The record from the suppression hearing revealed “there was no evidence that the officers at the scene confirmed or observed any illegal activity, unusual conduct, or suspicious behavior to indicate that Baptiste was carrying a firearm before Officer Williams stopped Baptiste at gunpoint.” Further, Officer Ellison’s testimony was “an individual approached her anonymously and then disappeared only after, and while, Baptiste was already held at gunpoint” and that “other than the individual who approached her after Baptiste had been stopped at gunpoint and then disappeared, the only information she possessed that Baptiste had publicly waved a firearm was from the radio dispatch based on an anonymous caller.”

The Court noted that the decision of the 3rd DCA “did not acknowledge or rely upon the presence or the conduct of witnesses who were supposedly present when Officer Williams arrived at the location” and instead “directed its attention to the anonymous witness who allegedly came forward only

after Baptiste was already stopped at gunpoint and allegedly identified himself as an anonymous caller—but who still remains anonymous due to the complete lack of any identifying information about this individual.” Given the lack of information about this individual, that “no one had informed the responding officers that Baptiste had waved a firearm before the stop at gunpoint,” the Court concluded that Baptiste was seized when the officer stopped him at gunpoint. As such, “the police lacked reasonable suspicion to seize Baptiste at gunpoint.” Therefore, the seizure of Baptiste violated the Fourth Amendment. The Court quashed the decision in Baptiste, approved the decision of the 2nd DCA in Rivera, and remanded for further proceedings.

[[Baptiste v. State, 09/18/08](#)]



Opinion: [sc07-1453Baptiste.pdf](#)

Defendant did not waive right to jury trial (second phase of felony DUI proceeding). Error was harmless; no reasonable probability the error contributed to the conviction.

Johnson sought review of the 4th DCA’s opinion that held, “Johnson’s right to a jury trial was not violated when the trial judge determined that Johnson had three prior DUI convictions.” The review “expressly and directly conflicts with the decisions in State v. Upton, 658 So. 2d 86 (Fla. 1995) and Tucker v. State, 559 So. 2d 218 (Fla. 1990).”

The record revealed that Johnson was charged, inter alia, with felony [driving under the influence (“DUI”)] and the “information alleged Johnson’s faculties were impaired and that he had three prior DUI convictions.” A jury trial was held on the instant DUI issue and the jury, unaware of the alleged prior DUI’s, returned a guilty verdict and was excused. Based on “the parties’ previous stipulation,” the trial court proceeded with a bench trial to determine if the conduct constituted a felony offense, determined Johnson had three prior DUI’s, and based on the prior DUI’s and the verdict of the jury, “adjudicated Johnson guilty of felony DUI.” The 4th DCA reasoned that even though the judge failed to “conduct a colloquy with Johnson concerning waiver,” his counsel’s stipulation to a second-phase bench trial “constituted a valid oral waiver of Johnson’s right to a jury trial during the second phase of the felony DUI proceeding.” Johnson v. State, 944 So. 2d 474, 476-77 (Fla. 4th DCA 2006).

The Court concluded the record was devoid of a valid written waiver signed by Johnson and an “oral waiver preceded by a proper colloquy.” Johnson’s “general silence” did not “establish a valid waiver of the right to a jury trial.” The Court concluded that “Johnson did not make a knowing and intelligent waiver of his right to a jury trial during the second phase of the felony DUI proceeding” and held “the trial judge erred when he conducted a bench trial during the second phase.”

The Court held the error was harmless and noted the documentation proved that Johnson’s “driving record was sufficient to establish this element of the felony DUI offense.” Johnson affirmatively stated his driving record was accurate and did not present any facts to the contrary. The Court held “the error in the instant case is not reversible but is, instead, harmless” and

approved the result of the decision “but disapprove the reasoning to the extent it is inconsistent with this opinion.” The Court further approved the decision in Upton and Tucker.

[*Johnson v. State*, 09/18/08]



Opinion: sc07-368Johnson.pdf

1st District Court of Appeals

Dog sniff at front door of apartment did not constitute a Fourth Amendment search violation.

