

LEGAL BULLETIN

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

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United States Supreme Court

“New Mexico’s crime of ‘driving under the influence’ falls outside the scope of the Armed Career Criminal Act’s clause (ii) ‘violent felony’ definition.”

The Supreme Court decided that drunk driving is not a “violent felony,” at least for purposes of an enhanced prison sentence under the Armed Career Criminal Act.

However, the Court opined that “drunk driving is an extremely dangerous crime. In the United States in 2006, alcohol-related motor vehicle crashes claimed the lives of more than 17,000 individuals and harmed untold amounts of property.”

[*Begay v. U.S.*, 04/16/08]



USSC06-11543Begay.pdf

1st District Court of Appeals

Statutory language was insufficient to grant rule-making authority.

An ALJ found an administrative rule that regulated unauthorized auto dealerships to be invalid because the grant of authority found in the statutes was insufficient.

The First District affirmed stating, “The ALJ relied on decisions from this court wherein we have recognized the legislature’s intent to restrict the scope of the agency rulemaking and consequently have approved a rule only when there is statutory language authorizing the agency to adopt rules to implement the subject matter of the statute.”

[Florida Department of Highway Safety v. JM Auto, 3/25/08]



1dcacvJM.Auto.wpd

Officers “exceeded the scope of a lawful investigatory stop” when they transported the defendant back to the scene of the burglary for the victim to identify.

Kollmer, charged by information with burglary of a conveyance and pled guilty,

appealed the denial of his motion to suppress the victim's identification of him asserting "he was illegally stopped, detained, and ultimately transported back to the scene of the burglaries for a 'show-up' identification, in violation of his constitutional rights." He also appealed the denial of his motion to dismiss, which the 1st DCA affirmed without comment.

The record revealed that Officers Newman, Propper, and Villabroza responded to the scene after the dispatcher reported a car robbery in progress. The vehicle in question was owned by Brian Paris. At the suppression hearing, the parties agreed to rely on the deposition testimony of the three officers, "rather than present live witnesses." Officer Newman saw a white male "fleeing into the wooded area." Officer Propper deployed his dog, Chico, to track the suspect. Chico located a CD player and black container and using the "scent from those items" tracked the white male, who was found lying on his back on the ground. Officer Villabroza, who was with Propper, handcuffed Kollmer, placed Kollmer in the police car, and transported Kollmer "back to the scene of the burglary for the victim, Mr. Paris, to identify."

"Regarding investigatory stops, Florida Statutes, section 901.151, provides, '[n]o person shall be temporarily detained . . . longer than is reasonably necessary to effect the purposes of that subsection. *Such temporary detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof.*' See § 901.151(3), Fla. Stat. (2006)(emphasis added).

Concluding the officers "had a reasonable suspicion" that Kollmer was the person who committed the burglary of the vehicle, the 1st DCA held the officers were "authorized to conduct an investigatory stop." However, the "officers exceeded the scope of a lawful

investigatory stop" when they transported Kollmer back to the scene for the victim to identify him. Thus, the 1st DCA reversed the court's order to suppress the identification and remanded with directions to vacate Kollmer's conviction pursuant to the plea.

[[Kollmer. v. State, 03/25/08](#)]



1D07-1852Kollmer.pdf

1st DCA certifies conflict with *Wells* "to the extent that it found section 316.191 facially invalid as void for vagueness."

On appeal, Reaves, who entered a guilty plea and was convicted of racing on a highway and vehicular homicide, argued the trial court "abused its discretion by denying his motion to withdraw his guilty plea to vehicular homicide."

The record revealed that Reaves and Benjamin Street were drag racing on a public highway at high rates of speed. Attempting to cut in front of defendant's vehicle, while approaching a median, Street's vehicle hit the median, spun out of control, hit two trees and Brandy Byer, a passenger in Street's vehicle, died as a result of the crash. The trial court denied defendant's motion to withdraw his plea to the vehicular homicide charge, "emphasizing" defendant's admission to his participation in the unlawful race. The trial court further found Byer was not a "direct participant in the race" and "past case law held all drivers in an unlawful race responsible for the deaths of innocent bystanders."

