

# LEGAL BULLETIN

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

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ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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## Florida Supreme Court

The Florida Supreme Court initially accepted jurisdiction to review the decision of the Fifth District Court of Appeal in Department of Highway Safety and Motor Vehicles v. Luttrell, 983 So.2d 1215 (Fla. 5th DCA). After full consideration, the court dismissed the appeal.

By not undertaking further review, the Supreme Court left intact the Fifth District's opinion in Luttrell. That opinion held that the BAR Hearing Officer did not have to accept un rebutted testimony from the driver. In this case, no law enforcement officers testified at the hearing and the facts testified to by the driver were not addressed in the officer's written reports. The 5<sup>th</sup> DCA held that the Hearing Officer did not have to accept the testimony even though it was not addressed in the officer's reports. In such situations, the Office of General Counsel recommends that if the Hearing Officer rejects the driver's testimony that the Hearing Officer include a finding that they did not find the testimony to be credible.

(Attached is the original 5<sup>th</sup> DCA's opinion.)



## 1<sup>st</sup> District Court of Appeals

**Evidence properly suppressed; officer had probable cause to initiate traffic stop for violation of tag light requirement.**

Davison appealed the denial of his motion to suppress the evidence that he admitted was in his car after a traffic stop. Relying on Langello v. State, 970 So. 2d 491 (Fla. 2d DCA 2007), Davison argued, "the traffic stop was unconstitutional on several grounds." In one issue, Davison contended "that because the officer was mistaken in his belief that section 316.221(2), Florida Statutes (2007), required the tag to be legible from a distance of 100 feet, no traffic violation occurred, thus the officer did not have a valid basis for a traffic stop." Davison further asserted, "as long as the rear registration tag was clearly legible from 50 feet, as section 316.221, Florida Statutes (2007), requires, the officer did not have probable cause to initiate a traffic stop because the appellant was not violating the statute."

"Section 316.221(2), Florida Statutes, requires that 'either a taillamp or separate lamp shall be . . . placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance

of 50 feet to the rear.’ Failure to have any rear tag light visible at all constitutes a traffic violation.” The 1st DCA noted the trial court found, in some conflicting testimony, that “Davison’s tag was *not* illuminated so as to be legible from 50 feet,” and noted that the instant case “is distinguishable from Langello. The Langello court held “the officer’s belief that there was an equipment violation because only one tag light was working was a mistake of law which did not establish probable cause to stop Langello’s car.” In the instant case, Davison was stopped because his tag light was not illuminated “at all.”

The 1st DCA determined that “contrary to the appellant’s assertion,” the basis for the traffic stop was the absence of any illumination of the tag. Even though the officer mistakenly believed the statute required the tag to be legible from 100 feet, “the officer nonetheless had probable cause to initiate the traffic stop because the tag was not illuminated at all,” thus, establishing the fact there was a traffic violation. The 1st DCA held there was probable cause to initiate the stop, the stop was lawful, and affirmed the trial court’s denial of Davison’s suppression motion.

[*Davison v. State*, 05/19/09]



Opinion: 1D08-0332Davison.pdf

## 2nd District Court of Appeals

**Remanded for evidentiary hearing; trial counsel should have motioned for**

## suppression of the gun.

Mobley appealed the summary denial of his rule 3.850 motion “seeking relief from his conviction for possession of a firearm by a convicted felon.” Mobley contends his counsel was ineffective for failing to move to suppress the gun.

The record revealed an arrest warrant was executed for Mobley for his failure to report to his probation officer. The officers went to Mobley’s girlfriend’s house; Mobley refused to come out, the officers entered through an unlocked door and “five officers swept through the house.” Mobley was found “hiding in the bathroom.” The girlfriend exited the bathroom first and an officer escorted her outside. Mobley came out a few minutes later and an officer “handcuffed him, took him outside, and secured him in a patrol car.” Corporal Thurman went back into the house, “ostensibly to see if anyone else was in the bathroom,” and when he entered the bathroom, he saw “the butt of a gun protruding from a makeup bag.” Mobley argued, “the post-arrest search of the bathroom and seizure of the gun were illegal.”

