

# LEGAL BULLETIN

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

---

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

VOLUME MMIX, ISSUE 1

---

## United States Supreme Court



Opinion: USSC07-513Herring.pdf

**“When police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply.”**

In a 5-4 ruling, the Justices ruled that evidence of a crime does not have to be excluded from a case if police obtained it while relying on erroneous information supplied by another police officer. The so-called “exclusionary rule” does not apply to evidence that results from police mistakes, but only to situations involving “systemic error or reckless disregard of constitutional requirements,” the Court concluded.

Herring v. U.S., 01/12/09]

**Officer, who lawfully stops a vehicle for a traffic offense, may pat-down the passenger if the officer reasonably suspects that the passenger is armed and dangerous.**

The Court unanimously held that, after a car is lawfully stopped for a traffic infraction, an officer may conduct a pat down of a passenger if the officer reasonably suspects that the passenger is armed and dangerous □ even if the officer does not have reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. The Court ruled that *Terry v. Ohio* authorizes patdowns, following a lawful seizure, based on reasonable suspicion of danger; that the passenger of a stopped car is lawfully seized; and that the police took no action here prior to the patdown that communicated to the passenger that the seizure ended and he was free to go.

The Court has released the opinion in *Arizona v. Johnson* (07-1122), on whether, in the context of a vehicular stop for a minor traffic infraction, an officer may conduct a

pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but had no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. The ruling below, which held for the defendant, is reversed and remanded. Justice Ginsburg wrote the opinion for a unanimous Court.

[[Arizona v. Johnson](#), 01/26/09]



Opinion: USSC07-1122Arizona.pdf

## Florida Supreme Court

### ***Nichols* is not persuasive precedent for purposes of interpreting article I, section 16 of the Florida Constitution.**

Kelly, charged with felony driving under influence (DUI), moved to dismiss the information “on the ground that he was being charged with a felony based on two earlier DUI’s and, because the earlier DUI’s were uncounseled misdemeanors, they could not be used to enhance this DUI to a felony.” Following an evidentiary hearing, the trial court granted the motion to dismiss the felony DUI information for lack of jurisdiction. The State appealed asserting, “the circuit court had abused its discretion by following the decisions of this Court in Hlad and Beach instead of the decision in the United States Supreme Court in Nichols.” Hlad v. State, 585 So. 2d 928 (Fla. 1991), State v. Beach, 592 So. 2d 237

(Fla. 1992), and Nichols v. United States, 511 U.S. 738 (1994). Kelly asserted that “Hlad and Beach remain controlling authority in Florida’s criminal courts unless and until this Court decides to alter its precedent.” The 4th DCA affirmed the order of the circuit court and certified a question “of great public importance due to the confusion surrounding whether Hlad and Beach remain binding precedent post-Nichols.” Upon review, the Court rephrased the certified question as follows: “WHAT IS THE SCOPE OF A CRIMINAL DEFENDANT’S RIGHT TO COUNSEL UNDER ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION CONCERNING THE STATE’S USE OF PRIOR UNCOUNSELED MISDEMEANOR CONVICTIONS TO ENHANCE A LATER CHARGE FROM MISDEMEANOR TO A FELONY?”

After a lengthy analysis, the Court concluded that Kelly’s “satisfactory Beach affidavit, his presentation of facially misleading plea forms, and his testimony at the evidentiary hearing satisfied the Beach burden of production. This created prima facie evidence that Kelly did not validly waive his right to counsel.” Beach clarified “the procedural framework required to assert an action based on Hlad error (i.e., a claim that the State may not use prior uncounseled misdemeanors to enhance a later offense from misdemeanor to a felony).”

The State argued that “Florida’s misdemeanor right-to-counsel standard should mirror the federal standard enunciated in Nichols.” Because the Florida standard “already differs from its federal counterpart,” the Court declined “to follow a more limited federal standard that would afford Florida’s criminal defendants less constitutional protection, or fewer constitutional rights, than they currently

enjoy under the Florida Constitution and under Hlad and Beach.” The Court determined that “Florida’s standard for an indigent’s right to counsel provides a more broadly constructed right to counsel than the federal actual-imprisonment standard, as it encompasses all cases in which imprisonment is a prospective penalty.” The Court held that Nichols is not persuasive precedent for purposes of interpreting article I, section 16 of the Florida Constitution.”

