

LEGAL BULLETIN

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

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

VOLUME MMIX, ISSUE 3

11th Circuit Court of Appeals

Because coaches' conduct did not rise to the level of a constitutional violation, they were entitled to qualified immunity.

A high school football player collapsed and died during an outdoor practice. His parents sued his coaches pursuant to 42 USC — §1983. They claimed that their son's due process rights were violated when the coaches failed to provide water and failed to seek medical help in a timely fashion. The Defendant coaches moved to dismiss based on qualified immunity. The district court determined that the coaches were not entitled to qualified immunity.

The Eleventh Circuit reversed saying, "Conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience-shocking in a constitutional sense." Noting that the coaches did not engage in corporal punishment or physically contact the student, the court found that the allegations in the complaint in this case did not support a finding that the coaches acted willfully or maliciously with intent to injure. The court

said, "Rather the facts allege that the coaches were deliberately indifferent to the safety risks posed by their conduct. In this school setting case, the complaint's allegations of deliberate indifference, without more, do not rise to the conscience-shocking level required for a constitutional violation."

[Davis v. Carter, 1/23/09]



11circvDavis.pdf

“When exhibits contradict the general and conclusory allegations of a complaint, the exhibits govern.”

Plaintiff sued police officers pursuant to 42 USC §1983, arguing that police had used excessive force when an officer used a canine to apprehend him. The Plaintiff attached police reports to his complaint. Defendants moved for summary judgment based on qualified immunity, but the motion was denied by the district court.

After noting the police reports used as exhibits by the Plaintiff contradicted the allegations of the complaint, the Eleventh Circuit reversed. The court said, "It is the law in this Circuit that when the exhibits contradict the general and conclusory

allegations of the pleadings, the exhibits govern...Because the officers' police reports attached to the complaint refute Crenshaw's conclusory and speculative allegation about what the officers saw, we do not credit Crenshaw's allegation."

[Crenshaw v. Lister, 2/6/09]



11thcvCrenshaw.pdf

Florida Supreme Court

Miranda warnings deficient; case reversed and remanded for new capital trial.

Rigterink, convicted and sentenced to death for the murder of Jeremy Jarvis and Allison Sousa, appealed his convictions and sentences arguing the trial court erred in denying his motion to suppress his statements made during the videotaped portion of his October 16, 2003 confession.

The record revealed that pre-trial, Rigterink filed his suppression motion contending "these statements should be suppressed because the written and verbal Miranda warnings . . . were materially defective." Miranda v. Arizona, 384 U.S. 436 (1966). Specifically, "Rigterink challenged the verbal and written right-to-counsel warnings he received because each advised him that he only had 'the right to have an attorney present prior to questioning.'" (Emphasis supplied.) The "initial trial judge and successor trial judge" each denied the suppression motion on the ground that

"Rigterink was not in custody and therefore, was not entitled to any Miranda warnings." The trial court also overruled Rigterink's objection to "the admission and publication of the videotaped confession at trial."

After a review of the complete record and utilizing the four-part test adopted in Ramirez v. State, 739 So. 2d 568 (Fla. 1999), the Court concluded that even though Rigterink went to the police station with his parents for the sole purpose of providing "elimination prints" and talking with the detectives, he was in custody for the purposes of Miranda, based on the "totality of circumstances." Further, "the purpose, place, and manner" of the interrogation "indicate that a reasonable person would not have felt that he or she was free to simply terminate questioning and leave the premises." Rigterink was confronted with evidence "strongly suggesting" his guilt and Rigterink was "never informed he was not under arrest and was free to leave."

The Court also held that pursuant to State v. Powell, 34 Fla. L. Weekly S2 (Fla. Sept. 28, 2008), which controls this issue, Rigterink's "right-to-counsel warning was materially deficient because it did not accurately and clearly convey one of the central components of Miranda: The custodial subject enjoys a right to the presence of counsel during, not merely before, a custodial interrogation." While the Court concluded there was substantial evidence to support the charges that Rigterink committed these crimes, it held that the submission of this videotape, which was "the very last evidentiary item that the jury specifically requested and considered as it conducted its deliberations" was error because "the jury most assuredly, and very seriously, considered and substantially included Rigterink's videotaped interrogation in reaching its verdict."