Noting the girlfriend was already out of the house, the 2nd DCA stated that pursuant to section 901.21(1), Fla. Stat. (2004), “there was no lawful reason for a warrantless search of the bathroom after Mobley’s arrest.” The 2nd DCA held “trial counsel performed deficiently, to Mr. Mobley’s prejudice” for failing to file a suppression motion on the gun. The 2nd DCA reversed and remanded for an evidentiary hearing “or other appropriate relief with respect to this claim.”

[*Mobley v. State*, 05/29/09]



**Wrong standard applied when granting suppression of statement; once trial court found defendant reinitiated the dialogue after invoking his right to remain silent, the correct standard should have been to determine if decision was voluntary, knowing, and intelligent.**

The State appealed the circuit court's order suppressing statements made by Hunt "in response to a custodial interrogation conducted after Mr. Hunt had reinitiated dialogue with detectives following his initial invocation of his right to remain silent under Miranda v. Arizona, 384 U.S. 436 (1966)."

Hunt was arrested on an alleged probation violation and while in custody was interviewed by Detectives Waldron and Levita regarding a pending homicide investigation. Hunt was given his Miranda warnings and "executed a written waiver of those rights." The interview was taped and approximately thirty minutes into the interview, Hunt "declared, 'I'm through talking, man.'" The interview terminated and Detective Waldron took Hunt outside the building to smoke a cigarette. At the suppression hearing, Detective Waldron testified that Hunt "reinitiated the conversation concerning the pending homicide investigation." He further testified he knew little about the homicide

investigation; that Hunt kept asking him questions; that he told Hunt he should talk with Detective Levita; and that he reminded Hunt several times that he said "he didn't want to talk any more . . . ." Waldron and Hunt returned to the interview room; Waldron informed Levita what transpired outside; Hunt confirmed he wanted to talk with the detectives again; and "the interview resumed." The second interview was taped; the Miranda warnings were not repeated; and during the second interview, Hunt admitted possessing "a gun three days before the homicide occurred." Shortly thereafter, Hunt invoked his rights and the interview was terminated. Hunt motioned the court to suppress his statements in the first and second interview. The trial court "denied the motion as to the first portion of the statement and granted the motion as to the second portion of the statement."

The 2nd DCA reviewed the standard of review, along with the applicable law and the two-step analysis that should be used "to determine whether the police have scrupulously honored the suspect's right to remain silent." When police continue an interrogation after the suspect invokes his right, then the police have failed to honor the suspect's right to remain silent. Because the interrogation in the instant case ceased, the court must proceed to the second step and "determine who reinitiated the dialogue." The standards were reviewed when police reinitiate the dialogue. In the instant case, Hunt was the one who reinitiated the dialogue, thus, the inquiry is different. The standard the courts consider is "whether the suspect's decision to change his or her mind and to waive his or her rights by speaking with the authorities was voluntary, knowing, and intelligent."

The 2nd DCA determined the circuit court properly found the detectives did not reinitiate the dialogue following Hunt's

“initial invocation of the right to remain silent” and Hunt was found to have reinitiated that dialogue. However, the 2nd DCA concluded, the circuit court applied an incorrect standard when determining the suppression of Hunt’s second statement. The circuit court was required to consider whether Hunt’s “decision to change his mind and to once again waive his right to remain silent was voluntary, knowing, and intelligent.” The circuit court instead, relied “heavily” on Michigan v. Mosley, 423 U.S. 96, 100, 104 (1975), to conclude the detectives “had not scrupulously honored Mr. Hunt’s right to remain silent.” Hunt was found to have reinitiated the dialogue after invoking his right to remain silent. Thus, the 2nd DCA found that Mosley and the other cases cited “relating to the admissibility of statements made after the interrogation is terminated and then restarted by the police are inapplicable.”

