

# LEGAL BULLETIN

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ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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## 1st District Court of Appeals

**Crawford violation did not occur; blood test record admitted into evidence was ordered by an emergency room doctor to diagnose and treat defendant for injuries sustained in the accident.**

Sellers, convicted for aggravated manslaughter, DUI manslaughter, vehicular homicide and child neglect, contested her convictions arguing the trial court erred “in admitting, over objection, blood test results that demonstrated her impairment.”

In its analysis of what constitutes “testimonial hearsay” and “non-testimonial” hearsay, the 1st DCA determined that “[r]eports that are produced in furtherance of a police investigation constitute testimonial hearsay.” See Martin v. State, 936 So. 2d 1190, 1192 (Fla. 1st DCA 2006). Drug or alcohol tests performed in the normal course of business by a hospital “are admissible as business records.” See Martin, 936 So. 2d at 1192 (citing Rivera v. State, Pflieger v. State, 952 So. 2d 1251, 1253-1254 (Fla. 4th DCA 2007)(finding annual . . . ; specifically mentions that a “hospital record of a blood test” is for “accurate medical treatment” and is non-testimonial).

Seller’s blood test was ordered by a doctor

in the emergency room who “required the test in order to properly diagnose and treat” Seller’s injuries. The 1st DCA held that a Crawford v. Washington, 541 U.S. 36, 68 (2004), violation did not occur because the blood test record “admitted into evidence is not testimonial; therefore, there was no violation of Appellant’s right to confrontation.”

[[Sellers v. State, 12/31/07](#)]



Opinion 1D06-4352Sellers.pdf

**After knowingly and voluntarily waiving *Miranda* rights, “[a] suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstance would understand the statement to be an assertion of the right to remain silent.”**

Davis who was charged with the first-degree premeditated murder with a firearm of his father motioned the court to suppress the statements and admissions he made to the officers during his interview, along with the suppression of the evidence (gun) that was located as a result of those statements and admissions. The court granted the motion and the state appealed.

The record showed that Davis was picked up for questioning regarding the murder of

his father. He was read his *Miranda* rights, signed a waiver form and kept telling the officers that he wanted to go home. Officer Spencer asked Davis which officer he would feel more comfortable talking with and Davis replied “None of ‘em.” Officer Spencer continued the questioning and Davis confessed to murdering his father and told the officers where they could find the gun he used. After the suppression hearing the trial court entered an order “partially granting Davis’s motion to suppress, concluding that his statement, ‘none of ‘em,’ was an unequivocal assertion of his right to terminate further questioning.”

In its analysis, the 1st DCA noted that in Davis v. United States, 512 U.S. 452, 459 (1994), “the United States Supreme Court held that, after a suspect knowingly and voluntarily waives *Miranda* rights, a law enforcement officer may continue questioning unless the suspect clearly and unequivocally asserts his or her right to counsel.” The Florida Supreme Court, in its decision in State v. Owen, 696 So. 2d 715, 717 (Fla. 1997), recognized that the reasoning of the Davis decision also “applies when a suspect makes an equivocal or ambiguous assertion of any *Miranda* right, including the right to terminate further questioning.” The 1st DCA determined that Davis’s statement, “none of ‘em,” was “not an unequivocal or unambiguous request to terminate further questioning.” That his statement, taken in context, was not clear whether he was indicating what officer he would or would not be comfortable talking to or whether he was indicating that he did not want to continue with the questioning. “Thus, the officers were under no obligation to clarify Davis’ intent or to terminate further questioning.” See Owen, 696 So. 2d at 717-18. The 1st DCA held the “trial court reversibly erred by partially granting the motion to suppress,” and reversed that

order.

[*State v. Davis, III, 01/10./08*]



Opinion 1D06-5678D.davis.pdf

## 2nd District Court of Appeals

### Breath Test Result Affidavit was sufficient to sustain suspension of license.

DeGroot’s license was suspended for DUI on the basis of a Breath Test Result Affidavit. DeGroot requested second tier review from the circuit court, arguing that not only was the affidavit required at the hearing but also the actual printed test results were required to sustain a suspension. The circuit court granted review and overturned the suspension.

On appeal the Second District reversed saying that the Florida Statutes did not specifically require the card with the printed results to be submitted as evidence in order to sustain the suspension. The Affidavit was competent substantial evidence.



