

LEGAL BULLETIN

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

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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2nd District Court of Appeals

“Affirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea.”

Sayles appealed his judgments and sentences for various criminal charges, “specifically challenging the denial of his motion to withdraw plea after sentencing filed pursuant to Florida Rule of Criminal Procedure 3.170.”

The record revealed Sayles entered a no contest plea to several charges in exchange for a sentence of thirty-six months probation with the condition that he serve eight months in jail. Two offenses were driving under the influence (DUI) and an issue was the revocation of his driver’s license. “The plea form signed by Sayles states that his sentences would ‘consist of . . . [a] 10 year DL revocation.’” Sayles license was permanently revoked after entering his plea. In his 3.170 motion he alleged his plea was involuntary because his counsel advised him “that since he was

resolving both DUI’s on the same day, that he would not have a lifetime revocation of his driver[’s] license. . .” On appeal, Sayles argued that when the trial court considered his withdrawal motion, it “incorrectly assumed that the revocation of his driver’s license is a collateral consequence,” and contended “that it is a direct consequence of his plea and that he therefore had a right to receive accurate advice about it.” An evidentiary hearing was not held on his motion. The State argued that “while all parties were operating under the mistaken assumption that Sayles would only be subject to a temporary license revocation, the record shows that the trial court specifically stated that it could not make any promises regarding what the DMV would do.”

The 2nd DCA noted that “[r]evocation of a driver’s license is a collateral consequence of a plea, and therefore, neither defense counsel nor the trial court is required to inform a defendant about such a consequence before the defendant enters his or her plea.” See Bolware v. State, 995 So. 2d 268, 275 (Fla. 2008). “However, ‘[a]ffirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea.’” Roberti v. State, 782 So. 2d 919, 920 (Fla. 2d DCA 2001).

The 2nd DCA concluded the trial court did not cure the alleged misadvice given to Sayles by his counsel. Sayles plea form

indicated what his sentence would be, along with a “10 year DL revocation.” Further, “the transcript of the plea and sentencing hearing shows that neither his defense counsel nor the trial court informed him that his license could be permanently revoked.” The record does not refute Sayles claim his plea was involuntary based on the misadvice of counsel that his license would not be permanently revoked. The 2nd DCA reversed and remanded for an evidentiary hearing on Sayles motion to withdraw his plea.

[*Sayles v. State*, 07/07/09]



Trial court’s ruling based on “defendant’s subjective fears” was incorrect standard to use when deciding whether police encounter with defendant constituted an unlawful seizure.

The State appealed the trial court’s order suppressing cocaine found during the search of Gentry contending, “the trial court improperly considered Gentry’s individual mental state when determining whether his encounter with the police constituted a seizure without reasonable suspicion.”

The record revealed that Gentry was “working off charges as an informant” for the Tampa Police Department during February and March 2008. He happened to be seen by another police officer coming out of a bar known for drug activity. This

officer called Officer Miles and asked him to talk with Gentry. At the suppression hearing, Officer Miles admitted, “neither he nor the officer who saw Gentry leaving the bar had either reasonable suspicion for a stop or probable cause for a search of Gentry.” Officer Miles testified he pulled up alongside of Gentry, Gentry agreed to talk with him, and consented to a search of his person. Cocaine was found inside the rim of Gentry’s baseball hat. Miles further testified that Gentry was free to leave before the search. Gentry testified he did not give consent to the search and did not feel free to leave at any time before the search because the police cruiser was blocking his path. While the trial court found Officer Miles’s testimony credible regarding the encounter with Gentry, the trial court also found that “Gentry’s belief that he was required to cooperate transformed the otherwise consensual encounter into a seizure that was not supported by reasonable suspicion and that Gentry’s consent was a product of that illegal seizure.” Thus, the trial court granted the motion to suppress the cocaine.

The 2nd DCA determined that “because the trial court found Miles’s testimony credible, we must accept his testimony that he pulled alongside Gentry, that he did not block Gentry’s path, and that Gentry agreed to speak with him and consented to be searched.” The “crucial issue is whether those facts establish a consensual encounter or an unlawful seizure.”

The 2nd DCA held “the trial court applied the incorrect legal standard when deciding and granting Gentry’s motion.” The trial court ruled the search was illegal based on “Gentry’s alleged subjective fears concerning his obligation to continue cooperating with the City of Tampa Police as an informant.” The trial court should have applied the “objective reasonable

person standard” because “the trial court, in its order, found Miles testimony credible.” The 2nd DCA determined “the facts as found by the trial court do not support a finding that the encounter was anything other than a consensual one when considered under the correct legal standard, and there is no basis in the record for a remand for any additional fact finding.” The 2nd DCA reversed the order granting Gentry’s motion to suppress and remanded for further proceedings consistent with this opinion.”

[*State v. Gentry*, 06/24/09]



2D08-5477Gentry.pdf

Police officers unable to read defendant's license plate because of a trailer hitch, properly attached to the vehicle, lacked authority under the statute to perform a traffic stop. § 316.605, Florida Statutes (2006).

Harris appealed his “judgments and sentences for possession of cocaine, possession of marijuana, and possession of paraphernalia, arguing the trial court erred in denying his motion to suppress because he was improperly stopped for violating section 316.605, Florida Statutes (2006).”

Harris was stopped by two police officers, who happened to be in different vehicles, because “a trailer hitch partially blocked the tag and they could not read the letters on the tag from a distance of thirty to fifty feet.” The officers stopped the vehicle and when

they approached the vehicle, “the officers smelled an odor of fresh marijuana coming from inside the vehicle. Thereafter, marijuana was found in Harris’s pocket and cocaine was found in the glove box of the truck.”

