

# LEGAL BULLETIN

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JULIE L. JONES, EXECUTIVE DIRECTOR

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## 11th Circuit Court of Appeals

*Coffin v. Brandau*, 2/24/10



**Deputies were entitled to qualified immunity even though they crossed the threshold into homeowner's garage without a warrant.**

An officer, attempting to serve an Order of Temporary Injunction, stepped across the threshold of a garage door as it was closing and caused the door to reopen. Subsequently there was a scuffle between officers and the homeowners. Eventually the homeowners brought an action pursuant to 42 USC §1983 for wrongful entry and arrest. The district court found that the officer had violated the homeowners' right but that the officers were entitled to qualified immunity.

The Eleventh Circuit affirmed. The Court found that the deputies' warrantless entry had violated the homeowners Fourth Amendment rights but that there was no warning to the officers at the time that they were clearly violating an established right by entering the garage without a warrant. The court pointed out that the decision establishing the fact that such a right existed was not issued until later.

**Officer who arrested wrong individual as a result of misidentification was entitled to qualified immunity.**

Officers arrested the wrong person based on a misidentification. The arrestee sued pursuant to 42 USC §1983. The district court granted a summary judgment in favor of the defendants based on qualified immunity.

On appeal the plaintiff/appellant argued that the officers did not investigate thoroughly enough. After noting, "In determining whether qualified immunity exists, the issue is not probable cause in fact but arguable probable cause", the court affirmed the finding of qualified immunity. The court said, "Although by no means perfect, Mincey's investigation was not "plainly incompetent"... Nor did the Plaintiff produce evidence that Mincey 'knowingly violated the law.' ...There is no evidence that Mincey had reason to believe the perpetrator was anyone other than the Plaintiff, given the victim's complaint and identification. Most importantly, we believe that a reasonable officer in Mincey's

situation could have followed a similar course of action and believed that probable cause existed. In order to 'defeat summary judgment because of a dispute of material fact, a plaintiff facing qualified immunity must produce evidence that would allow a fact-finder to find that no reasonable person in the defendant's position could have thought the facts were such that they justified the defendant's acts.'"

[*Rushing v. Parker* 3/16/10]



## **Supervising police officers were not entitled to qualified immunity when they violated demonstrators First Amendment rights.**

Plaintiffs were peaceful demonstrators when police officers took steps to stop them. The plaintiffs then sued for the supervising police officers for violation of their First Amendment and Fourth Amendment rights pursuant to 42 USC §1983 because the supervisors failed to stop the other officers from using lethal weapons and from 'herding' demonstrators. The supervisors filed for summary judgment, claiming qualified immunity. The trial found that there was no qualified immunity for violating the First Amendment rights. The court also determined that herding violated the protestors' Fourth Amendment rights but that the officers were entitled to qualified immunity on that claim.

The Eleventh Circuit found that the lower court was correct in denying qualified

immunity for violating protesters First Amendment rights. In addition, because the officers had already been granted qualified immunity on the Fourth Amendment violation, the court also dismissed their petition challenging the decision that 'herding' protestors was a violation of Fourth Amendment.

[*Keating, et al. v. City of Miami, et. Al.*  
03/02/10]



## **Florida Supreme Court**

### **Defendant was properly Mirandized. Officers did not employ a "warn-delay-interrogate strategy."**

On direct appeal, McWatters, convicted of three counts of first-degree murder and three counts of sexual battery with great force (strangulation murders) and sentenced to death for each murder appealed arguing several guilt phase and penalty phase claims.

In one issue, McWatters contends that the thirty-minute delay between receiving his *Miranda* warnings from the arresting officer, Sergeant Humphrey, and the actual interrogation by Detective Dougherty was a "warn-delay-interrogate strategy that rendered the warning constitutionally inadequate under the United States Supreme Court's holding in Missouri v. Seibert, 542 U.S. 600, 604 (2004)."

