

LEGAL BULLETIN

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

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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The Office of General Counsel is proud to announce that Attorneys Douglas Sunshine and Sandra Coulter will be working at the Tallahassee Headquarters' office. Attorney Kimberly Gibbs and Paralegal Specialist Pamela Mann have opened the Orlando office. Below please find the attorneys and what office they are assigned.

Judson M. Chapman, General Counsel

Tallahassee:

Michael J. Alderman, Senior Assistant General Counsel
Rosen H. Finklea, Assistant General Counsel
Mark J. Hiers, Assistant General Counsel
Peter N. Stoumbelis, Senior Assistant General Counsel
Doug Sunshine, Assistant General Counsel
Sandra Coulter, Assistant General Counsel

Miami:

Jason Helfant, Assistant General Counsel
Thomas C. Mielke, Assistant General Counsel

West Palm, Beach:

Heather Cramer, Assistant General Counsel

Orlando:

Kimberly Gibbs, Assistant General Counsel

or that the defendant's free will had been overcome.

Blake, convicted and sentenced to death for the first-degree murder of Maheshkumar "Mike" Patel, as well as convicted of armed robbery and grand theft of a motor vehicle, appealed his conviction and sentence arguing the trial court erred in denying his motion to suppress his recorded statement; in failing to advise him of his right to self-representation; and that his death sentence is not proportionate.

The record revealed that Blake was picked-up and arrested by Detectives Louis Giampavolo and Ivan Navarro after they interviewed Richard Green about his and Blake's involvement in the death of Patel. Green was later convicted as a principle and sentenced to life for the death of Patel. Blake was read his Miranda rights while being transported to the station. See Miranda v. Arizona, 384 U.S. 436 (1966). At the station, Blake was placed in an interview room "with hidden audio and video equipment" and he confessed to shooting Patel with a 9mm handgun he was carrying. The officers asked Blake to give an audio-taped statement, however, Blake did not agree to tape the statement, "but said he would detail the events one more time." The officers videotaped the statement anyway. He confessed to shooting Patel with the 9mm handgun he was carrying and he claimed it was an accident. Blake acknowledged he was treated well and had been given his

Florida Supreme Court

The totality of the circumstances "did not suggest" that the request to tape the defendant's statement constituted coercive police activity

Miranda rights in the patrol car by Giampavolo.

Blake argued that “the videotape confession was a result of an implied promise that it would not be taped.” The Court concluded that there was “no causal connection between the request to tape and the confession.” Blake had already confessed; while he declined the recording of his statement, he agreed to repeat the statement again and testified that he knew “the detectives would be able to testify about it,” and “it would be their word against his.” The Court held that the request to tape “did not overcome Blake’s will and induce his confession,” and rejected his claim.

Blake further argues that his death sentence is disproportionate by challenging the weight assigned to the three aggravators found by the trial court. A review of the record showed the prior violent felony aggravator was supported by “Blake’s previous conviction for first-degree murder and attempted robbery with a firearm” resulting in the death of Kelvin Young. The Court determined that the fact that Blake used the same gun on Patel, less than two weeks after this gun was used to kill Young, “undermines his argument that the prior violent felony aggravator is ‘less significant.’” The record showed that Blake was on probation for four felony offenses and that section 921.141(5)(a) does not require violence for the “commission while on felony probation” aggravator to apply. Blake argued the third aggravator is found in every case of robbery that resulted in death and the Court noted that it has “repeatedly rejected” the argument that “the murder in the course of a felony aggravator is an unconstitutional automatic aggravator.” See Dufour v. State, 905 So. 2d 42, 69 (Fla. 2005). While the shooting death of Patel “happened quickly,” the Court stated “the encounter was necessarily violent.”

The Court found that the absence of the heinous, atrocious, or cruel (HAC) or the

cold, calculated, and premeditated (CCP) aggravators, while relevant, is “not controlling” and cited to many cases where it upheld the death sentences without an HAC or CCP being present. Blake’s death sentence was held to be proportional to other death sentences.

[*Blake v. State*, 12/13/07]



sc05-1302Blake.pdf

1st District Court of Appeals

Trial court erred; “detection by a police officer of the odor of burnt cannabis emanating from a vehicle, by itself, constitutes sufficient ‘facts and circumstances’ to establish probable cause to search the person of an occupant of that vehicle.”

Williams, charged with intent to sell or deliver cannabis and possession of drug paraphernalia, filed a motion to suppress the drug evidence found on his person. The trial court granted the motion and the State appealed.

The record reflected that Williams was stopped while driving a vehicle with a license plate registered to a different vehicle. The officers, standing next to the vehicle, “recognized” the “strong odor of burnt cannabis” coming out from the passenger-side window. Williams was searched after he and the passenger were “directed to exit” the vehicle and twelve bags of cannabis were found in Williams’ sweatshirt pocket. The trial court granted Williams’ suppression motion concluding the officers had probable cause to search

the vehicle, but did not have probable cause to “extend the search to Williams’ person.” The State appealed.

