

LEGAL BULLETIN

PROVIDING HIGHWAY SAFETY AND SECURITY THROUGH EXCELLENCE IN SERVICE, EDUCATION, AND ENFORCEMENT

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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United States Eleventh Circuit Court of Appeals

Post-invocation right to remain silent was “scrupulously honored.”

Gore, convicted and sentenced to death for the murder, kidnapping, and robbery of Susan Roark, applied for a certificate of appealability after the district court denied his petition for a writ of habeas corpus. The issue being reviewed is: “Whether the Florida Supreme Court’s decision upholding the trial court’s refusal to suppress certain statements Gore made to detectives in the Metro-Dade Police Department infringed his rights under the United States Constitution.”

Gore contended that when he invoked his right to remain silent during the FBI interrogation, Miranda “foreclosed his interrogation” by Detective Simmons of the Metro-Dade Police Department. While Miranda does not address or is “silent” on whether the “invocation of the right to remain silent precludes all future law enforcement questioning of a suspect, the Supreme Court addressed the issue in Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), concluding “that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his ‘right to cut off questioning’ was ‘scrupulously honored.’” The “scrupulously honored” inquiry is determined by four factors: when a suspect invokes the right to remain silent, the initial interrogation ends immediately; a substantial amount of time has elapsed before re-initiation of the questioning; prior to the “re-initiation of interrogation,” the suspect is read his Miranda rights; and once the interrogation is resumed, the suspect is

questioned by a different officer about an unrelated crime.

The uncontested testimony at the suppression hearing showed that when Gore invoked his right to remain silent, the FBI immediately ceased its interrogation and that seven days later Detective Simmons, Metro-Dade Police, advised Gore of his Miranda rights before he began questioning Gore, therefore, the 11th Circuit concluded that the court’s “treatment of this issue . . . fell well within the bounds of reasonableness.”

Gore argued that the absence of the fourth Mosley factor rendered the “Florida Supreme Court’s decision an unreasonable application of law.” The 11th Circuit stated that it looks to the “circumstances as a whole” and that the absence of a Mosley factor is not considered “dispositive”, relying on United States v. Nash, 910 F.2d 749, 752-53 (11th Cir. 1990)(holding post-invocation statements admissible where some of the Mosley factors were absent), therefore concluding that the reliance upon only three of the four Mosley factors “was not objectively unreasonable.”

[*Gore v. Dept., of Corrections*, 07/20/07]



Opinion 11Cir200611522Gore.pdf

Good faith exception to exclusionary rule permits the use of the evidence.

Herring, appealing his conviction for possession of methamphetamine and being a felon in possession of a firearm, argued that the district court erred in denying his motion to suppress the evidence found during the search of his truck.

The record revealed that police officers in Coffee

County, Alabama, relying on information from Dale County Sheriff's Department, Alabama, that there was an outstanding warrant in Dale County for the arrest of Herring, pulled over Herring and arrested him pursuant to the warrant. The officers searched his person and his vehicle, incident to the arrest, and found drugs and a firearm in the vehicle. After Herring's arrest, the officers were informed by the Dale County Sheriff's Department that the warrant had been recalled.

At trial, Herring moved to suppress the evidence arguing the search was not incident to a lawful arrest because the warrant had been recalled. The district court adopted the magistrate judge's recommendation to deny the motion because the officers "conducted their search in good faith," and because the drugs and firearm were found before the officers discovered the warrant had been recalled. The magistrate judge concluded "there was simply no reason to believe that application of the exclusionary rule here would deter the occurrence of any further mistakes." The district court further determined that the erroneous warrant information was from the Dale County Sheriff's Department personnel.

The 11th Circuit, relying on United States v. Leon, 468 U.S. 897, 906, 104 S. Ct. 3405, 3412 (1984), noted that the Supreme Court, in many cases, held that the decision to apply the exclusionary rule is "an issue separate from the question [of] whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." Its analysis of Leon identified "three conditions that must occur" when applying the exclusionary rule: there must be misconduct by the police or by adjuncts of the law enforcement team, the application of the rule must result in "appreciable deterrence of that misconduct," and the benefits must "not outweigh the costs." Id. at 913-17, 104 S. Ct. at 3415-18; 909, 104 S. Ct. at 3413; 910, 104 S. Ct. at 3413.

The 11th Circuit affirmed the district court's ruling that the good faith exception to the rule, in this case, permits the use of the evidence.