Stabler, arrested and charged with trafficking cocaine, filed a motion to suppress the cocaine, “arguing that the search warrant was issued without probable cause.” After the suppression hearing, the trial court denied the motion holding that “the dog sniff did not violate the Fourth Amendment and that, without considering the dog sniff, the other information presented in the probable cause affidavit would not support the issuance of a search warrant.” Stabler pled no contest and appealed the denial of his suppression motion.

The record revealed that officers, based on information they received that Stabler and his girlfriend were trafficking cocaine and liquid codeine, had Stabler’s residence and his girlfriend’s apartment under surveillance. Stabler, during surveillance,

was observed leaving his residence in a vehicle being driven by another person. The officers conducted a traffic stop and the search of the vehicle “revealed a baby bottle of what appeared to be liquid codeine.” Stabler consented to a search of his residence and no evidence of drug trafficking was found. While this was happening, the officers who had the girlfriend’s apartment under surveillance interviewed the manager and other residents at the apartment complex. A police drug dog was brought to the apartment complex where the front door of the complex “was open to public access and a common area.” The dog was brought through the common area and to the front door of the girlfriend’s apartment and “alerted to drugs.” The dog was also taken “to the front door of another apartment in the complex and did not alert to drugs.” The officers prepared a probable cause affidavit, received a search warrant for the apartment, and found cocaine during the search. Stabler contended the trial court erred denying his suppression motion “because the dog sniff at the front door of the apartment constituted an illegal search under the Fourth Amendment and, thus, could not be used as evidence of probable cause for the search warrant.” Stabler relied on Rabb v. State, 920 So. 2d 1175 (Fla. 4th DCA 2006).

After reviewing several Fourth Amendment and police drug dog search decisions, the 1st DCA concluded that Stabler’s reliance on Rabb was misplaced, where that court “held that a dog sniff at the front door of a house violated the Fourth Amendment.” The 1st DCA found persuasive “the Fourth Amendment analysis conducted by the Seventh circuit in United States v. Brock, 417 F.3d 692 (7th Cir. 2005)” and held that Stabler did not have a legitimate interest in possessing the cocaine, nor a legitimate expectation the hidden cocaine in the

apartment would not be revealed. Further “the binary nature of a dog sniff renders it unique in that it is distinguishable from traditional search methods,” therefore, “the dog sniff at the front door of the apartment did not constitute a Fourth Amendment search because it did not violate a legitimate privacy interest. Paramount to this conclusion is the fact that the dog was located on a common walkway within the apartment complex when the sniff occurred.”

The 1st DCA held the trial court did not err when denying the suppression motion. The dog sniff was properly considered by the trial court to determine that probable cause existed to support the search warrant and certified conflict with the Rabb decision.

[[Stabler v. State, 09/26/08](#)]



Opinion: 1D06-4555Stabler.pdf

Critical factor in evaluating a recantation claim is whether the recantation occurred before or after the arrest.

Appealing the adjudication of delinquency for giving a false name or identification to a law enforcement officer, M.G. (appellant), argued her adjudication should be reversed because “the State provided insufficient evidence of identity” and “she established the affirmative defense of recantation.”

The record revealed that Appellant, during a traffic stop, identified herself to Officer Petroczky as Victoria Herring and provided a birth date of June 12, 1989. Appellant

was arrested after an outstanding warrant for Victoria Herring appeared during a routine check of the name. Appellant, during transport to the county jail, told the officer she gave him false information and provided her true name and birth date. After verifying the information with the Juvenile Assessment Center, Petroczky was told that appellant had a pickup order. Appellant was charged with giving a false name or identification to a law enforcement officer, in violation of section 901.35(1), Florida Statutes (2007). At the adjudication hearing, Officer Petroczky could not positively identify appellant, however, he was 99% sure that she looked like the female he had contact with that night. No other witnesses were presented regarding identity and “defense moved for a judgment of dismissal on the grounds that the identification of Appellant was inadequate, and because even if sufficiently identified, Appellant had recanted her false statements to the police officer.”

The 1st DCA determined that the officer’s “limited recollection of Appellant’s identity does not provide a legal basis to reverse the adjudication.” After reviewing all the evidence, in the light most favorable to the State, the 1st DCA concluded that the officer’s testimony, including the exchange during cross-examination, provided legally sufficient evidence to uphold Appellant’s adjudication.