The Court reversed Rigterink's convictions and sentences and remanded for a new capital trial "during which this videotape is excluded." "However, if, on remand Rigterink were to take the stand and again offer a version of events that differed from that which he described during his videotaped interrogation, the State would remain free to use the videotape, and the statements contained therein, to impeach his testimony."

Note: Justices Wells and Canady dissented based on their disagreement with the holding in State v. Powell.

[Rigterink v. State, 01/30/09]



While Court cautions against the use of photographic montages; Defendant failed to identify "any specific error" in admission of victim impact testimony of photographs.

Wheeler was convicted and sentenced to death for the first-degree murder of Deputy Wayne Koester (premeditated), and attempted first-degree murder and aggravated battery with a firearm of deputies Thomas McKane and William Crotty. On direct appeal, Wheeler raised five issues. In one issue, Wheeler claimed he was "denied due process, fundamental fairness and a reliable jury recommendation" because the victim impact evidence became a "feature of the penalty phase."

The record revealed that pre-trial, Wheeler filed a motion in limine to exclude all victim impact evidence and testimony and the court reserved ruling on the motion before the penalty phase proceedings commenced. The trial court "reviewed each of the four written, proposed victim impact statements, granted defense counsel's requests for certain redactions involving three of the statements, and allowed the redacted versions to be read to the jury" prior to the "admission of the victim impact testimony in the penalty phase." The trial court also allowed the State to present fifty-four pictures of the victim and members of his family on four separate storyboards. The jury was instructed "that the victim impact testimony was not to be used for finding aggravation and was not to be weighed as such in their deliberations."

The Court held Wheeler did not preserve this claim. The record reveals that "[d]uring the entire presentation of victim impact evidence, Wheeler made no specific objections to any portion of the testimony or any particular aspect of the photographic evidence, although Wheeler renewed his general objection to presentation of any victim impact evidence." Further, Wheeler's direct appeal, "still fails to identify any specific error in admission of the victim impact testimony of photographs." As per Art. I, § 16(b), Fla. Const., Section 921.141(7), Florida Statutes (2006), and the Due Process Clause of the Fourteenth Amendment, the Court held that the four impact witnesses and the fifty-four photographs of the victim and his family were properly admitted. The testimony of the four witnesses, reviewed by the trial court, discussed Koester's uniqueness as an individual and "explained how his death had caused a loss to both his family members and to the community." As such, this testimony "has not been shown to

constitute error, fundamental or otherwise, and has not been shown to constitute a due process violation in this case.”

While the Court cautioned against the “presentation of photographic montages” of the victim and his family, the Court held “that neither fundamental error nor a due process violation has been demonstrated in this case by the number of photographs” presented. Wheeler never “identified any particular photograph or group of photographs that was impermissibly prejudicial so as to render the penalty phase fundamentally unfair.” The Court denied relief on this claim.

The Court also held that there was substantial evidence to support Wheeler’s convictions; the capital sentencing statute and jury instructions were constitutional; and the death sentence was proportionate.

[Wheeler v. State, 01/29/09]



Court affirms finding that recanted testimony was unreliable.

Heath, convicted of first-degree murder, armed robbery, conspiracy to commit uttering a forgery, conspiracy to commit forgery, forgery (seven counts), and uttering a forgery (seven counts) was sentenced to death for the first-degree murder of Michael Sheridan. On direct appeal, the Florida Supreme Court affirmed Heath’s convictions and sentences. Heath filed an initial and amended motion for post conviction relief raising twenty claims. Following a hearing, eleven claims were denied and the trial court granted an

evidentiary hearing on nine of the remaining claims. An order was issued, after the evidentiary hearing, denying the remaining nine claims and Heath appealed. Heath argued his brother’s recanted testimony constituted “newly discovered evidence which, if introduced during the penalty phase, would have produced a life sentence for Heath” and “if introduced during the guilt phase, would have resulted in Heath’s conviction for a lesser-included offense.”

