

LEGAL BULLETIN

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1st District Court of Appeals

Stand Your Ground; defendant met burden proving entitlement to immunity by a preponderance of the evidence.

Hair petitioned the court for a writ of prohibition, “contending that he is immune from prosecution” on charges of first-degree murder under section 776.032(1), Florida Statutes (2007). In an unpublished order, the 1st DCA previously granted the petition and ordered Hair’s release. The 1st DCA, in its published order, explained its reasons.

During the evidentiary hearing on Hair’s motion to dismiss, it was revealed that following an altercation Charles Harper was shot and killed by Hair. Hair contended that “he was attempting to strike Harper with the handgun when it discharged.” Hair had a permit to carry a concealed weapon and had the handgun on the seat in his vehicle. During the altercation, Harper entered the parked vehicle that Hair was in; a friend of Harper’s pulled Harper out of the vehicle, however, the friend lost his grasp of Harper and Harper reentered the vehicle. The friend, again, tried to pull Harper out of the

vehicle “but Harper was shot and killed by Hair.” The circuit court denied the motion to dismiss reasoning “that the statutory immunity was inapposite where the defendant was attempting to use the weapon as a club and it accidentally discharged.” The circuit court also “found that there were disputed issues of fact which precluded granting of pretrial immunity.”

After analyzing Peterson v. State, 983 So. 2d 27 (Fla. 1st DCA 2008), where “this court addressed Florida’s ‘Stand Your Ground’ law, enacted by the Florida Legislature in 2005 and codified at sections 776.013 through 776.032, Florida Statutes,” the 1st DCA concluded that the material facts, of the instant case, are not in dispute, and the circuit court’s finding was incorrect. “The physical evidence was clear that Harper was still inside the vehicle when he was shot,” and “[t]he statute makes no exception from the immunity when the victim is in retreat at the time the defensive force is employed.” Further, the trial court’s holding “was also directly contrary to our express holding in Peterson that a motion to dismiss based on ‘Stand Your Ground’ immunity cannot be denied because of the existence of disputed issues of material fact.” The 1st DCA also held the basis for the circuit court’s denial, “that the handgun accidentally fired while being used as a club, is erroneous as a matter of law.” See Williams v. State, 588 So. 2d 44 (Fla. 1st DCA 1991); McInnis v. State, 642 So. 2d 831 (Fla. 2d DCA 1994); Fowler v. State,

AUGUST 2009

LEGAL BULLETIN

492 So. 2d 1344 (Fla. 1st DCA 1986); Diaz v. State, 387 So. 2d 978 (Fla. 3d DCA 1980).

The 1st DCA determined that Hair was aware that Harper “had unlawfully and forcibly entered the vehicle when he was shot.” Therefore, Hair was “authorized by section 776.013(1), Florida Statutes, to use defensive force intended or likely to cause death or great bodily harm and was immune from prosecution for that action under 776.032(1).” The 1st DCA issued the Writ of Prohibition holding that the motion to dismiss should have been granted.

[*Hair v. State*, 08/19/09]



1D09-2501Hair.pdf

Cocaine found in back seat of vehicle was in exclusive control of defendant.

RDD challenged his final order of delinquency on charges of possession of cocaine and paraphernalia asserting, “the State failed to prove constructive possession of the cocaine and drug paraphernalia found in a jointly occupied vehicle.”

The record reveals that RDD and two other individuals were in a vehicle that was stopped by Officer Narayan of the Gainesville Police Department. The two individuals were in the front seats and RDD was sitting in the right rear seat. A small clear plastic bag (later identified as cocaine) was found “in plain view on the left hand side of the rear seat” and was within reach of RDD. Officer Narayan testified that “all three occupants were given their *Miranda* warnings” and none of them claimed

ownership of the bag. The officer testified he could not see what was going on inside the vehicle; there was a dark tint on the windows and it was getting dark outside. Further, he could not tell if one of the front passengers “tossed the bag into the back seat before the door was opened.”