Regarding Appellant’s recantation claim, the 1st DCA noted that a critical factor in evaluating the recantation defense depends on whether the recantation occurred before or after the arrest. In A.A.R. v. State, 926 So. 2d 463 (Fla. 4th DCA 2006), the 4th DCA found the affirmative recantation defense applied “because no serious harm was done before the recantation.” The offender provided his true identity before the arrest. In L.J. v. State, 971 So. 2d 942

(Fla. 3d DCA 2007), the 3rd DCA held that the recantation defense did not apply “because the juvenile did not recant until after he was in custody and was being transported to the police station.” Like its sister courts, the 1st DCA held that “common law defense of recantation applies to prosecutions for giving a false name to law enforcement officers in violation of section 901.36(1), Florida Statutes (2007). However, in the instant case, the recantation defense does not apply because Appellant recanted after her arrest and during her transportation to the police station. Harm was done because the officer was forced into making what he thought was a necessary arrest.” The 1st DCA affirmed the trial court’s adjudication and sentence of Appellant for providing a false name to a law enforcement officer.

[\[M.G., a child. v. State, 08/27/08\]](#)



Opinion: 1D08-0864MGChild.pdf

2nd District Court of Appeals

Trial court erred; police detained defendant longer than necessary to write the warning.

Maldonado appealed his judgments and sentences for possession of a controlled substance, resisting an officer without violence, and failure of a defendant on bail for a felony charge to appear. Maldonado argued the trial court erred in denying his motion to suppress the cocaine because

the officer “unreasonably prolonged the traffic stop.”

The record revealed that Maldonado was originally stopped at 3:00 a.m., in the morning on I-75 in Sarasota County for malfunctioning brake lights and a tag light that was out. At the suppression hearing, Deputy Hall testified that based on Maldonado’s initial answers to his questions, along with Maldonado appearing nervous, he was unsure whether Maldonado was involved in any criminal activity and called for a K-9 unit to be dispatched to the scene. After questioning the two passengers, running a computer check on Maldonado’s driver’s license, which revealed nothing, the deputy informed Maldonado he would give him a written warning and Maldonado could be on his way. The deputy also informed Maldonado that a K-9 unit was on the way and asked Maldonado if that was OK, to which Maldonado replied “no problem.” The deputy then noticed a bulge in Maldonado’s pocket, requested the object be displayed and Maldonado removed a paper towel from his pocket, which the deputy testified he thought contained “dope.” An altercation ensued, Maldonado ran and Deputy Hall, along with the other deputies that arrived at the scene, apprehended Maldonado and cocaine was found next to the paper towel on the ground next to Maldonado. Defense counsel, at the suppression hearing, argued the deputy “unreasonably prolonged the traffic stop to allow additional time for the K-9 unit to arrive.” The State conceded Maldonado was detained “longer than was necessary to write the warning.” The trial court agreed the deputy was on a “fishing expedition,” but denied the suppression motion “without making any findings of fact.”

The 2nd DCA concluded that on appeal, “the State cannot avoid the effect of its

concession in the trial court of a fact material to the disposition of Mr. Maldonado's motion" and turned its attention to the issue of "whether the deputy had a reasonable suspicion based on articulable facts that criminal activity was occurring to justify the continued detention of Mr. Maldonado." Further, Maldonado's lying and nervous behavior, along with being in a known drug corridor in the early morning hours, did not rise to the level "of reasonable suspicion to justify prolonging the detention of Mr. Maldonado beyond the time necessary to write the warning."

Holding the trial court erred in denying the suppression motion, the 2nd DCA reversed Maldonado's judgment and sentence for possession of cocaine and remanded he be discharged for that offense. Maldonado's judgment and sentence for resisting an officer without violence was also reversed. However, the 2nd DCA affirmed Maldonado's "judgment and sentence for failure of a defendant on bail to appear."

[[Maldonado v. State, 09/26/08](#)]



Opinion: 2D06-5276Maldonado.pdf

Suppression of evidence improper; totality of facts and circumstances provided probable cause for defendant's arrest.