The record revealed that at trial, McWatters moved to suppress his confession saying the delay between receiving his Miranda warning

and the actual interrogation “diluted the effectiveness” of his waiver. The trial court denied the motion finding that McWatters was given a “thorough and accurate reading of his Miranda rights,” and that McWatters “understood the rights read to him and repeatedly asked to be able to speak to Detective Dougherty.” “The Miranda warning was not re-read before McWatters was interviewed by Detective Dougherty.” The Court concluded that McWatters did not “challenge the trial court’s findings of fact,” even though he did dispute the claim that less than thirty minutes passed between the warning and the interrogation.

The Court determined that unlike *Seibert*, McWatters received his Miranda warning “as soon as he was taken into custody, and he has conceded that he was accurately informed of his rights and that he understood his rights before any questioning began.” The Court held the trial court did not err in denying McWatters’ suppression motion and did not err “in concluding . . . officers were not obligated to read advise McWatters of his rights immediately before the interview.” The interlude between the warning and the interview was “comparatively brief.” In addition, McWatters undermined his own claim when he waived his rights by requesting to speak with Detective Dougherty, “who did in fact conduct the interview about the homicides.”

The Court found each death sentence was proportionate and affirmed McWatters’ convictions and his sentences of death.

[*McWatters v. State*, 03/18/10]



## 2nd District Court of Appeal

**Trial court properly granted motion to suppress; defendant was handcuffed, separated from his vehicle, and under the supervision of other officers at the time of the search.**

The State appealed the order “granting K.S.’s motion to suppress a firearm seized during a search of K.S.’s vehicle and K.S.’s statements to law enforcement relating to his ownership or use of the firearm.”

At the suppression hearing, the officer testified to the events leading up to his arrest of K.S., for fleeing and eluding. The officer also testified that when he pulled his patrol vehicle up behind K.S.’s vehicle, he “observed K.S. reaching towards the dashboard on the passenger side and order K.S. to show his hands and step out of the car.” K.S. exited his car; he was handcuffed, and arrested for fleeing and eluding. Backup officers arrived and no weapons were found on K.S. The officer took K.S.’s car keys; unlocked and opened the glove box in K.S.’s vehicle; and found a semiautomatic firearm. K.S. testified at the hearing that he had not agreed to or consented to a search of the vehicle. The trial court, relying on Arizona v. Gant, 129 S. Ct. 1710 (2009), granted the suppression motion.

The 2<sup>nd</sup> DCA noted that the Gant court held that “the search of Gant’s vehicle was unreasonable where Gant ‘clearly was not within reaching distance of his car,’ because he was handcuffed in a patrol car at the time of the search.” The Gant court also held that “the police could not reasonably have believed they would find evidence relevant to Gant’s crime of driving with a suspended license.” In the instant case, while the State argued that K.S.’s “furtive movements towards the glove compartment

justified the search based on officer safety concerns,” the 2<sup>nd</sup> DCA rejected that argument.

Similar to Gant, K.S. was in handcuffs, separated from his car, and “under the supervision of additional backup officers,” at the time of the search. “Further, the officer could not reasonably have believed he would find evidence of K.S.’s crime of fleeing and eluding.” Thus, the 2<sup>nd</sup> DCA affirmed the trial court’s order granting K.S.’s motion to suppress.

*(This case demonstrates that courts will be carefully scrutinizing the reason for the search. Here, the court opined that when the defendant was handcuffed and reasonably secure, law enforcement may not search the vehicle. Secondly, the courts will look at the reason for the arrest to determine if the search is reasonable and lawful. You may want to review the April 2009 Special Bulletin on Arizona v. Gant.)*

[State v. K.S., 03/05/10]



## 3rd District Court of Appeal

### **Circumstances before stop gave rise to “a founded or reasonable suspicion” defendant was involved in drug transaction.**

The State appealed an order “in a prosecution for cocaine trafficking and conspiracy which suppressed self-incriminating statements obtained after a Terry stop the lower court found was unsupported by founded suspicion of the defendant’s involvement in criminal

activity.”