The record revealed that both Heath and his brother Kenneth, were indicted for the first-degree murder and armed robbery of Sheridan. Kenneth pled guilty and entered into a plea agreement and agreed to testify about Sheridan’s murder. Kenneth testified at Heath’s trial that “Heath stabbed Sheridan in the throat after he was shot in the chest, but before he was shot in the head.” He further testified that Sheridan was still alive when Heath was attempting to cut Sheridan’s throat. Later, Kenneth recanted his testimony regarding the events leading up to Sheridan’s death, including that Sheridan was not alive while Heath was stabbing Sheridan in the throat.

The post conviction court found Kenneth’s recanted testimony was unreliable for four reasons: (1) “it was inconsistent with the medical examiner’s trial testimony,” (2) Kenneth’s “testimony is internally inconsistent,” (3) Kenneth “had a motive to alter his trial testimony,” and (4) Kenneth’s “demeanor on the witness stand and explanation for his changed testimony [i.e., that someone altered the court documents] belies any notion that his testimony as to the order of wounds is credible.” The Court concluded that “even if Heath received a new trial, Kenneth’s recanted testimony is not of such nature that it would probably produce an acquittal of Heath or even a conviction on a lesser charge.” The Court

determined the evidence supported the facts that "Heath could still be convicted as a principal of either premeditated murder or first-degree felony murder," and affirmed the trial court's denial of this claim. The Court further affirmed the post conviction court's findings that trial counsel was not ineffective.

[Heath v. State, 01/29/09]



1st District Court of Appeals

An in camera inspection of asserted exempt records is generally the only way for a trial court to determine whether or not a claim of exemption applies.

Garrison made a public records request from the Florida Department of Law Enforcement. FDLE claimed that the records were exempt. Garrison then petitioned for a writ of mandamus to compel FDLE to turn over the records. The trial court ruled in favor of FDLE without inspecting the records at issue.

The First District reversed and remanded saying, "... an in camera inspection of assertedly exempt records is generally the only way for a trial court to determine whether or not a claim of exemption applies."

[Garrison v. Bailey, 2/5/09]



1dcacvGarrison.doc

2nd District Court of Appeals

Department of Highway Safety and Motor Vehicles may validly suspend a driver's license for refusal to submit to a breath alcohol test when a law enforcement officer offers the driver the option of taking a breath test, a blood test, or a urine test.

The 2nd DCA granted the Department's petition for writ of certiorari in *DHSMV v. Nader/McIndoe*. This case dealt with the implied consent "Clark" issue. In *Clark* the 4th DCA held that the "breath, blood or urine" language was inherently confusing thus requiring the Department to invalidate the suspension. In disagreeing with the 4th DCA in *DHSMV v. Clark*, the district court held that "sections 316.1932 and 322.2615 plainly require the suspension of a driver's license where the driver refuses to submit to a breath-alcohol test. Both Nader and McIndoe refused a breath test although they were perhaps provided with an option for two other tests (ie. blood or urine). Both refused to submit to any test. The Department obeyed the clear statutory language."

The district court summed up the opinion when it stated "we cannot agree with the reasoning in Clark that (blood, breath or urine) language establishes that a driver was or might have been misled into thinking that a more invasive test was required. The use of "or" plainly suggests that the driver has a choice of one of the three tests."

A district court has authority to grant common law certiorari relief from a circuit court opinion that applied or obeyed existing precedent from another district court if court concludes that the other district court's opinion misinterpreted clearly established statutory law.

The following questions were certified to the Florida Supreme Court:

1. Does a law enforcement officer's request that a driver submit to a breath, blood, or urine test, under circumstances in which the breath-alcohol test is the only required test, violate the implied consent provisions of section 316.1932(1)(a)(1)(a) such that the Department may not suspend the driver's license for refusing to take any test?

2. May a district court grant common law certiorari relief from a circuit court's opinion reviewing an administrative order when the circuit court applied precedent from another district court but the reviewing district court concludes that the precedent misinterprets clearly established statutory law?

[Department of Highway Safety and Motor Vehicles v. Nader/McIndoe, 02/20/09]



In an administrative hearing, the DHSMV hearing officer can issue subpoenas for anyone identified in both the agency inspection report, the breath test results affidavit and breath alcohol analysis report.