Walker, charge with delivery of cocaine, possession of cocaine, possession of cannabis, obstructing with violence, and obstructing without violence, filed a motion to suppress the evidence. The trial court granted the motion concluding "the officer's bare suspicion of criminal activity is

insufficient to justify an investigatory, or Terry, stop." Terry v. Ohio, 392 U.S. 1 (1968). The State appealed.

Officer Barton, Tampa Police Department, "testified he was working with a confidential informant (CI) doing 'buy-busts.'" The CI and the officer were in a van. The officer observed a man on the street, who after being told by the CI he wanted to buy some cocaine, walked over to Walker. Walker appeared to hand the man something and the man then walked back to the CI, with his hand still closed, and then "gave the CI cocaine from the same hand that he had used with Walker in the apparent hand-over process." Money exchanged hands for the purchase of the cocaine and after the transaction was complete, Officer Barton radioed two other officers who detained and later arrested Walker. The trial court concluded that because Officer Barton didn't see anything pass from one hand to the other during the exchange, he only had "a bare suspicion" of criminal activity and "did not have sufficient justification to stop Walker."

The 2nd DCA noted the trial court's reliance on "drug-related case law concerning scenarios distinct from the one at issue here." In each case cited, the officers, like the instant case, were unable to see what, if anything, changed hands when they observed the hand-to-hand contact between the two individuals. However, unlike the instant case, those "officers or their agents were not themselves involved in the transaction." The 2nd DCA concluded in the instant case, "there was an uninterrupted process that began with hand-to-hand contact between Walker and the other man and ended with the transfer of cocaine from the other man to the CI in Officer Barton's immediate presence." Further, before the police detained Walker, the "drug transaction was complete" and

the drug was visually identified. “Probable cause to arrest exists when the totality of the facts and circumstances within the officer’s knowledge would cause a reasonable person to believe that an offense has been committed and that the defendant is the one who committed it.” Revels v. State, 666 So. 2d 213, 215 (Fla. 2d DCA 1995).

The 2nd DCA concluded that based on “the totality of the facts and circumstances observed by Officer Barton,” the police had probable cause to arrest Walker. Thus, the 2nd DCA reversed and remanded for further proceedings.

[[State v. Walker, 08/20/08](#)]



Opinion: 2D07-462Walker.pdf

Under Florida law, knowing defiance of a lawful police order to stop is a crime.

C.E.L., found guilty and adjudicated delinquent, appealed the circuit court’s denial of his motion for judgment of dismissal on the ground the “evidence was insufficient to support an adjudication for the offense of resisting, obstructing, or opposing a law enforcement officer without violence under section 843.02, Florida Statutes (2007).”

The record revealed that C.E.L., in a high-crime area, immediately took flight when he saw the police and did not stop when commanded to do so. Based on D.T.B. v. State, 892 So. 2d 522 (Fla. 3rd DCA 2004), and J.D.H. v. State, 967 So. 2d 1128 (Fla. 2d DCA 2007), C.E.L. argued “the flight

cannot be both the basis for the detention and the obstruction itself” and he “did not obstruct any duty [the officers] were performing when he fled because the officers had no grounds to detain [C.E.L.] before he fled.”

En Banc, the 2nd DCA specifically considered “whether a person who knowingly fails to heed a police order to stop is guilty of an offense under section 843.02 when the order to stop is justified by Illinois v. Wardlow, 528 U.S. 119 (2000).” The instant case is similar to both D.T.B. and J.D.H., where defendant in a high-crime area upon seeing police fled and did not stop when commanded to do so. The issue of the “defendant’s knowing defiance of the command to stop” was not the focus of the analysis in either case. The focus was on “refuting the State’s suggestion that the defendant’s initial flight was itself a violation of section 843.02.” In D.T.B., the 3rd DCA reasoned that “Wardlow did not criminalize running from the police,” even though his flight may have created a suspicion of criminal activity. In J.D.H., this court, following the reasoning of D.T.B., stated that “an individual is guilty of resisting or obstructing an officer by flight only if he flees while knowing of the officer’s intent to detain him *and* if the officer is justified in detaining the individual *before he flees.*”

Receding from its prior decision in J.D.H., the 2nd DCA determined that “Wardlow does not specifically address the legal ramifications of a suspect’s failure to comply with a police order to stop,” concluding “that is a matter of state law.” Knowing defiance of a lawful order to stop is a crime under Florida law. The 2nd DCA concluded that “once the police obtained justification based on Wardlow to stop C.E.L. and acted pursuant to the justification, C.E.L. was required to comply.”