The 1st DCA referred to its decision in Williams v. State, 742 So. 2d 509 (Fla. 1st DCA 1999), where it held that “the evidence that drugs were in an area of a car that was in the exclusive possession of a defendant was sufficient to satisfy the control element of constructive possession.” The 1st DCA affirmed RDD’s final order of delinquency finding “there is direct evidence of control; the cocaine was in the back seat, an area that was in the exclusive control of appellant.” The 1st DCA noted that “[t]he issue of how the cocaine ended up in an area exclusively in defendant’s control . . . was for the trier of fact to decide.”

[*RDD v. State*, 07/29/09]



1D09-0152RDDchild.pdf

Conviction for possession of firearm by convicted felon discharged; identity of defendant as perpetrator of prior felonies not established.

Ling challenged his conviction for possession of a firearm by a convicted felon arguing “the trial court erred in denying his motion for judgment of acquittal because the state failed to establish the identity of Appellant as the perpetrator of the prior felonies.”

“Mere identity of the name appearing on the prior judgment and the name of the defendant on trial does not satisfy the state’s obligation to present affirmative evidence that they are the same person.” Killingsworth v. State, 584 So. 2d 647, 648 (Fla. 1st DCA 1991). The State argued Ling was identified by his date of birth and name, however, the certified judgments and sentences did not contain Ling’s date of birth. Further, a witness testified that Ling’s “alleged arrest fingerprints” matched “the fingerprints on the judicially noticed judgments and sentences,” however, “[t]he trial witness did not generate the fingerprints on the arrest record and did not see the person identified by the arrest record actually being printed. Therefore, the state needed to produce additional evidence that Appellant was the perpetrator of the prior felonies but failed to do so.”

The 1st DCA held “a reasonable trier of fact could not find the existence of the elements of the crime beyond a reasonable doubt.” See Pagan v. State, 830 So. 2d 792 (Fla. 2002); Banks v. State, 732 So. 2d 1065 (Fla. 1999). The 1st DCA affirmed Ling’s other convictions and sentences but reversed and remanded for Ling to be discharged “from the possession of a firearm by a convicted felon offense.”

[*Ling v. State*, 08/06/09]



“Mere proximity to contraband, without more, does not establish probable cause to arrest.”

Hatcher, convicted for possession of cocaine, appealed arguing the trial court erred in denying his motion to suppress “the physical evidence seized as well as statements made by him following his warrantless arrest.” Hatcher contended the evidence was insufficient to establish he had constructive possession of the baggie containing cocaine.

In its order denying the suppression motion, the trial court made the following findings of fact: while working “in conjunction with special drug interdiction operations” Escambia County Sheriff’s Deputies observed “[o]utside of the fence in front of the house at 20 Loretta Street, a table is located between the fence and the street” with two individuals sitting at the table, and a “small corner bag” sitting on the table. Hatcher was sitting closest to the bag; the bag tested positive following a cobalt test and Hatcher was “thereafter searched, and a quantity of a controlled substance was found on the Defendant’s person.” Hatcher was arrested and confessed to owning some of the seized material and denied possession of the other seized material. The trial court found there was “credible substantial evidence” to establish Hatcher was in control of the “small corner bag” on the table.”

The 1st DCA noted that Officer Milstead testified that Hatcher was sitting at the table “directly in front of” the baggie and never testified that Hatcher was “closest to the baggie.” The 1st DCA concluded that even if Hatcher had been closest to the baggie, “mere proximity to contraband, without more, does not establish probable cause to arrest.” Edwards v. State, 532 So. 2d 1311, 1314 (Fla. 1st DCA 1988).

The 1st DCA noted that the State “correctly and professionally” acknowledged on appeal the “evidence adduced at the

suppression hearing did not establish constructive possession so as to justify the warrantless arrest of appellant.” As such, the 1st DCA reversed the order denying suppression and remanded to the lower court for discharge of Hatcher.