[\[United States v. Herring, 07/17/07\]](#)



Opinion 11DCA200610795Herring.pdf

First Amendment Rights of suspended high school student were not violated after she shared violent narrative that she had

written.

A high school student drafted a violent essay describing how she shot her math teacher in a dream. Her notebook containing the essay was confiscated by another teacher when she shared it with a classmate. Determining that the writing violated school rules, the school administrators suspended the student because of the violent and threatening nature of the essay. The student sued two years later and the case was removed to federal court. The district court granted Fulton County School District's motion for summary judgment.

The student appealed arguing that her First Amendment rights had been violated. Noting the increasing climate of school violence, the Eleventh Circuit affirmed the lower court stating, "Literary merit and technique notwithstanding, without doubt, [her] narrative could reasonably be construed as a threat of physical violence against her sixth period math teacher."

[\[Boim v. Fulton County School District 7/31/07\]](#)



06-14706 11thcvBoim.pdf

Fourth Amendment right to be free from unreasonable searches and seizures are not violated when the fleeing motorist "intentionally" places himself and the public in danger by engaging in a "reckless, high-speed pursuit."

During a high speed chase, David Beshers' truck was clipped by Officer Harrison's police cruiser when Beshers was attempting to return to the roadway after passing the police cruiser on the right shoulder of the road. Beshers died on impact.

Beshers' son, Jason, filed suit against Officer Harrison and the named defendants, pursuant to 42 U.S.C. §, alleging, *inter alia*, "a violation of his Fourth Amendment right to be free from unreasonable searches and seizures." Claiming they were entitled to qualified immunity, the District Court granted the defendants motion for summary judgment, finding that "Harrison had probable cause to believe Beshers posed an immediate threat to others because he was driving erratically, was suspected to be

intoxicated, and had stuck another motorist with his vehicle.” Beshers appealed.

In its analysis and application of the recent Supreme Court’s decision issued in Scott v. Harris, 127, S. Ct. 1769, 1774 (2007), along with its review of the record and the tapes of the chase, the 11th Circuit determined that Officer Harrison’s “actions were objectively reasonable” when considering the facts and circumstances surrounding the pursuit. The officer had reason to believe that Beshers “was a danger to the pursuing officers and others and was driving under the influence of alcohol.” Like Harris, Beshers “intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight.” The 11th Circuit concluded that if “Harrison intentionally used deadly force to seize Beshers, the use of such force was reasonable,” and held that “Harrison did not violate Beshers’ Fourth Amendment right to be free from excessive force during a seizure.”

[*Beshers v. Harrison, et al.*, 08/14/07]



Opinion 11Cir200517096Beshers.pdf

1st District Court of Appeals

PERC erred in its finding that marital strife was never a mitigating factor.

During a period of marital strife, Officer Smith got in a violent confrontation with a fellow law enforcement officer. Although no charges were brought, he was dismissed from the Department of Corrections. He appealed the dismissal to PERC. The hearing officer determined that Smith’s good employment record and the turmoil with his wife were mitigating factors so he recommended a sixty-day suspension instead of dismissal. PERC rejected the hearing officer’s recommended penalty and stated that marital strife could not be a mitigating factor.

Noting the 2001 amendments to the statutory provisions governing PERC’s discretion with regard to public employees, the First District concluded that PERC erred by stating that marital strife is never a mitigating factor and by failing to consider the complete record presented by the hearing officer.

[*Smith v. Florida Dept of Corrections, 7/24/07*]



Opinion 1D06-5024 1dcacvSmith.wpd

2nd District Court of Appeals

A warrantless search (incident to a lawful arrest) is limited to the area within the immediate control of the defendant.

Holloman, pled no contest to the charge of battery on a law enforcement officer and to the charge of possession of cocaine, and appealed the denial of his motion to suppress the cocaine that was found inside the M&M candy containers.

Turner and Holloman had fled from an attempted traffic stop earlier in the evening for reckless driving infractions and their descriptions were broadcasted over the police radio. While at a motel on another unrelated incident, Officers Michael Carter and Jason Irvin, noticed two individuals who matched the description of the earlier broadcast, getting out of a cab and going into a motel room. Officer Carter made a “citizen contact” with Turner and after obtaining his name, arrested him. Before the arrest, Turner took something from his pocket and gave it to Holloman, who then threw the objects into the bathroom of the hotel room. The officers later testified that they recognized the objects as two “opaque M&M containers,” which they said are “common storage containers that drug dealers use to store their crack cocaine.” Holloman then pushed the officers out of the doorway and closed the door. After Turner was in custody, the officers went back into the hotel room and arrested Holloman, searched the bathroom and found, in plain view, a marijuana cigarette and the M&M containers. They opened the containers and found crack cocaine. The trial court denied Holloman’s motion to suppress on the basis that “exigent circumstances existed surrounding the arrest of Turner,” that the officers had the right to reenter the hotel room; that the two opaque M&M containers were in plain view in the bathroom and the officers had the right to seize them.

