

LEGAL BULLETIN

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

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

VOLUME MMVIII, ISSUE 9

1st District Court of Appeals

Affidavit failed to establish a nexus between the objects of the search and the residence to be searched.

Dyess, arrested after a controlled buy took place in a grocery store parking lot, appealed the denial of his dispositive motion to suppress arguing “that the controlled buy was not sufficiently controlled to support issuance of a search warrant and that no probable cause exists to support a search warrant for a home.”

The record revealed that after the controlled buy in the parking lot, Officer Hausner arrested Dyess and completed an affidavit to “obtain a search warrant for the property at 2314 Truman Avenue.” Two trailers were located on the property; one supplied by FEMA and the other unlivable. “The affidavit alleged that the premises were occupied by or under Appellant’s control and that officers had observed Appellant leaving the residence to go to the controlled buy.” The affidavit also chronicled Dyess’ activities following the controlled buy, including the search of Dyess’ vehicle, incident to his arrest, where 20 grams of marijuana were found. The money given to

Dyess in the controlled buy, in exchange for the 28 grams of cocaine sold to him, was not located in the vehicle. The affidavit further stated that Dyess “denied being at 2314 Truman Avenue,” however, the “officers found keys to both trailers in Appellant’s pockets.” Officer Hausner “averred in his affidavit that he had reason to believe that certain items of contraband were on the premises” and provided a laundry list of items he believed would be found.

The 1st DCA concluded that “the controlled buy clearly provided probable cause to search the site of the sale.” State v. Howard, 666 So. 2d 592, 594 (Fla. 4th DCA 1996). However, “the controlled buy did not provide probable cause to search the residence, because the facts, as alleged in the supporting affidavit, did not establish a fair probability that the laundry list of items to be searched for would be found there.” See Renckley v. State, 538 So. 2d 1340, 1342 (Fla. 1st DCA 1989); Garcia v. State, 872 So. 2d 326, 329-30 (Fla. 2d DCA 2004). The 1st DCA determined that like Garcia and Renckley, the inference that other drugs and paraphernalia might be found in the residence, “is nothing more than speculation,” as such, “the supporting affidavit does not provide probable cause to search the Truman Avenue home.” Further, the good faith exception to the exclusionary rule did not apply “because the supporting affidavit here fails to establish a nexus between the objects of the search and the residence to be searched.”

The 1st DCA reversed the conviction and sentence of Dyess, holding that his suppression motion should have been granted.

[Dyess v. State, 08/04/08]



1D07-1465Dyess.pdf

2nd District Court of Appeals

Sufficient evidence produced to establish probable cause existed for law enforcement officer's order for blood draw.

Palazzotto appealed his judgments and sentences for DUI serious bodily injury, DUI with damage to person or property, child neglect, and battery on a law enforcement officer. While the 2nd DCA affirmed his judgment and sentence, it wanted to address Palazzotto's "invitation to us to recede from State v. Catt, 839 So. 2d 757 (Fla. 2d DCA 2003), and Keeton v. State, 525 So. 2d 912 (Fla. 2d DCA 1988)."

Palazzotto invited the district court to examine whether the odor of alcohol alone was sufficient probable cause to order the blood draw and argued that the "trial court erred in ruling that a law enforcement officer had probable cause to order a blood draw pursuant to section 316.1933, Florida Statutes (2004)."

Section 316.1933(1)(a) "allows a forcible blood draw after a traffic accident with serious bodily injury where there is

probable cause to believe that the driver was under the influence of alcohol." The 2nd DCA noted that "the odor of alcohol was not the only evidence of Mr. Palazzotto's impairment. The speed at which he had been driving and his violent behavior at the hospital, coupled with the odor of alcohol, provided probable cause to order a blood draw."

[Palazzotto v. State, 07/25/08]



2D07-44Palazzotto.pdf

4th District Court of Appeals

Administrative Suspension Hearings Standard of Review

The circuit court correctly applied competent substantial evidence standard of review when it held that evidence at license suspension hearing was "undisputed" that licensee's vehicle was inoperable and, accordingly, implied consent law did not apply. Whether there was competent, substantial evidence to support the DHSMV's finding that probable cause exists to believe that Sarmiento drove the car was debatable. Sarmiento's vehicle was legally parked in a parking lot with its two tires blown out and its axle hanging down. Although the engine was running, the presence of lubricants in the power train, neither the police office not the automotive service advisor was able to offer an opinion as to when or how the care may have gotten to the parking lot or how long it had

been there. The circuit court afforded procedural due process and applied correct law, and no injustice occurred. There was a strong dissent.

[DHSMV v. Sarmiento, 08/06/08]



Based on the totality of the evidence, the admission of the collateral crime evidence was harmless.