In its analysis, the 1st DCA concluded that under “well-settled Florida law, the detection by a police officer of the odor of burnt cannabis emanating from a vehicle, by itself, constitutes sufficient ‘facts and circumstances’ to establish probable cause to search the person of an occupant of that vehicle.” The 1st DCA distinguished cases where the detection was based “solely on a trained police dog alerting to the vehicle” because it has held that the law enforcement officers “did not have probable cause to search the person of an occupant of a vehicle.” The distinction was made because a trained narcotic’s dog “superior olfactory sense also enables it to ‘detect not only the presence of drugs, but also the fact that drugs have been present in a particular location at some time in the recent past,’” citing State v. Griffin, 949 So. 2d 309, 319 (Fla. 1st DAC 2007).

Based on the above, the 1st DCA concluded in this instance, where “an experienced police officer smells the odor of burnt cannabis, the risk of smelling residual odors is not present and the odor itself provides the basis for probable cause.” The Court reversed finding probable cause existed for the search of William’s person.

[State v. Williams, 09/14/07]



1DCA05-2118Williams.pdf

2nd District Court of Appeals

Circuit court erred when it denied defendant’s suppression motion; the officer’s traffic stop of the

defendant’s vehicle was unlawful.

Zarba, pled nolo contendere to a third-degree felony of driving while his license was revoked (habitual traffic offender) and reserved his right to appeal the circuit court’s denial of his dispositive motion to suppress his statements and the other evidence obtained after a traffic stop.

Zarba was stopped by Officer Sweat of the Haines City Police Department because the right rear brake light was not working on the Explorer he was operating. A license and registration check revealed that Zarba’s driver’s license had been revoked and the officer arrested Zarba.

At the suppression motion hearing, Officer Sweat testified he stopped Zarba because the “right rear brake light was not working.” Michael Zemaitis, a passenger in Zarba’s vehicle, testified that the vehicle was equipped with three brake lights: “one at the left rear of the vehicle, one at the right rear of the vehicle, and a center high-mounted stop lamp,” and that two of the three brake lights were operating. Zemaitis further testified that when they picked the vehicle up from the impound lot, they tested and found that “the left rear brake light and the center high-mounted stop lamp” were working and that the right rear brake light was not working.

Citing State v. Perez-Garcia, 917 So. 2d 894 (Fla. 3d DCA 2005), the prosecutor argued that even if Zarba’s vehicle complied with section 316.222(1), “the statute requiring ‘[e]very motor vehicle . . . [t]o be equipped with two or more stop lamps’ - the traffic stop was lawful under section 316.610,” which addresses vehicle safety and inspections. The prosecutor argued that the decision in State v. Burger, 921 So. 2d 847 (Fla. 2d DCA 2006), did not address whether section 316.610 applied to a vehicle that had two out of the three stop lamps operating and that the Perez-Garcia



decision held that under similar circumstances the officer had the authority under section 316.610 to stop a vehicle with one out of the three stop lights not operating. The circuit court denied Zarba's motion to suppress holding that the vehicle was lawfully stopped under section 316.610(1) and relied on the decision in Perez-Garzia as the authority for its conclusion.

In its analysis, the 2nd DCA noted its decision and the authority of Burger, where the 2nd DCA held that "if two of the vehicle's three brake lights were operational, this was sufficient to comply with the requirements of section 316.222(1), Florida Statutes (2004). More specifically, "[t]he statute does not require that the operable lights be parallel to one another but only that they be located in the rear of the vehicle." The statute only requires that two of the three brake lights be operational on a vehicle equipped with a center high-mounted stop lamp. The 2nd DCA also noted the Florida Supreme Court's recent decision Hilton v. State, 961 So. 2d 284 (Fla. 2007), where it held that "a cracked windshield violates section 316.610 only if it renders the vehicle in 'such unsafe condition as to endanger any person or property.'"

Because the state did not present any evidence that Zarba's vehicle "posed a safety hazard" and because the statute only requires "two functional brake lights on the vehicle's rear," the 2nd DCA concluded that it was "unwilling to assume" that having two functional brake lights, out of three, on the vehicle's rear, when the vehicle is equipped with a center high-mounted stop lamp, posed such an unsafe condition as to endanger any person or property, therefore, "the officer's traffic stop of Mr. Zarba's vehicle was unlawful." The 2nd DCA held that the circuit court erred in denying Zarba's suppression motion and certified conflict with "the Third District's decision in Perez-Garcia."

Trial court erred as a matter of law; exigent circumstances (the officers' peril would increase) existed to justify the twelve second delay from the "knock and announce" to the forcibly entry into the defendant's home.

The State of Florida appealed the trial court's order granting Pruitt's motion to suppress the evidence (two firearms, marijuana, heroin, electronic scales, currency, and documents) obtained during the search of Pruitt's home. Through the combined efforts of the St. Petersburg Police Department, the United States Drug Enforcement Agency (DEA) and the Organized Crime Drug Enforcement Task Force (OCDETF), Pruitt was identified as a "key participant" in a large-scale heroin trafficking operation and as a distributor of heroin in the St. Petersburg area. A warrant was issued and the St. Petersburg Tactical Apprehension and Control Team (TACT) executed the warrant on January 6, 2004 at 5:15 a.m. TACT "waited twelve seconds after knocking and announcing their purpose before forcibly entering the home," Pruitt moved to suppress the evidence arguing the "forced entry violated Florida's knock-and-announce statute, section 933.09, Florida Statutes (2003)." The trial court granted the motion holding that the "twelve-second delay between the knock and announce and TACT's entry was insufficient." The State appealed arguing exigent circumstances, "specifically law enforcement's knowledge that Pruitt was a suspect in a murder investigation in which the murder weapon was an AK-47," justified the short delay.