The 2nd DCA, determined that an occupant at a hotel has the same expectation of privacy as a homeowner has against an unreasonable entry, “where the occupant is there legally, has paid or arranged to pay, and has not been asked to leave.” The record showed that Holloway testified that he was a paying guest of the hotel and had not been asked to leave; therefore, the 2nd DCA concluded that Holloman provided sufficient evidence of an expectation of privacy.

The Court concluded a danger no longer existed after Holloman was arrested. While officers had the right to search the room where they arrested Holloman, they did not have the right to search the bathroom, without first obtaining a search warrant.

[\[Holloman v. State, 06/20/07\]](#)



Opinion 2D05-3294Holloman.pdf

Law enforcement officer was not engaged in the lawful performance of a legal duty when he arrested the defendant.

Mrs. Rodriguez, convicted of resisting an officer with violence (attacking the officer while he was attempting to detain her husband) and battery on a law enforcement officer (hitting the officer after her husband died), appealed her convictions and an order requiring her to pay costs and restitution.

The record showed that Mr. Rodriguez was asked, by the store manager, to leave the convenience store parking lot after another customer complained that Mr. Rodriguez bumped his grocery cart into their vehicle. Mr. and Mrs. Rodriguez left as requested and drove home. A sheriff's deputy, who was across the street on another matter, was told by a bystander that Mr. Rodriguez had been involved in a motor vehicle accident and was leaving the scene of the accident. The deputy followed the couple to their house and saw Mr. Rodriguez drive through the gate of their fenced-in yard and watched as Mrs. Rodriguez began to close the gate. He approached the gate and attempted to question Mr. Rodriguez about the hit-and-run accident. Mr. Rodriguez told the deputy to leave him alone and walked away. As Mrs. Rodriguez was attempting to lock the gate with a chain, the deputy took the chain and “pushed through the gate,” took hold of and struggled with Mr. Rodriguez. Mrs. Rodriguez began striking the deputy. Mr.

Rodriguez escaped into the house and the deputy used pepper spray on Mrs. Rodriguez. The deputy, in pursuit of Mr. Rodriguez, entered the house and Mr. Rodriguez began attacking the deputy with an axe. The deputy shot and killed Mr. Rodriguez. Mrs. Rodriguez ran into the house and began hitting the deputy. When back-up officers arrived, they arrested Mrs. Rodriguez.

An element for both crimes, resisting an officer with violence and battery on a law enforcement officer, is that the officer must be “lawfully executing a legal duty.” The 2nd DCA stated that at the commencement of Rodriguez’s appeal, the Florida Supreme Court “rejected the proposition that section 776.051(1), extended beyond an arrest situation to other types of police-citizen encounters.” Tillman v. State, 934 So. 2d 1263, 1266 (Fla. 2006). Noting the legislative intent when placing the element of “lawful execution of a legal duty” in statutes 784.07(2) and 843.01, the Court explained that “in prosecutions under either statute for crimes committed outside an arrest situation, the State must prove that the officer was acting lawfully.” Id. At 1270.

The court determined that defendant’s acts against the officer were prior to her arrest and were not in “connection with the arrest.” When Mr. Rodriguez walked away from the deputy, he was not a fleeing felon and he was not obstructing an investigation, therefore, the deputy did not meet the “exigent circumstances” required for a warrantless search and/or seizure. The deputy was engaged in a “consensual citizen encounter” and did not communicate any intention to detain Mr. Rodriguez. His only crime would have been a misdemeanor for refusing to cooperate with the officer’s investigation; therefore the deputy could not legally enter his home and arrest him for that crime. The 2nd DCA determined that the deputy was “unlawfully inside the Rodriguezes’ fenced yard and residence” when he had his altercation with Mrs. Rodriguez.

Because the State’s evidence actually proved that the deputy was not engaged in the lawful performance of a legal duty when he arrested Mrs. Rodriguez, the 2nd DCA reversed her convictions. The circuit court was instructed to reduce the charge of “battery on a law enforcement officer,” to the lesser offense of “simple battery” and to enter a judgment of acquittal on the charge of resisting an officer with violence.