The Court answered the rephrased certified question as follows:

*Article I, section 16 of the Florida Constitution, as influenced by Florida’s prospective-imprisonment standard, prevents the State from using uncounseled misdemeanor convictions to increase or enhance a defendant’s later misdemeanor to a felony, unless the defendant validly waived his or her right to counsel with regard to those prior convictions. However, the State may constitutionally seek the increased penalties and fines short of incarceration associated with the defendant’s relevant number of DUI offenses. In accordance with this holding, we adapt our Hlad/Beach framework along the following lines. To meet the initial burden of production, the defendant must assert under oath, through a properly executed affidavit that: (1) the offense involved was punishable by imprisonment; (2) the defendant was indigent and, thus, entitled to court-appointed counsel; (3) counsel was not appointed; and (4) the right to counsel was not waived.*

*If the defendant sets forth these facts under oath, then a burden of persuasion shifts to the State to show either that counsel was provided or that the right to counsel was validly waived. Cf. Beach, 592 So. 2d at 239.21 For these reasons, we approve the*

*decision of the Fourth District Court of Appeal, but disapprove any of its reasoning that is inconsistent with our modified framework.*

The Court remanded to the 4th DCA for “further proceedings consistent with this opinion.”

[*State v. Kelly*, 12/30/08]



Opinion: sc07-95Kelly.pdf

## 1st District Court of Appeals

**Trial court misapplied law; evidence seized to revoke probation of defendant could not be admitted into evidence in the prosecution of new criminal charges.**

Gordon v. State, 1D07-4136, Revised Opinion Upon Appellee’s Motion for Clarification and Appellant’s Response, filed January 21, 2009.

Gordon, on probation in Circuit Court Case No. 2006-CF-1221, appeals his convictions and sentences for trafficking in hydrocodone and misdemeanor possession of cannabis in Circuit Court Case No. 2006-CF-6014.

The record revealed that while Gordon was on probation for Circuit Court Case No. 2006-CF-1221, his residence was searched, without a warrant, by probation

officers who were “accompanied by deputies from the Escambia County Sheriff’s Office narcotics unit.” The search resulted in the seizure of hydrocodone pills and marijuana and Gordon was subsequently charged in Circuit Court Case No. 2006-CF-6014 with trafficking in hydrocodone and misdemeanor possession of cannabis. It was during the prosecution of his new criminal offenses, Circuit Court Case No. 2006-CF-6014, that Gordon moved to suppress the evidence. Gordon conceded that “given the express notice of the right to search that new probationers receive, the probation officers had a right to both enter and search Appellant’s home without a warrant, probable cause, or a reasonable suspicion of illegal activity there, and to arrest him for violating a condition of probation.” See United States v. Knights, 534 U.S. 112, 121 (2001); Soca v. State, 673 So. 2d 24, 28 (Fla. 1996); Grubbs v. State, 373 So. 2d 905, 908-09 (Fla. 1979); Bamberg v. State, 953 So. 2d 649, 654 (Fla. 2d DCA 2007). However, Gordon “asserted that the anonymous tip prompting the search did not create a reasonable suspicion of criminal activity and, therefore, pursuant to Knights and Bamberg, its fruits could not be used in a new criminal prosecution.” The trial court denied the suppression motion “on the ground that the deputies’ participation in the search of the residence was less extensive than the probation officers’ involvement, and perhaps minimal.” Gordon pled no contest, was adjudicated guilty, sentenced to three years incarceration “with a \$50,000 fine for the more serious offense.”

As agreed to by the parties, the 1st DCA determined that the evidence seized from the search of Gordon’s residence was properly admitted to determine Gordon had violated his probation. However, the 1st DCA opined that “contraband discovered during a search by the probation officers

that is supported by reasonable suspicion may be used as a basis for a new law violation,” however, “contraband discovered during a search by the probation officers that is not supported by reasonable suspicion may not be used as a basis for a new law violation.”

The State correctly conceded “the unverified, anonymous tip in the instant case failed to provide a reasonable suspicion.” Therefore, the 1st DCA found that the trial court erred applying the Fourth-Amendment law to the facts of this case. As such, the 1st DCA reversed Gordon’s convictions and sentences in Circuit Court Case No. 2006-CF-6014 and remanded with instructions to discharge Gordon in that case.

[*Gordon v. State*, 01/21/09]



Opinion: 1D07-4136Gordon.pdf

## 2nd District Court of Appeals

**Trial court erred; there was insufficient evidence to support defendant possessed the cocaine.**

Sheppard, convicted for delivery of cocaine and possession of cocaine, appealed his convictions arguing “there was insufficient evidence to support the State’s theory of aiding and abetting on the possession offense.”

