

LEGAL BULLETIN

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

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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11th Circuit Court of Appeals

Detective's statement was properly admitted to show what was said, not that it was true.

Jiminez, convicted of "various charges concerning the manufacture and distribution of marijuana plants," appealed his convictions arguing, "the evidence was insufficient, the district court improperly admitted evidence in violation of the Sixth Amendment Confrontation Clause, and the court abused its discretion in admitting irrelevant and prejudicial evidence."

Jiminez, who was originally indicted with four co-defendants, including his brother Jisklif Jiminez (Jisklif), contended "'that close association with a co-conspirator or mere presence' at the scene of the illegal activity, standing alone, is insufficient to support a conspiracy conviction." United States v. Lyons, 53 F.3d 1198, 1201 (11th Cir. 1995) (collecting cases). The 11th Circuit, however, determined that "this is not a mere presence case." The record established that Jiminez was living in the Lake Lowery Road house, owned by his brother Jisklif, for several months. This home was "a sophisticated marijuana grow house operated by his brother; anyone in or

near the house could smell the odor of marijuana; cut marijuana and the implements of a manufacturing and distribution operation such as harvesting tools, . . . were located in the living room and kitchen of the house." The 11th Circuit found "the presence of the large quantities of marijuana plants and packaged marijuana ready for distribution . . . along with the other evidence is more than sufficient to support Jiminez's convictions for possessing with intent to manufacture at least 100 marijuana plants and possessing with the intent to distribute at least 50 kilograms of marijuana."

Jiminez also argued, "the trial court improperly allowed Detective Wharton to testify about Jisklif's statement to Wharton that the defendant Jiminez was a participant in the marijuana grow operation, in violation of the Sixth Amendment Confrontation Clause."

Detective Wharton testified that at the time of the search, Jiminez, when asked on several occasions, denied having any knowledge of marijuana being in the house. Jisklif, when questioned by the detective, said, "Jiminez did, in fact, assist him with the marijuana grow operation." The detective again questioned Jiminez and he changed his story and admitted that he helped his brother "with tending and cultivating the marijuana." At trial, Jiminez denied "confessing to participating in the marijuana grow operation." The 11th Circuit noted, "at trial, Jiminez did not object to the

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testimony based on the Confrontation Clause, instead relying only on hearsay grounds; nor did Jiminez ask the district court to give a limiting instruction of any kind.” Therefore, the 11th Circuit’s review on the Sixth Amendment claim is only for error. The 11th Circuit held that the detective’s testimony about what Jisklif told him “was not admitted in violation of the Confrontation Clause. It was not hearsay; it was not admitted to prove the truth of the matter asserted. See Fed. R. Evid. 801(c).” The detective’s statement was only admitted “to show what was said, not that it was true.”

The 11th Circuit also found that the evidence regarding the Champagne Road house was relevant to the conspiracy and that the “sophisticated marijuana grow operations in both houses were strikingly similar.” The 11th Circuit concluded that the evidence was “sufficient to establish that the Champagne Road house was involved with the grow operations at the Lake Lowery Road house, and thus permit the admissibility of the evidence.” The 11th Circuit affirmed the convictions.

[United States v. Jiminez, 04/07/09]



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1st District Court of Appeals

Criminal sentence is separate and distinct from mandatory administrative revocation.

Trial court order which corrected a sentence for driving under influence to state that defendant's out-of-state DUI conviction is not substantially similar should not be considered as prior conviction for Department of Highway Safety and Motor Vehicles license suspension purposes. This order does not bind Department to a determination that the out-of-state infraction is not sufficiently similar for purpose of administrative license revocation.

The criminal sentence is separate and distinct from mandatory administrative revocation, and administrative revocation cannot be negotiated away as part of criminal sentence in plea agreement.

[DHSMV v Crane, 04/03/09]



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2nd District Court of Appeals

Officer with Florida Fish and Wildlife Conservation Commission did not have authority to stop defendant in wildlife management area for a resource inspection in the absence of a reasonable suspicion that defendant was engaged in criminal

activity or violating traffic laws.