Further, “the mere act of running from the police was not an offense under section 843.02, once a lawful command to stop had been issued by an officer, knowing defiance of that command was such an offense.” The 2nd DCA affirmed the denial of C.E.L.’s motion for judgment of dismissal and affirmed his adjudication under section 843.02.

The court opined that because it was a high crime area and that the officers were following up on a complaint regarding drugs and trespassing, that the command stop was lawful and that the violation of section 843.02, Florida Statutes, occurred when the defendant failed to obey the police.

[*C.E.L. v. State*, 09/05/08]



Opinion: 2D07-4515CEL.pdf

3rd District Court of Appeals

Trial court erred; defendant was subject to arrest the moment he began to flee.

The State appealed the trial court’s order “suppressing some seventy pounds of marijuana seized by police from a motor vehicle in the possession of defendant, Raul Herrera, on the ground that the seizure was incident to an illegal arrest.” The State argued “the arrest was legal because the defendant knowingly fled police while they were engaged in the performance of a lawful investigatory stop based upon a founded suspicion that Herrera was engaged in trafficking.”

The record revealed that the Miami-Dade County police were working with a confidential informant (CI) and the arrest of Herrera was after the “culmination of a day’s work” by the CI and the police. The CI had identified Raul Duarte as a local drug dealer. A meet between Duarte and the CI was set up to make the drug purchase. Duarte told the CI that the drugs would in a Toyota 4Runner and that he (Duarte) would be following in another vehicle. The Toyota 4Runner was driven by Herrera and before police could stop Herrera, he parked the vehicle and went into Home Depot, only to emerge several hours later. Again, before police could stop Herrera, he got into the vehicle and began driving away. Police activated their emergency lights to signal Herrera to stop. Not stopping, Herrera “tried to outrun the authorities, running over two curbs and crossing a mall entryway before he finally was detained.” Herrera was handcuffed and held until a narcotics detection dog arrived. The dog alerted to a “small quantity of marijuana in the front console and a much larger quantity in two black duffel bags in the backseat” and the police charged Herrera with trafficking in marijuana.

The 3rd DCA noted that based on the hearing transcript, it appeared that the trial court did not consider all the circumstances of the day’s work between the CI and the police, “but instead granted the motion on the ground that Herrera was arrested before the existence of narcotics was confirmed.” The 3rd DCA concluded that while “the police decided to conduct a dog sniff before seizing the drugs, the dog sniff was legally irrelevant to both the arrest of the defendant and the seizure of the drugs. The defendant was subject to arrest at the moment he began to flee.” Further, “upon his lawful arrest, the police had authority to search the vehicle” and reversed the trial

court's order suppressing the evidence. See Thornton v. United States, 541 U.S. 615 (2004); accord State v. Clark, 33 Fla. L. Weekly D580 (Fla. 2d DCA Feb. 22, 2008). In a footnote, the 3rd DCA also stated that "Herrera may also have been subject to arrest under section 316.1935(1), Florida Statutes (2007). Because this ground was not argued below, we do not consider it here." See Tillman v. State, 471 So. 2d 32 (Fla. 1985).

[[State v. Herrera, 09/03/08](#)]



Opinion: 3D07-1561Herrera.pdf

Trial court erred; trial court was required to accept officer's testimony because there was no evidence to dispute it.

Wong, charged with burglary of an unoccupied conveyance and third degree grand theft, filed a suppression motion contending "the BOLO was insufficient to warrant an investigatory stop." The motion was granted and the State appealed.