Department of Highway Safety and Motor Vehicle's denied licensee's request to issue subpoena for agency inspector who had inspected and tested breath test machine used to test licensee's breath alcohol level and who had signed agency inspection report submitted as part of documentation to support license suspension.

On certiorari review, circuit court departed from essential requirements of law in finding that Department is prohibited by statute from issuing subpoena to agency inspector responsible for maintaining breath testing equipment. When the officer who administratively suspends a person's license submits breath tests results pursuant to section 322.2615(2) that include the breath alcohol analysis report, a breath test affidavit, and an agency inspection report, and those documents identify specific persons, the hearing officer is authorized under section 322.2615(6)(b) to issue a subpoena to any person identified in those documents

[Yankey v. Department of Highway Safety and Motor Vehicles, 02/20/09]



Also, see *Department of Highway Safety and Motor Vehicles v. Maffett*.



Maffett.doc

The circuit court departed from the essential requirements of law when it held that the hearing officer was required to consider the legality of Escobio's arrest when reviewing the suspension of his license for driving with an unlawful breath alcohol level. Secondly, just as in *Yankey*, the district court opined that in an administrative hearing the DHSMV hearing officer can issue subpoenas for anyone identified in either the agency inspection report, the breath test results affidavit and breath alcohol analysis report.

Circuit court departed from essential requirements of law in concluding that hearing officer performing formal administrative review hearing was required to address whether licensee was placed

under lawful arrest for driving under influence.

Escobio is in agreement with the 2nd DCA's earlier opinion in *McLaughlin* in holding that section 322.2615(7)(a) limits the hearing officer's scope of review to two issues for DUBAL cases and continues to hold that the lawfulness of arrest is not an issue for consideration. Like in *McLaughlin* which dealt with a refusal, the scope of review under §322.2615(7)(b), [*a refusal*], should be the same as the scope of review under section 322.2615(7)(a), [*a DUBAL*] should not be read in *pari materia* (together) with 316.1932.

Further, the district court found that the circuit court properly held that Department of Highway Safety and Motor Vehicles departed from essential requirements of law by interpreting section 322.2615(6)(b), Florida Statutes (2006), to prohibit hearing officer from issuing subpoena for agency inspector responsible for maintaining breath testing equipment used to test breath alcohol level.

Department of Highway Safety and Motor Vehicles v. Escobio, 02/20/09



Escobio.doc

4th District Court of Appeals

Vehicle impoundment ordinance was unconstitutional because it failed to give notice to

owners.

Relying on a Third District case, the Fourth District found Hollywood's vehicle impoundment ordinance to be unconstitutional because it failed to give notice to owners who were not on the scene at the time of the arrest. The court also found that the ordinance was deficient as to standard of proof.



4dcacvMulligan.doc

Summary denial affirmed; proper remedy for correcting license revocation is to challenge the revocation, not continue to drive.

Rafine, appealed the summary denial of his post conviction relief motion alleging ineffective assistance of counsel for "failing to advise him that his prior uncounseled DUI convictions could not be used to enhance his fourth DUI offense to a felony." Rafine also alleged his "sentence on count two, for diving while license permanently revoked, was illegal because the Department of Highway Safety and Motor Vehicles had improperly revoked his driving privileges based on a 1997 DUI offense." Because Rafine's ineffective assistance claim did not state a sufficient claim, the 4th DCA affirmed without prejudice for Rafine to "file an amended motion which states a facially sufficient claim." See Spera v. State, 971 So. 2d 754 (Fla. 2007).

Rafine, in his second claim, alleged that "because the 1997 offense involved an unmotorized bicycle, and not a motor

vehicle, permanent license revocation was inappropriate." The 4th DCA determined that Rafine knowingly committed the offense of driving with a revoked license. § 322.241, Fla. Stat. (2004). "Assuming for the sake of argument" Rafine's license should not have been revoked following the 1997 DUI conviction, Rafine "should have challenged the revocation and had his license reinstated before getting behind the wheel." Sorell v. State, 855 So. 2d 1253, 1255 n.4 (Fla. 4th DCA 2003) (explaining that "the proper remedy for a person who feels that his or her license was improperly revoked is to have the record corrected 'not to ignore the revocation and continue to drive'" (citation omitted). The 4th DCA affirmed the summary denial of this claim.