An officer with the Florida Fish and Wildlife Conservation Commission testified that he was on resource patrol around dusk in the Richloam Wildlife Management area. He observed Amison's pickup truck near a river, backing away. The officer initiated his blue lights to stop the truck in order to conduct "a resource inspection."

As the officer approached Amison's vehicle on foot, he smelled marijuana coming from the vehicle. Amison and a passenger were taken out of the vehicle, handcuffed, and searched. They admitted to having smoked "a joint" about an hour before. The officer searched the vehicle and located a bag of marijuana in the toolbox in the bed of Amison's truck.

Even though the officer did not observe any of the occupants engaging in criminal conduct or violating traffic laws, the officer believed that he had the authority to detain anyone for a regulatory inspection in the wildlife management area.

The court opined that the administrative rule could not enlarge the wildlife's officer's statutory authority. The officer must still have reasonable suspicion that the person is violating any law or wildlife regulation to lawfully stop a citizen.

[Amison v State, 04/01/09]



Forfeiture of vehicle was proportional to the gravity of the offense.

Gainous was arrested and convicted of DUI for the third time. As a result, his car worth \$17,000 was seized pursuant to the Florida Contraband Forfeiture Act. Gainous argued that the forfeiture of the automobile violated the Excessive Fines Clause of the Eighth Amendment. The trial court held that there was a violation of the Excessive Fines Clause and granted summary judgment to Gainous.

The Second District reversed. The court identified factors to test whether the forfeiture was proportional to the gravity of the offense. The court looked at 1) whether the defendant falls into the class of persons whom the criminal statute was principally directed, 2) other penalties and 3) the harm caused by the defendant. The court said, "Applying these factors, we conclude that the forfeiture of Mr. Gainous's automobile was not grossly disproportionate to his repeated DUI and related offenses."



3rd District Court of Appeals

Officer did not have probable cause to stop defendant, reach into his pocket and seize the contents.

Mathis appealed the denial of his motion to suppress cocaine found on his person pursuant to an illegal search.

At the suppression hearing, the officer testified he received a tip, from a known confidential informant (CI), regarding “a man standing on a specific street corner selling narcotics.” The tipster provided the officer with a description of the man, the clothing he was wearing, and told the officer the narcotics were inside the man’s left front pocket. The officer further described the tip, on cross-examination, as “a call of an alleged hand-to-hand transaction.” The officer went to the location, stopped the man (Mathis), reached into his left front pocket, “and retrieved a sandwich bag with sixteen suspected rocks of crack cocaine.” The trial court, based on State v. Butler, 655 So. 2d 1123 (Fla. 1995), determined the officer had probable cause to stop Mathis and a conduct a search.

The 3rd DCA determined that while the instant case is similar to Butler, in that the informant was reliable and credible, “[t]he critical difference is that the informant here did not describe the type of drugs sold or the method of delivery.” The 3rd DCA noted the instant case was “more analogous to Chaney v. State, 956 So. 2d 535 (Fla. 4th DCA 2007), where the court held that the evidence should have been suppressed.” The Chaney court determined that “[o]bservations by an untrained layperson of multiple hand-to-hand transactions, standing alone, do not necessarily provide sufficient information for detention or arrest by a police officer.” Id. At 538. The record in the instant case, like Chaney, is “devoid of any testimony that the location described by the informant had any prior history of drug transactions or arrests or that the police officer had any prior knowledge of the defendant’s involvement in drug dealing.” The 3rd DCA further noted that the instant

case was “even weaker than Chaney in that the informant only described one hand-to-hand transaction.”

The 3rd DCA concluded that the CI’s “report of observing a hand-to-hand transaction, standing alone, was insufficient under the totality of the circumstances to provide the officer with probable cause to search Mathis.” Thus, the State failed to prove the officer had probable cause to stop Mathis, reach into his pocket and seize its contents. The 3rd DCA reversed the order denying suppression of the evidence and remanded the case.

[*Mathis v. State*, 04/08/09]



4th District Court of Appeals

Trial court properly instructed the jury on resisting an officer with violence.

Carter, adjudicated guilty of fleeing and eluding (Count I), resisting an officer with violence (Count II), and battery on a law enforcement officer (Count IV), appealed arguing the trial court erred in allowing a jury instruction “that relieved the state from proving an element of the crime charged.”

