



FALL 2015

## CASE NOTES

### **ACTUAL KNOWLEDGE IS AN ESSENTIAL ELEMENT OF LEAVING THE SCENE OF A CRASH - SO HOW DO WE PROVE IT?**

In *State v. Dorsett*, 158 So. 3d 557 (Fla. Feb. 26, 2015), the Florida Supreme Court ruled that a defendant must have actual knowledge of being involved in a crash before he can be convicted of leaving the scene of a crash.

Dorsett was driving a heavy truck northbound on A1A when it started raining. Dorsett claimed he had his windows rolled up, his windshield wipers and air conditioner on, and was listening to his radio. Dorsett told law enforcement he saw a lot of people running across the street from the beach, but the street was clear when he drove through. He also told law enforcement he was unaware that a teenager had lost control of a skateboard and fell to the ground, hitting his truck's passenger side undercarriage. Dorsett continued driving north at a normal rate of speed and did not stop. He was not under the influence of drugs or alcohol, and had no hearing or health problems. When stopped by law enforcement, Dorsett was adamant that if he had known about the accident, he would have stopped his vehicle.

Because actual knowledge of a crash is required, the question becomes how to prove a driver's knowledge. The First District Court of Appeal in *Cahours v. State*, 147 So. 3d 574 (Fla. 1st DCA 2014) wrote "that proving knowledge or intent is seldom capable of direct proof; it usually is established from the surrounding circumstances." The observations by other witnesses, law enforcement observations of the driver's demeanor, and inconsistencies in the driver's account of what occurred, together with physical evidence, can all be used to show the driver had actual knowledge of a crash. The Court noted that while section 316.027(2) does not expressly state that actual knowledge is required for a violation, the law does expressly provide that a felony criminal violation requires that the driver willfully violate the statute. Therefore, actual knowledge must be proven before a driver can be convicted.

When investigating a hit and run crash, troopers should remain focused on obtaining statements from witnesses, gathering physical evidence, taking photographs, and obtaining other evidence relevant to a suspect's version of events. This evidence will help the prosecutor to prove actual knowledge when charges are filed.

*By: Tom Moffett  
Legal Advisor, Troops D and K*

## CAN STATEMENTS RECORDED BY A TROOPER'S MICROPHONE AT ROADSIDE BE USED AS EVIDENCE?

On July 29, 2014, a Florida Highway Patrol Trooper conducted a traffic stop for a violation of the Move Over Law. See section 316.126(l)(b), Florida Statutes. The FHP Trooper was driving his marked patrol vehicle and was wearing his uniform. His patrol vehicle was equipped with a camera, which was linked to a microphone on his uniform. The stop was conducted using emergency equipment on the marked vehicle. The Trooper approached the driver on foot, and spoke with the driver on the side of the Interstate in Brevard County. The driver remained seated in his vehicle while the Trooper remained outside the vehicle. They spoke through the open window and their conversation was recorded by the microphone worn by the Trooper.

The driver was a criminal defense attorney and moved to suppress the roadside conversation under Chapter 934, Florida Statutes. However, a roadside conversation pursuant to a traffic stop is not subject to suppression under this section of the statutes.

Specifically, section 934.06, Florida Statutes, states "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding ...."

In other words, suppression is only appropriate when a conversation has been intercepted. This includes recordings of oral communications, but not statements that are made directly to a Trooper. Statements made directly to a law enforcement officer do not fall under Chapter 934, Florida Statutes, because there is no interception of a conversation between two people who meant to keep it private.

A driver who is stopped roadside and talks to a Trooper who is standing outside of his car through his rolled down window has no expectation of privacy. Therefore, Chapter 934 is inapplicable.

The driver in this case argued he did not voluntarily pull over or summon the Trooper for assistance, therefore, he had a right to privacy in his vehicle. The problem with the driver's argument was that the Trooper never entered his vehicle to seize anything. All of the statements the driver asserted he had an expectation of privacy in were broadcast out of his window to the Trooper, and the public at large.

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## ARE BODY CAMERA RECORDINGS EXEMPT FROM PUBLIC RECORD REQUESTS?

Section 119.071, Florida Statutes, creating a public records exemption for Body Camera recordings, became effective on July 1, 2015. Section 119.071, Florida Statutes, states that a body camera recording, or any portion of it, is confidential and exempt from public record if it is taken within the interior of a private residence; taken within the interior of a facility that offers health care, mental health care, or social services; or taken in a place that a reasonable person would expect to be private. The statute may be applied retroactively and does not supersede any other public records exemption.

A law enforcement agency may release a body camera recording or a portion of one if it is done in the furtherance of its official duties and responsibilities or to another government agency in furtherance of its official duties and responsibilities. A law enforcement agency may disclose the recording or a portion of the recording to:

A person recorded by a body camera, if the portions are relevant to the person's presence in the recording;

A personal representative of such a person, such as an attorney, executor, or guardian; or

A person not depicted in a body camera recording if it depicts a place in which such person lawfully resided, dwelled, or lodged at the time of recording, but only those portions that record the interior of such a place.