[*Hatcher v. State*, 08/12/09]



1D08-5750Hatcher.pdf

4th District Court of Appeals

Pat-down illegal; agents lacked any reasonable suspicion of criminal activity and had no reasonable basis to fear for their safety.

Navamuel, charged by information with possession of a firearm or electric weapon by a convicted felon (Count I), possession of cannabis with intent to deliver/sell (Count II), and possession of drug paraphernalia (Count III), pled no contest on all counts and appealed the denial of his motion to suppress the evidence. Navamuel argued, “law enforcement agents initially searched his home without a warrant or valid consent and then continued the search with a warrant based on the illegally obtained evidence.”

Conflicting stories were presented as to the initial contact between the DEA agents and Navamuel at the suppression hearing. Agents Hahn and Roche were sent to Navamuel’s house with instructions “to try

and get consent to search his home.” According to the agents, one parked his vehicle behind Navamuel’s vehicle in the driveway and the other agent parked his vehicle on the side. The agents testified that Navamuel was standing near his vehicle, they informed him they were doing a pat down for their safety; and they obtained Navamuel’s verbal consent to search his home. Once in the home, the agents “saw a partially smoked marijuana cigarette in an ashtray on the kitchen counter.” Other agents arrived to assist with the search and more marijuana was found in a kitchen drawer. Navamuel revoked his consent to search. He changed his mind and the search continued. After more marijuana and some hydroponic grow equipment was found, Navamuel was placed under arrest. He again withdrew his consent to search. Agents then obtained a search warrant that was issued “upon allegations in the application that a consensual search of the residence led to the recovery of marijuana.” Navamuel testified that when the agents arrived, they blocked his car in the driveway, he was in his vehicle when the agents, “with guns drawn,” ordered him out of the vehicle. He testified that after he got out of his vehicle, Agent Roche “re-holstered his weapon and told him he was going to pat him down.” After numerous evidentiary hearings, the trial court denied the motion ruling “the initial encounter between the officers and appellant in the driveway was a ‘consensual citizen encounter’ and that the initial search of appellant’s home was consensual.”

The 4th DCA referred to its decision in Johnson v. State, 785 So. 2d 1224, 1225 (Fla. 4th DCA 2001), where it found that during a consensual encounter, if an officer “makes observations that support his ‘reasonable belief that the appellant [is] armed and potentially dangerous,’ the officer is entitled to conduct a pat down

pursuant to the Fourth Amendment.” The 4th DCA also referred to its decision in DeLorenzo v. State, 921 So. 2d 873, 876 (Fla. 4th DCA 2006), where it held the “officer’s order directing the defendant to remove his hand from his pocket and step out the car converted the interaction . . . from a consensual encounter to an investigatory stop.” The DeLorenzo court found the investigatory stop illegal because the officer “lacked any reasonable suspicion of criminal activity and had no reasonable basis to fear for his safety.” Thus, “[c]onsent given after police conduct determined to be illegal is presumptively tainted and deemed involuntary, unless the state proves by clear and convincing evidence that there was a clear break in the chain of events sufficient to dissolve the taint.”

The 4th DCA concluded in the instant case, the state “failed to establish that during the encounter the agents had a reasonable belief that the appellant was armed and dangerous to justify patting him down.” Further, the “illegal pat down converted the consensual encounter into an unlawful stop. Because the state failed to show by clear and convincing evidence a break in the chain of events from the time the officers conducted the illegal stop and frisk and obtained appellant’s consent to search, his consent is deemed involuntary.” The 4th DCA held “the motion to suppress should have been granted and all the physical evidence derived from this illegal stop and frisk excluded as ‘fruit of the poisonous tree.’” Wong Sun v. United States, 371 U.S. 471, 488 (1963). “This includes any evidence the agents found in appellant’s house after securing the search warrant, because the warrant was tainted by the prior illegal search of the house.” See Grant v. State, 978 So. 2d 862 (Fla. 2d DCA 2008).