Ochacher, convicted of felony driving under the influence (DUI), appealed the conviction arguing the “trial court erred in allowing testimony about his suspended license at the time of the charged offense.”

Both Lieutenant Kaplan and Officer Dorfman testified to Ochacher being stopped after the Lieutenant observed Ochacher’s vehicle “make an erratic swerve and later hit the median twice.” Their combined testimony as to Ochacher’s condition after being stopped included: staggering, slurred speech, bloodshot watery eyes, odor of alcohol on Ochacher’s breath, along with failing several field sobriety tests that were conducted. During closing arguments, the State made “three brief references” to Ochacher’s suspended license. Ochacher asserts that “the fact he was driving with a suspended license was not probative of whether he was driving under the influence.”

The 4th DCA opined to the decision rendered in Castro v. State, 547 So. 2d 111 (Fla. 1989), where that court found “that the admission of collateral crime evidence was harmless beyond a reasonable doubt in

light of the totality of the evidence and defendant’s confession.” After reviewing the “totality of the evidence,” the 4th DCA noted that after the conclusion of the state’s case, the defense rested without presenting any witnesses. Defense never presented a theory of defense “other than to attack the observations of the officers,” and defense never presented any evidence to contradict the direct observation of the officers. As such, the 4th DCA held, as in the Castro case, “that under the totality of the evidence and the direct observations of the defendant by the officers, any error in admitting this evidence of defendant’s suspended license was harmless beyond a reasonable doubt.”

Note: J. Taylor respectfully dissented with an opinion that he would have reversed and remanded for a new trial because he believed that the admission of the suspended license testimony was not harmless.

[Ochacher v. State, 08/13/08]



4D07-24940chacher.op.pdf

5th District Court of Appeals

Appearance of applying an incorrect standard to evaluate the legality of a traffic stop results in reversal/remand for further proceedings.

The State appealed the order suppressing cannabis and statements obtained “following a police stop of the vehicle in which Javonte L. Wimberly was a passenger.” The State argued that the officers “had a reasonable suspicion to believe that a traffic infraction was being committed, and as a result, had a lawful basis to stop the vehicle Wimberly occupied.”

The two officers testified at the suppression hearing that they stopped the vehicle because “they believed that the vehicle’s windows were illegally tinted.” They confirmed Wimberly’s identification, along with “the existence of an outstanding warrant for his arrest.” Wimberly was removed from the vehicle, handcuffed, and the subsequent search of his person revealed a small baggie of cannabis in his pocket. He was “read his Miranda rights, and placed in the back of the patrol car.” The officers further testified they searched the vehicle because of the smell of cannabis coming from the vehicle, along with the cannabis found on Wimberly. That search resulted in finding approximately “70 to 80 grams of cannabis” in the backpack of a child sitting in the backseat of the vehicle. The officers testified that Wimberly admitted the drugs were his. Wimberly denied all of the officers’ allegations at the suppression hearing. Ronald Holmes testified “he installed a legal 35% auto window tint on the vehicle Wimberly occupied about five months prior to Wimberly’s arrest.” The trial court granted the suppression motion concluding that “because the window tint was legal, the police had no basis to stop the car.” More specifically, the trial court found “the testimony of Mr. Holmes, the only independent witness, more credible and persuasive than the other witnesses, and concluded based upon his testimony *that the vehicle did not have illegal tint on its windows at the time of the traffic stop. Thus, law enforcement had no legal basis*

to conduct a traffic stop on the vehicle.” (Emphasis added).

The 5th DCA referred to the Supreme Court’s decision where it held that “a traffic stop is reasonable under the Fourth Amendment ‘where the police have probable cause to believe that a traffic violation has occurred.’” Whren v. United States, 517 U.S. 806, 810 (1996). Opining that the issue in the instant case was not whether the windows were actually illegally tinted, but “whether the officers had probable cause to believe that the windows of the car . . . were illegally tinted.” “A traffic stop based on an officer’s incorrect but reasonable assessment of the facts does not violate the Fourth Amendment.” Saucier v. Katz, 533 U.S. 194, 205 (2001); United States v. Chanthasouvat, 342 F.3d 1271, 1276 (11th Cir. 2003).

The 5th DCA determined an incorrect standard was used by the trial court when granting Wimberly’s suppression motion. That “it appears to us that the trial court concluded that because the window tint was legal, the traffic stop was illegal, requiring suppression of the drugs and statements.” The 5th DCA reversed and remanded for further proceedings.

[State v. Wimberly, 07/25/08]



5D07-3444Wimberly.op.pdf

Trial court erred; officers’ statements adequately advised defendant of his rights, as required by *Miranda*.

The State appealed the order granting the suppression of “certain inculpatory

statements made by Modeste.”

