

LEGAL BULLETIN

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FLORIDA SUPREME COURT

“A seizing agency is required to establish only that there is probable cause to believe that the property was being employed or likely to be employed in criminal activity—establishing the owner’s actual or constructive knowledge is not required until the forfeiture stage.”

Gomez owned investment property that was used as a marijuana grow house. Eventually authorities seized the house because it was used in criminal activity. Gomez objected because she did not know that the house was used in criminal activity.

The question before the Florida Supreme Court was whether a seizing agency has to establish at the time of seizure that the property owner knew or should have known that the property was being employed or was likely to be employed in criminal

activity. After reviewing the Florida Statutes, The Court said, “ Rather at the seizure stage, the seizing agency is required to establish only that there is probable cause to believe that the property was being employed or likely to be employed in criminal activity—establishing the owner’s actual or constructive knowledge is not required until the forfeiture stage.”

[*Gomez v. Village of Pinecrest*, 7/8/10]



Reading of *Miranda* warnings “. . . does not, by itself, transform that encounter into an investigatory stop.”

The Court had for review the 2nd DCA’s decision in Caldwell v. State, 985 So. 2d 602 (Fla. 2d DCA 2008), where the 2nd DCA certified conflict with the 4th DCA’s opinion in Raysor v. State, 795 So. 2d 1071 (Fla. 4th DCA 2001). The 4th DCA in Raysor concluded “that as a per se matter, an officer’s reading of Miranda warnings during an otherwise consensual encounter will always result in a Fourth Amendment Seizure.” Whereas in Caldwell, the 2nd DCA concluded Caldwell had not been subjected

to an unconstitutional seizure reasoning “that because the warnings are intended to be a protective measure, Miranda warnings given during a consensual encounter may contribute to a seizure finding within the totality-of-the-circumstances framework.”

The Court cited to United States v. Mendenhall, 446 U.S. 544, 554 (1980)(plurality opinion), where the Mendenhall Court stated that “[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”(emphasis added). Following a lengthy analysis, the Court concluded that “to the extent the Fourth District determined that the mistaken administration of Miranda warnings results in a seizure as a matter of law, its conclusion was error. The proper test is whether, based on the totality of the circumstances, a reasonable person would feel free to end the encounter and depart.”

“Officers are not prohibited from merely approaching a citizen in public and asking questions regarding criminal activity.” See Voorhees v. State, 699 So. 2d at 608 (Fla. 1997). The Court concluded that “the totality of the circumstances in Caldwell’s police encounter did not result in a seizure.” The officers approached Caldwell “in a public area, during the daytime, and in the presence of others.” The officers did not display any weapons, did not use any “lights or sirens,” nor was there a “threatening presence of multiple officers.” Caldwell was “directed away from the others,” and confronted about the burglaries. The officer “expressed his belief” that Caldwell committed the burglaries and read Caldwell his Miranda warnings. When Caldwell asked “why he was being arrested,” the officer “specifically informed [Caldwell] that he was not under arrest, but

rather that the officer merely wanted to make sure Caldwell was aware of his rights.” The Court concluded that “[a] reasonable person, having received this clarification, would not have believed that he was under arrest.” Further, the Court determined that Caldwell was not “seized as a result of the pat-down search.” He was “informed in advance that he would be frisked as a condition of accepting a ride in the officer’s vehicle and did not object to this condition.”

The Court held that “Miranda warnings do not result in a seizure as a matter of law.” “While we do not discount the possibility that Miranda warnings may increase the coercive atmosphere of a police-citizen encounter outside the context of a custodial interrogation, we find that the warnings did not result in a seizure in this case.” The Court approved the 2nd DCA’s decision in Caldwell “to the extent that it is consistent with this opinion, and disapprove the opinion of the 4th DCA in Raysor to the extent that it is inconsistent with this opinion.”

[*Caldwell v. State*, 07/08/10]



1st DISTRICT COURT OF APPEAL

Trial court erred denying suppression motion; case reversed and remanded for new trial because police reinitiated custodial

interrogation after defendant invoked.

Wilder appealed his convictions of first-degree murder, attempted second-degree murder with a firearm, and petit theft, arguing “the trial court erred in denying the motion to suppress evidence of inculpatory statements he made, after he had invoked his right to counsel, when the police reinitiated custodial interrogation.”

The 1st DCA “reversed for a new trial, with directions to grant the motion to suppress.” “After Mr. Wilder asked for a lawyer in the course of custodial interrogation, his interrogator stopped the questioning, just as Miranda required. But rather than facilitating—or at least awaiting—an opportunity for him to consult with counsel, the police shortly thereafter reinitiated interrogation. This produced the statements introduced over objection at trial, in violation of the requirements of Edwards.” Further, the 1st DCA stated that “the prosecution did not show that appellant initiated further contact with the police or otherwise waived his right to counsel, after invoking it.” The 1st DCA held that the trial court erred in denying the suppression motion and that “the State failed to establish that the erroneous admission of the statements did not contribute to the verdict.”