[*Navamuel v. State*, 07/22/09]



4D07-2289Navamuel.op.pdf

Probable cause existed to support issuance of search warrant for defendant’s apartment, “regardless of the K-9 alert.”

Flowers pled no contest to attempted trafficking in cocaine, felony possession of cannabis, and possession of drug paraphernalia and reserved his right to appeal the denial of his suppression motion.

In Flowers’ motion to suppress the cocaine, he contended “the police did not have reasonable suspicion or probable cause to seize him because they did not record or corroborate the first-time informant’s alleged conversation setting up the transaction.” Further, the information was stale because his last interaction with Flowers was three months prior to the drug buy. In his motion to suppress the cannabis and paraphernalia, Flowers contended “the affidavit which the police submitted to obtain the search warrant did not inform the circuit court that they based their arrest and vehicle search upon a first-time informant’s unrecorded and uncorroborated conversation with Flowers.” He further alleged “the affidavit contained a false statement that the phone call during which the informant arranged the buy was controlled” and that the “affidavit did not establish a nexus between the cocaine found in his vehicle and a search of his apartment because the police never observed the vehicle at the apartment.”

The 4th DCA concluded the motion to suppress the cocaine was properly denied based on the “totality of the circumstances” test” which “determines whether information from a confidential informant gives rise to probable cause and, under this test, the informant’s reliability and basis of knowledge are merely ‘relevant considerations.’” Roman v. State, 786 So. 2d 1220, 1221-22 (Fla. 4th DCA 2001)(citing State v. Butler, 655 So. 2d 1123, 1128 (Fla. 1995) and Illinois v. Gates, 462 U.S. 213, 238-39 (1983)). The 4th DCA stated the informant’s reliability was confirmed by the police: they matched the address and vehicles, identified by the informant, with Flowers’ driver’s license and vehicle registration; and observed Flowers arrival at the designated drug buy site set up by the informant. These circumstances, along with the informant’s statements of repeated drug purchases at Flowers’ apartment, “gave the police probable cause to seize Flowers when he arrived at the parking lot.” See Roman, 786 So. 2d at 1222 (quoting Butler, 655 So. 2d at 1126) (“[A] basis of knowledge could be established from the wealth of detail provided in the tip.”); State v. Clark, 986 So. 2d 625, 630 (Fla. 2d DCA 2008) (police had probable cause to arrest defendant as soon as he stepped out of his vehicle because they had verified all the details “except for the final one of the commission of the crime.”) (citation omitted). When the K-9 alerted to the vehicle, “the police had further cause to search the vehicle, whereupon the police found eighty-seven grams of cocaine.”

The 4th DCA further concluded “the motion to suppress the marijuana and paraphernalia, based on the alleged insufficiency of the affidavit supporting the search warrant, was properly denied.” The 4th DCA concluded “the circuit court had a substantial basis for concluding that

probable cause existed” because the affidavit submitted for the search warrant of Flowers’ apartment “documented the informant’s contacts with Flowers and the results of the vehicle search.” “Even without the false statement that the phone call setting up the buy was controlled, the affidavit’s other allegations provided the circuit court with a fair probability that the police would find contraband in Flowers’ apartment.” “Given the informant’s corroborated knowledge and the results of the vehicle search as contained in the affidavit, probable cause existed to support the circuit court’s issuance of a search warrant for Flowers’ apartment, regardless of the K-9 alert.” The 4th DCA affirmed the denial of the suppression motion.

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



4D07-4142Flowers.op.pdf

Probable cause affidavit not deficient; issuing judge had substantial basis for finding there was probable cause to believe drugs would be found in defendant’s home.

