

# LEGAL BULLETIN

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## 11th Circuit Court of Appeals

[[Penley v. Enslinger](#) 5/3/2010]



**Officers who were involved in the shooting of a student who had a fake firearm were entitled to qualified immunity.**

A middle-school student brought an air pistol to school. He had changed the appearance of the pistol to make it look like a real firearm. Ultimately he was in a stand off with police and was shot and killed by a police officer. His parents sued the police officers pursuant to 42 USC sec. 1983. They claimed that the officer who shot their son used excessive force. The District Court issued a summary judgment in favor of the defendants, finding that the officers had qualified immunity.

After an extensive review of the events leading to the shooting, the Eleventh Circuit affirmed the District Court. The Court said, "As set forth above, when examining whether an officer's use of deadly force is reasonable, we recognize that 'police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, rapidly evolving-about the amount of force that is necessary in a particular situation.'"

## 2nd District Court of Appeal

**Trial court erred granting suppression motion; defendant's actions conveyed his consent to search his person.**

The State appealed the trial court's order granting Gamez's motion to suppress the evidence. Gamez was charged with trafficking in methamphetamine and possession of paraphernalia.

At the suppression hearing, Detective Ogg testified "he stopped Gamez's car after it failed to stop at two stop signs." There were other passengers in the vehicle. Because Gamez appeared "very nervous and was physically shaking," the detective requested Gamez talk to him near the police vehicle and away from the other passengers. Gamez consented to a search of his vehicle and when asked, he told the detective he had nothing illegal on him. When the detective requested to search his person,

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MAY 2010

LEGAL BULLETIN

Gamez “raised his hands above his head and spread out his feet, indicating that he was giving consent to search his person.” The detective “felt a ‘squishy’ material wrapped in plastic on Gamez’s waistline.” Based on his experience, the detective believed the substance was “methamphetamine, marijuana or cocaine.” The detective asked Gamez to empty his pockets and “Gamez took out a couple of cell phones and a roll of money.” The detective asked Gamez if he could check his pockets again and “Gamez again raised his hands.” The detective found another roll of money and some drugs in a bag. The trial court granted the suppression motion finding specifically “there was not clear and convincing evidence that Gamez gave Detective Ogg consent to search his person when he lifted his hands and spread his feet.”

The 2<sup>nd</sup> DCA noted that “[c]onsent to search may be in the form of conduct, gestures, or words.” United States v. Griffin, 530 F.2d 739, 742 (7<sup>th</sup> Cir. 1976); Ingram v. State, 928 So. 2d 423, 430 (Fla. 1<sup>st</sup> DCA 2006). In both instances where Gamez was asked by the detective for permission to search his person, Gamez responded by raising his hands and spreading out his feet. The 2<sup>nd</sup> DCA concluded “these actions conveyed Gamez’s consent to search his person.” Further, “as in Griffin, Gamez’s behavior after Detective Ogg began to search him also supports the conclusion that Gamez consented to a search of his person, because Gamez never pulled away or otherwise indicated that he did not want to be searched.” The 2<sup>nd</sup> DCA also found Gamez’s consent to search was voluntary and reversed the trial court’s order granting the suppression motion and remanded for further proceedings.

[*State v. Gamez*, 05/14/10]

Opinion: 

## 3rd District Court of Appeal

### Trial court erred; hot pursuit is an exception to warrantless searches.

The State appealed the order granting Brown’s motion to suppress his statement, along with the weapon and drugs found in his apartment. Two officers noticed Brown and another man outside an apartment complex during an unrelated investigation. Brown had an assault-type rifle. The men were ordered to stop, however, they ran into defendant’s apartment. The door was open, the police followed and found the rifle “and over twenty grams of marijuana.” Brown admitted they belonged to him. The trial court granted the suppression motion concluding in part “that Brown’s action ‘would have been a misdemeanor, and the officer cannot follow him into the home for that purpose.’”

The 3<sup>rd</sup> DCA noted that “[w]arrantless searches or arrests in constitutionally protected areas, particularly one’s home, are per se unreasonable unless they fall within one of the established exceptions to the warrant requirement.” One such exception is “the existence of ‘exigent circumstances,’ which in turn include those which arise when police are conducting lawful ‘hot pursuits.’” While the trial court was correct in finding that “the offenses observed by the officers, possession of an

assault-type rifle, and fleeing from an officer were 'only' misdemeanors," the 3<sup>rd</sup> DCA cited to its decision in Ulysse v. State, 899 So. 2d 1233, 1234 (Fla. 3d DCA 2005), where it "squarely held that the hot pursuit exception to the warrant requirement is nonetheless fully applicable."

