

LEGAL BULLETIN

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

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United States Court of Appeals Eleventh Circuit

Officer entitled to qualified immunity since a reasonable officer could have had reasonable suspicion that knocking and announcing his presence would have been dangerous under the circumstances.

Kobayashi, a police officer with the City of Sunrise, Florida, Police Department and a member of a Special Weapons and Tactics (SWAT) team appealed the denial of his summary judgment motion where he argued he was entitled to qualified immunity and no genuine issue of material fact existed as to whether a knock and announce occurred.”

Andrew Diotaiuto was shot and killed during the execution of a warrant on the residence he shared with his mother Marlene Whittier. Neighbors informed the Sunrise Police Department that Diotaiuto was selling large quantities of cannabis and cocaine from his residence. An investigation began,

including surveillance of the residence “and a ‘controlled buy’ of marijuana by a confidential informant.” Also revealed during the investigation was the fact that “Diotaiuto carried a semi-automatic handgun on his person at all times and kept a loaded shotgun in his bedroom closet.” The warrant issued to search the residence was classified as “high risk,” which is defined as “involving acts of violence or potential acts of violence” and was based on “Diotaiuto’s drug activity and possession of firearms.” The SWAT team issued all “high risk” warrants. Kobayashi, the team leader of the SWAT team, testified he knocked and announced, there was no answer, the breach team opened the front door, and the SWAT team entered the home. Diotaiuto was shot and killed after raising his gun and pointing it at the officers and not complying with the order to drop the gun. Whittier contends Kobayashi entered their residence “without first knocking and announcing the SWAT team’s presence in violation of the Fourth Amendment.”

“Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” Dalrymple v. Reno, 334 F.3d 991, 994 (11th Cir. 2003)(quoting Hope v. Pelzer, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002)). “If the official was acting within the scope of his discretionary

authority . . . the burden shifts to the plaintiff to show that the official is not entitled to qualified immunity.” Skop v. City of Atlanta, 485 F.3d 1130, 1136–37 (11th Cir. 2007). The 11th Circuit noted that “within the context of warrantless searches, we have held the mere presence of contraband, without more, does not give rise to exigent circumstances. United States v. Tobin, 923 F.2d 1506, 1510 (11th Cir. 1991). However, “we have also repeatedly noted the dangerous, and often violent, combination of drugs and firearms . . . may give rise to reasonable suspicion of danger and justify a no-knock entry.”

The 11th Circuit held that Kobayashi “is entitled to qualified immunity because a reasonable officer could have had reasonable suspicion that knocking and announcing his presence would have been dangerous under the circumstances facing the SWAT team.” The 11th Circuit noted:

We are aware that Kobayashi maintains he did actually knock and announce the SWAT team’s presence and that fourteen officers have testified to that effect. Whether a knock and announcement actually occurred, however, is irrelevant to our analysis of arguable reasonable suspicion, and thus the outcome in this case is the same under both Kobayashi’s and Whittier’s versions of the facts.

[*Whittier v. Kobayashi*, 08/31/09]



11Cir200812998Whittier.pdf

1st District Court of Appeals

Warrantless entry not justified when actions of police created the exigent circumstances.

Higginbotham appealed the denial of the motion to suppress evidence seized in the warrantless search of his motel room “based on the ‘exigent circumstances’ exception to the warrant requirement, where the circumstances were very similar to those presented in Gnann v. State, 662 So. 2d 406 (Fla. 2d DCA 1995), Levine v. State, 684 So. 2d 903 (Fla. 4th DCA 1996), Rebello v. State, 773 So. 2d 579 (Fla. 4th DCA 2000), and State v. Garcia, 866 So. 2d 124 (Fla. 4th DCA 2004).”

The 1st DCA reversed the Order denying the suppression motion and remanded for further proceedings. The warrantless entry into a motel room was not justified because the actions of the police created the “exigent circumstances.” In this case, it was argued that the exigent circumstance was that illegal drugs could be destroyed soon after the police knocked on the door. It was the police action of knocking on the motel room door that created the exigent circumstance, a circumstance that might not have existed prior to the police action. Therefore, the Court determined there was time to obtain a warrant before knocking on the motel room door.

[*Higginbotham v. State*, 08/21/09]



1D08-3269Higginbotham.pdf

Employer was liable for punitive damages because they condoned their employee's fraudulent conduct.