In response to Reaves' claim that "Byer

effectively caused her own death,” the 1st DCA concluded that “since there was no evidence that Byer’s conduct was the sole cause of the accident, she cannot be considered the proximate cause of her own death.” Liability for Byer’s death rested on the conduct of both Reaves and Street. The 1st DCA held “the charge of vehicular homicide had adequate factual support and the trial court did not abuse its discretion” in denying the motion to withdraw his guilty plea.

Reaves further alleged “section 316.191 is facially unconstitutional as void for vagueness” pursuant to Wells v. State, 965 So. 2d 834 (Fla. 4th DCA 2007), where that court found “the statute’s definition of ‘racing’ as the ‘use of one or more vehicles in an attempt to outgain or outdistance another motor vehicle’ included legal activities such as passing and accelerating from a stop.” Id. at 839. The 4th DCA concluded that by “failing to include an element of competition in its out-of-the-ordinary definition of ‘race,’ encompass[ed] an endless range of otherwise legal conduct . . . so as to make the scope of proscribed conduct vague and the statute facially unconstitutional.” Id.

“Section 316.191(2)(a)(1) Fla. Stat., prohibits drivers from engaging in, among other things, ‘any race, speed *competition* or *contest*, [or] drag race or acceleration *contest*.” Drag race, is defined in Section 316.191(1)(b), Fla. Stat., as “when two vehicles engage ‘in a *competitive* attempt to outdistance each other.” (emphasis added). Reaves “was engaged in a high speed drag race” against Street, and his sole purpose was to “outdistance the other car and be the first to arrive at a given destination.” Further, his refusal to let Street’s vehicle pass “is encompassed by the definition of ‘racing’ and, more importantly, is expressly prohibited by section 316.191(2)(a)(1).” As such, the 1st

DCA found “section 316.191 facially constitutional,” and certified conflict with Wells “to the extent that it found section 316.191 facially invalid as void for vagueness.”

[Reaves v. State, 03/31/08]



1D07-1205Reaves.pdf

Trial court correctly denied suppression of the evidence; warrantless entry into the apartment was legal and justified by "exigent or emergency circumstances known then by the officers."

Watson pled guilty to actual or constructive possession of a controlled substance, MDMA, “popularly known as ‘Ecstasy,’” thereby reserving his right to appeal the denial of his dispositive suppression motion.

Testimony at the suppression hearing revealed that Gainesville police officers were dispatched to the Gardenia Gardens Apartment complex after receiving a report of a gunshot and disturbance at Unit I-2. Officer Knighton testified that after she entered the apartment from the front door, she walked through the apartment and let the other officers in through the back door. The officers saw a spent casing on the floor, bullet holes were observed in the wall and two men were calmly sitting on the couch. Officer Knighton did an initial pat-down of the two men on the couch. The officers did not have their guns drawn, there was no yelling and the two men were not handcuffed while they sat on the couch.

Sergeant Nechodom, knowing a weapon had been fired and not sure the couch had been searched, testified he requested, in a police manner, the men stand up so he could search the couch and told the men "[t]hat way, we can talk, figure out what's going on here. I'll feel more comfortable." Finding nothing in the couch, Officer Nechodom told Watson that he knew he had already been patted down, but that he wanted "to double-check, make sure that you don't have any weapons or anything. It's just for my piece [sic] of mind." Watson consented to the search and a small plastic Ziplock bag with pills were located in Watson's pocket. No weapon was found. Officer Nechodom, a narcotic's investigator, believed "the pills were consistent with MDMA."

Watson, who did not reside in the apartment, argued the warrantless entry was illegal and "the State failed to prove by clear and convincing evidence that the chain was broken between the initial police misconduct and Appellant's subsequent purported free and voluntary consent to search his pockets." Watson contended his "consent" was not given freely; he acquiesced to the "apparent authority of the police." The State asserted the entry was "justified by the exigent or emergency circumstances known then by the officers" and Watson did not have standing to challenge the warrantless entry.