The record revealed that Officers Cardell and Zieger received a BOLO regarding a car burglary while having lunch approximately one block from the Julia Tuttle Causeway in Miami Beach. The BOLO was issued three minutes after the dispatcher "received a call from a witness reporting the car burglary, and identified a Hispanic male driving a silver or gray BMW." At the suppression hearing Officer Cardell testified "Miami Beach has four exits to the mainland" and based on his fourteen (14) years of experience and the location of the robbery, he "believed the

robbers would exit Miami Beach using the Julia Tuttle Causeway," so they stationed their police vehicle at the entrance of that causeway. The officers stopped a silver BMW, occupied by two Hispanic males, and the driver, Wong, consented to a search of the vehicle. Stolen items from the victim's vehicle were recovered from the search. Relying on Pantin v. State, 872 So. 2d 1000 (Fla. 4th DCA 2004), the trial court's written order concluded the "BOLO's 'bare bones' description was insufficient to establish a basis for the stop." Among its several findings, the trial court found the Venetian Causeway, not the Julia Tuttle Causeway, would have been the most direct route off Miami Beach from the crime scene.

Noting it was not bound by the Pantin decision, the 3rd DCA stated it was bound by its decision in State v. Gelin, 844 So. 2d 659 (Fla. 3d DCA 2003), which was "directly on point" and held that "the BOLO provided law enforcement with 'the reasonable suspicion necessary to follow and ultimately stop the defendants.'" Finding Gelin controlling, the 3rd DCA reversed the trial court's order granting the suppression motion.

The 3rd DCA further held Officer Cardell's testimony "regarding the route the perpetrators of the robbery would take to exit Miami Beach was 'neither impeached, discredited, controverted, contradictory within itself, or physically impossible,'" and that "nothing justifies a factual finding contrary to the officer's testimony on the key issue in this case: the basis of the initial stop of [the defendant's] car." State v. Fernandez, 526 So. 2d 192, 193 (Fla. 3d DCA 1988). The 3rd DCA held that the court "was required to accept this evidence," and erred granting the suppression motion based on its contrary finding regarding the escape route off Miami Beach.



5th District Court of Appeals

Search of duffle bag was harmless error; sufficient evidence existed to conclude the error did not contribute to the conviction.

Evans, convicted of attempted robbery with a firearm, aggravated battery with a firearm causing great bodily harm, and aggravated assault with a firearm, appealed the denial of his suppression motion arguing “the search of his duffle bag was illegal because the police did not sufficiently inquire whether the third party who consented to the search had common control and mutual use of it.”

The record revealed that Evans fired a shotgun wounding the cashier of the Express Food Mart as he was attempting to rob the store. A passing motorist heard the gunshots and followed the man who left the store in a red car to an apartment complex. The motorist notified police and a canine tracked Evans to apartment #5503. Sharon Dorsey, who lived in the same complex (#5515), owned the red car and told the police that Evans had been living with her. Dorsey consenting to a search of her apartment, told the officers that Evans kept his duffle bag in her children’s bedroom closet and “there was no space in the apartment that was exclusively his.” A .22-

caliber handgun (later determined as the gun fired at the scene) was found in the children’s bedroom closet, along with the duffle bag. Dorsey again told the officers the duffle bag belonged to Evans and gave consent to search the bag. The ensuing search revealed a “partially loaded handgun magazine, a wool ski mask, and an ID.” The trial court denied the suppression motion finding that “Dorsey had authority to consent to the search of the duffle bag because it was in her home and under her care, custody, and control.”

The 5th DCA relied on United States v. Salinas-Cano, 959 F.2d 861, 864 (10th Cir. 1992), where that court determined “the government has the burden of proving the effectiveness of a third party’s consent” and explained that the government must “come forward with persuasive evidence of both shared use and joint access or control of a container in order to support third party consent.” The 5th DCA concluded Dorsey put the officers on notice when she told them the duffle bag belonged to Evans, thus, they needed “to make further inquiry sufficient to establish that she had both common control over the property and mutual use of it.”

The 5th DCA held “the officers’ search of Evan’s duffle bag was unreasonable because Dorsey did not have common control or mutual use of it, and, therefore, did not have apparent authority.” However, the 5th DCA held the error was harmless. The evidence at trial, “absent the contents of the duffle bag,” was sufficient for the 5th DCA to “conclude that there is no reasonable probability that the error contributed to the conviction.”

[*Evans v. State*, 09/05/08]



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