Plaintiff was a purchaser of a repossessed mobile home. She sued when Defendant substituted the home she had chosen for one that was inferior in quality. She prevailed at trial but pursued a cross appeal when the trial court denied her motion to add a claim for punitive damages.

The First District reversed after noting that an employer can be liable for punitive damages "if the employee was personally guilty of intentional misconduct or gross negligence, and a) the employer actively and knowingly participated in such conduct; b) officers, directors or managers of the employer knowingly condoned, ratified or consented to such conduct; or c) the employer engaged in gross negligence which contributed to the injury suffered by the party making a claim for punitive damages." The court said that the evidence supported a finding that Wayne Frier had condoned the substitution of the mobile home without the buyer's consent.



1dcacvWayneFrier.pdf

Conviction for driving under suspended license reversed; State failed to prove defendant received actual notice of suspensions.

Haygood, convicted of possession of greater than twenty pounds of cannabis, resisting an officer without violence, and knowingly driving with a suspended license, appealed the denial of his judgment of acquittal motion, where he argued "the State failed to present sufficient evidence that Appellant was aware his license was suspended at the time of his arrest."

A copy of Haygood's driving record was submitted into evidence. The record was issued on November 21, 2006, by the Department of Highway Safety and Motor Vehicles (DHSMV). The record listed three dates in August 2006 where Haygood's license was suspended. Once for failure to pay a traffic fine and twice for being delinquent in paying child support. "The driving record also provided that the statutory notice required by section 322.251, Florida Statutes (2006), had been given." However, Haygood's address was not listed on the driving record. There was no evidence presented to show that Haygood "knew his license was suspended on November 18, 2006, the date he was arrested after driving into a ditch."

The 1st DCA noted that Haygood's license was suspended for failing to pay traffic fines and child support, which are financial obligations. Therefore, "the State was required to present evidence that Appellant actually received notice that his license was suspended." The 1st DCA concluded that "the fact that Appellant's DHSMV record listed his license as having been repeatedly suspended does not prove that Appellant ever received notice of these suspensions." The 1st DCA reversed Haygood's conviction for knowingly driving with a suspended license and affirmed his remaining convictions and sentences.



1D08-2699Haygood.pdf

2nd District Court of Appeals

Traffic stop and first pat-down valid; second pat-down constitutionally improper and evidence it produced should have been suppressed.

Ballenger appealed her convictions for possession of illegal drugs and drug paraphernalia, “asserting that the trial judge erred in denying her dispositive motion to suppress evidence seized during the traffic stop of the vehicle she was operating.” Ballenger contends there was no legal basis for the stop because no traffic violation had occurred. She further contended that “the first pat-down was not justified by the movements the first deputy observed as he approached the vehicle.”

The record revealed that Ballenger was stopped for failing to stop at a stop sign. Because the officer, as he approached the vehicle, observed Ballenger and the passenger in the vehicle “moving within the vehicle as though they were reaching for something either below or in the center console,” the officer instructed them to place their hands on their heads, and then he removed Ballenger from the vehicle. He patted her down, found nothing, and “handcuffed her for officer safety.” She then

stood behind the vehicle while it was being searched. A second officer arrived for backup and without her consent; he “conducted another pat-down for weapons.” He felt “what he suspected to be a crack pipe,” and she “acquiesced” when he asked if he could remove it. When asked if she had anything else, “she responded that there were Methadone pills in her front pocket.”

While there was conflicting testimony regarding the traffic stop, the 2nd DCA concluded there was “competent evidentiary support that a traffic violation occurred” and “affirmed the trial court’s legal conclusion that the stop of Ms. Ballenger’s vehicle was lawful.”

The 2nd DCA also found that the first pat-down was constitutionally valid. “In light of the potential danger involved in pulling over an unknown vehicle and witnessing the occupants hurriedly moving items around, the officer was justified in ensuring that the occupants did not have weapons.” However, “[o]nce the first pat-down was finished without producing any threat to the officer, the constitutional underpinning of a pat-down evaporated, and the deputy should have removed the handcuffs from Ms. Ballenger.”