In its referral to Hicks v. State, 852 So. 2d 954, 959 (Fla. 5th DCA 2003), the 1st DCA noted that "[t]emporary visitors or short-term invitees . . . are generally unable to advance a position of privacy with success." The 1st DCA held Watson's warrantless entry claim was "waived or abandoned and is procedurally barred" because he never proved his standing and the trial court never ruled on that claim. The officers were dispatched to the apartment because of a reported disturbance and gunshot(s),

therefore, the warrantless entry was "lawful and justified by the exigent or emergency circumstances known by the officers." Further, because the record was void of any testimony "that the officers acted in a coercive, oppressive, or dominating manner," the 1st DCA held that Watson's "consent was not mere acquiescence to apparent police authority" and affirmed the trial court's denial of the suppression motion. See United States v. Mendenhall, 466 U.S. 544, 554-55 (1980); State v. Parrish, 731 So. 2d 101, 103 (Fla.2d DCA 1999).

[[Watson v. State, 04/17/08](#)]



1D07-1346Watson.pdf

2nd District Court of Appeals

Trial court erred; officer's "mere suspicion" that defendant possessed marijuana is "insufficient to supply probable cause for a search."

Robinson, who pled no contest to drug and weapon charges, reserved the right to appeal the denial of his dispositive suppression motion. Robinson argued he had not consented to the search, "that the generalized odor of marijuana did not justify a search of all the individuals in the parking lot," and that "without the particularized odor of marijuana on a specific individual located in a public place, the officers did not have reasonable suspicion or probable cause to search."

At the suppression hearing, Officer Dixon testified that he and three other officers conducted a “walk-through” in a parking lot “known for public drinking, narcotics, and fights” behind a nightclub. The officers could smell “a strong odor of burned marijuana” as they approached four individuals in the back of the parking lot. Officer Dixon testified he did not see Robinson or the other three individuals smoking marijuana. Robinson initially consented to a search but withdrew his consent when he refused to turn around. He later turned around and it was during the “pat-down” a weapon was retrieved from Robinson’s back pocket. Robinson was arrested and marijuana was found in his front pants pocket. The trial court found that “Robinson’s consent to search had been withdrawn.” However, the trial court concluded that “the officer surmised Robinson was hiding marijuana ‘and I think [the refusal to turn around] increased his reasonable suspicion, which makes it in the area of the stop issue which I think makes it a legitimate search, so I deny the motion.’”

The 2nd DCA noted “there was no testimony that Officer Dixon believed Robinson was armed or posed a threat to anyone.” The “mere suspicion that a person is carrying illegal drugs is insufficient to supply probable cause for a search.” State v. Witherspoon, 924 So. 2d 871 (Fla. 2d DCA 2006). The fact that Robinson and his friends were “surrounded by the odor of burned marijuana was insufficient to supply more than a ‘mere suspicion’” that Robinson possessed marijuana. Robinson’s withdrawn consent “did not give the officer probable cause to search for marijuana.” The 2nd DCA reversed the denial of the suppression motion because no probable cause existed for the search.

[\[Robinson v. State, 03/28/08\]](#)



2D06-4092Robinson.pdf

For an officer to lawfully detain a citizen, “an investigatory stop requires a well-founded, articulable suspicion of criminal activity.”

Greider pled guilty to possession of crack cocaine and drug paraphernalia reserving his right to appeal. On appeal, Greider argued the trial court erred in denying his motion to suppress the evidence.

The record revealed that Greider was parked in a legal parking space, in his black sedan with towels rolled up in the windows and hanging down “like curtains,” late at night, when Officer Perna parked his patrol vehicle directly behind Greider’s black sedan. Concerned for the occupants safety, the officer testified he walked up to the passenger side of the vehicle to see if anyone was in the vehicle, Greider rolled down the passenger window and told the officer he was fine. While he thought it was strange Greider was in the vehicle with towels covering the windows, “he did not think that Mr. Greider had committed or was about to commit a crime.” The officer testified he then walked around the car to the driver’s side and ordered Greider to roll down the window. When the towel fell, the officer saw “what appeared to be a glass crack pipe in the center console next to the gear shift.” The officer also observed Greider taking a small opaque orange vile from between his legs and placing it “inside a compartment in the driver’s side door.” Officer Perna opened the car door, directed Greider to get out of the vehicle, looked in

the compartment and “observed crack cocaine pieces.” Greider was arrested for possession of crack cocaine and drug paraphernalia.