Section 933.09, Florida Statutes (2003), requires that before forcibly entering a home, law enforcement must first announce their authority and purpose, and second, they must have been refused admittance. "Refusal can be express or implied, and lack of response is deemed a refusal," Richardson v. State, 787 So. 2d 906, 908 (Fla. 2d DCA 2001). In its analysis, the 2nd DCA concluded that "there is no bright line answer" in Florida's case law to determine how much time should be allowed "before the lack of response may be deemed by law enforcement officers at the scene to be a refusal," other than a "reasonable opportunity" to respond. Id. 908.

The record revealed that the affidavit and warrant were issued for further evidence of Pruitt's drug trafficking business. The "affidavit was prepared to fulfill the probable cause requirement for searching for narcotics and evidence of Pruitt's heroin business operations, specifically business and phone records." Pruitt was also under an ongoing active six-month investigation for a murder committed with an AK-47, as such, that information (immaterial to the purpose of the warrant) was given to TACT before the execution of the warrant for planning purposes, "to enable TACT to make on-the-spot decisions as to the best way to execute the warrant at the scene." Testimony provided by the TACT Commander, at the suppression hearing, revealed that he waited approximately "twelve seconds after his initial knock and announce before calling for a breach of the door of the residence"; that he believed that was a reasonable amount of time to wait; that he knew Pruitt was a violent felon and a suspect in a homicide using an AK-47; that as he was counting up to 10, 11, and 12, he knew that "now the team has been compromised . . . the risk definitely increases where we may return fire . . . ," and that the TACT team's "body armor was not capable of stopping rounds from an AK-47," therefore, the TACT teams' safety risk would be increased. It was further revealed that the TACT team is used

to execute warrants only "with high-risk situations," and the execution of this warrant on Pruitt's residence was considered a "high-risk situation in which information was given fitting the criteria where firearms or the subject involved is known to use violence."

The 2nd DCA concluded that the trial court erred as a matter of law; that exigent circumstances existed that justified TACT's entry into Pruitt's house after waiting twelve seconds and reversed the trial court's order granting Pruitt's suppression motion.

[*State v. Pruitt*, 11/02/07]



2D06-4006Pruitt.pdf

Search and seizure -- Vehicle -- Narcotics detection dog's alert did not provide probable cause for search of vehicle

State cannot make prima facie showing of probable cause for search based on narcotics detection dog's alert by demonstrating that the dog has been properly trained and certified. To demonstrate that alert by narcotics detection dog is sufficiently reliable to furnish probable cause to search, state must introduce evidence of the dog's track record or performance history. The DCA said it was error to deny motion to suppress.

Randy Dewayne Gibson appeals an order denying his dispositive motion to suppress following his *nolo contendere* plea to carrying a concealed firearm, possession of cocaine, and possession of drug paraphernalia. We find no merit in Gibson's argument that the search of his vehicle was illegal because police unreasonably delayed the traffic stop to allow a canine search of his vehicle. We do find merit,

however, in Gibson's claim that under the standard articulated in *Matheson v. State*, 870 So. 2d 8 (Fla. 2d DCA 2003), the State failed to establish that the narcotics detection dog's alert provided probable cause for the search. Accordingly, we reverse. In *Matheson*, this court rejected the argument that the State can make a prima facie showing of probable cause for a search based on a narcotics detection dog's alert by demonstrating that the dog has been properly trained and certified. Instead, this court held that the fact that a dog has been trained and certified to detect narcotics, standing alone, does not justify an officer's reliance on the dog's alert to establish probable cause. To demonstrate that an alert by a narcotics detection dog is sufficiently reliable to furnish probable cause to search, the State must introduce evidence of the dog's "track record" or performance history. Although the officer who handled the dog testified that the dog was certified and had completed 400 hours of training, the State failed to elicit any testimony from him regarding the dog's track record. The officer admitted that drugs are not always found when the dog alerts, but he could not quantify the percentage of false alerts. Under *Matheson*, the officer's testimony was inadequate to establish the dog's reliability. Thus, the State did not meet its burden to demonstrate that the officers had probable cause to search Gibson's car.

In reversing, we certify direct conflict with *State v. Coleman*, 911 So. 2d 259 (Fla. 5th DCA 2005), and *State v. Laveroni*, 910 So. 2d 333 (Fla. 4th DCA 2005), both of which hold that the State can make a prima facie showing of probable cause based on a narcotics detection dog's alert by demonstrating that the dog has been properly trained and certified. This case has been certified to the Florida Supreme Court.

[GIBSON v. STATE 11/26/07]

District Court considers State's alternative argument ("tipsy coachmen" rule); arrest was valid and supported by probable cause.

Pleading no contest to trafficking in amphetamine (meth), Bravo reserved the right to appeal the trial court's dispositive order denying his suppression motion to "suppress contraband that he discarded during a tussle with law enforcement officers."