An agency must disclose a body camera recording as a public record if ordered to do so by the Court. The requesting party must give reasonable notice to the law enforcement agency prior to any hearing. In deciding whether or not the law enforcement agency must release the recording or any portion of it, the Court shall consider whether:

Disclosure is necessary to advance a compelling interest;

The recording contains information that is otherwise exempt or confidential and exempt under the law;

The person requesting disclosure is seeking to obtain evidence to determine legal issues in a case in which the person is a party;

Disclosure would reveal information regarding a person that is of a highly sensitive personal nature;

Confidentiality is necessary to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;

The recording could be redacted to protect privacy interests; and

There is good cause to disclose all or portions of the recording.

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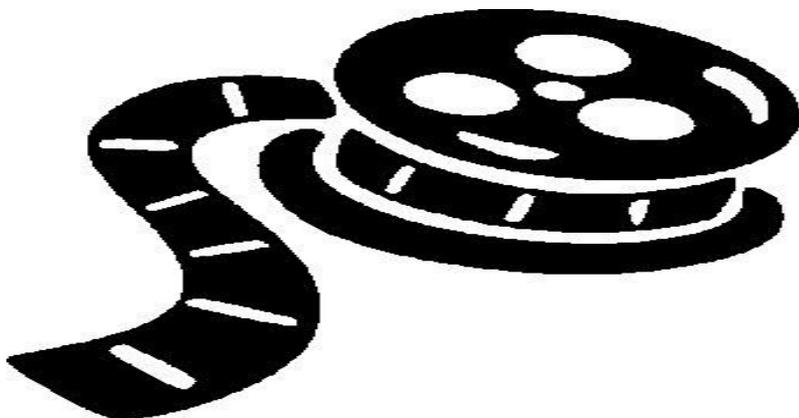
Law enforcement agencies are required by section 119.071, Florida Statutes, to maintain all body camera recordings for a minimum of ninety (90) days. The storage of body camera recordings will be an issue for law enforcement agencies. In the interest of justice, recordings that document incidents involving capital crimes, sex crimes, or any crime with a statute of limitations longer than 90 days, should be kept in excess of the 90-day statutory requirement. Agencies must determine where to store the recordings, perhaps on a private internal server or a cloud-based service.

Agencies will need to create policies regarding body camera recordings that will affect what is or is not exempt as a public record. Other issues include how to proceed if a suspect requests that an officer turn off a body camera during the course of an investigation whether an officer has the ability to turn off a body camera at his or her own discretion, whether it is necessary to record and retain non-investigative/evidentiary duties of an officer, such as paperwork and breaks with co-workers

Body cameras are still a new concept. In 2014, no State of Florida law enforcement agency used body cameras. In mid-2015, approximately 26 local city or county agencies were using body cameras as a practice or as part of a pilot program. However, there is no standard statewide policy as to the use of body cameras.

In 2015, two bills were introduced to address policies and procedures among the hundreds of law enforcement agencies in Florida. Neither bill passed. For the 2016 session, House Bill 93 aims to establish guidelines for policies and procedures for the use of body cameras in the State of Florida. Your legal advisors will be monitoring the bill's progress through the legislative session. Should you have any questions regarding this or any other bill, please do not hesitate to contact us!

*By: Rebecca Pettit  
Legal Advisor  
Troops C and F*



## ACTUAL PHYSICAL CONTROL WITHOUT KEYS IN THE IGNITION IS IT POSSIBLE?

In *Weigel v. State of Florida, Department of Highway Safety and Motor Vehicles*, Case No. 15-AP-04, a case from the Twentieth Circuit Court in Collier County, the driver argued there was no competent substantial evidence of actual physical control because his key was not in the ignition. He also argued that his seat was not in the upright position. Both arguments were unsuccessful.

The Circuit Court noted that the presence of a key in the ignition is a “key factor” in an “actual physical control” determination, and that a second factor is whether an individual has immediate access to a key even though the key may not be in the ignition. See *Fieselman v. State*, 537 So. 2d 603 (Fla. 3d DCA 1988).

In *Weigel*, the driver’s key was in the front console and his seat was reclined, however, he still had the ability to take his keys, fix his seat, start the vehicle and drive away. In *Griffin v. State*, 457 So. 2d 1070 (Fla. 2d DCA 1984), the Second District Court stated that in order to establish a driver was in “actual physical control” the State must show the defendant “could at any time start the automobile and drive away.”

Although *Griffin* is a thirty year old case, it has withstood the test of time. With keyless ignition switches, which start the engine at the push of a button, and keyless remote starters, which can start an engine from a distance, we can expect to see more and more challenges in DUI cases to “actual physical control” when there are no keys in the ignition. In such cases, citing to *Fieselman* and *Griffin* is the way to go. These cases make it clear that not having a key in the ignition is not the end of your case. “Actual physical control” means the driver has the ability and means to start the car and drive away. Of course, actual physical control cases involving drivers who are not actually inside the car may be more difficult to prove. If you encounter such a situation, call your troop legal advisor to discuss it.