The 2nd DCA determined there were “two police-citizen encounters” and noted the trial court’s ruling denying the suppression motion “did not distinguish the interaction on the passenger side of the vehicle from that which occurred on the driver’s side.” The first consensual encounter was Officer Perna’s initial contact with Greider via the passenger side window. The officer was doing a “welfare check” and the officer’s own testimony reflected his concerns for safety were “dispelled” after the welfare check. While the officer was suspicious of the towels in the windows, the record reflected that he did not believe any criminal activity had occurred or was about to occur. The second encounter occurred when Officer Perna walked around to the driver’s side window and ordered Greider to roll the window down. This encounter became an “investigatory stop” and it was the unlawful detention and seizure of Greider “from the driver’s side of the car that ultimately resulted in the plain view of the paraphernalia.” Once the officer determined that Greider was “okay” and “not involved in any criminal activity, the officer lacked the proper authority to order Mr. Greider to lower his window.” Finding that Greider was illegally detained and searched, the 2nd DCA reversed and remanded for discharge “because the trial court erred in denying Mr. Greider’s motion to suppress.”

[\[Greider v. State, 04/04/08\]](#)



2D06-592Greider.pdf

“An officer's observations of a vehicle may provide

reasonable suspicion that the vehicle is speeding.”

Allen, charged with possession of cocaine, tampering with evidence, possession of paraphernalia, and three courts of willfully refusing to sign and accept a summons moved for a motion to suppress the evidence claiming “the police did not have probable cause to stop Allen’s car, because there was no testimony establishing the actual speed of the car.” The trial court granted the motion and the State appealed.

Detective Rylott testified at trial that Allen appeared to be driving at a high rate of speed and that he had to “accelerate quite a bit” to catch up to Allen; that the posted speed limit was twenty-five miles per hour and that “he had to drive well over fifty miles per hour to catch up to Allen.” The trial court’s order granting the suppression motion found that the vehicle appeared to be speeding; that the detective had to drive approximately fifty miles per hour to catch up to Allen’s vehicle and that “[w]hile the Detective testified that he observed the Defendant speeding, he did not testify as to the Defendant’s actual speed.”

The 3rd DCA referred to its previous decisions where it has held that “police may stop a vehicle for a speeding violation based on the officer’s visual or aural perceptions and that verification of actual speed by the use of radar equipment or clocking is not necessary to justify the stop.” State v. Joy, 637 So. 2d 946 (Fla. 3d DCA 1994); State v. Eady, 538 So. 2d 96 (Fla. 3d 1989). The 3rd DCA further noted that other states have also concluded “that an officer’s observations of a vehicle may provide reasonable suspicion that the vehicle is speeding.” State v. Barnhill, 601 S.E.2d 215, 218 (N.C. Ct. App. 2004). Based on the above, along with the detective’s testimony and the court’s

specific finding that “Allen’s vehicle appeared to be speeding,” the 3rd DCA held that probable cause existed for the detective to stop Allen’s vehicle for the traffic infraction and reversed the suppression motion.

[*State v. Allen*, 04/04/08]



The search of defendant's property prior to defendant's consent was illegal and therefore "tainted the consent and rendered the evidence inadmissible as 'fruit of the poisonous tree.'"

Grant appealed his conviction and sentence to eighty counts of misdemeanor cruelty to a dog arguing the trial court erred in its ruling that he voluntarily consented to a search of his property.

The record revealed that Deputies Wright and Harris, investigating a report that more than one hundred dogs were on Grant's property, went to Grant's home and when no one answered the door, they "peered over and through the slats of a six-foot privacy fence" and only saw some chained or caged dogs. While there was no evidence suggesting any mistreatment of the dogs, the Deputies "walked through a gate and searched the property" and found more than one hundred dogs chained to kennels. Many dogs had scars, were emaciated and had no food or water. The Deputies left the property, called for backup and waited for Grant to return home. When

Grant arrived, Deputy Wright told Grant they had searched his property and asked him to "show them around the property and explain the dogs' conditions." Grant showed them around the property but refused to allow them in the house. The deputies obtained a search warrant and found "mistreated dogs and other evidence inside" and arrested Grant for animal cruelty. The trial court denied Grant's motion to suppress stating that "although the State failed to demonstrate that the deputies entered the property lawfully under the plain view doctrine or because of exigent circumstances, the search was lawful because of Mr. Grant's consent and the inevitable discovery rule."