The 2nd DCA noted that “the only language in the statute that would apply to the case at bar is the phrase, “other obscuring matter.” § 316.605, Florida Statutes (2006). The 2nd DCA stated that a reading of the statute “shows that the license plate must be free from obscuring matter, be it grease, grime, or some other material placed over the plate.” Thus, pursuant to the “ejusdem generis’ canon of statutory construction, . . . it would not include a trailer hitch that is properly attached to the truck’s bumper.”

The 2nd DCA concluded, “Harris’s vehicle was improperly stopped pursuant to section 316.605,” and reversed “Harris’s judgments and sentences” and remanded for further proceedings.

Note: In the dissenting opinion, J. Khouzam, found that Wright v. State, 471 So. 2d 155 (Fla. 3d DCA 1985) was very “instructive” and wrote “[a]s in Wright, I would find that the officers had the authority to investigate why Harris’s tag was obscured.”

[*Harris v. State*, 06/19/09]



Harris.doc

3rd District Court of Appeals

Officers charged with battery were required to consult with the City before hiring their own private attorney.

Officers were charged with felony battery. They hired attorneys and successfully defended the charges. Then they submitted their legal bills to the City for payment. When the City refused to pay, the officers filed a motion with the court. The trial court found that the officers were entitled to reimbursement.

On appeal, the Third District reversed the fee award. The court said that a reading of the plain language of F.S. 111.065 required the officers to go to the City before hiring their own private attorneys.

[City of Sweetwater v. Alvarez, 6/24/09]



5th District Court of Appeals

Vehicle stopped after tag check was lawful and evidence discovered thereafter was properly admitted.

Reaves, a passenger in a vehicle that was stopped for a tag check, filed a motion to suppress the illicit drugs and a firearm that were found in the vehicle after the traffic

stop. The trial court granted the motion and the State appealed.

The vehicle was stopped after an officer ran a tag check and discovered that the registered owner of the vehicle had a suspended driver's license. At the suppression hearing, the officer testified that after the stop, he asked driver to exit the vehicle, produce his driver's license, and walk to the back of the officer's vehicle. The driver handed his license over and another officer, Deputy Sheriff Riley, arrived at the scene for back-up purposes. When asked, the driver told the officer there was "nothing illegal in the vehicle." After being told he could not search the vehicle "for any weapons, drugs or anything illegal," the officer asked Deputy Sheriff Riley to "walk his dog around the vehicle" while he did a license check. The dog alerted to the driver's side door and the officer walked over to that door and noticed, "in plain view, a clear plastic baggie with a white powder laying on top of the driver's seat," which based on his training . . . "I identified the substance to be suspected powder cocaine." He also found a can of degreaser, with a false bottom, and found several baggies containing the white substance. Under the can of degreaser, the officer found a loaded black semi-automatic handgun. Reaves, after being *Mirandized*, admitted the drugs and gun were his and that he kept the gun for protection. At the end of the suppression hearing, "the trial court found the stop was valid, the checking of the license was authorized, and the officer was telling the truth," however, it granted the suppression of the evidence. "The comments of the trial court indicate that it misunderstood the testimony to be that the K-9 sweep occurred *after* the completion of the license investigation, thus suggesting that the officer unnecessarily detained the driver without a basis for doing so."

The 5th DCA concluded, “the evidence did not support the trial court’s factual findings” because “the trial court incorrectly recalled the arresting officer’s testimony.” While Reaves contended the officer “knew from looking at the driver’s license that the driver was not the owner of the vehicle,” the 5th DCA concluded that Reaves contention “ignores the fact that the ongoing license check was part of the valid investigatory stop or detention.” The testimony was “clear that the officer asked for a K-9 sweep after obtaining the license but before making any determination about the validity of the driver’s license.”

The 5th DCA found that the order granting the suppression motion “was erroneous” because there “was no competent evidence to support the trial court’s findings of fact.” The 5th DCA reversed and remanded for further proceedings because the “trial court’s findings specifically indicated that the ruling was based on its recollection of the order of events,” and the “judge’s recollection was faulty.”

[*State v. Reaves*, 07/19/09]



5D08-2831Reaves.op.pdf

Trial court erred not granting judgment of acquittal; evidence obtained through unlawful investigatory stop.

Kramer appealed his conviction for tampering with physical evidence and resisting without violence contending “the State’s evidence failed to establish that he was aware that a law enforcement investigation was about to commence when

he allegedly swallowed a piece of crack cocaine.”

The 5th DCA “found it unnecessary to address this issue because the trial court should have granted Kramer’s motion for judgment of acquittal where the arresting officer’s testimony established: 1) that the State’s evidence was obtained as a result of an unlawful investigatory stop; and 2) that the officer was not engaged in a lawful duty at the time of Kramer’s alleged resistance.” The initial contact between the two “constituted a consensual encounter.” However, when the deputy “ordered Kramer to open his mouth, the consensual encounter was transformed into an investigatory stop. See Popple v. State, 626 So. 2d 185 (Fla. 1993); Parsons v. State, 825 So. 2d 406 (Fla. 2d DCA 2002). “To justify an investigatory stop of a citizen, the officer must have a reasonable suspicion that the individual has committed, is committing, or is about to commit a crime.” Popple, 626 So. 2d at 186.

The 5th DCA reversed Kramer’s convictions.

[*Kramer v. State*, 07/17/09]



5D08-2015Kramer.op.pdf

U. S. Supreme Court 2008 Term Summary

During its 2008 Term, the Supreme Court resolved many important issues to the states. Dan Schweitzer, the Supreme Court Counsel, for the Attorney General's Office drafted this brief summary of the cases decided by the Court in its 2008 Term.



US SUPREME COURT
2008 TERM.doc

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