[*Wilder v. State*, 07/07/10]



Suppression motion granted in error; when BOLO issued, police had reasonable belief incident report was verifiable and

reliable.

The State sought review of the order “granting DeLuca’s motion to suppress evidence obtained as a result of what the trial court called an illegal detention.” At issue is “whether officers had justification, based on a detailed 911 call, to detain DeLuca and investigate the report of his criminal activity.”

The call at issue was from a man named Cecil Brown who called 911 and stated that two white men pulled a black 9-mm handgun on him. Mr. Brown gave a description of the two men; the location where the incident happened; a description of the SUV the men were driving, including the license plate number and the location of an FSU decal; and he also provided the direction the vehicle was heading in. Brown provided his cell phone number; the name of the street he could be located on; and a detailed description of what he was wearing. The Tallahassee Police Department (TPD) issued a “be-on-the-lookout” (BOLO) as a result of that call and within minutes after the BOLO issued, the SUV was located and DeLuca and the other occupant were detained. Drugs were found under the SUV and DeLuca was charged with drug offenses and resisting without violence. However, Cecil Brown’s call disconnected and sometime after the arrest, TPD “determined it could not verify the call.” TPD could not locate Cecil Brown, nor could they find the handgun. The trial court granted DeLuca’s motion to suppress finding “the informant’s communication was tantamount to an anonymous call and his tip was thus unreliable.” The detention was illegal, thus, “the evidence seized must be suppressed pursuant to Baptiste v. State, 995 So. 2d 285 (Fla. 2008).” The State appealed.

The 1st DCA noted that in Adams v. Williams, 407 U.S. 143, 147 (1972), the Supreme Court noted:

Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response.

Based on Adams, the 1st DCA concluded that the trial court “failed to note the appropriate nuance to the informant rule where the informant is the victim of the crime reported.” The trial court improperly classified the source of the tip as “anonymous” by “relying solely on other information discovered by law enforcement after the lawful detention.”

Certainly this later information suggested the informer’s veracity and reliability were less stalwart than originally thought when TPD broadcast the BOLO. Cf. Baptiste, 995 So. 2d at 293 (noting “the fact that an anonymous tip ultimately proves to be accurate does not establish reasonable suspicion”). Nevertheless, belatedly acquired facts did not blemish the reasonable police actions here. The lawfulness of DeLuca’s detention depended on what the officers knew at its inception.

The 1st DCA found that the “totality of the circumstances indicate the police reasonably believed the incident report was verifiable and reliable when the detention began.” The 1st DCA reversed and remanded for further proceedings.

[*State v. DeLuca*, 07/16/10]



3rd DISTRICT COURT OF APPEAL

Police conducted investigatory stop without reasonable suspicion of criminal activity; thus, consent to search was involuntary.

Hill, charged by information with possession of cocaine, entered a plea of *nolo contendere* and appealed his conviction and sentence arguing “the trial court erred in denying his Motion to Suppress Evidence.”

The record revealed that “Officer Brian Leahy of the Key West Police Department responded to an anonymous call that a black male wearing a shirt, jeans, and nice sneakers was sitting with a nicely dressed white female and selling narcotics.” Officer Leahy arrived and “did not observe anything that indicated that a crime had occurred, was occurring, or was about to occur.” Officer Leahy called for assistance and Officer Anglin arrived “in his patrol car, entering the wrong way on the one way street where the two individuals sat, and then directed his spotlight on the two figures.” Two other officers

also arrived at the scene. One officer held onto Hill's license, one officer ran a warrants check and another officer requested to search his person. Hill testified he did not believe the officer had the right to search him, but "he proceeded to empty his pockets." Officer Leahy noticed "a clear plastic bag with a white powdery substance," and recognized the substance to be cocaine. Hill was arrested and the substance later tested positive for cocaine. Officer Leahy testified that "Hill was free to decline the search and leave." At the suppression hearing, defense counsel argued that "Hill was 'boxed' in by four uniformed officers who approached from multiple directions . . . and Officer Leahy asked for Hill's consent to a search-amounted to a Fourth Amendment stop from which no reasonable person would have felt free to leave."