The record revealed that Officer Berry was riding “undercover as a passenger in a car

being driven by a registered confidential informant (CI) on the night of the offense.” After Sheppard yelled at their vehicle, the CI pulled over and an exchange took place between Officer Berry and Sheppard. Berry acknowledged he wanted to purchase cocaine and Sheppard instructed Berry to park and exit the vehicle. Co-defendant, Otto Bennett, handled the rest of the conversations and the actual transaction. During this process, Bennett would walk over to confer with Sheppard and then return to Berry. After one discussion with Sheppard, Bennett walked back over to Berry and showed him the drugs. Berry gave Bennett money for the drugs and then Berry and the CI left. The drugs field-tested positive for cocaine and Sheppard was arrested, “but no money or drugs were found on him.” Officer Berry testified he “did not see anything change hands between Sheppard and Bennett during the transaction.” Sheppard moved for judgment of acquittal “on the basis that he was ‘never seen touching any drugs or passing any drugs or providing any drugs.’” The State “argued that Sheppard was guilty as an aider and abettor.” Even though the circuit court, in its order, found that “[t]here was no testimony anyone saw the Defendant and Co-Defendant exchange drugs,” the circuit court found “Sheppard guilty of both offenses under an aiding and abetting theory.”

The 2nd DCA determined there was “no evidence in the record that Sheppard actually or constructively possessed cocaine.” No money or drugs were found on Sheppard when he was arrested. The 2nd DCA further determined that the “State did not prove that Sheppard was an aider and abettor in Bennett’s possession of the cocaine.”

The 2nd DCA held that while there was sufficient evidence to support co-defendant

Bennett was in possession of the cocaine and that Sheppard “aided and abetted Bennett in selling the cocaine to Officer Berry, there was no evidence that Sheppard aided and abetted Bennett in acquiring or retaining the cocaine.” Thus, “there was insufficient evidence to support Sheppard’s conviction for possession of cocaine under any theory, and the circuit court erred in denying Sheppard’s motion for judgment of acquittal on the possession charge.” The 2nd DCA affirmed Sheppard’s conviction for delivery of cocaine, however, it reversed Sheppard’s conviction for possession of cocaine.

[*Sheppard v. State*, 12/24/08]



Opinion: 2D07-5056Sheppard.pdf

## 3rd District Court of Appeals

### **Pilots’ personal flight logs for period of time pilots were employed with the County Aviation Unit were considered public records.**

The Professional Law Enforcement Association sued to get access to personal flight logs of pilots in the County Aviation Unit. The circuit court granted the Association’s petition for mandamus.

The Third District affirmed the order insofar as it related to personal flight log entries for flights which occurred during the time the Police Department pilots had been assigned by the County to the aviation unit. The court went on to say that the order did

not cover flights before or after being assigned to the county unit.

*[Miami-Dade County v. Professional Law Enforcement Association, 01/12/09]*



3dcacvMiami-Dade.doc

## 4th District Court of Appeals

### Case reversed and remanded for judgment of acquittal; only three of the four elements were proven for possession of crack cocaine.

Jenkins, convicted of possession of crack cocaine with intent to sell within 1000 feet of a school in violation of section 893.13(1)(c)1, Florida Statutes (2006), appealed the denial of a motion for judgment of acquittal at the close of the State's case. Jenkins contended that the only evidence the substance involved in the transaction was crack cocaine was the testimony of Detective Robertson, who testified he observed the transaction with the aid of eight-power binoculars at a distance of 45-50 feet.

The record revealed that Detective Robertson testified at trial that he observed the transaction through his binoculars. He further testified "he could not identify the substance; he could say only the transaction he saw was consistent with 'thousands' of similarly illegal 'hand-to-hand transactions' he has seen throughout his

career."

The 4th DCA opined that to "satisfy the elements of the offense of possession of cocaine with intent to sell within 1000 feet of a school, the State must establish that (1) the appellant sold, manufactured, delivered, or possessed; (2) a controlled substance; (3) within 1000 feet; (4) of a school or child care facility." The officer testified he "had a clear view of the transaction." He never testified he "saw the substance or could identify it other than by custom." The State argued the officer's "description of the familiar manner in which the transaction occurred was sufficient for the jury to infer the substance was crack cocaine." The State also requested "a special standard of review, . . . where convictions result from circumstantial evidence." See *State v. Law*, 559 So. 2d 187, 188 (1989). However, the 4th DCA stated that "where one or more of the elements of the crime are proven by direct evidence, this heightened standard of review is not applicable." *State v. Burrows*, 940 So. 2d 1259, 1262 (Fla. 1st DCA 2006).