The record showed that Bravo was arrested with the help of Mr. Doe, an informant arrested on another matter and who agreed to "cooperate" with Sergeant Baldwin of the Polk County Sheriff's Office and Drug Enforcement Agency (DEA) agents Armando Guerrero and Terry Corn. Doe identified Bravo as his meth supplier and arranged a purchase of the drug from Mr. Bravo. All calls between Doe and Bravo were recorded. Doe also informed the officers that Bravo "wrapped the drugs in black electrical tape—forming a 'black ball'—and carried them in his pocket." On the day of the arrest, the officers were set up inside Doe's residence and when Bravo entered the living room the officers immediately announced: "Police[!] You're under arrest[!]" While the DEA agent was attempting to handcuff Bravo, the Sergeant recovered items he witnessed Bravo remove from his pocket and throw on the living room floor. The items turned out to be a pack of cigarettes and a ball of black electrical tape. The trial court found the initial encounter with Bravo and DEA agents a "detention, based on reasonable suspicion," and because "it was not until after [Mr. Bravo] threw the drugs on the ground that the arrest was achieved, the arrest was supported by probable cause pursuant to the plain view doctrine." *State v. Hendrex*, 865 So. 2d 531 (Fla. 2d DCA 2003).

On appeal, Bravo conceded the officers had “a reasonable suspicion of criminal activity” to justify temporarily detaining him, but did not have probable cause to arrest him. The State’s alternative argument was that “the officers had probable cause to arrest Mr. Bravo as soon as he walked into Mr. Doe’s living room.” See § 901.15(3), Fla. Stat. (2001); Popple v. State, 626 So. 2d 185, 186 (Fla. 1993).

The 2nd DCA determined that the officers’ “intention was to arrest” Bravo; that Bravo was seized the moment the officers “grabbed his arms” to handcuff him; that the officers announced they were law enforcement officials and informed Bravo he was under arrest when he walked into the living room; and that Bravo “clearly understood” the officers’ intent to arrest him, thus, all the elements of an arrest were present. Because of the totality of the circumstances, the Court concluded that the officers had probable cause to believe that “Bravo was engaged in committing a felony when he entered Mr. Doe’s residence.” Further, the arrest was valid because the officers “verified the details ‘except for the final one of the commission of the crime.’”

[Bravo v. State, 08/31/07]



2D06-1760Bravo.pdf

Abandoned Evidence

Trial court properly refused to suppress cocaine which defendant asserted was obtained by police as result of illegal traffic stop because cocaine which was abandoned while defendant was running from officers was not fruit of a seizure where cocaine was dropped by defendant before he was seized by police. Since defendant did not comply with officers’ efforts to stop him, he was not seized until he was stopped by officer with stun-gun. Cocaine was

obtained without a violation of his Fourth Amendment right to be secure against unreasonable seizures. Attempted stop of defendant based on erroneous information concerning license plate would have been unlawful, but is not dispositive in this case. Regardless of the legality of the stop, the drugs were not suppressed, as they were abandoned by the defendant before he was personally seized.

[Austin v. State, 9/28/07]

Search and Seizure — Stop of a vehicle unlawful.

Stop of vehicle registered to a woman after officer ran tag and discovered FCIC warning indicating that registered owner had a suspended license for failure to maintain insurance on the vehicle. Although officer had reason to suspect that female owner of vehicle did not have insurance coverage for the vehicle, officer had no reasonable suspicion that a crime was being committed where officer could tell that the driver of the vehicle was a male before he approached the vehicle

[SIMPSON v. STATE, 12/12/07]

Trial court should have granted defendant’s motion to suppress; Officer’s belief there was an equipment violation was a “mistake of law” and did not “establish probable cause” to stop the vehicle.

Langello pled nolo contendere to charges of carrying a concealed firearm and possession of marijuana. Reserving the right to appeal the denial of his suppression motion regarding the evidence found in his car from a traffic stop for a broken tag light, Langello appealed. He argued that the statute only requires one operational tag

light; that the officer “erroneously focused” on whether both tag lights were operational instead of on whether the tag was “clearly legible,” and that because of this, he was not violating the statute and the officer “did not have probable cause to stop him.”

Section 316.221(2), Florida Statutes (2004) requires “vehicles to be equipped with ‘either a taillamp or a separate lamp’ that is ‘placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of 50 feet to the rear.’”

The record revealed that the officer testified at trial that she stopped Langello because only one of the two tag lights was operational on his vehicle and she believed this violated section 316.221(2), Florida Statutes (2004). She could not recall whether the tag was rendered illegible because of the one malfunctioning light.

The 2nd DCA determined there was no evidence submitted to establish that the defendant’s vehicle was not equipped as required by law, nor any evidence to establish that the vehicle was unsafe. As such, the officer’s belief there was an equipment violation “because only one tag light was working was a mistake of law which did not establish probable cause to stop Langello’s car.” Thus, the stop of Langello’s car was unlawful and the trial court “should have granted Langello’s motion to suppress.” The district court reversed with instructions to discharge Langello.

[\[Langello v. State, 12/19/07\]](#)



Opinion 2D06-2419Langello.pdf

A uniform traffic citation, by itself, does not provide probable cause for a defendant’s arrest and continued detention.

Gould petitioned for a writ of certiorari to review a circuit court order denying his petition for writ of habeas corpus to review “the first appearance magistrate’s finding of probable cause to support Mr. Gould’s arrest and continued detention.”