Boyd, adjudicated guilty of possession of a firearm by a convicted felon and possession of ammunition by a convicted felon, appealed the denial of his motion to suppress the evidence. In one issue, Boyd contended that the probable cause affidavit submitted in support of the application for a search warrant “failed to establish probable cause to believe drug trafficking was occurring in Boyd’s residence because the affidavit never established the informants’

credibility and relied on a single trash pull.” Boyd relied on Getreu v. State, 578 So. 2d 412 (Fla. 2d DCA 1991), in support of his assertion that the probable cause affidavit was deficient.

The 4th DCA determined that the facts of this case were more like Green v. State, 946 So. 2d 558 (Fla. 1st DCA 2006). Based on the totality of the facts, the 4th DCA held the issuing judge had a substantial basis for finding that probable cause existed “to believe drugs would be located inside Boyd’s residence.” Therefore, the trial court properly denied the suppression motion. The probable cause affidavit, submitted by Officer Tianga and relied upon by the issuing judge, listed several facts in support of his application for a search warrant. The 4th DCA noted that:

. . . two of the three confidential informants had proven trustworthy in previous narcotics investigations. Four different informants provided their information through three different means: the first made his statement to Detective Miller following his arrest, the second and third provided their information directly to Tianga, and the fourth explained Boyd’s operation to Detective Spear. Each informant’s credibility is bolstered by the corroborating accounts of the other three. Tianga verified that the address provided by the second and third informants was, in fact, Boyd’s place of residence. The second informant stated he had personally observed a kilogram amount of cocaine inside Boyd’s residence within the previous week, and the fourth informant stated he had

purchased cocaine from Boyd in the past. Finally, the second and third informants stated Boyd had been arrested for narcotics violations in the past. Tianga verified that Boyd had been arrested several times for narcotics violations.

In another issue, the 4th DCA determined Boyd’s conversation with his wife in the interrogation room at the jail was not a privileged, marital communication because “it was tape recorded by a third party and listened to by the police while it was taking place.” The officer testified as to what was said between the two. The 4th DCA held the trial court did not err in allowing Boyd’s wife to testify about her conversation with Boyd in the interrogation room because her testimony was cumulative.

As to Boyd’s contention that the dual convictions for possession of a firearm by a convicted felon and possession of ammunition by a convicted felon violated double jeopardy, the 4th DCA reversed and remanded with instructions for the trial court to “vacate one of the convictions.”

[*Boyd v. State*, 08/19/09]



4D07-2743Boyd.op.pdf

Testimony from officer regarding his arrest rate for DUI’s he investigated was improper and prejudicial.

McKeown appealed her felony DUI conviction contending “the trial court erred in admitting the arresting officer’s testimony that he arrests only half of the DUI suspects

that he investigates.” McKeown further alleges the error was compounded by the state “repeating the improper testimony during closing argument.”

At the hearing, on direct examination, the prosecutor asked the officer “how many DUI investigations he had done since becoming a police officer.” The officer responded “he had conducted forty to fifty DUI investigations.” The prosecutor then asked the officer “if he made an arrest every time after those investigations.” The trial court overruled defense counsel’s objection over relevancy grounds. The officer testified “he did not make an arrest every time he investigated a DUI; he made arrests only about half, or fifty percent, of the time.” The prosecutor, during closing arguments, “reminded the jury of Officer Crooks’ testimony ‘that he only arrests fifty percent of the people that he even investigates,’” and added that “[i]t’s not something automatic that occurs.”

The 4th DCA determined that Officer Crooks’ testimony “that he only arrests fifty percent of the people that he even investigates,” was “irrelevant because the sole issue in this case was whether the defendant was guilty of DUI.” The testimony improperly bolstered the credibility of the state’s case by implying the defendant was guilty, otherwise, she would not have been arrested or charged. See Cartwright v. State, 885 So. 2d 1010, 1015 (Fla. 4th DCA 2004) (holding that it is improper for a prosecutor to suggest that the state charges only those who are guilty); Ruiz v. State, 743 So. 2d 1, 5 (Fla.1999) (finding that the state engaged in improper argument by implying that “[i]f the defendant wasn’t guilty, he wouldn’t be here”); Johns v. State, 832 So. 2d 959, 962 (Fla. 2d DCA 2002) (finding improper the state’s remarks that it had charged the right

defendant and only brought charges it could prove).