The 4th DCA concluded there was "direct evidence supporting three of the four elements of the crime," however, there was "simply no evidence of the nature of the substance" which was the second element of the crime that needed to be proven to the jury beyond a reasonable doubt. Thus, the 4th DCA reversed "the order denying the motion for judgment of acquittal at the close of the State's case" and remanded with directions for the trial court to enter judgment of acquittal for Jenkins.

*[Jenkins v. State, 01/21/09]*



Opinion: 3D07-1211Jenkins.pdf

## **Conviction of tampering with evidence reversed; evidence insufficient to find anything more than mere abandonment.**

While not apparent in this opinion, Evans, tried by jury, was found guilty of purchase of cocaine, possession of cocaine and possession of drug paraphernalia (a pipe). Evans was also convicted of tampering with evidence. At the end of the State's case, and again when defense rested, "defense counsel moved for a judgment of acquittal on the charge of tampering with evidence." The motion was denied because the trial judge found "it was a question of fact for the jury."

The record revealed that Evans purchased "a crack cocaine rock from an undercover police officer." At the conclusion of the sale, uniformed police officers moved in for the arrest announcing "they were the police." As the officers approached, Evans threw the crack cocaine rock onto the ground, which happened to be a sandy area, and the officers "were unable to recover the object."

The 4th DCA opined that the only evidence presented to the jury regarding the tampering with evidence charge was that Evans "threw or dropped the cocaine rock in the sand and the officers were unable to find it thereafter." Because there was no other evidence presented to show "specific intent to tamper with or conceal the evidence," the 4th DCA held that "the evidence was insufficient to find anything more than mere abandonment" and reversed the conviction of tampering with evidence. The 4th DCA further remanded to

"the trial court with direction to grant the aforesaid motion."

[*Evans v. State*, 01/14/09]



Opinion: 4D08-1790Evans.op.pdf

## **5th District Court of Appeals**

### **Trial court erred denying suppression motion based on plain-feel doctrine; deputy extracted the baggie to discover what it contained.**

Steadman appealed the denial of his motion to suppress arguing that the "State failed to justify a search under the 'plain-feel' doctrine."

The record revealed that deputies from the Orange County Sheriff's Office happened to observe a hit & run accident and "pursued and stopped the offenders." Steadman was a passenger in the vehicle stopped by the deputies. Deputy Baker, the only witness called at the suppression hearing, testified regarding the "pat-down" and said: "[T]here was a bag with something inside. It was crumpled up inside a plastic bag I can feel." He further described the pat-down saying: "it wasn't money, it wasn't cigarettes, it wasn't a specific item, it was something of—a large item. So at that time I reached inside his pocket and discovered what it was." No background information of Deputy Baker was elicited, nor was any information

regarding his knowledge and experience in the area of drug detection. Based on his testimony, “the trial court denied the motion to suppress under the ‘plain-feel’ doctrine.” The 5th DCA referred to the decision rendered in Minnesota v. Dickerson, 508 U.S. 366 (1993), where the United States Supreme Court determined that the officer, during the pat-down, “did not immediately recognize the lump in Dickerson’s jacket to be cocaine, but instead determined it was cocaine only after he squeezed, slid, and otherwise manipulated the item,” and thus the officer “had exceeded the bounds of Terry.” The Supreme Court “affirmed the state court’s suppression of the evidence seized from Dickerson,” and the decision resolved a conflict “among the state and federal courts over whether contraband detected through the sense of touch during a pat-down search was admissible.”

The 5th DCA noted that the deputy, in the instant case, was “justified in conducting a pat-down of Steadman. The vehicle had just been involved in a hit-and-run accident and the occupant’s furtive movements as well as attempts to conceal items within the car justified the initial pat-down.” However, because the deputy did not “immediately recognize the items in Steadman’s pocket as contraband” and “needed to extract the baggie to ‘discover’ what it contained,” the 5th DCA reversed, holding that this “runs afoul of the dictates of Dickerson.” See also Perkins v. State, 979 So. 2d 409 (Fla. 1st DCA 2008).

[*Steadman v. State*, 01/02/09]



Opinion: 5D08-375steadman.pdf

**Approved by:**

Robin F. Lotane, General Counsel

**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](http://www.fhp.state.fl.us)).