Opinion 2D05-1929Rodriguez.pdf

The driver of a vehicle that causes a crash is considered to be “involved” in the crash.

Elder, charged with leaving the scene of a crash with death, filed a motion to dismiss the information arguing that “a motorist cannot be charged with leaving the scene of a crash unless there was actual contact between the two vehicles.” The trial court granted the order stating that the requirements of Section 316.027(1)(b), F.S., “have not been met in this case.” The State appealed the order.

The trial court relied on C.J.P. v. State, 672 So. 2d 62 (Fla. 1st DCA 1996), where the 1st DCA held that to establish culpability for leaving the scene of an accident, “the prosecution had to prove that C.J.P., was ‘the driver of any vehicle *involved in an accident* resulting in an injury . . . of any person.’” In that case, C.J.P., was not the driver of the vehicle.

Section 316.027(1)(b) requires “the driver of any vehicle involved in a crash resulting in the death of any person must immediately stop . . .” Because this statute does not provide a definition for the word “involved,” the 2nd DCA relied upon the definition of this commonly used word and found, as it related to this statute, that “involved” meant “to draw in as a participant,” to “implicate,” “to relate closely,” “to connect,” “to have an effect on,” to “concern directly,” and to “affect,” and concluded that it was clear that “a driver of a vehicle that causes a crash is ‘involved’ in the crash.”

The 2nd DCA determined that while Elder’s vehicle did not come into contact with the victim’s vehicle, it was Elder’s driving that was the cause of the crash that resulted in the death of a person, and therefore, Elder was required to remain at the scene. The court held that the trial court erred in dismissing the charges against Elder.

[[State v. Elder, 07/11/07](#)]



Opinion 2D06-771StatevElder.pdf

Consent to search was not needed; probable cause existed for the arrest of the defendant.

Castro-Medina was charged with possession of cocaine and sale of cocaine. The trial court granted his motion to suppress after his girlfriend testified, at the suppression hearing, that he did not understand English. Based on that testimony, the trial court concluded that the search was not voluntary and granted suppression of the evidence. The State appealed.

At the suppression hearing, Sergeant Rowe testified that he observed Castro-Medina receiving money from another man, later identified as Adrian Aboytes, and then gave Aboytes a plastic bag containing a white substance that appeared to be cocaine. The area was very well lit and it was the Sergeant’s opinion that Castro-Medina was selling narcotics. Thereafter, Officer Frum testified that Castro-Medina told the officer that he was just hanging out. Officer Frum told Castro-Medina why he was making contact with him and Castro-Medina denied selling cocaine. Officer Frum got permission to search Castro-Medina and his vehicle.

The 2nd DCA held that because the officers observed the “hand-to-hand exchange of money and cocaine” between Castro-Medina and Aboytes, that probable cause existed to arrest him, therefore, Castro-Medina’s consent to the search was not required.

[[State v. Castro-Medina, 07/06/07](#)]



Opinion 2D06-1986Castro-Medina.pdf

Trial court’s focus on the weight of the evidence was misplaced.

The State appealed the trial court’s order dismissing Gay’s felony count of possession of cocaine.

The record showed that during the traffic stop, Gay and his two passengers were charged with possession of cocaine. Gay filed a motion to dismiss contending there was no cocaine on the center console when he got out of the vehicle. The State traversed disputing Gay’s contention and presented additional facts alleging Gay to be the registered owner and driver of the vehicle;

that the two passengers denied “knowledge and possession” of the cocaine; and alleging that the cocaine was in plain view and was “within reach of all of the occupants of the car.” At the hearing the trial court stated that Gay “is going to prevail at a judgment of acquittal,” because the State could not establish “whose cocaine it was.” The trial court granted Gay’s motion and dismissed the charges against him.

The 2nd DCA noted that under rule 3.190(c)(4), it becomes the defendant’s burden “to specifically allege and swear to the undisputed facts in a motion to dismiss and to demonstrate that no prima facie case exists upon the facts set forth in detail in the motion,” relying on State v. Kalogeropoulos, 758 So. 2d 110, 111 (Fla. 2000). Also under rule 3.190(d), if a traverse is filed by the State, it must, “under oath and in good faith, either specifically dispute the defendant’s material facts or allege additional material facts that are sufficient to establish a prima facie case.” Id. at 112; State v. Dickerson, 811 So. 2d 744, 746 (Fla. 2nd DCA 2002). The State only needs to establish the “barest prima facie case,” and may rely on circumstantial evidence. Essentially, the trial court is “not permitted to make factual determinations or to weigh the State’s evidence,” if the State “in good faith disputes any material fact, denial of the motion to dismiss is mandatory.”