The defendant suggests that the hot pursuit exception to the warrant requirement of the Fourth Amendment does not apply if the officers are pursuing a fleeing misdemeanor. That point has been resolved in this district adversely to the defendant's position. See Gasset v. State, 490 So. 2d 97 (Fla. 3d DCA 1986). Hot pursuit of a fleeing misdemeanor is permissible where the misdemeanor is punishable by a jail sentence. *Id.* at 98.

Ulysse, 899 So. 2d at 1234. Indeed, section 901.15, Florida Statutes (2008) specifically provides:

A law enforcement officer may arrest a person without a warrant when: (1) The person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer. An arrest for the commission of a misdemeanor or the violation of a municipal or county ordinance shall be made immediately or in fresh pursuit. [e.s.]

The 3<sup>rd</sup> DCA found that "the time of day, the presence of an assault-type rifle, the disregarded commands to stop, and the possible threat of an uncooperative suspect with a weapon, were overwhelming reasons to follow Brown into the home." The 3<sup>rd</sup> DCA found that "[i]n accordance with Ulysse and Gasset, we therefore find that

no constitutional violation was involved in this case." The 3<sup>rd</sup> DCA also found that "the knock and announce rule is not applicable in hot pursuit situations." The order under review was reversed and the cause was remanded for denial of the motion to suppress.

[*State v. Brown*, 05/12/10]

Opinion: 

## Officers did not have a reasonable suspicion to detain juvenile.

OB was charged with resisting an officer without violence. Based on its determination that responding to a BOLO was tantamount to the lawful execution of a legal duty, the trial court issued a judicial warning and withheld adjudication of delinquency. OB appealed arguing "the State failed to establish either that the officers had the requisite reasonable suspicion to detain him or that he fled with knowledge that the officers intended to detain him."

The record revealed that OB and his friends were walking to the school to play basketball when it started raining. They took "shelter under a neighbor's carport." When the rain stopped, "a police car pulled up, and one of the officers, with his gun drawn, approached the youths." Scared, the kids ran. OB was found hiding in someone's backyard by another officer, "who ordered him to lie face down in the mud and handcuffed him."

The trial court, based on Billips v. State, 777 So. 2d 1094 (Fla. 3d DCA 2001, and E.A.B. v. State, 851 So. 2d 308, 311 (Fla.

2d DCA 2003), “determined that as a matter of law, simply responding to a BOLO constitutes the lawful execution of a legal duty.” However, the 3<sup>rd</sup> DCA determined that both Billips and E.A.B., in fact, “support the opposite determination: that police officers seeking to detain an individual in response to a BOLO are not lawfully executing a legal duty *unless they have the requisite reasonable suspicion.*” The 3<sup>rd</sup> DCA noted that “[t]he State says merely that the officers ‘observed three African-American males in the backyard,’ not that they observed them engaging in any criminal or suspicious conduct.”

In C.E.L. v. State, 24 So. 3d 1181, 1186 (Fla. 2009), the Florida Supreme Court found the defendant guilty of resisting arrest, basing its decision on Wardlow, “which held that a defendant’s ‘unprovoked flight upon noticing the police’ in a high-crime area was suggestive of wrongdoing and therefore provided reasonable suspicion justifying an investigatory detention.” C.E.L., 24 So. 2d at 1183, n.4 (citing Illinois v. Wardlow, 528 U.S. 119, 124-26 (2000)).

Regarding OB’s flight from the officers, the 3<sup>rd</sup> DCA stated that “[f]light can support a resisting charge if the state proves that (1) the officer had an articulable well-founded suspicion of criminal activity that justifies the officer’s detention of the defendant, and (2) the defendant fled with knowledge that the officer intended to detain him or her.” The 3<sup>rd</sup> DCA concluded that neither of these requirements was met by the State. There was no testimony to establish that OB’s flight took place in a high-crime area, nor was there any testimony to prove that OB “heard any order to stop; in fact, he testified that when he ‘took off running,’ he did not hear the officers issue a command, and he was unaware whether an officer was after him in particular.” Based on the above, the

3<sup>rd</sup> DCA found “the trial court erred in finding O.B. guilty of resisting an officer without violence.”

[*OB v. State*, 05/12/10]

Opinion: 

## ATTORNEY GENERAL OPINION

### Tax Collectors as an agent of the DHSMV must participate in the motor vehicle electronic filing system.

A review of the legislative history surrounding the enactment of Chapter 2009-206, Laws of Florida, does not reflect any discussion as to the intent of section 320.03(10), Florida Statutes, to make application of the EFS mandatory or discretionary.

A review of the recordings of that session indicates no discussion of whether it would require mandatory participation by all tax collectors or it would make participation optional. As noted above, however, the language used in section 320.03(10), Florida Statutes, mandates the uniform application of the EFS to all tax collectors and a plain reading of the statute shows an intent to make the system applicable to all tax collectors within the state.



AGO 2010-18 Tax  
Collector as DHSMV a

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