The 2nd DCA reversed the suppression of the second statement and remanded for further proceedings.

[*State v. Hunt*, 05/22/09]



Opinion: 2D08-2834Hunt.pdf

**Knock and talk was not illegal police conduct; proper standard of proof was preponderance of the evidence, not clear and convincing evidence.**

Appellees’, Mercedes Navarro and Oscar Ramon Olivia, filed a motion to suppress marijuana plants found inside their home “during a consent search that followed a

‘knock and talk’ at the Appellees’ front door.” The circuit court granted the suppression motion finding “the knock-and-talk encounter constituted illegal police conduct because it was not based on a tip or complaint.” The circuit court ruled, “Olivia’s consent may only be found voluntary if there is clear and convincing evidence that his consent was not the product of the illegal knock and talk.” The circuit court further found “the State failed to establish the voluntariness of Mr. Oliva’s consent by clear and convincing evidence” and granted the motion to suppress. The State appealed arguing, “the circuit court erred in ruling that a knock and talk must be based on a tip or complaint.”

At the suppression hearing the officers testified as to their actions, and their “hunch” regarding the knock and talk at this particular residence and that it was not based on an informant’s tip or complaint.

“A knock and talk ‘is an investigative technique whereby an officer knocks on the door to a residence and attempts to gather information by explaining to the occupants the reason for the police interest.” United States v. Norman, 162 F. App 866, 869 (11th Cir. 2006); see also Luna-Martinez v. State, 984 So. 2d 592, 598 (Fla. 2d DCA 2008). “A knock and talk is considered a legitimate investigative procedure as long as it does not become a constructive entry.” State v. Triana, 979 So. 2d 1039, 1043 (Fla. 3d DCA 2008). The Triana court explained “that a knock and talk ‘is a purely consensual encounter, which officers may initiate *without any objective level of suspicion.*”

The 2nd DCA stated that many of the cases the circuit court pointed to in support of its finding that “a knock and talk cannot be based on a hunch and must stem from a tip or complaint,” are inapposite. Further, their

conclusion “finds no support in the case law.” The only cases in the circuit court’s order that actually ruled on the legality of a knock and talk were Luna-Martinez, Triana, and Langley v. State, 735 So. 2d 606 (Fla. 2d DCA 1999). The 2nd DCA also referred to several cases that found that police officers “may approach a residence and speak to the residents just as any private citizen may.”

The 2nd DCA held that the circuit court erred in applying “the clear and convincing evidence standard of proof because it found illegal police conduct based on its erroneous interpretation of the law concerning knock-and-talk encounters.” The 2nd DCA determined that “because the knock and talk was not otherwise illegal, the appropriate standard of proof was preponderance of the evidence.” The 2nd DCA reversed the circuit court’s order and remanded for reconsideration of the motion to suppress under the proper standard of proof.” See State v. T.L.W., 783 So. 2d 314, 317 (Fla. 1st DCA 2001).

[*State v. Navarro, et al.*, 05/22/09]



Opinion: 2D08-4888Navarro.pdf

## Attorney General Opinions

**The Clerk of Court is prohibited from imposing filing fee for domestic violence protection petition.**

The Attorney General opined that the plain language of section 741.30(2), Florida Statutes, which clearly prohibits the imposition of such a fee “[n]otwithstanding any other provision of law,” Further, the AG stated that “the recent amendment to section 28.241(1)(a)1.b., Florida Statutes, by section 5, Chapter 2009-61, Laws of Florida, does not require a clerk of court to assess a filing fee for the filing of a petition for a domestic violence injunction.

## 2009 LEGISLATIVE UPDATES

### FDLE CRIMINAL LAW UPDATE



2009 Online  
Summaries-062209.di

### DHSMV TRAFFIC LAWS UPDATE



Leg2009.pdf

### FHP LEO BILL OF RIGHTS UPDATE



LEOBillofRightsGuide  
v1.doc

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