The record revealed that Gould was issued a uniform traffic citation for driving under the influence (DUI) under section 316.193, Florida Statutes (2006) in May of 2007. At first appearance, Gould’s attorney “objected to the finding of probable cause because the traffic citation showed only that the law enforcement officer suspected DUI, asked for a breathalyzer, and the result was .000.” Further, there was “no narrative indicating ‘what was being done with the automobile - - whether there was a smell of alcohol, bloodshot eyes or anything like that.’” The magistrate, after noting the objection, “found probable cause based solely upon the uniform traffic citation.”

Gould filed an emergency petition for writ of habeas corpus and for the return of his dog, White Cloud, who was in the vehicle at the time of Gould’s arrest and taken to the pound. Gould alleged that the facts before the court at the time of his first appearance hearing demonstrated “there is no probable cause to believe that this particular crime at issue was committed.” Gould alleged that a simple traffic citation “in and of itself that contains only conclusions of a police officer does not pass due process muster with regard to establishing probable cause for arrest and continuing detention,” and “it was error for the magistrate to have found probable cause” for Gould’s arrest. Gould further argued that the magistrate was required to “apply the same probable cause standard necessary for issuing an arrest warrant,” per Florida Rule of Criminal Procedure 3.133(a)(3), Florida Statutes, and requested his release. Gould’s emergency petition was denied and while the circuit court’s order did not address Gould’s 3.133(a)(3) argument; it did cite to

John Schmeil v. Judd, 951 So. 2d 844 (Fla. 2d DCA 2007), where it noted that Schmeil's habeas corpus petition for a similar allegation that a uniform traffic citation by itself did not satisfy probable cause for his arrest and continued detention was recently denied by the 2nd DCA and the circuit court held "that a denial of [Mr. Gould's] Petition is appropriate in the present matter."

Even though Gould was released from jail, the 2nd DCA determined that because Gould also claimed that "first appearance judges in the Tenth Judicial Circuit routinely accept unsworn, conclusory uniform traffic citations from arresting officers to justify the arrest and continued detention of [DUI] suspects," Gould's petition "presents a question capable of repetition yet evading review," and it had the jurisdiction to "hear the merits of the case even if the petition is moot." See Enter. Leasing Co. v. Jones, 789 So. 2d 964, 965 (Fla. 2001)(holding that the court may retain jurisdiction despite mootness because the issue on appeal is likely to recur.).

In its analysis, the 2nd DCA concluded that the circuit court relied on a per curiam appellate decision without a written opinion, Schmeil, which has "no precedential value," when it denied Gould's habeas corpus petition, and therefore held that the circuit court "departed from the essential requirements of law" because it applied the incorrect law. The circuit court "should have relied on rule 3.133(a)(3) and the cases interpreting that rule." The error "constituted a miscarriage of justice" because the order denying Gould's petition "establishes the general principle that a uniform traffic citation, by itself, provides probable cause for a defendant's arrest and continued detention," and because the decision in this case "is binding on all three county courts within the Tenth Judicial Circuit." The circuit court "created precedent applicable to numerous other first appearance hearings involving uniform traffic citations as the sole proof of probable cause." The 2nd DCA

granted certiorari and quashed the circuit court's order denying Gould's habeas corpus petition.

Note: White Cloud was saved from "destruction" at the pound when a sympathetic county judge intervened and ordered the Polk County Sheriff to "stay the death and preserve White Cloud." White Cloud was returned to Gould upon his release from jail.

[*Gould v. State*, 12/19/07]



Opinion 2D07-2918Gould.pdf

3rd District Court of Appeals

Trial court "misapplied the 'plain-feel' doctrine in holding that the removal and search of the M&M container was permitted."

Crawford, conviction for possession of cocaine, appealed the denial of his dispositive suppression motion arguing that the crack cocaine was seized improperly after he consented to a patdown.

The record revealed that Crawford was a passenger in a vehicle that was stopped by Officer Bush of the St. Petersburg Police Department for running a stop sign. After exiting the vehicle, Crawford kept "fumbling at his waistband" and the officer noticed a "cylindrical shaped bulge approximately five or six inches long and a few inches wide" in Crawford's right pants pocket. Officer Bush testified that Crawford's "behavior was making him nervous," and Crawford consented to his request for a patdown. The officer testified that during the patdown he "felt the cylindrical tube and immediately recognized it as a cylindrical M&M candy

container,” that the container “rattled” when he patted it, and that he knew from the sound of the rattle that the container contained cocaine. Officer Bush removed and opened the container and found ten pieces of crack cocaine. The officer further testified that he had worked narcotics investigations for ten years, he had more than “100 arrests where crack cocaine was found inside cylindrical candy containers,” and that he had “never seen anything other than crack in those containers.” Officer Bush testified that he did not observe Crawford involved in any criminal activity, nor was any evidence presented to suggest that.

In its analysis, the 2nd DCA reviewed the two exceptions that would validate a warrantless search: “consent and the ‘plain-feel’ doctrine,” along with evaluating whether probable cause existed to justify the search.

In Minnesota v. Dickerson, 508 U.S. 366, 375-376 (1993), the Supreme Court explained “if a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized.”

The 2nd DCA concluded that Officer Bush requested and was given consent to patdown Crawford out of concern for officer safety; that once Officer Bush identified the bulge in Crawford’s pocket as a candy container and not a weapon, the officer “had no more authority than that reasonably conferred by the terms of Mr. Crawford’s consent.” Further, because the officer could tell by touch that the object was a cylindrical candy container but could not tell by touch what was inside the container, the 2nd DCA concluded that Officer Bush did not meet the requirements established for the “plain-feel” doctrine in Dickerson.