The 2nd DCA concluded that the State met its burden when it filed the traverse by disputing the factual allegations and by alleging additional facts “that gave rise to the inferences that would support a finding of constructive possession,” and held that the trial court erred in granting Gay’s motion to dismiss.

[\[State v. Gay, 07/13/07\]](#)



Opinion 2D05-2201Gay.pdf

Trial court erred; detention was illegal and the evidence should have been suppressed in drug case following defendants’ guilty plea, reserving his right to appeal.

Robert Rios, charged with possession of cocaine, pled guilty after the trial court denied his motion to suppress, thereby reserving his right to appeal.

The record reflected that two officers from the

Pinellas County Sheriff’s Office had an arrest warrant for Robert Rios, along with a mugshot that contained “a listing of physical characteristics—black male with black hair and brown eyes; 5’8” tall; 150 pounds.” Other research also revealed that Robert Rios had a tattoo on his neck saying “Saneta.” When the officer’s arrived at the address listed on the warrant, they saw a “light-skinned black male or Hispanic-looking male” and announced they were looking for Robert Rios. The man told the officers he was Richard Rios and when asked for identification, told the officers “his wife has his driver’s license in the house.”

At the suppression hearing the back-up officer testified that when they first approached Rios, he backed away from them toward the house, which prompted him to stand directly behind Rios “to cut off any escape route if he tried to run.” The warrant officer testified that she spent approximately fifteen to twenty minutes “interacting with the man and trying to get someone’s attention inside.” After the officers noticed the “Saneta” tattoo on his neck, they placed Rios in custody, searched him and found cocaine on his person. After Richard Rios was in custody, his wife appeared with his driver’s license, which identified him as Richard Rios, not Robert Rios. The trial court found that “under all the circumstances within their knowledge at the time of [Richard Rios’s] arrest, the officers had probable cause to reasonably believe that [Richard Rios] was in fact the person for whom they had a warrant” and that “the search of Rios and the seizure of cocaine were incident to the lawful arrest.”

The 2nd DCA determined that once the back-up officer stepped behind Rios to prevent him from running, the officer displayed his “authority in a manner that restrains the defendant’s freedom of movement,” turning this into an investigatory stop. The initial detention was based on a “hunch” and the officers could not “articulate” they had a reasonable suspicion that Rios was “engaged in or about to engage in” criminal activity. It was not until the officers finally noticed the tattoo on Rios’ neck that they took him into custody. Because the officers did not have a “reasonable suspicion to detain Rios,” the 2nd DCA held that the detention was illegal.

[\[Rios v. State, 07/25/07\]](#)



Opinion 2D06-4381Rios.pdf

Trial court erred in denying dispositive suppression motion; search was unlawful.

D.B.A. appealed his adjudication of delinquency, arguing the trial court erred in denying his dispositive motion to suppress the marijuana that was found in his pocket.

At the suppression hearing, Deputy Vidal testified that he was dispatched to a burglary in progress. Once at the scene, the deputy observed D.B.A., who fit the description of the person attempting to enter the caller's apartment, standing next to the apartment door. The Deputy instructed D.B.A. to "face away from him and show him his hands." As D.B.A. turned away from the Deputy, he put his right hand in his right pocket. The Deputy testified that for officer safety, he grabbed D.B.A.'s right hand, handcuffed him, searched his right pocket and found a baggie with a substance that later tested positive for marijuana. D.B.A. argued that while the Deputy had a reasonable suspicion to detain him, "he did not have probable cause to search him."

The 2nd DCA concluded that when an officer has probable cause to believe a detainee is armed with a dangerous weapon, Florida's Stop and Frisk Law, § 901.151(5), Fla. Stat. (Fla. 2006), authorizes "a limited search to disclose a dangerous weapon." Further, the "limited search may not go beyond a patdown of the detainee's outer clothing," and the officer may only seize the object, if during the patdown he "reasonably believes" that the object he feels is a weapon. Winters v. State, 578 So. 2d 5, 6-7 (Fla. 2d DCA 1991).

Because the officer did not conduct a patdown of D.B.A., after lawfully detaining D.B.A., and he did not feel "what he reasonably believed was a dangerous weapon," the 2nd DCA held that the search was unlawful.