Regarding the second pat-down, the 2nd DCA found it “was constitutionally improper,” was a violation of Ballenger’s Fourth Amendment rights, “and the evidence it produced must be suppressed.” “In order to legally pat-down a detainee without consent or a warrant, ‘the officer must be able to articulate some basis which would support a reasonable belief that an individual is armed.’” *D.L.J. v. State*, 932 So. 2d 1133, 1134 (Fla. 2d DCA 2006). The second officer, at the suppression hearing, was unable to justify the second pat-down, “saying only that the first deputy requested

it.” As such, there was no reasonable basis to believe that Ballenger was “armed or posed a threat.”

The 2nd DCA further determined “there was no clear and convincing evidence, or even a preponderance, that the consent to either the second search or seizure was voluntary.” Given the fact that Ballenger was physically restrained, standing behind her vehicle, where “she could neither walk nor drive away” and was under the control of the officer who handcuffed her, the 2nd DCA concluded that Ballenger’s “cooperation regarding the crack pipe and the pills in her pocket at the time of the second pat-down constituted a submission to authority, not a freely and voluntarily given consent.” Thus, “the State’s evidence fell short of proving that the consent was not coerced, and the trial court erred in denying Ms. Ballenger’s motion to suppress.” The 2nd DCA reversed and remanded with instructions to discharge Ballenger.

[*Ballenger v. State*, 09/09/09]



2D08-3934Ballenger.pdf

Miranda warnings were not required during traffic stop that evolved into investigatory detention.

The State appealed the order granting suppression of statements Martissa made “without Miranda warnings” for “possession of cocaine and driving while license suspended or revoked.” Miranda v. Arizona, 384 U.S. 436 (1966).

The record revealed that Martissa was

stopped by Officer Hilsdon for not having a functional tag light. This stop occurred after the vehicle Martissa was driving was seen by Officer Bradshaw leaving a suspected drug house that was part of an undercover investigation. At the suppression hearing there was no dispute as to the validity of the traffic stop. After the stop, the officer asked for Martissa’s license and registration and Martissa informed the officer his license was suspended. Martissa was asked to exit his vehicle and stand with the backup officer so Officer Hilsdon could confirm if Martissa’s license was suspended “before he could arrest him.” Officer Hilsdon testified that he advised Martissa, as Martissa was exiting the vehicle, that “he was observed leaving an area known for the sale of illegal narcotics, and asked him if he had any illegal narcotics on him.” Martissa told the officer “he did and told the officer that he had crack cocaine in the vehicle.” Officer Hilsdon went back to his patrol vehicle and confirmed that Martissa’s license was suspended. Officer Hilsdon testified “he believed he had probable cause to arrest Martissa on the suspended license and on his statement that he had cocaine in the vehicle.” Based on those grounds, the vehicle was searched and crack cocaine was recovered. The trial court granted suppression of Martissa’s statements regarding the drugs in the vehicle finding “that the detention regarding the suspended license ‘was pursuant to an ongoing criminal investigation and that the Defendant was in custody for practical purposes.’” The trial court further found that before Martissa was read his Miranda warnings, “Martissa was subjected to custodial interrogation, relying upon Fowler v. State, 782 So. 2d 461 (Fla. 2d DCA 2001).”

The 2nd DCA determined that the issue was “whether Martissa was in custody for purposes of Miranda when Officer Hilsdon

asked if Martissa ‘had any illegal narcotics on him.’” “During a traffic stop an officer may ask if a person is in possession of a weapon or drugs.” The 2nd DCA concluded that Martissa was not in custody for Miranda purposes.” Martissa was asked to step out of his vehicle and stand with a second officer while the status of his suspended license was being investigated; he was not in restraints during the stop; and unlike Fowler, he was not accused of committing a drug crime. “Rather, the circumstances of Martissa’s detention did not exert pressure that would sufficiently impair a detainee’s free exercise of his privilege against self-incrimination to require that he be given Miranda warnings.” See State v. Poster, 892 So. 2d 1071, 1072 (Fla. 2d DCA 2004), where this court recognized that “[a] temporary detention upon founded suspicion of criminal activity does not always require Miranda warnings.” The 2nd DCA reversed the suppression order and remanded for further proceedings.

[*State v. Martissa*, 09/11/09]



2D08-2339Martissa.pdf

Trial court erred granting suppression motion; “Warnings to Suspects” card signed by both defendants satisfied constitutional requirements set forth in Miranda.