The 2nd DCA held that the officer’s search of Crawford’s pocket was “beyond the scope of a weapons check and the subsequent

seizure and opening of the M&M container were constitutionally invalid actions.”

[*Crawford v. State*, 11/28/07]



2D06-557Crawford.pdf

Attorney fees were inappropriate because Appellate Rule 9.400 is procedural and cannot alone be the basis for an attorney fee award.

The law of the case doctrine only applies when certiorari is denied based on the merits of the case.

Two drivers had their driving privileges suspended after they were arrested for DUI and refused to consent to blood alcohol level testing. They challenged their suspension and were successful. They were awarded attorney fees on the basis of Florida Rule of Appellate Procedure 9.400. The Department requested second-tier certiorari review in the Third District. The Third District denied certiorari. Later the Department appealed. While the appeal was pending the county court awarded fees at the direction of the circuit court.

The Department appealed, arguing that the trial court made no specific findings regarding attorney fees. The Drivers argued that the fees should be affirmed because of the law of the case doctrine and because the Third District lacked jurisdiction. In rejecting the Drivers’ arguments, the Third District said that the law of the case doctrine only applies when certiorari is denied based on the merits of the case. The court also determined that it had jurisdiction. Lastly the court noted that Appellate Rule 9.400 is procedural and cannot alone be the basis for an attorney fee award. The court concluded by saying, “Because the circuit court appellate panel failed to state any basis for awarding

attorneys' fees, other than rule 9.400, the attorneys' fee award cannot stand."

[State v. Trauth and Llamas, 12/12/07]



3dcacvHighwaySafety.doc

Double jeopardy violation existed when defendant was convicted of attempted second degree murder and attempted felony murder.

Appealing his convictions for attempted second degree murder, kidnapping and attempted felony murder, Walker argued it was a double jeopardy violation for him to be convicted of kidnapping (Count II) and attempted felony murder (Count III). He also argued it was a double jeopardy violation for him to be convicted of second degree murder (Count I) and attempted felony murder (Count III).

Double jeopardy analysis requires the court to determine "whether each offense has an element that the other does not." See: § 775.021(4)(a), Fla. Stat. (2003), and to "determine if any of the statutory exceptions are applicable."

In its double jeopardy analysis for the crimes of kidnapping and attempted felony murder, the 3rd DCA reviewed the statutory elements of each offense and concluded each offense has a statutory element that the other does not. While confinement is required in kidnapping, there is no requirement "for an overt act which inflicts bodily harm or terrorizes the victim." The only requirement in kidnapping is the "intent to inflict bodily harm or terrorize." Attempted felony murder requires "an overt act which could, but does not, inflict death." In determining whether any of the statutory exceptions are applicable, the 3rd DCA concluded that the elements of proof are not identical (exception 1); neither offense "is a

category 1 lesser of the other" (exception 3); and because "the crime of kidnapping punishes the defendant's confinement of a person against his or her will," and "attempted felony murder punishes the potential of the defendant's act to cause death," these are "different core offenses and are not degree variants of the same crime" (exception 2).

In its double jeopardy analysis for the crimes of second degree murder and attempted felony murder, the 3rd DCA found there was a double jeopardy violation for Walker to be convicted of second degree murder (Count I) and attempted felony murder (Count III) and remanded with "directions to vacate the conviction and sentence either on count one or count three."

[Walker v. State, 08/29/07]



3D05-0012Walker.pdf

4th District Court of Appeals

Trial court erred in granting the motion to dismiss because the State presented a prima facie case.

Hinkle, charged with unlawfully, and knowingly, carrying a concealed firearm on or about his person, contrary to section 790.01(2), Florida Statutes (2006), filed a motion to dismiss arguing that the "undisputed facts failed to establish a prima facie case." The State, not filing a traverse, maintained that "the issue was one of law as to whether the facts constituted carrying a concealed weapon." The trial court granted the motion and the State appealed.

Hinkle was picked up for speeding and when the officer approached the vehicle, Hinkle stuck both hands out of the window and told the officer that he had a firearm in the vehicle and did not have a concealed weapons permit. The firearm was under a bouquet of flowers on the front passenger seat.

A concealed firearm, per Section 790.001(2), F.S., is defined as “any firearm . . . which is carried on or about a person in such a manner as to conceal the firearm from the ordinary sight of another person.”

The record revealed that the firearm was readily accessible to Hinkle because it was on the seat next to him and that it was covered by a bouquet of flowers “which had to be removed to reveal its presence,” as such, the 4th DCA concluded that the State presented a prima facie case and held that the trial court “erred in granting the motion to dismiss.”

[*State v. Hinkle*, 11/28/07]



4D06-4527Hinkle.op.pdf

Order granting suppression of evidence is reversed; once law enforcement officers smell the odor of marijuana coming from the open windows of the vehicle, they have probable cause to search the occupants of that vehicle.

The State appealed the order granting the motion to suppress the evidence of cocaine found on Jennings during the search of his person.

Jennings was a passenger in a vehicle that was stopped by two Broward County deputy sheriffs, for speeding and having no tag light. As the officers approached the vehicle,

they smelled “the odor of marijuana coming from the open windows of the vehicle.” Both the driver and Jennings were asked to exit the vehicle. The driver, when questioned, told one law enforcement officer that he had marijuana in the driver’s side visor. Because Jennings was acting “very jittery,” the other officer asked for consent to search his person. Jennings only responded with a nodding gesture of his head, lifting up his arms and shrugging his shoulders. A packet of cocaine was found on his person.

