



IMPLIED CONSENT— “BREATH, BLOOD OR URINE TEST”

Susan Nader was arrested for DUI and refused breath testing. She subsequently requested a formal administrative review of her license suspension. At the formal review hearing, Nader argued that her suspension should be invalidated because she was asked to submit to “breath, blood or urine” testing when only breath testing was required by law. The hearing officer rejected her argument and upheld her license suspension.

Nader appealed the hearing officer’s decision to the circuit court. The circuit court quashed the hearing officer’s order because it was bound by Clark v. DHSMV, a case from the Fourth District Court of Appeal, which found that the request for “breath, blood or urine” testing was misleading and unlawful when only breath testing was required by law.

The Department appealed the circuit court’s ruling in Nader to the Second District Court of Appeal, which found nothing wrong with a request for “breath, blood or urine.” The Second District Court found that the driver had the choice of one of three tests and was free to choose the breath test if she preferred the least invasive method. However, the Second District Court noted that the circuit court had correctly applied the Fourth District Court’s opinion in Clark and certified the matter to the Florida Supreme Court.

The Florida Supreme Court in Nader v. DHSMV, agreed that the request for “breath, blood or urine” made it clear that the driver had the choice of one of three tests and was free to

choose the breath test. Because the driver refused breath testing, her license suspension was properly upheld. The Supreme Court also found that the Second District Court’s review of the circuit court’s decision was appropriate because the circuit court had violated clearly established statutory law by following Clark and quashing the hearing officer’s lawful order.

DAMARIS REYNOLDS

Asst. General Counsel

Editor’s note: Damaris Reynolds represented the Department in this successful appeal.

In this issue:

>Implied Consent

>Intoxilyzer Software

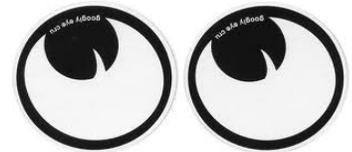
>Doing the Right Thing

>2012 Legislative Update

>The BAR Scene

>FHP Legal Corner

>Spotlight



INTOXILYZER SOFTWARE APPROVED— FLA. SUP. COURT

It is not every day that a DUI traffic crash becomes a legal fight so significant that it winds up before the Florida Supreme Court.

In December, 2011, a DUI investigation by Trooper Deborah Hawkins led to Berne v. Florida, Department of Highway Safety and Motor Vehicles. In Berne, the Florida Supreme Court reviewed the Fifth District Court of Appeal’s decision which held that the documents introduced into evidence at Berne’s administrative driver’s license suspension hearing established that he had a blood-alcohol level in excess of 0.08, which raises the presumption that Berne was DUI. This shifted the burden to Berne to overcome the presumption by showing no substantial compliance with the pertinent statutes and methods approved by FDLE. Berne attempted to overcome the presumption of impairment by presenting evidence that the Intoxilyzer 8000 used in Florida utilized a version of software that he claimed had never been subjected to an approval study.

The Fifth District Court concluded that only an evaluation

was required and not an approval study. Therefore, Berne failed to meet his burden of overcoming the presumption of impairment, and the circuit court applied the wrong law when it found that Intoxilyzers utilizing this version of software were not approved. The Fifth District Court further found that the circuit court applied the wrong law in quashing the administrative order upholding the suspension of his driver’s license.

The Florida Supreme Court found that the Fifth District Court of Appeal’s decision was correct, did not conflict with any prior Florida Supreme Court decision or with another district court of appeal decision, and dismissed Berne’s appeal.

JASON HELFANT

Asst. General Counsel

Editor’s note: Jason Helfant successfully argued this case for the Agency.

Doing the Right Thing



Ethics is the activity of man directed to secure the inner perfection of his own personality.
—Albert Schweitzer

As I write this, it is just a couple weeks or so past Tax Day when the procrastinators rush to get to the post office before midnight. Or at least that's what used to happen. Now, with online tax forms and reporting options, more and more of us are sending digital information through the air rather than paper through the mail.

As is true each year, with the deadline for filing taxes comes a spate of news stories about tax evasion and tax fraud. What surprised me about the stories this year was the cavalier attitude many people have toward dishonest conduct. The New York Times even ran a story titled [“What’s the Easiest Way to Cheat on Your Taxes?”](#)

David Callahan is the author of a book I'm reading called “The Cheating Culture: Why More Americans are Doing Wrong to Get Ahead.” Callahan's book (which I strongly recommend) is a dark book because it documents what we tend to suspect about our culture: it is becoming ethically worse, not better. Even the religious institutions we used to look to for ethical strength and inspiration are now used as the punch lines of jokes. Worse, some representatives of those institutions have been named as defendants, accused of unspeakable crimes against children.