The State appealed the order granting motions to suppress filed by Fletcher and Lee. In their motion to suppress they claimed “they received faulty Miranda warnings because officers did not adequately inform them of their right to the presence of an attorney both before and during questioning,” and “that their statements ‘were a product of deceit, coercion and duress, therefore involuntary and illegal.’” Miranda v. Arizona, 384 U.S. 436 (1966).

The 2nd DCA concluded that both Fletcher and Lee “signed ‘Warnings to Suspects’ cards that stated, ‘You have the right to the presence of an attorney.’” “This unrestricted warning is distinguished from the one given in Powell and identical to language recently approved by this court in State v. Smith, 6 So. 3d 652, 653 (Fla. 2d DCA 2009) (holding that the statement satisfied the constitutional requirements set forth in Miranda because it did not limit the time during which the defendant could exercise his right to counsel).” See also Graham v. State, 974 So. 2d 440 (Fla. 2d DCA 2007), review denied, 984 So. 2d 1250 (Fla. 2008) (same). The 2nd DCA reversed the trial court’s order.

Note: Mr. Powell’s Miranda warning only informed him he had a right to an attorney *before* answering any questions. Both the 2nd DCA and the Florida Supreme Court held “that such an instruction did not satisfy Miranda because it could mislead a suspect to believe that he did not have a right to the advice and counsel of an attorney during questioning.” Footnote 2: In State v. Powell, 998 So. 2d 531 (Fla. 2008), the Florida Supreme Court approved this court’s opinion. The U.S. Supreme Court has since granted certiorari review and the case remains pending. See Florida v. Powell, No. 08-1175, 2009 WL 741877 (U.S. June 22,

2009).

[*State v. Fletcher and Lee*, 09/09/09]



2D08-4646FletcherLee.pdf

Constructive possession not established; burden to establish dominion and control over drugs not met.

Byers appealed his judgment and sentence for trafficking in methamphetamine and carrying a concealed weapon arguing “the trial court erred denying his motion for judgment of acquittal on the trafficking charge because the evidence did not establish that he possessed the methamphetamine in the backpack.”

The record revealed police responded to a call at a motel and during the investigation, asked Byers, who was standing outside one of the motel rooms to identify himself and also asked if he had any weapons. Byers admitted having a set of brass knuckles in his pockets. He was searched and arrested for carrying a concealed weapon. The police entered the motel room and found Roberto Gutierrez and arrested Gutierrez “after they observed smoke and saw a ‘bong’ by the sink when he came out of the bathroom.” Byers consented to a search of his vehicle where “a black bag on the passenger side floorboard containing 52.7 grams of methamphetamine, baggies, and a BB gun,” were found. Byers admitted that he knew there was a large amount of methamphetamine in the vehicle and that Gutierrez intended to sell it. He also stated “that he had driven Gutierrez to the motel in exchange for a small amount of the drug.”

The State contended that Byers constructively possessed the drugs.

The 2nd DCA noted that while Byers admitted he knew about the drugs in the vehicle; “the question is whether had had dominion and control over it.” The 2nd DCA concluded the evidence established that Byers knew about the drugs in the vehicle, that he knew Gutierrez intended to sell the drugs, and that he agreed to drive Gutierrez to the motel in exchange for a small amount of the drugs. However, “[e]ven if proof of these circumstances permitted an inference that Byers had control over the methamphetamine, it does not exclude Byers’ reasonable hypothesis of innocence that the drugs in the backpack belonged exclusively to Gutierrez.” Thus, the State did not establish constructive possession because it “did not meet its burden to establish Byers’ dominion and control over the drugs.” Byers’ conviction and sentence for trafficking was reversed. His conviction and sentence for carrying a concealed weapon was affirmed.

[*Byers v. State*, 08/21/09]



2D07-3125Byers.pdf

Violation of knock and announce statute; officer knocked and announced his presence and authority but failed to announce his purpose.

Cable appealed her conviction and sentence for trafficking in methamphetamine after pleading no contest, thus, reserving her right to appeal

“the trial court’s denial of her dispositive motion to suppress evidence discovered by the police and statements made by Cable regarding that evidence when the police entered a motel room to arrest Cable pursuant to an arrest warrant.”