Jennings filed a motion to suppress the cocaine evidence arguing that once the officers knew there was marijuana in the vehicle, they did not have probable cause to search his person. The trial court granted the suppression motion finding that “based on the totality of the circumstances the search was not done for officer safety purposes and the consent indicated by a shrug was simply an acquiescence to police authority.”

The record revealed that both officers testified they smelled marijuana coming from the vehicle as they approached it and testified to their training and experience “in detecting marijuana by smell.”

The 4th DCA determined that Jennings’ argument was meritless because “[t]he deputies were not required to rely on the statements of a suspect to assure them that the only violation of the narcotic’s law consisted of what the suspect tells them.” Once the officers smelled the marijuana, they had probable cause to search the occupants of the vehicle. “Probable cause exists where ‘the facts and circumstances within their (the officers’) knowledge . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *State v. Betz*, 815 So. 2d 627, 633 (Fla. 2002).

The 4th DCA held the officers had probable cause to search the occupants of the vehicle and that the cocaine was found during a lawful search.

[[State v. Jennings, 11/21/07](#)]



4D06-3618Jennings.op.pdf

Suspension of license was properly reversed because officer failed to give proper consent warnings.

Clark refused to take a breath test after an accident. As a result her license was suspended. She challenged the suspension, arguing that the officer did not properly inform her of the statutory implied consent warnings. Although there was no serious injury or death resulting from the accident, the officer had warned that her driving privileges would be suspended if she refused to submit to not only a breath test, but also a urine, and blood test. The administrative hearing officer concluded that the license was properly suspended. The circuit court reversed the suspension, and the state petitioned for certiorari.

The Fourth District denied the petition, finding that the officer's warning did not comply with the statute and that the circuit court had not departed from the essential requirements of law.

[[DHSMV v. Clark, 9/12/07](#)]



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Previously issued opinion is withdrawn; trial court's original holding is reinstated.

On June 20, 2007, the 4th DCA issued an

opinion reversing Fender's "felony DUI conviction, finding the State had failed to present sufficient proof that Fender had three prior DUI convictions." [Fender v. State](#), 2007 WL 1755617 (Fla. 4th DCA June 20, 2007). On motion for rehearing, the State alleged "that this court overlooked section 316.193(12), Florida Statutes (2004) in making this determination." In granting the motion, the court noted it normally would not consider an issue raised for the first time in a motion for rehearing, however, it "has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." [State v. Owen](#), 696 So. 2d 715, 720 (Fla. 1997).

Section 316.193(12), Fla. Stat. (2004) provides: "If the records of the Department of Highway Safety and Motor Vehicles show that the defendant has been previously convicted of the offense of driving under the influence, *that evidence is sufficient by itself to establish that prior conviction for driving under the influence.* However, such evidence may be contradicted or rebutted by other evidence."

The 4th DCA concluded that "the evidence submitted by the State created a rebuttable presumption of the prior convictions and was sufficient, by itself, to prove Fender's three prior DUI convictions." Since Fender did not "present evidence at trial rebutting this presumption," the 4th DCA withdrew its previously issued opinion and reinstated "the trial court's prior conviction and sentence."

[[Fender v. State, 09/12/07](#)]



4D06-927Fender.pdf

Recorded confession statement and rendered

unconstitutional as “coerced and involuntary.”

Following a police interrogation, Chambers was charged with burglary (dwelling/battery) (Count I); attempted robbery (deadly weapon) (Count II, Pauline Crooks, and Count III, Nicki Crooks); aggravated battery (deadly weapon) (Count IV, Pauline Crooks, and Count V, Nicki Crooks); and aggravated assault (deadly weapon) (Count VI, Nicki Crooks). Chambers moved to suppress his statement and confession, claiming they were not voluntary. The trial court denied the motion and Chambers appealed.

Miranda rights were read to Chambers, he signed a wavier form and was interrogated about three separate crimes, including the incident involved in this case. The recorded interrogation (incident to this case) revealed the detective “asserted” there was a witness to the incident and that Nicki Crooks identified the perpetrator as Chambers. The detective also told Chambers he would be “going away for thirty years for home invasion robbery with a firearm,” and also “suggested to Chambers” that if the other perpetrators (incident to this case) had guns and killed someone, then Chambers “could be charged with murder” if he did not identify the other perpetrators. Soon after this suggestion was made, Chambers confessed to his involvement in the incident.

Relying on Edwards v. State, 793 So. 2d 1044, 1047-48 (Fla. 4th DCA 2001) and Samuel v. State, 898 So. 2d 233 (Fla. 4th DCA 2005), Chambers argued the suggestion that “he could face murder charges unless he told the truth” was an “impermissible promise not to prosecute in exchange for the truth.” In Edwards, the 4th DCA held the confession involuntary when the suspect confessed after the investigator threatened to hit the suspect with “every charge he could if the suspect did not tell the truth.” Because that threat was coercive, it was “essentially a promise not to prosecute

to the fullest extent allowed by law if that person confesses.” In Samuel, the 4th DCA held the confession involuntary after the defendant was threatened he would be charged with fifteen robberies, when there was only evidence of nine robberies and “probable cause for only one.” The confession was made after there was a “promise not to prosecute the other fictional crimes.”