[*D.B.A., v. State*, 08/10/07]



Opinion 2D06-4774DBACHild.pdf

3rd District Court of Appeals

Trial court departed from essential requirements of law when it suppressed the out-of-court identification based on the photographic array.

The State, through its petition for writ of certiorari, claimed that the trial court departed from essential requirements of law when it suppressed a photographic array from which the victim identified the defendant, Styles, as his assailant.

The 3rd DCA determined that the two-part test, for which Florida law is clear, for determining whether to suppress an out-of-court identification is that first, the trial court must determine that the police employed an "unnecessarily suggestive procedure in obtaining the out-of-court identification." See Grant v. State, 390 So. 2d 341 (Fla. 1980). Then, it must look to the "totality of the circumstances" to determine if "the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification." However, "if the police did not use an unnecessarily suggestive procedure, then the court need not consider the second part of the test."

Styles claimed that the photographic array was "suggestive" because he was the only person wearing light-colored clothing in the array and that the bright yellow shirt he was wearing "drew attention to his picture." At the evidentiary hearing, the victim testified he was "unequivocal" in his identification of the defendant that the reason the defendant's picture "popped out at him" was because he recognized the defendant. The State argued that the "out-of-court identification is properly admissible at trial." The record then showed the prosecutor and trial judge discussing the "factors in the second prong of the suppression test" and whether "each factor weighed in favor of or against suppressing the out-of-court identification." Reasoning that the victim testified to drinking several alcoholic drinks and did not look at his assailants, that the testimony of the two detectives was inconsistent with the victim's testimony regarding the description of the assailants and that the photographic array "was impermissibly suggestive and unnecessarily drew attention to the defendant," the trial court issued its order which "first discussed the multi-factor totality of the

circumstances test and summarily concluded that the photographic array was suggestive.”

The 3rd DCA determined that the trial court erred in its analysis and should have first determined if the photographic array “was unnecessarily suggestive.” The appellate court held that the trial court departed from the essential requirements of law because it failed to determine “the suggestiveness of the photographic array apart from the reliability of the identification.”

[*State v. Styles*, 08/08/07]



Opinion 3D07-1147Styles.pdf

4th District Court of Appeals

Certified copies of prior DUI convictions, admissions, and stipulations, is the required proof needed to prove prior DUI convictions.

Fender, found guilty of one count of driving under the influence (DUI), one count of resisting an officer without violence and one count of failing to submit to a breath test, appealed the charge elevation from misdemeanor to a felony. Fender argued that the State did not provide sufficient evidence to prove she had three prior DUI convictions or that she previously refused a breath test and appealed the denial of her judgment of acquittal motion on both sentence elevations.

The State submitted a certified copy of Fender’s criminal history report, her fingerprints with a fingerprint analysis report matching Fender to two of her previous bookings, and a certified copy of her driving record.

The 4th DCA concluded that “admissions, stipulations, or certified copies of convictions” are required to prove prior DUI convictions and held that a certified copy of Fender’s criminal history report from the Clerk’s Office and a certified copy of her driving record is not sufficient proof of prior DUI convictions.

The Court, however, agreed with the State that there is no case law indicating, “what constitutes sufficient proof” regarding a prior refusal to take a breath test. The 4th DCA held that “proof requirements” were not as “stringent” as the requirements needed for a felony DUI conviction. Fenders’ certified driving record, which showed a previous DUI arrest, along with her refusal to take the breath test, was sufficient evidence to prove of her prior refusal to submit to the breath test.

[*Fender v. State*, 06/20/07]



Opinion 4D06-92Fender.pdf

Section 320.02, F.S., does not authorize law enforcement officers to impound a vehicle when the vehicle does not have a valid Registration Sticker.

Morris, charged by information with possession of heroin, entered a plea of no contest, reserving his right to appeal the denial of his motion to suppress as dispositive.

Officer Joyce Flemming testified at the suppression hearing that she first came into contact with Morris and the vehicle when it was parked on the street. She advised Morris that the vehicle’s registration expired over a year ago and that he needed to make arrangements to get the vehicle out of the area because it “could not be driven on the roadways.” The officer testified that two weeks later she saw Morris and his vehicle in a vacant lot and because the vehicle still had the expired license plate, she decided to impound the vehicle. Before having the vehicle impounded, she inventoried the vehicle and discovered, under the passenger side floorboard, a pouch with seven bags of heroin. She arrested Morris and the vehicle was towed.