The record reflects that while reviewing the proposed jury instructions, defense counsel objected to an instruction for resisting a law enforcement officer with violence, which stated, “an arrest constitutes lawful

execution of a legal duty.” Defense argued the “instruction relieved the state from having to prove one of the elements of the crime charged.” The trial court overruled the objection, and on appeal, Carter argues this constituted reversible error.

Relying on Tillman v. State, 934 So. 2d 1263, 1270 (Fla. 2006), the 4th DCA noted that “the *Tillman* Court also reiterated that Florida Courts consistently hold that in arrest scenarios, section 776.051 applies to relieve the state of the burden of proving that the arrest was lawful.” In the instant case, Carter, after a high-speed chase and running a red light, exited his vehicle and ran through a residential area. When he tried to climb over a chain-link fence, the officer in pursuit, grabbed him and Carter elbowed the officer while the officer was trying to pull Carter off the fence. As a result, Carter was charged with resisting an officer with violence. Thus, the 4th DCA held that “[u]nder *Tillman*, the officers in the present case were effecting an actual arrest. Accordingly, the state was not required to prove the lawful execution of a legal duty by the officer, and the trial court did not err in instructing the jury otherwise.” The 4th DCA affirmed the trial court’s decision.

[Carter v. State, 04/01/09]



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No error in denying motion to sever charge of possession of cocaine from charge of felony driving under influence,

both of which arose out of single criminal episode.

The court opined that there is no merit to defendant's argument that state improperly bolstered its proof of DUI charge with evidence of cocaine discovered in defendant's pocket at time of arrest when state was unable to prove that defendant had actually consumed the cocaine.

Defendant's possession of cocaine was circumstantial evidence that he was under influence of cocaine as alleged in information, and jury was instructed that to convict defendant of DUI charge, the state was required to prove that defendant, while driving, was under influence of alcoholic beverages or a controlled substance to extent normal faculties were impaired, and that cocaine was a controlled substance under Florida law. (Note: Had the Information not specifically charged “alcohol or a controlled substance” the Court most likely would have severed the charges.)

Further, there was significant evidence of defendant's impairment, including fact that he was slumped over steering wheel of vehicle in middle of intersection at 4:00 a.m. Passing motorists had difficulty waking him, deputy observed flushed face, bloodshot eyes, and odor of alcohol, and defendant was confused as to where he was.

[Gonzales v. State, 04/22/09]



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Revocation of a driver's license does not constitute

punishment and thus is a collateral, not direct, consequence of a plea

Nordelus claimed that he was not advised prior to entering his plea that his driver's license would be revoked as a result of his conviction. The 4th DCA cited the Supreme Court holding in *Bolware v. State*, 995 So. 2d 268 (Fla. 2008), that revocation of a driver's license does not constitute punishment and thus is a collateral, not direct, consequence of a plea. The failure to advise Nordelus did not rise to the level of ineffective assistance of counsel or an uninformed plea.

[*Nordelus v. State*, 4/22/09]



NORDELUS v
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5th District Court of Appeals

Dual convictions of robbery with a weapon and carjacking with a weapon violate double jeopardy.

Dyson attacked the victim with a mallet and then stole the victim's motorcycle. Dyson did not steal any other item. The two offenses require the identical elements of proof, and therefore, the dual convictions cannot stand.

[*Dyson v. State*, 03/27/09]



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Attorney General Opinions

A municipal police department may enforce state traffic laws, within a gated community when the private community has entered into a traffic control agreement with the municipality pursuant to section 316.006(2), Florida Statutes.

The Attorney General opined that the traffic laws contained in Chapter 316, Florida Statutes, may be enforced by a municipal police department on private roads located within the municipality when there is a written agreement between the owner of the private road and the municipality as prescribed in section 316.006(2)(b), Florida Statutes.

The City of Hollywood attorney asked whether the city had the authority to enforce speed limits established under section 316.183 and 316.189, Florida Statutes. The Attorney General stated that there is nothing in Chapter 316, Florida Statutes, which appears to limit or exclude the application of sections 316.183 or 316.189, Florida Statutes, to a written agreement between the municipality and the owner of the private road.



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