The record revealed that undercover Detective Valdez arranged to purchase two kilograms of powder cocaine from Marcos Lopez (Marcos). During surveillance of Marcos, defendant Elvis Lopez (Lopez) was seen leaving a residence with Marcos and then followed Marcos, in his own vehicle, to the prearranged drug buy. Lopez parked in a different location from where Marcos and Detective Valdez met. Following the transaction between Marcos and Detective Valdez, a “takedown unit moved in and arrested Marcos.” Lopez immediately tried to leave, however, Detective Oliva used his car to block and detain Lopez. Lopez told the officer he was there “to collect the debt from the proceeds of the sale he knew was going to take place.” Lopez agreed to go to the police station, he waived his *Miranda* rights, and then “gave the recorded interview primarily at issue on appeal, in which he specifically admitted his involvement in the unlawful transaction.” Lopez filed a motion to suppress challenging “the validity of the initial investigatory stop.” At the evidentiary hearing Detective Valdez testified that, “based on his broad experience, a second vehicle follows a vehicle involved in a drug transaction to insure that there are no law enforcement officials at the transaction site.” Detective Oliva testified that “the defendant’s behavior gave rise to the suspicion that he was in communication with Lopez during the drug sale.” The lower court “suppressed the admissions, ruling that the stop of which the statements were products was unjustified.”

The 3<sup>rd</sup> DCA ruled that the trial court’s “conclusion is unacceptable.” “The contrary conclusion, which seems to have been indulged by the trial judge, amounts to a finding not only that the defendant’s actions in accompanying, following, and waiting for

Marcos and then attempting to flee when he was apprehended were completely innocent and the connections to the drug deal completely coincidental, but that the police were unreasonable as a matter of law in thinking otherwise.” The 3<sup>rd</sup> DCA concluded that “we think it clear that the circumstances apparent before the stop gave rise to a founded or reasonable suspicion, as required by the Constitution, that the defendant was a principal or accomplice in the ongoing drug transaction.” See Terry v. Ohio, 392 U.S. 1 (1968).

As observed in State v. Maya, 529 So. 2d 1282, 1287 n.7 (Fla. 3d DCA 1988), these determinations do not “turn on whether an innocent explanation can possibly be conjured up from what are obviously incriminating circumstances. Rather, [they are] dependent on what a realistic view of the facts justifies or requires.” Not only can we not fault the police for stopping Elvis, but, as Terry itself says, “[i]t would have been poor police work indeed for [the] officer . . . to have failed to investigate[] [his] behavior.” Terry, 392 U.S. at 23. See Terry1; U.S. v. Canela, 144 Fed. Appx. 17 (11th Cir. 2005)2, and Brown v. State, 719 So. 2d 1243 (Fla. 5<sup>th</sup> DCA 1998).

The 3<sup>rd</sup> DCA reversed and remanded. “Applying these principles, the stop was justified, Terry; § 901.151(2), and the order under review cannot stand.”

[*State v. Lopez*, 03/03/10]



## 4th District Court of Appeal

**“ . . . existence of probable cause is not susceptible to formulaic determination. Rather, it is the ‘probability, not a prima facie showing, of criminal activity [that] is the standard of probable cause.’ ”**

On Motion for Rehearing, the State appealed “the trial court’s order granting defendant’s motion to suppress evidence seized after execution of a search warrant.” This was a vehicular homicide prosecution and the trial court found “that the affidavit and application for a search warrant for the ‘black box’ from the defendant’s vehicle lacked sufficient facts to establish probable cause for issuance of the warrant.”