The 4th DCA reversed and remanded for a new trial holding “the testimony was improper and prejudicial.”

[*McKeown v. State*, 08/19/09]



4D08-2160McKeown.op.pdf

5th District Court of Appeals

Conduct of notarizing affidavits signed by CI, using fictitious name, not so outrageous it violates core sense of fairness and justice.

Gil, convicted and sentenced for trafficking in cocaine, conspiracy to traffic in cocaine, unlawful use of a two-way communication device, and resisting a law enforcement officer without violence, appealed the denial of his motion to dismiss the information. Gil pled *nolo contendere* to the charges, reserving his right to appeal the denial of his motion to dismiss. On appeal Gil contended that Officer William Powell’s “act of notarizing two affidavits that had been signed by a confidential informant using a fictitious name, amounted to a violation of his due process rights, justifying dismissal of the prosecution.”

At the hearing on the motion to dismiss the information, Officer Powell testified Stephen Bator entered into “a substantial assistance agreement” with the Orlando Police

Department's Metropolitan Bureau of Investigation ["MBI"] and had chosen the pseudonym of Shaun Alexander. The information is maintained in the MBI Source Profile Sheet. A pseudo signature is used to protect the identity of the confidential informant (CI) "until ordered to bring his real identity . . ." When denying the motion to dismiss the information, the trial court noted that while defense counsel argued "the case should be dismissed because of the outrageous conduct of law enforcement . . . it does not fall into the category of conduct which is so outrageous that it violates the core sense of fairness and justice." See State v. Williams, 623 So. 2d 462 (Fla. 1993).

The 5th DCA found "no error in the trial court's denial of Gil's motion to dismiss" and stated "Officer Powell's conduct . . . does not rise to that same level and does not cause offense to a court's sense of justice or fairness." See Williams, 623 So. 2d at 467.

During the hearing on Gil's motion to dismiss, Officer Powell testified that (1) use of the pseudonym was for purposes of protection, (2) he erred but did not intend to commit a fraud when he notarized the two affidavits, (3) he disclosed the actual name of the confidential informant during his deposition, and (4) he learned from his mistake and now includes the term "alias" on an affidavit when a confidential informant signs using a pseudonym.

[*Gil v. State*, 08/07/09]



5D08-3192Gil.op.pdf

Dying declarations are an exception to the Sixth Amendment Confrontation Clause.

Cobb, convicted of first degree murder with a firearm and theft with a firearm in connection with his participation in the armed robbery of Rajon Davis, appealed raising several issues. In two issues, Cobb argued (1) "the trial court impermissibly allowed evidence that permitted the jury to infer the results of a polygraph examination taken by Alexis Nurell," and (2) "his Sixth Amendment right of confrontation was violated when the trial court allowed the responding officers to testify about Davis' dying declarations."

Regarding the first assertion, the 5th DCA held that "assuming the trial court erred, Cobb invited the error." See Jenkins v. State, 380 So. 2d 1042, 1044 (Fla. 4th DCA 1980); Mora v. State, 964 So. 2d 881, 883 (Fla. 3d DCA 2007).

After a historical analysis addressing the second issue presented, the 5th DCA held that "dying declarations are an exception to the Sixth Amendment's Confrontation Clause." That "allowing the officers to testify about Davis' dying declarations did not violate Cobb's right of confrontation. Furthermore, Cobb's right of confrontation was not violated because he had the opportunity to cross-examine the officers about the dying declarations." The 5th DCA referred to State v. Weir, 569 So. 2d 897 (Fla. 4th DCA 1990), quashed on other

grounds by Weir v. State, 591 So. 2d 593 (Fla. 1991) to bolster its conclusion.

[*Cobb v. State*, 08/07/09]



5D08-1050Cobb.op.pdf

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