The 4th DCA held that the trial court erred when it denied Chamber’s suppression motion because like Edwards and Samuel, Chambers’s confession occurred right after “what was essentially a promise not to charge him with a ‘fictional’ murder if he told the truth” and “rendered his recorded statement and confession unconstitutional as coerced and involuntary.”

[*Chambers v. State*, 08/22/07]



4D06-2273Chambers.pdf

Warrant for arrest was valid; entrapment is an affirmative defense and does not strip the initial arrest of probable cause.

Tercero appealed the trial court’s denial to suppress the contraband found in his vehicle during a search incident to his arrest, in February 2005, on an outstanding warrant.

After Tercero sold marijuana to an undercover police officer in October 2004 (Case No. 05-130-CF), a warrant was issued for his arrest. Based on the outstanding warrant, Tercero was stopped in February 2005, and incident to the arrest on the warrant, drugs and drug paraphernalia were discovered during the search of Tercero’s vehicle. Tercero was charged with possession of hydrocodone, possession of twenty grams or less of

cannabis, and the use or possession of drug paraphernalia (Case No. 05-230-CF).

Tercero moved to dismiss the “undercover drug sale charges” in Case No. 05-130-CF, arguing “objective entrapment,” and the trial court, finding “the police conduct in the undercover investigation was ‘outrageous’ and a violation of appellant’s due process rights,” dismissed the charges.

In Case No. 05-230-CF, Tercero moved to suppress the drugs found in his vehicle arguing the “fruit of the poisonous tree” doctrine and claiming the drugs were seized incident to his arrest on a warrant “tainted by police misconduct.” The trial court found the warrant was supported by probable cause; the drugs were seized during the execution of the valid arrest warrant; and “any search incident to that arrest was likewise valid.” Tercero pled “no contest” and reserved his right to appeal.

On appeal, Tercero argued “the initial police misconduct, i.e., the entrapment activity during the undercover drug sale, rendered the arrest warrant invalid.” He further argued there was “no break in the causal connection” between the illegal entrapment activity of the police and the search incident to the arrest.

The 4th DCA cited an out-of-state authority on the issue of a defendant attempting to apply the exclusionary rule to evidence seized incident to the arrest on charges later dismissed on the grounds of entrapment. In Labensky v. County of Nassau, 6 F. Supp. 2d 161 (E.D.N.Y. 1998), when the defendant argued “no probable cause existed for his arrest because of the police conduct creating entrapment,” the Labensky court disagreed, “noting first that entrapment is an affirmative defense,” and does not strip the initial arrest of probable cause.

The 4th DCA, likewise, concluded that the trial court’s finding of entrapment, in Case No. 05-130-CF, did not invalidate the arrest

warrant; the arrest warrant was supported by probable cause; the drug evidence was seized during the execution of a valid arrest warrant; and that there was a break in the causal connection between the illegal entrapment activity of the police and the discovery of the drugs during the search incident to the arrest on the warrant.

[*Tercero v. State*, 08/22/07]



5th District Court of Appeals

Deputies did not establish special relationship with ill women therefore did not owe her a duty.

When Plaintiff could not reach her mother by phone, she called her mother’s neighbors to check on her mother. When the neighbors were unable to get Plaintiff’s mother to come to the door, they called 911. Two deputies responded and entered the house. They found Plaintiff’s mother on the couch, snoring but were unable to wake her. Although the neighbors wanted to call an ambulance, the deputies suggested that they just leave the door unlocked and check on her later. The next morning the neighbors found the Plaintiff’s mother unresponsive. When they called 911 emergency personnel came and transported Plaintiff’s mother to the hospital. She died a few days later without regaining consciousness. Subsequently Plaintiff sued the Sheriff for wrongful death. She claimed that the Sheriff owed a duty of reasonable care under common law. The trial court dismissed for a failure to state a cause of action.

In its analysis on appeal, the Fifth District

restated the general rule that “enforcement of the law and protection of public safety are discretionary duties, for which there is no common law duty of care owed to any particular individual. The court went on to acknowledge that there was an exception to the general rule when a special relationship existed between the government actor and a person. Finding that no such relationship existed between deputies and Plaintiff’s mother, the court concluded by saying, “While the actions of the deputies, if they occurred as alleged, may have demonstrated poor judgment or were contrary to some moral obligation, their failure to act created no legal duty and cannot be the basis of a negligence action.”

[Wallace v. State, 11/30/07]



5D06-4289 5dcacvWallace.doc

Evidence was insufficient to support finding that officer/victim who was working in an off-duty status was engaged in performance of a lawful duty at time of alleged battery.

Uniformed officer was working off duty at an amusement park. While he was escorting an unruly patron out of the park, the patron’s brother struck the officer. It was not alleged that brother had engaged in any criminal activity, and there was no evidence that brother had refused to comply with a lawful directive. Because the officer was not engaged in the lawful performance of his duties, defendant’s felony conviction was reduced to simple battery. Court suggests that the Legislature consider amending the statute to provide for stiffer penalties in situations like this.

[J.A.S.R. v. State 11/02/07]

NEW! Please note that the entire court opinion may be available on the PDF or Word link provided with 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).