The record revealed Detective John Grimes of the Broward County Sheriff’s Office, investigated an accident where Joseph Hatton died as a result of the injuries he sustained after defendant’s vehicle collided with Hatton’s vehicle. Detective Grimes filed a “General Affidavit and Application for Search Warrant for the sensing and diagnostic module (SDM) (also known as a ‘black box’) from the defendant’s vehicle.” The officer “alleged in his affidavit that his

investigation ‘reveal[ed] that [the defendant] . . . was traveling well in excess of the [40-m.p.h.] posted speed limit.’” The officer stated that

the “[p]ost impact distance traveled by both vehicles was greater than one hundred twenty five feet. There were no pre impact tire marks, suggesting that no braking took place before impact. Post impact tire marks along with physical evidence on scene suggest that [the defendant’s] vehicle was traveling in excess of 70 [m.p.h.]” The affidavit further reported that an eyewitness “stated that she heard the tires on the vehicle that [the defendant] was driving ‘chirp’ as the vehicle was changing into a faster gear.”

The officer further stated in his affidavit that “the ‘black box’ located in the defendant’s vehicle ‘may contain electronically stored data including, but not limited to, data pertaining to the pre impact speed of the vehicle, airbag system deployment time and status, engine RPM’s, brake circuit status, seat belt circuit status, Delta ‘V’ readings, and ignition cycles.”

The trial court granted the suppression motion and concluded that “the general affidavit and application for search warrant did not contain specific and sufficient facts to establish probable cause that a crime had been committed and that the evidence of that crime would be found in the defendant’s vehicle. Speed alone was insufficient.”

In its lengthy analysis, the 4<sup>th</sup> DCA discussed the “task of the issuing

magistrate” and also noted that “where the issuance of a search warrant based on a probable cause affidavit is at issue, the standard of review is not de novo, but rather a standard of ‘great deference.’” The “issuing magistrate’s duty ‘is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that . . . evidence of a crime will be found in a particular place.’” There are two elements that must be proven in the affidavit for the magistrate to determine that probable cause exists when issuing a search warrant:

- (1) the commission element—that a particular person has committed a crime—and (2) the nexus element—that evidence relevant to the probable criminality is likely to be located at the place searched. State v. Vanderhors, 927 So. 2d 1011, 1013 (Fla. 2d DCA 2006) (citing Burnett v. State, 848 So. 2d 1170, 1173 (Fla. 2d DCA 2003)) (emphasis added).

The 4<sup>th</sup> DCA determined the detective’s affidavit presented enough facts “for the magistrate to make a practical, common-sense decision, based on the circumstances set forth in the affidavit, that the defendant committed the alleged crime (the commission element) and that ‘evidence relevant to the probable criminality [of vehicular homicide was] likely to be located at the place searched’ – the Corvette’s black box (the nexus element).” See Vanderhors, 927 So. 2d at 1013. Thus, the 4<sup>th</sup> DCA held that the magistrate properly issued the search warrant and reversed the trial court’s order suppressing the evidence.

[*State v. Abbey*, 02/24/10]



**The DCA opined that the Circuit Court denied DHSMV due process by granting petition for writ of certiorari on ground that Department failed to respond order to show cause where order to show cause was not served on Department.**

White took an appeal via a petition of writ of certiorari of his administrative suspension of his driving privileges. In a certiorari review of the Department's revocation, the circuit court sitting in its appellate capacity must determine that the Petitioner, White, has made a prima facie case for relief. If so, the court then issues its order to show cause. The Respondent, DHSMV, must then file a response to the order to show cause why the relief should not be granted.

In this case, DHSMV did not receive the order to show cause and never filled a response. The court noted the absence of the response as its basis for granting the relief.

The department moved for rehearing and request that its response on the merits of the case. The circuit court denied the motion and granted White's petition. and order his license reinstated.

The department filed a petition for writ of certiorari (appeal) which was granted by the Fourth DCA. The district court granted the department's petition and remanded to the circuit court to rule on the merits of the case.

Assistant General, Counsel, Damaris Reynolds from the Lake Worth Office of the General Counsel represented the Department..

*[Department of Highway Safety and Motor Vehicles v White, 03/10/10]*



DHSMV v White.DOC

**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  
Richard Coln, Senior Assistant General Counsel

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