By: Damaris Reynolds  
Chief Counsel, Tallahassee



## **DOES ADVISING A DRIVER THAT BREATH TESTING IS OPTIONAL CREATE A PROBLEM FOR YOUR DUI CASE?**

Joseph S. Baird was arrested for DUI in October 2014 after being stopped for traveling 50 mph in a 30 mph zone. He requested a formal administrative review hearing with the Bureau of Administrative Reviews. At the hearing, the arrest report, breath alcohol test affidavit, and refusal affidavit were introduced into evidence. The refusal affidavit indicated his refusal occurred at 3:40 a.m. while the DUI check sheet indicated refusals at 3:41 a.m. and 3:52 a.m. In addition to the documents submitted by law enforcement, the hearing officer also considered testimony from two officers. One of the two officers testified that he asked Mr. Baird to submit to breath testing at least twice and that Mr. Baird understood the consequences of refusing to submit for testing.

The video, which was also introduced into evidence, reflected that when the officer asked Mr. Baird to submit to a breath test Mr. Baird asked whether the test was optional. The officer said, “Yes, it is optional, but there are consequences.” Mr. Baird argued that because he was told the breath test was optional, his refusal could not be used as evidence against him. Mr. Baird also argued that the DUI check sheet and affidavit were inconsistent and that it was not clear whether his refusal had occurred before or after he was read implied consent warnings.

The Third District Court noted that the video evidence showed the officer reading Mr. Baird the statement on his driver’s license which states, “Operation of a motor vehicle constitutes consent to any sobriety test required by law.” Then, the officer read him the portion of implied consent, which states, “If you fail to submit to the test I have requested of you, your privilege to operate a motor vehicle will be suspended for a period of one year for a first time refusal, or eighteen months if your privilege has been previously suspended as a result of a refusal to submit to a lawful test of your breath, urine or blood.”

After being read these statements, Mr. Baird refused to submit to breath testing. At the end of the twenty minute observation period, he was again asked to submit to testing and again refused. At the formal administrative review hearing, the hearing officer upheld the suspension of his driver’s license. Mr. Baird appealed the decision to the Sixteenth Circuit Court, which found that the refusal could not be used as evidence against him. Natalia Costea, Legal Advisor for Troop E, appealed this case to the Third District Court of Appeal.

In *State of Florida, Department of Highway Safety v. Joseph S. Baird*, Case No. 3D15-1199 (Fla. 3d DCA September 16, 2015), the District Court found that the Sixteenth Circuit Court in Monroe County applied the wrong law and improperly substituted its judgment for that of the hearing officer. Therefore, the administrative suspension was upheld.

*By: Damaris Reynolds  
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## JUDICIAL CREATIVE WRITING

Not all court opinions are filled with legalese that continues on and on until you finally just look at the last page to see what the court actually decided. When lawsuits are filed that may be considered frivolous or unworthy of the judicial system, some judges will use their creative talents to make their opinions more entertaining.

United States Supreme Court Justice Antonin Scalia was apparently not happy that the high court was asked to hear the case of *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), and stated:

We Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States...to decide What is Golf. I am sure that the Framers of the Constitution...fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would someday have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer? Either out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly difficult and incredibly silly question.

In 2006, the Middle District Court of Florida grew tired of the petty arguments of the parties in a case entitled *Avista Management v. Wausau Underwriters Insurance*. When the attorneys could not agree on a location in which to hold a deposition and again sought judicial assistance, the Court decided that enough was enough and held:

The Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U. S. Courthouse... Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of 'rock, paper, scissors.' The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006.

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Florida isn't the only state with interesting opinions. Because so many "unusual" federal cases are appealed to the Ninth Circuit Court (California), sometimes the judges feel they can make a decision more powerful by keeping it simple. The Court did just that in *Mattel v. MCA Records*, 296 F.3d 894 (9<sup>th</sup> Cir. 2002), where the parties were litigating over the song "Barbie Girl." At the end of its short opinion, the Court merely stated: "The parties are advised to chill."

Returning to the United States Supreme Court, Justice Ruth Bader Ginsburg decided that some parents and other adults had lost their perspective on the War on Drugs. It seems that parents and school officials in Tecumseh, Oklahoma, were so concerned about drugs that they agreed to mandatory drug testing of every child who wanted to be in extracurricular activities. The policy was so broad that even members of the chess club became subject to mandatory drug testing. Justice Ginsburg wrote:

The School District cites the dangers faced by members of the band, who must perform extremely precise routines with heavy equipment and instruments in close proximity to other students and by Future Farmers of America, who are required to individually control and restrain animals as large as 1500 pounds.... Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree.

Justice Ginsburg's argument was lost on the majority of the Court who voted 5-4 that children in extracurricular activities do not need privacy from drug testing. Even so, she and the other justices and judges quoted here show that creative writing is alive and well in the justice system.

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Please do not hesitate to reach out to your troop legal advisor for help with these and any other issues. *THAT'S WHY WE'RE HERE!!*

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***WELCOME ABOARD, REBECCA!!***  
***WE ARE GLAD TO HAVE YOU ON OUR TEAM!!***  
Troops I, J, and Q please contact your nearest Legal Advisor for assistance.