Section 320.07, Florida Statutes (2005), states that a motor vehicle shall not be operated on the roads of Florida with an expired license plate and that the vehicle must have a “valid sticker reflecting current registration. The statute does not authorize, however, the impounding of a vehicle when there is a violation of the statute. The 4th DCA determined that the officer could have given Morris a citation for violating the statute, could have “immobilized the vehicle” or could have given Morris the option of making arrangements to have the vehicle towed.

The 4th DCA held there was no basis or justification for the officer to impound the vehicle; that the warrantless search of the vehicle constituted an “unreasonable search and seizure,” and ordered the trial court to vacate Morris’s conviction.

[*Morris v. State*, 06/27/07]



Opinion 4D06-1825Morris.pdf

***Miranda* rights not violated by basic “identification data” questions.**

Timmons, charged with possession of marijuana and possession with intent to sell, entered a plea and reserved his right to appeal the denial of his motion to suppress.

The record reflected that police officers observed Timmons dropping two bags as they entered the parking lot of the Pompano Beach Hotel in Broward County. After retrieving the two bags he believed contained marijuana, Officer Romano arrested and handcuffed Timmons. While checking for warrants, the officer asked Timmons “if he was staying in the hotel, what room he was in.” Timmons gave the officer his room number and consented to a search of the room. The officer testified that he asked Timmons that question in an effort to further his investigation “as to why Timmons was in the hotel parking lot with suspect marijuana.” The search of the room revealed a large quantity of marijuana and Timmons was also charged with possession with intent to sell.

Timmons moved to suppress the marijuana found in the hotel room, arguing that the officer interrogated him prior to giving him *Miranda* warnings, therefore, “the consent to search was tainted by the initial illegality of the interrogation.”

“The safeguards provided by *Miranda* apply only if an individual is in custody and subject to interrogation.” *State v. Weiss*, 935 So. 2d 110, 1116 (Fla. 4th DCA 2006). When the custody or interrogation prong is absent, “*Miranda* does not require warnings.” The term “interrogation” under *Miranda* “refers not only to express questions, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an

incriminating response from the suspect . . .” *Rhode Island v. Innis*, 446 U.S. 291 (1980).

Timmons was arrested, therefore, he was in custody. However, the 4th DCA determined that the question “if he was staying in the hotel, what room he was in,” was a question from an officer who was “acquiring basic information,” similar to the type of questions required during the booking process. It is the type of question that leads to “essential biographical data” and not to an incriminating response. The 4th DCA further determined that the request to “search the room” did not constitute an interrogation because the request was not likely to “elicit an incriminating response” and affirmed the trial court’s decision.

[*Timmons v. State*, 08/01/07]



Opinion 4D06-2324Timmons.pdf

“A second confession can make the failure to give an earlier *Miranda* warning harmless.”

Wolliston appealed his conviction of trafficking in cocaine arguing his *Miranda* rights were violated.

Officer Stewart testified at the motion to suppress hearing that he and other officers were dispatched to an address after receiving information that a woman had been battered at the home. Wolliston and another person answered the door and let Officers Stewart and Forteza into the home. Upon learning why the officers were there, Wolliston informed the officers that he and his girlfriend had broken up and she came to pick up her belongings. Wolliston consented to a search of the home when the officers sought information as to whether the victim was still there. After observing multiple bags of what appeared to be cocaine in one of the bedrooms, along with a bowl that contained a white substance in it, Officer Stewart asked Wolliston what the substance was in the bowl. Wolliston replied “cocaine.” Officer Stewart then asked whose bedroom the cocaine was in and Wolliston confirmed that it was his bedroom.

Wolliston argued that he was not free to leave and should have been read his *Miranda* rights before the officer asked him whose bedroom contained the cocaine.

The 4th DCA agreed that Wolliston should have been read his *Miranda* rights before being questioned “about the control of the bedroom,” however, because the court is required to do an “independent review for harmlessness” as required in Section 924.33, Florida Statutes, the evidence showed that the bedroom contained two credit cards and a social security card in Wolliston’s name. When Wolliston was taken to the police station and read his *Miranda* rights, he gave a full confession. Relying on Oregon v. Elstad, 470 U.S. 298 (1985) and Davis v. State, 859 So. 2d 465 (2003), where the court held that a “second confession can make the failure to give an earlier *Miranda* warning harmless,” the 3rd DCA concluded that “the identification found in the bedroom, and the second confession, which was properly admitted in evidence, make the earlier *Miranda* violation harmless.”

