

LEGAL BULLETIN

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

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2nd District Court of Appeals

Trial court erred; facts did not support the charge of carrying a concealed firearm.

Strikertaylor appealed his convictions of carrying a concealed firearm and misdemeanor possession of marijuana alleging “the trial court erred in denying his motion to dismiss the information filed against him because the facts do not support the charge of carrying a concealed firearm.”

The record revealed that Strikertaylor was stopped for a noise violation and after a dog alerted to narcotics in the vehicle, Strikertaylor was detained in the officer’s vehicle while his vehicle was searched. An unloaded weapon (handgun) was found under the front passenger seat and ammunition was located in the closed glove box of the vehicle. The State did not file a traverse.

The 2nd DCA opined that “it is not a violation of section 790.01(2) to possess a concealed firearm without a license within the interior of a private conveyance if the firearm or other weapon is securely encased or is otherwise not readily

accessible for immediate use.” The 2nd DCA further opined to the definitions of “Readily accessible for immediate use” and “securely encased” as defined by sections 790.001(16) and (17).

In a similar case, Weyant v. State, 990 So. 675 (Fla. 2d DCA 2008), “this court affirmed the dismissal of a concealed firearm charge because the unloaded firearm was wedged between the front seats and the ammunition was in the closed center console.” Based on Weyant, where the facts of that case are the same as the instant case, the 2nd DCA reversed Strikertaylor’s conviction of carrying a concealed firearm and affirmed the conviction of misdemeanor possession of marijuana.

[Strikertaylor v. State, 12/17/08]



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4th District Court of Appeals

Trial court abused its discretion in failing to sever the marijuana charges from the driving offenses.

Estrich was charged with DUI manslaughter, leaving the scene of a crash

involving a death, and possession of less than 20 grams of marijuana. Before trial, Estrich moved to “sever the marijuana charges from the driving offenses” and also argued “for the exclusion of testimony about the marijuana metabolite in his blood, contending that such evidence was unfairly prejudicial.” Both motions were denied and the jury subsequently found Estrich “guilty of the lesser included offense of misdemeanor driving under the influence, not guilty of leaving the scene of a crash involving death, and guilty of possession of less than 20 grams of cannabis.”

The record revealed that Estrich had been involved in a serious two car crash and the driver of the other vehicle, America Babilonia, died at the scene. Estrich’s vehicle traveled approximately 210 feet before actually stopping. There were no witnesses to the actual collision. However, there was testimony at trial from several people that attended to Estrich after the crash that Estrich’s “behavior was more consistent with a person under the influence rather than someone in shock,” however, each person also conceded that Estrich’s behavior could be the result of “closed head trauma.” Two prescription bottles were found in Estrich’s vehicle. A third bottle containing marijuana was found in Estrich’s pocket by a paramedic. Estrich told the paramedic he had “ADHD and heart palpitations and was taking Xanax for anxiety.” During a taped statement with police, Estrich told the officer he did not drink alcohol, that he had taken Adderall earlier in the day to study but denied taking any narcotics or drugs. He also told the officer “he took 25 milligrams of Xanax at night before going to sleep,” he “acknowledged the marijuana in his car,” and told the officer he smoked some marijuana the night before. Estrich “vigorously contested he was impaired by Xanax at the time of the crash” and argued he had “developed a tolerance to Xanax as

a result of his use of the prescribed medication over time.” Estrich contended his disorientation was a result of closed head trauma. Experts testified at trial that “patents develop a tolerance to the adverse side-effects of the medication.” That “therapeutic levels of Xanax have been reported as high as 272 nanograms . . .” Chemical analysis of his blood showed the presence of 39 nanograms of marijuana metabolite and 139 nanograms of the generic form of Xanax.

The 4th DCA noted that “every expert witness at the trial . . . stated that the presence of the marijuana metabolite in the defendant’s blood sample likely would not have affected him at the time of the accident.” Because the material fact at issue was “the defendant’s impairment at the time of the crash,” and the evidence at trial was Estrich’s marijuana use “probably did not affect him at the time of the collision,” the 4th DCA held that “the probative value of the marijuana metabolite in the defendant’s blood was substantially outweighed by the danger of unfair prejudice.” The trial court abused its discretion denying the motion in limine. Further, the 4th DCA held the error was not harmless because “the state cannot show ‘beyond a reasonable doubt that there was no reasonable possibility that the error complained of contributed to the verdict.’”

Regarding Estrich’s argument that the trial court erred in failing to sever the marijuana charges from the driving offenses, the 4th DCA concluded that the trial court “failed to adequately consider the ground of severance in Florida Rule of Criminal Procedure 3.152(a)(2)(A), that a severance is ‘appropriate to promote a fair determination of the defendant’s guilt or innocence of each offense.’” The contested issue was “whether the defendant was impaired by Xanax at the time of the accident.” The jury heard that Estrich

“possessed .95 grams of marijuana” and the 4th DCA held this had a “prejudicial effect on the trial of the manslaughter charge.” The 4th DCA reversed and remanded for the court to sever the DUI charge from the marijuana possession charge and conduct new trials.