[Rafine v. State, 02/11/09]



4D08-3715Rafine.op.pdf

5th District Court of Appeals

Seizing authority was required to show in adversarial preliminary hearing that registered owner of vehicle was not an innocent owner.

The Brevard County Sheriff's Office seized a truck from the Appellee's father who was engaged in the cultivation of marijuana. Although the vehicle was registered to the Appellee, there was evidence that the vehicle was hers in name only and that the real owner of the vehicle was her father. The trial court determined that it was necessary for the

Sheriff's Department to demonstrate in the adversarial preliminary hearing that the Appellate was not an "innocent" owner.

The Fifth District agreed with the trial court that the Sheriff must demonstrate that the Appellee was not an "innocent" owner but disagreed with the trial court as to the standard. The Fifth District said that the Sheriff's Office was required to show that there was "probable cause to believe that the owner knew or should have known, after a reasonable inquiry, the property was employed or was likely to be employed in criminal activity."

[Brevard County Sheriff v. Baggett, 02/20/09]



5dcacvBaggett.doc

Attorney General Opinions

When a driver elects to take his or her toll violation case to court, he or she waives the civil penalty rights under Chapter 318 and the fines found in Section 318.14(5).

As a general rule, an individual who elects to take his or her traffic citation to hearing is deemed to have waived the civil penalty rights under Chapter 318, Florida Statutes. The judge or magistrate hearing the case who finds that the infraction had occurred, may impose a civil penalty for toll violation not to exceed \$500 without regard to the

mandatory \$100 fine prescribed in section 318.18(7), Florida Statutes.



TRAFFIC FINES -
AG.doc

In the absence of an arrest and criminal charge against the person sent for evaluation under Florida's Baker Act, the Sheriff of Bay County may not retain firearms confiscated from such persons and held by that office.

The Sheriff of Bay County asked for a legal opinion from the Attorney General of Florida as to whether he is required to return firearms that have been confiscated from persons who are sent for evaluation under Florida's Baker Act.

The Attorney General responded that Florida's Baker Act makes it clear that Baker Act proceedings are not criminal proceedings. The Act provides that a person who is being treated for mental illness shall not be deprived of any constitutional rights. He added that the Act takes a strong position that those who suffer from mental, emotional, and behavioral disorders should not, on the basis of their mental health, be treated as criminals.

Patients who are admitted to a facility under the Baker Act may have their personal effects retained if a determination is made

that returning an item would be detrimental to the patient. As the Attorney General noted, however, no similar provision is included in the Baker Act that authorizes a law enforcement agency to retain custody of any personal property, including a firearm, when a patient is discharged after evaluation under the Baker Act. Although section 790.08, Florida Statutes, provides authority for law enforcement officers to take possession of firearms and other weapons found on persons arrested for crimes, the individuals must be charged with a criminal offense.

Therefore, the Attorney General opined that in the absence of an arrest and criminal charge against the person sent for an evaluation based on the Baker Act, the Sheriff could not retain the firearms confiscated and retained by his office and should be returned to the person upon release.



BAKER ACT -
FIREARMS - AG.doc

Edited By:

Judson M. Chapman, Senior Assistant General Counsel
Michael J. Alderman, Senior Assistant General Counsel
Peter N. Stoumbelis, Senior Assistant General Counsel
Heather Rose Cramer, Assistant General Counsel
Jason Helfant, Assistant General Counsel
Kimberly Gibbs, Assistant General Counsel
Douglas D. Sunshine, Assistant General Counsel
Santee Coulter, Assistant General Counsel
M. Lilja Dandelake, Assistant General Counsel
Jim Fisher, Senior Assistant General Counsel
Damaris Reynolds, Assistant General Counsel

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.hsmv.state.fl.us/Bulletins> or FHP Homepage (www.fhp.state.fl.us).

Approved by:

Robin F. Lotane, General Counsel