The record revealed, “the officer who arrested Cable knocked and announced his presence and authority but failed to announce his purpose before entering the motel room and arresting Cable.”

The 2nd DCA concluded “that by failing to announce his purpose before entering the motel room, the officer acted in violation of section 901.19(1), Florida Statutes (2005), Florida’s knock-and-announce arrest statute, which requires that before effecting an arrest by entering premises without consent, an officer must “announce[] her or his authority and purpose.”

While the State contended that “the decision of the United States Supreme Court in Hudson v. Michigan, 547 U.S. 586 (2006), precludes the application of the exclusionary rule as a remedy for violations of the knock-and-announce statute,” the 2nd DCA concluded “that Hudson does not displace the existing Florida precedent, which mandates the application of the exclusionary rule for violations of the knock-and-announce statute.” The 2nd DCA did recognize, however, that “the reasoning of Hudson calls into question the appropriateness of applying the exclusionary rule for violations of Florida’s knock-and-announce statute.” The 2nd DCA certified the following question to be of great public importance:

IN VIEW OF THE
ABROGATION OF THE
EXCLUSIONARY RULE FOR
FOURTH AMENDMENT
KNOCK-AND-ANNOUNCE

VIOLETIONS, SHOULD THE
JUDICIAL REMEDY OF
EXCLUSION OF EVIDENCE
BE APPLIED FOR
VIOLETIONS OF FLORIDA’S
STATUTORY KNOCK-AND-
ANNOUNCE PROVISIONS?

The 2nd DCA reversed and remanded for discharge.

[*Cable v. State*, 09/04/09]



2D07-5267Cable.pdf

5th District Court of Appeals

While defendant did not enter residence, he entered a covered porch at front of residence when stealing the screen door; thus, constituting “entry into a dwelling under the burglary statute.”

Ferrara, convicted of burglary of a dwelling for stealing a screen door and attempting to steal copper tubing from the air conditioning unit of a vacant residence, appealed contending “he cannot be convicted of burglary of a dwelling because he did not enter the structure.”

The 5th DCA noted that to prove a burglary of a dwelling:

the State needs to prove that a defendant entered a dwelling with the intent to commit an offense therein. See § 810.02, Fla. Stat. (2008). Section 810.011(2), Florida Statutes (2008), defines "dwelling" as: "a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof. . . ." (Emphasis added). The standard jury instructions define "dwelling" as "a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the enclosed space of ground and outbuildings immediately surrounding it." Fla. Std. Jury Instr. (Crim.) 13.1 Burglary. It also provides that the entry necessary "need not be the whole body of the defendant. It is sufficient if the defendant extends any part of the body far enough into the [structure] to commit [burglary]." Id.

Ferrara contended that "the State failed to prove that a burglary of a dwelling occurred with regard to either the screen door or the copper tubing from the air conditioner because neither involved an entry into the

house, an attached porch, or the curtilage." He further asserted that "because the property was not enclosed, going to the front door of the house and removing the screen door did not constitute entry into a dwelling under the burglary statute."

Noting the similarity of the instant case with Weber v. State, 776 So. 2d 1001 (Fla. 5th DCA 2001), the 5th DCA concluded that "Ferrara had to enter a covered porch at the front of the residence to steal the door," and as defined under § 810.011(2), Florida Statutes, "the front porch is part of the dwelling." Thus, Ferrara committed a burglary when he entered the attached porch to steal the screen door. The 5th DCA further concluded that "a carport attached to a dwelling is a burglarizable part of the dwelling" and held that Ferrara's conviction was proper and affirmed.

[*Ferrara v. State*, 09/25/09]



5D08-3144Ferrara.op.pdf

ATTORNEY GENERAL ADVISORY LEGAL OPINION

CJST certification is required for unsworn individuals who perform law enforcement duties.

Local criminal justice agencies must comply with section 943.13, Florida Statutes,

requiring the certification of officers variously described as "public service aides" and "community service officers" if those individuals perform the duties of a law enforcement officer.

The Attorney General opined that it is the duties of the personnel under consideration in this situation that may place them within the definition of "law enforcement officer" or "auxiliary law enforcement officer" in section 943.10(1) or (8), Florida Statutes, thus, subjecting these personnel and the municipality employing them to the terms and provisions of the Criminal Justice Standards and Training Commission's laws.



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