[*Estrich v. State*, 11/26/08]



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Possession with intent to sell cocaine and marijuana conviction can be inferred from arresting officer’s testimony.

Bedford was found in possession of cocaine and marijuana. Officer testified regarding the quantity of the drugs, and that the manner in which they were packaged was consistent with sale. This evidence was sufficient to support a conviction of possession with intent to deliver.

[*Bedford v. State*, 12/03/08]



Bedford.doc

5th District Court of Appeals

Trial court erred in suppressing the evidence located in defendant’s vehicle; search was legal

because of inevitable discovery rule.

The State appealed an order suppressing statements made by Nowak to police, “along with evidence obtained from a search of Nowak’s vehicle.”

The 5th DCA affirmed the suppression of Nowak’s statements to police, however, it reversed the suppression of the physical evidence because of the “the inevitable discovery rule.”

The 5th DCA opined that it is generally known that physical evidence obtained by police using information illegally obtained from a defendant cannot be admitted into evidence at trial. The inevitable discovery rule is the exception where “evidence obtained as the result of unconstitutional police procedures may still be admissible if it is shown that the evidence would ultimately have been discovered by legal means.” In the instant case, the State “had to demonstrate not only that it would have found the vehicle without using information illegally obtained from Nowak, but also that it would have then had a legal basis to search the vehicle without relying upon Nowak’s statements.” The trial court found that “law enforcement would have found the vehicle legally, even if Nowak had not led them to it.” However, the trial court held the search of the vehicle was illegal because law enforcement “did not have probable cause to believe it contained any additional evidence of the crimes that they ultimately charged in this case.”

The 5th DCA concluded the search was legal based “on the items already lawfully seized from Nowak, along with the *victim’s statement to police*,” which “clearly indicated prior planning.” Nowak, a former astronaut involved in a love triangle, was accused of planning to kidnap a romantic

rival. She had traveled from Texas to Florida to accost her victim while wearing a disguise. She was apprehended and arrested after dousing her victim with pepper spray. The 5th DCA determined that given the prior and future planning “nature of the facts known to law enforcement, separate and apart from any information illegally obtained from Nowak herself, it was simply a practical, common-sense conclusion that evidence of Nowak’s planning and plan would likely be found in the vehicle that brought her to the encounter, and to which she would return.” The 5th DCA stated that “this” was all that was required to show probable cause and reversed the suppression of the evidence seized from Nowak’s vehicle.

[State v. Nowak, 12/05/08]



Trial court erred; investigatory stop was valid as the officers had a reasonable and founded suspicion to believe defendant was involved in criminal activity.

The State appealed an order granting Allen’s motion “to suppress certain evidence seized during an investigatory stop.”

A known confidential informant (CI) who had a history of providing reliable information, told police he had just purchased crack cocaine in a parking lot located in a high crime area. The CI provided the following verbal description of the man who sold him the cocaine: “Black

male, dark skin, approximately 6’2”, weighing 200 pounds, wearing a dark-colored shirt, with facial hair.” The CI also provided a description of the second man who was there during the transaction. Police were sent to investigate and when they arrived, they noticed Allen and another man who matched the verbal description given by the informant. The two men walked away “hurriedly” when the police, in full uniform, exited their vehicle. The men did not stop when the police identified themselves as police officers and told them to stop. One man was observed throwing an item under a truck which later turned out to be crack cocaine and Allen was eventually stopped and found to have several pieces of crack cocaine in his hand. It turned out that Allen and the other man were not the individuals who sold the crack to the CI. The officer’s did not see the CI’s written description of the two men until after the arrest of Allen and the written description of the clothing worn by Allen and the other man did not match the actual clothing worn by the two men. However, the “verbal physical description of the perpetrator in fact matched both Mr. Allen and the other gentleman in the parking lot.” The trial court held the search was “unconstitutional and suppressed the cocaine . . . because the subsequently given written description of the clothing worn by the persons involved with the informant did not match up with the clothing worn by Mr. Allen and his companion on the night in question.”

The 5th DCA determined that the “written description is not relevant to the legal determination before us” and for “constitutional purposes we can only evaluate the information in the possession of the officers at the time of the stop.” The 5th DCA, based on the totality of the circumstances, held that the investigatory stop was valid “because the officers had a reasonable and founded suspicion to

believe that Mr. Allen was involved in criminal activity, particularly in view of the verbal description given to them by the informant.” The 5th DCA reversed the suppression order and remanded for further proceedings.

[State v. Allen, 11/14/08]



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