Living in a culture that seems increasingly indifferent toward the importance of ethical conduct, how can we maintain our focus on doing what is right? Well, just as we recognize

there is value in education that has nothing to do with increased earning potential, so we must focus on the fact that ethical conduct is its own reward. We do right because it is right – not just because we're afraid of being caught, embarrassed, and punished for not doing right. That conviction comes from an internal moral compass that guides us even when no one is watching.

Anthony Balderrama, a writer for Career-



Builder.com, posted a quiz to gauge how ethical a person is at work. Although you may not agree with all of his conclusions, it is a valuable resource to help you frame your thinking about ethics in the workplace. Take the quiz by clicking [here](#) and see how you stack up against Balderrama's standard of what is ethical behavior. Remember that doing right is good because it's doing right. Do the right thing.

STEVE HURM
 GENERAL COUNSEL

2012 LEGISLATIVE UPDATE

The 2012 Legislative Session ended with the Department of Highway Safety and Motor Vehicles having another good year. The Department's legislative proposals were all passed and are now awaiting the Governor's signature. House bill 1223 contains updates related to enhancing the electronic services we provide. In addition, the bill also includes modifications to commercial driver licensing laws that will keep Florida in line with federal motor carrier requirements. Other bills

passed during the session include the creation of additional military license plates, modifications to the “V” designation on driver licenses for veterans, and changes to the disabled parking permit statute. The budget includes funding to enhance the Driver And Vehicle Information Database (DAVID) system. Major legislation was also enacted relating to modification of Personal Injury Protection insurance (“PIP”). These changes

almost exclusively address issues regarding insurance claims, but a small portion of the bill modifies the collection and retention of information contained in crash reports. Notably, the enforcement of PIP through the vehicle registration and driver license processes remains unchanged.

Additionally, the Department's data center has been scheduled to move no later than August 31, 2012. State agency data centers are being consolidated with the hope of creating savings. This statewide project will impact the Department's ability to

make programmatic changes over the next few months. However, once consolidation has been completed, routine programming changes will resume. After all bills affecting the Department and its partners have been signed by the Governor, the Department's Legislative Affairs Office will distribute the annual Summary of Motor Vehicle Laws which will provide greater details.

RICHARD BROWN
 ASST. GENERAL COUNSEL



The **BAR** Scene—*BUREAU ATTENDS LEGAL TRAINING*

The Bureau of Administrative Reviews (BAR) participated in a training seminar in Tampa, Florida January 19-22, 2012. The keynote legal training portion was conducted by the National Judicial College (NJC). BAR members actively enjoyed the intensive four day training event titled “Evidence Challenges for Florida DHSMV Hearing Officers”.

The legal training seminar with the National Judicial College was kicked off with a brief introduction by BAR Chief Kathy A. Jimenez-Morales and DHSMV General Counsel Stephen D. Hurm who discussed the future of BAR and other timely issues of importance. Then we were off to the races with NJC! Participating faculty from NJC were Consultant/Professor Kelly Tait

with the University of Reno, the Honorable Judge Toni Boone, the Honorable Judge Tom Capshaw, and the Honorable Judge W. Michael Gillette. Each faculty member brought unique insight into different topics using personal life experiences which was enjoyed by all.

The seminar program was broken down into bite-size elements dealing with topics such as: Dealing with Difficult People, Bias and Cultural Competence, Communication Skills, Conducting Hearings by Telephone or In-Person, Hearing Officer Authority and Ethics, Admitting & Weighing of Evidence, Fact-Finding & Relevance, Competent Substantial Evidence, as well as several other important and helpful areas. Also covered was the Florida Supreme Court

decision in DHSMV v. Hernandez, 74 So.3d 1070 (Fla. 2011), which dealt with the lawfulness of the arrest as it relates to the scope of review. Interaction with the presenters was encouraged and expected, and that is just what happened! BAR members were ready to lend a hand by offering questions, sharing relevant issues and scenarios that were helpful in comprehending the issues being discussed. The faculty members were enthusiastic and attention-grabbing by bringing humor and real-life experiences into their presentations.

The legal training seminar with the National Judicial College was considered by all to be the best that has been held since BAR started their association with them in 2006. Each time a semi-

nar is put on, the NJC faculty members become more familiar with our bureau, Florida Statutes, and relevant Florida case law which makes the event a successful learning experience. When the seminar ended, the BAR members came away with additional knowledge and a renewed appreciation and enthusiasm for their profession.