The record revealed that Modeste shot and killed Arthur and Betty Williams and there was a witness to the shooting. Modeste was picked up a year later in Indiana and brought back to the Orange County Sheriff’s Department where his interrogation was videotaped. Modeste made “certain inculpatory statements” and “was later indicted for two counts of first degree murder.” Modeste’s first suppression motion was denied by the trial court after a hearing was held on the motion. The trial court found that Modeste “was adequately advised of his *Miranda* rights, that he affirmatively acknowledged that he understood those rights, and that he voluntarily waived those rights.” Miranda v. Arizona, 384 U.S. 436 (1966). The videotape entered into evidence showed Modeste was advised by an officer of his right to remain silent, that anything he said could be used against him in a court of law, that an attorney would be appointed to him if he could not afford one, that he could talk with an attorney before talking to them, and that “if at anytime you feel uncomfortable or you think we’re trying to persuade you to say something you stop talking bro.” There was evidence in the videotape showing that the officers “re-emphasized that Modeste did not have to talk to them.”

Modeste’s second suppression motion claimed that “the officers’ failure to expressly advise Modeste of his right to counsel *during interrogation* necessitated a suppression of his statements,” citing to Maxwell v. State, 917 So. 2d 404 (Fla. 5th DCA 2006), in support of his motion. After a hearing was held on the second suppression motion, by a different judge, the successor trial judge found that “Modeste had not been adequately apprised of his right to counsel during the interrogation,” and that “while Modeste had

been expressly advised of his right to counsel prior to interrogation he had not been advised of his right to counsel during interrogation.” The State appealed.

The 5th DCA rejected Modeste’s claim “that the officer’s statement ‘[o]f course you . . . you can talk to an attorney first before talking to us’ rendered his *Miranda* warnings invalid.” The district court failed to see “how the officer’s statement could reasonably lead Modeste to believe that he had a right to counsel prior to questioning but that such right would summarily disappear once questioning began.” See People v. Wash, 861 P.2d 1107, 1118-1119 (Cal. 1993). Referring to the decision in Duckworth v. Eagan, 492 U.S. 195, 203 (1989), the 5th DCA noted the significance of the Supreme Court’s decision when it “stressed that *Miranda* warnings are not themselves constitutionally-protected rights, but are measures to ensure that the right against compulsory self-incrimination is protected.” As such, a reviewing court needs to use “a common sense approach in an effort to determine if the warnings given would adequately advise a layperson of his or her right to an attorney under the Fifth Amendment.”

The 5th DCA concluded that while the officers’ statements to Modeste “were not an eloquent formulation of *Miranda* warnings, he was “advised that he did not have to talk to the officers; but that if he did, anything he said could be held against him in a court of law. Modeste was further informed that he had the right to an attorney and, indeed, could consult with an attorney prior to talking to the officers.” Further, “the officers made no statements that could reasonably be construed to suggest that Modeste’s right to counsel did not include the right to have counsel present during interrogation.” Furthermore, Modeste was informed that an attorney would be

appointed for him, if he could not afford one. As such, the 5th DCA held “that the officers’ statements adequately advised Modeste of his rights, as required by *Miranda*.” The judgment was reversed and the case was remanded to the trial court.

The 5th DCA certified conflict with West v. State, 876 So. 2d 614 (Fla. 4th DCA 2004) and Roberts v. State, 874 So. 2d 1225 (Fla. 4th DCA 2004), where the 4th DCA’s contrary position was “that a *Miranda* warning is inadequate when the suspect is informed generally of the right to an attorney but not *when* the attorney can assist.” The Roberts court specifically wrote that “an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.. . .”

Note: Justice Sawaya wrote a twenty-one-page dissenting opinion.

[[State v. Modeste, 08/08/08](#)]



5D07-2010Modeste.pdf

Approved by:

Robin F. Lotane, General Counsel

Edited By:

Judson M. Chapman, Senior Assistant General Counsel

Michael J. Alderman, Senior Assistant General Counsel

Peter N. Stoumbelis, Senior Assistant General Counsel

Heather Rose Cramer, Assistant General Counsel

Jason Helfant, Assistant General Counsel

Kimberly Gibbs, Assistant General Counsel

Douglas D. Sunshine, Assistant General Counsel

Sandee Coulter, Senior Assistant General Counsel

M. Lilja Dandelake, Assistant General Counsel

Jim Fisher, Senior Assistant General Counsel

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. If you care to review other Legal Bulletins, please note the website address: [DHSMV Homepage http://www.dhsmv.state.fl.us](http://www.dhsmv.state.fl.us) or [FHP Homepage \(www.fhp.state.fl.us\)](http://www.fhp.state.fl.us).