[[Wolliston v. State, 08/15/07](#)]



Opinion 4D06-4528Wolliston.pdf

5th District Court of Appeals

Probable cause existed to arrest defendant and seize evidence.

E.D.R., arrested for possession of cocaine, filed a motion to suppress the evidence alleging that the police officers trespassed on private property, seized the evidence without a warrant and violated his Fourth Amendment right against “unreasonable searches and seizures.”

At the suppression hearing, Orlando Police Officers Bridges and Javier testified that while on patrol, in a high drug residential area, they noticed several males asleep on the porch at approximately 7:00 a.m. When walking up to the porch, the officer observed what appeared to be crack cocaine in the defendant’s lap. When he reached the porch, he seized the evidence, woke up the defendant and arrested him for possession of crack cocaine. The officer testified that the porch was not enclosed, the drugs were in plain view and could be viewed from the street. Determining that the officers “trespassed on private property without a legitimate police purpose,” the trial court granted the motion to

suppress the evidence and dismissed the case.

The 5th DCA determined that the Fourth Amendment provides a constitutional right in designated areas where a person has a “reasonable expectation of privacy,” however, it does not protect areas of the home that are “open and exposed to public view,” relying on Katz v. United States, 389 U.S. 347, 360 (1967) and State v. Duhart, 810 So. 2d 972, 973 (Fla. 4th DCA 2002).

The 5th DCA concluded that the porch was “not a constitutionally protected area,” it was open, in front of the house, and in full public view, that “any delivery person or passerby could have walked onto the porch and left a package or knocked on the door without a violation of the resident’s reasonable expectation of privacy.” The police officers had probable cause to arrest the defendant and seize the evidence.

[[State v. E.D.R., A Child, 06/20/07](#)]



Opinion 5D06-2559State v EDR.pdf

Fourth Amendment provides for a “warrantless entry into a residence” when the officer has reason to believe the person inside needs “immediate aid.”

Eastes, convicted of battery on a law enforcement officer, resisting an officer with violence, and resisting an officer without violence, appealed the denial of his suppression motion and his judgment of acquittal motion.

The record showed that Officers Wical and Stover were dispatched to Eastes’ apartment and advised “Disturbance call, possible suicide. Somebody who was potentially suicidal was at the house.” The officers observed Eastes standing in his doorway with blood on both arms “from his forearms down to his fingers,” and they observed the “state of disarray” inside the apartment. Eastes refused to respond to any of the officer’s questions about what had happened. The officer advised Eastes of his intention to take him to a local mental health facility and that he was “not under arrest.” Eastes refused to cooperate and began swinging at both officers. After Eastes hit a third officer, who arrived at the scene, Officer Wical “tasered” Eastes; arrested and handcuffed him; placed him in the patrol car and proceeded to take Eastes to

the local hospital. After Eastes was treated and then taken to the patrol station, where he was booked, he refused to sign any paperwork or be fingerprinted.

Eastes argued that the trial court erred in failing to “exclude any evidence obtained subsequent to Officer Wical’s warrantless entry into his apartment.”

In order to convict a defendant of battery of a law enforcement officer or resisting an officer with violence, in a non-arrest case, the State must prove that the officer was “engaged in the lawful execution of a legal duty.” The officer had a well founded belief that Eastes was “possibly suicidal” and not able to “determine for himself whether an examination was necessary.” His behavior, physical condition and condition of his apartment “suggested a substantial likelihood that, without care or treatment, Eastes would cause serious injury to himself in the near future.” There was substantial evidence in the record that the “officers were engaged in the lawful execution of a legal duty at the time of Eastes’ violent actions.” The 5th DCA held that there was “ample evidence” to support that the officers had legally entered the apartment.

[Eastes v. State, 07/13/07]



Opinion 5D06-3583E eastes.pdf

NEW! Please note that the entire court opinion is available on the web link provided in the case summary.

The materials presented are a compilation of cases from the Attorney General’s Criminal Law Alert and Appellate Alert as well as summaries from the Office of General Counsel. They are being presented to alert the Division of Florida Highway Patrol and the Division of Driver Licenses of legal issues and analysis for informational purposes only. The purpose is to merely acquaint you with recent court decisions. Rulings may change with different factual situations. All questions should be directed to the local State Attorney or the Office of General Counsel (850) 617-3101, SunCom 217-3101. If you care to review other Legal Bulletins, please note the website address: DHSMV Homepage <http://www.hsmv.state.fl.us/Bulletins> or FHP Homepage (www.fhp.state.fl.us).

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