GREG OZMENT

Operations & Mgt. Consultant
Bureau of Administrative
Reviews



FHP Legal Corner — *US SUP. CT. SAYS USE OF A GPS DEVICE IS A SEARCH*

In United States v. Jones, 132 S. Ct. 945 (2012), the Supreme Court opined that the attachment of a tracking device to a vehicle and its use of the device to monitor the vehicle’s movements constitute a search under the Fourth Amendment.

A federal task force obtained a warrant to place a GPS tracking device on the defendant’s wife’s vehicle. The defendant was the sole driver of the vehi-

cle. The warrant provided for the installation of the device in the District of Columbia within 10 days and it was installed in Maryland on the 11th day.

The Government’s physical intrusion on an “effect” for purposes of obtaining information constitutes a search. Since it is a Fourth Amendment search, a search warrant is required unless there is probable cause and an **EXCEPTION** to the warrant

requirement, such as exigent circumstances. In its opinion the Court did not discuss why the automobile exception to the warrant requirement did not apply.

It is our opinion that a trooper may install a GPS device during a stop if he or she has probable cause to believe that a crime has been, is being committed, or is about to be committed. However, the device should not be activated

until approved by a judge. As soon as possible the trooper is to file an Application for Mobile Tracking Device Authorization. If the tracking is approved, the court will issue a Ratification Order.

If, during the course of a criminal investigation, it is determined that you need to use a GPS device, you need to apply for an Order Authorizing Installation and Use of a Mobile Tracking Device. Please contact your troop legal advisor for assistance.

PETER N. STOUMBELIS

SR. ASST. GENERAL COUNSEL

DHSMV Office of General Counsel

OFFICE LOCATIONS

Headquarters:
2900 Apalachee Parkway
A-432, MS 02
Tallahassee, FL 32399-0504

Lake Worth:
Lake Worth Regional
Communications Center
Florida's Turnpike MM 94
Lake Worth, FL 33463

Orlando:
133 S. Semoran Blvd. Suite A
Orlando, FL 32807



News and Notes



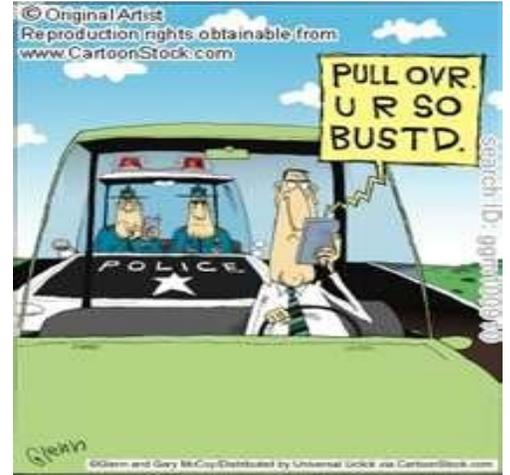
• May/June birthdays:

Eileen Bishop 5/6
Judy Medina 5/12
Jim Fisher 5/22
Pam Decambra 6/1
Judd Chapman 6/7
Jennifer Clark 6/25
Hattie Jones-Williams 6/26

• July/August birthdays

Jason Helfant 7/2
Patty Turnage 7/8
Damaris Reynolds 7/22
Marianne Allen 8/19
Peter Stoumbelis 8/25
Jennifer Pompey 8/26

Looking for old Legal Bulletins?
You can find them here: [http://
www.flhsmv.gov/Bulletins/
index.html](http://www.flhsmv.gov/Bulletins/index.html)



Have an idea or request for a future Bulletin article? Click on the button to send it to us!



Lilja Dandelake, Asst. General Counsel



Our spotlight is on Lilja Dandelake. Lilja is the legal advisor to the Division of Motorist Services and is the FHP legal advisor for Troop A. Lilja is a native Floridian who was born and raised in Jacksonville, FL. She attended undergraduate and graduate school at Florida State University. She has a bachelor's degree and a master's degree in international relations. Lilja attended law school at the William Mitchell College of Law in St. Paul, MN and graduated in 1998. She is a member of both the Florida and Massachusetts Bars.

After passing the Bar, she worked for the Attorney General's Office, the Public Defender's Office, and at a private law firm. Prior to coming to the Department, she had her own firm that specialized in criminal trial defense and appeals. She has been with the Department for a little over four years. When not at work, she likes to ride her Harley, drive her classic Porsche, and play with her Saint Bernard.

BAR LEGAL TRAINING