"The Supreme Court adheres to the view that a person is 'seized' only when, 'by means of physical force or a show of authority, his freedom of movement is restrained.'" U.S. v. Mendenhall, 446 U.S. 544, 553 (1980). The 3rd DCA concluded that "[w]e cannot say that a reasonable person in Hill's position would have felt free to leave or to decline the officers' requests in light of the surrounding circumstances immediately preceding Hill's arrest." The 3rd DCA found that "a reasonable person in Hill's shoes would not have felt free to simply walk away from four officers, one of whom retained Hill's license while another asked to search Hill's person." "The Florida Supreme Court, in Golphin v. State, 945 So. 2d 1174 (Fla. 2006), found that the retention of identification during the course of further interrogation or search certainly factors into whether a seizure has occurred."

Because the officers' contact with Hill amounted to a Fourth Amendment investigatory stop, and because the police did not have a well-founded, articulable suspicion that Hill was engaging in criminal activity, Hill's consent to a search was tainted such that it was not voluntary.

The 3rd DCA reversed the order denying Hill's motion to suppress and remanded for further proceedings.

[*Hill v. State*, 06/30/10]



4th DISTRICT COURT OF APPEAL

Officers' reference to "marked unit" comes under attack again; however, conviction for aggravated fleeing and eluding is affirmed.

Dumais, convicted for aggravated fleeing and eluding under section 316.1935(2), Florida Statutes (2007), argued "the trial court erred in denying his motion for judgment of acquittal." "Specifically, he contends there was no evidence that the patrol vehicles from which he was fleeing had 'agency insignia and other jurisdictional markings prominently displayed.'"

The record revealed that two Fort Lauderdale police officers, in separate marked vehicles were stopped, one behind each other at a red light. Both officers "observed the defendant's vehicle pass to the right of the stopped traffic," with the vehicles passenger-side wheels on the sidewalk and watched the defendant run the red-light. The officers pursued Dumais, but after two blocks, they "turned off their lights, and the first officer turned off his

siren.” Dumais “then made a wild U-turn in front of oncoming traffic,” and went down a side street into a residential neighborhood. The officers went down the side street and when the first officer “saw defendant’s vehicle again,” he “re-activated his lights, but not his siren.” Dumais parked in front of a house; ran into the house; and shut the door behind him. When back-up officers arrived, one officer knocked and announced his presence; Dumais opened the door and the officer told Dumais he was under arrest. The officer testified that Dumais “spontaneously said ‘he was sorry for what he did, that he knew he should have stopped when he saw my lights.’” At trial, one officer testified he was in a “marked unit,” while the other officer referred to his vehicle as “a marked police unit – I’m sorry, a marked police vehicle.” Dumais contends that “marked unit” and “marked police unit” does not satisfy section 316.1935(2)’s third element:

The law enforcement officer was in an authorized law enforcement patrol vehicle *with agency insignia and other jurisdictional markings prominently displayed on the vehicle* and with siren and lights activated.

Fla. Std. Jury Instr. (Crim.) 28.7 (2007)(emphasis added).

The 4th DCA affirmed the conviction. “Viewing the officers’ references to ‘marked unit’ and ‘marked police vehicle’ in the light most favorable to the state, in conjunction with the defendant’s admission that he knew he was fleeing from the police, we conclude that competent, substantial evidence supports the defendant’s conviction for aggravated fleeing and eluding.”

The purpose of requiring the state to prove that “the law enforcement officer was in an authorized law enforcement patrol vehicle with agency insignia and other jurisdictional markings prominently displayed on the vehicle and with siren and lights activated” is to guarantee that the defendant “[knew] he had been directed to stop by a duly authorized law enforcement officer [and] willfully refused or failed to stop.” Fla. Std. Jury Instr. (Crim.) 28.7 (2007). The defendant’s admission here provides that guarantee. We leave for another day our consideration of whether reference to a “marked” vehicle, standing alone, is sufficient to prove the “agency insignia and other jurisdictional markings” element.

[*Dumais v. State*, 07/14/10]



Suppression motion denied in error; not enough factors present for officer to have reasonable suspicion defendant committed a crime.

Ray appealed “an order denying her motion to suppress drug evidence obtained during an investigatory traffic stop which led to her arrest for possession of cocaine.” Following the denial of her motion, Ray “entered a no contest plea, reserving her right to appeal the order.” Ray argued that “at the time the arresting officer

activated her emergency lights, the officer did not have a reasonable suspicion that Ray had committed a crime.” Therefore, Ray contended the traffic stop was illegal “and the evidence obtained incident to the stop cannot be used against her.”