The 2nd DCA determined that the illegality of the deputies' initial search was not cured by Grant's later consent to show them around his property. While Grant's refusal to allow the deputies inside his home proved he understood his right to refuse consent to search his property, the fact that the deputies had already searched his property, demonstrated to Grant "they had an absolute right to search and that his 'consent' to any further search was a mere formality which he could not refuse."

The 2nd DCA determined the search of Grant's property prior to Grant's consent was illegal and therefore "tainted the consent and rendered the evidence inadmissible as 'fruit of the poisonous tree.'" See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *Wheeler v. State*, 956 So. 2d 517, 518-19, 522 (Fla. 2d DCA 2007). Because there was no evidence "suggesting any mistreatment of the dogs," the State failed to prove that the evidence seized after Grant gave his consent to search the property "was not obtained by exploiting what they discovered during the prior search." Further, the evidence was not admissible under the inevitable discovery doctrine because "the deputies lacked any

basis to secure a warrant absent their observations after they entered the property. Any assertion that they would have discovered evidence of animal cruelty absent the illegal conduct is speculative.” Thus, the 2nd DCA reversed Grant’s conviction.

[\[Grant v. State, 04/09/08\]](#)



3rd District Court of Appeals

Trial court properly concluded that deceased victim’s statements to her son were admissible because they were “excited utterances and non-testimonial.”

Paraison, who plead guilty and reserved the right to appeal the denial of his motion to exclude a number of hearsay statements, was convicted for armed burglary with assault/battery, kidnapping with a weapon, and armed robbery with a firearm.

The record revealed that Mrs. Whitehead, an elderly woman, was “battered, robbed, and bound with duct tape.” After the intruders left, she was able to free herself, call emergency services and her son, Ira, to tell them she had been robbed. When Ira arrived at the house, Officers Dixon and Hayes were already there. Mrs. Whitehead told the officers and her son what had happened. When Mrs. Whitehead died, Paraison argued that “all of Mrs.

Whitehead’s statements to Officer Hayes must be excluded under Crawford as they are testimonial out-of-court statements by a witness unavailable for prior cross-examination and trial.” See Crawford v. Washington, 541 U.S. 36 (2004).

The 3rd DCA concluded that the Mrs. Whitehead’s statements to Officer Hayes were testimonial and fell within Crawford, as such, they should have been precluded. The 3rd DCA further determined that the trial court properly concluded that Mrs. Whitehead’s statement to her son on the phone that she had been robbed, along with her statements to her son when he first arrived at the house are admissible because they were “excited utterances and non-testimonial.” See § 90.803(2), Fla. Stat. (2004). Further, the combination of Mrs. Whitehead’s statements to her son on the phone and when he arrived at the scene, along with the fingerprint and DNA evidence against Paraison, and the “incriminating post-Miranda statement” Paraison made to the police, “confirm that the instant ruling on application of Crawford to some of the statements made by Mrs. Whitehead is not dispositive.”

[\[Paraison v. State, 03/26/08\]](#)



4th District Court of Appeals

"The search warrant shall in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer requiring it, said officer being present and acting in its execution." § 933.08, Fla. Stat. (2005).

The trial court granted John and Jean Hill's motion to suppress the evidence after it "excised certain allegations" from both search warrants (one for the K-9 sniff outside the Hill's residence and one for the interior search of the residence) and found that the "remaining allegations of probable cause were insufficient to support the canine search warrant." The trial court further found the "execution was fatally flawed because neither affiant was present during the search, and the searching officer did not have physical possession of the search warrant. Therefore, unlawful execution of the warrant independently required suppression." The state appealed the order arguing that "even after the trial court excised the information from the affidavits, probable cause existed for the search warrants."

The 4th DCA noted the suppression order was not exclusively based on the lack of probable cause, "but also on the improper execution." Both warrants, which directed Officers Bradford and Williams to perform the search, were actually executed by other

"unauthorized" officers who performed the search. The 4th DCA held that "because both search warrants were served in violation of section 933.08, Florida Statutes, applying Vargas and Morris, the motion to suppress was properly granted." See State v. Vargas, 667 So. 2d 175 (Fla. 1996); Morris v. State, 622 So. 2d 67 (Fla. 4th DCA 1993).

[*State v. Hill*, 04/16/08]



4D06-5046.opC041508Hill.pdf

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