At the suppression hearing the arresting officer testified she was monitoring this particular neighborhood where Ray was arrested “in response to resident complaints of drug dealing.” She observed Ray stop her vehicle in the middle of the road; an unknown male approached the vehicle; and the officer “observed some sort of hand-to-hand exchange” between the two. While the officer could not identify what was exchanged, “she perceived the exchange to be a drug transaction.” The officer followed Ray when she drove away. The officer testified she “activated the lights on her police cruiser in an attempt to effectuate a traffic stop.” When Ray drove through a stop sign without stopping, the officer pulled Ray over. Ray dropped a white substance out of her vehicle’s window as the officer approached. The officer recovered the substance and it later tested positive for cocaine. The State argued that “based on the totality of the circumstances, including the nature of the exchange, the officer’s narcotics training, and the location’s reputation as a drug area, the officer could form a reasonable suspicion that a drug transaction occurred.” The State also argued in the alternative that “Ray was detained and investigated because of a traffic law violation.”

The 4th DCA referenced the decision in Burnette v. State, 658 So. 2d 1170, 1171 (Fla. 2d DCA 2003), where the 2nd DCA decided that even though the officer could not identify the objects exchanged in the transaction, “the police could form a reasonable suspicion that a drug transaction took place because (a) the officer had extensive drug training; (b) the defendant was making an exchange with an identified known drug dealer; and (c) the transaction took place at a location where the police had previously made thirty to forty drug arrests.”

The 4th DCA found in the instant case “there

were not enough factors present to support a finding of reasonable suspicion.”

The officer could not identify the objects exchanged, the participant involved in the exchange with Ray was not a known drug dealer, and the officer was monitoring the area in response to reported drug deals rather than prior drug arrests. Because the arresting officer was not justified in performing the investigatory stop, the trial court erred in denying Ray’s motion to suppress.

The 4th DCA reversed and remanded for further proceedings. The 4th DCA also noted that “Ray’s traffic infraction occurred *after* the officer turned on her lights.”

[*Ray v. State*, 07/14/10]



5th DISTRICT COURT OF APPEAL

State’s interest and necessities of the case warranted satellite testimony; also, oath element satisfied.

Rogers, convicted of burglary of a structure, grand theft, criminal mischief causing greater than two hundred dollars’ damage, and resisting an officer without violence, appealed his convictions contending “the trial court erred by allowing a state witness to testify by satellite from China at the trial of Mr. Rogers in Lake County, Florida.” Rogers’ argued “his constitutional right to confront this important witness against him

was violated.” “More specifically, he asserts that because of the lack of an extradition treaty between the United States and China, there was no guaranty of the enforcement of the witness’s oath because of the extraterritorial nature of the testimony.” Relying on *Harrell v. State*, 709 So. 2d 1364 (Fla.), *cert. denied*, 525 U.S. 903 (Fla. 1998), and *Crawford v. Washington*, 541 U.S. 35 (2004), Rogers contends that “[t]o ensure that the possibility of perjury is not an empty threat for those witnesses that testify from outside the United States, it must be established that there exists an extradition treaty between the witness’s country and the United States, and that such treaty permits extradition for the crime of perjury.”

The witness in question that was allowed to testify at trial via a satellite feed from China, over the objection of the defense, was a “former officer of the Leesburg Police Department, who was the arresting officer and a material witness to the crimes charged.” At the time of trial, the witness, a United States citizen, was living in China and “intended to return to live in the United States once his wife, a Chinese national, got her visa.”

While the confrontation clause provides “. . . the accused shall enjoy the right . . . to be confronted with the witnesses against him,” the 5th DCA noted that “[t]he Confrontation Clause, however, is not absolute in terms of a requirement for *physical confrontation*, and is subject to exceptions where ‘considerations of public policy and the necessities of the case’ require it.” *Maryland v. Craig*, 497 U.S. 836, 849 (1990); *see also Harrell*. The *Harrell* court concluded that “the satellite procedure can only be approved as an exception to the Confrontation Clause if it is justified on a case-specific finding based on important state interests, public policies, or

necessities of the case, and provided that the three purposes of confrontation – oath, cross-examination and observation of witness demeanor – are satisfied.” *Harrell*, 709 So. 2d 1369.

The 5th DCA agreed with the trial court’s finding that the prosecution of Rogers “could not have gone forward without some acceptable procedure being adopted other than a face-to-face confrontation,” thus, “the State interest and necessities of the case warranted the use of the satellite procedure.” The 5th DCA further found that the “oath element is satisfied.” When affirming the judgment and sentence the 5th DCA noted:

the trial court did not err in finding that the satellite procedure would ensure that the oath required by the Confrontation Clause would be effective because the State established that the law enforcement officer would be subject to prosecution for perjury upon his making of a knowingly false statement.

[*Rogers v. State*, 07/23/10]



U. S. Supreme Court 2009 Term Summary

During its 2009 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 2009 Term.



2009 SUPREME
COURT HIGHLIGHTS.

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