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## 3rd District Court of Appeals

### Impoundment ordinances that did not include adequate notice and that did not allow for the innocent

**owner defense were unconstitutional.**

Miami enacted some ordinances that allowed police to seize and impound vehicles where there was probable cause to believe that the vehicle was used to facilitate a crime. The trial court found that the ordinances were unconstitutional.

The Third District affirmed finding that the ordinances were unconstitutional because they failed to require adequate notice to the owners of the vehicles, because they used an incorrect standard of proof (“Preponderance of the evidence” as opposed to “clear and convincing” evidence standard), and because the ordinances fail to acknowledge the innocent owner defense.



3dcacvWellman.doc

## 4th District Court of Appeals

**“The United States Supreme Court has decided as a matter of law that a police officer who has obtained a valid consent from a physically present tenant does not act unreasonably by conducting a search of the shared premises without obtaining consent from a physically absent, but nearby, co-tenant.”**

Prophet, pled guilty to charges of possession of a firearm by a convicted felon and trafficking in cocaine, reserving his right

to appeal the denial of his motion to suppress the evidence found in his bedroom “contending the warrantless search was unreasonable under the Florida and United States Constitutions.”

Relying on Georgia v. Randolph, 547 U.S. 103 (2006), Prophet argued the search was unreasonable because the “police should have obtained his consent before searching the home, and that the consent of the co-tenants was insufficient to justify the search.” He further argued that because the officer came back to the patrol vehicle and talked with him, prior to the search, the officer should have informed him of the “pending search and secured his consent,” and urged “this court to apply a ‘reasonableness’ analysis to the rule announced in *Randolph*.”

The 4th DCA noted that the *Randolph* Court held that “[a] warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.” Randolph, 547 U.S. at 120 (emphasis supplied). The record showed that Prophet was not physically present at the residence because he was “handcuffed in the back of a patrol car, voicing no objection to the search.”

Regarding a “reasonableness analysis” to the rule announced in *Randolph*, the 4th DCA opined to the Supreme Court’s explicit explanation that “the rule in *Randolph* is intended as a bright line, rendering irrelevant any consideration of the practical or impractical nature of locating a physically absent co-tenant: . . . if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential

objector, nearby but not invited to take part in the threshold colloquy, loses out.”

The 4th DCA held no constitutional violation occurred and affirmed the trial court’s denial of Prophet’s suppression motion.

**[Prophet v. State, 01/02/08]**



Opinion 4D06-3662Prophet.op.pdf

## 5th District Court of Appeals

**Trial court erred in granting defendant’s suppression motion; the stop of defendant’s vehicle was lawful and the Officer had probable cause to search defendant and his vehicle.**

Tullis filed a motion to suppress the cocaine, cannabis and drug paraphernalia that was found in his vehicle after a traffic stop and the trial court granted the motion finding that “the traffic stop was illegal.” The State appealed.

The record showed that the arresting officer testified that he was approximately thirty feet behind Tullis’ motor vehicle and the temporary tag was “indistinguishable” because of a tinted cover over the tag. The officer activated his lights and pulled Tullis over. As he approached the vehicle, the officer testified he could not distinguish the number and letters on the tag and that the tag was still “indistinguishable” at a distance of four to five feet. The officer further testified that when he approached the driver’s side window, “he smelled the odor of burnt cannabis coming from the vehicle,” and that cocaine, cannabis, and drug paraphernalia “were subsequently

found on Tullis.” Tullis argued that per Section 320.131(4), Florida Statutes (2006), the only requirement is for the tag to be “clearly visible” and does not require the tag to be “legible.” He argued that because the tag was “clearly visible” the officer had no basis to detain him.

The 5th DCA rejected Tullis’ “proposed construction of the statute,” citing to Maddox v. State, 923 So. 2d 442, 446 (Fla. 2006), stating that “[a] court should endeavor to construe a statute in a manner which would not lead to absurd results that were obviously not intended by the legislature.” Further, Tullis’ reliance on State v. Diaz, 850 So. 2d 435 (Fla.), cert. Denied, 540 U.S. 1075 (2003), was “misplaced.” The Diaz case involved an “illegible expiration date, not an illegible tag,” and that court found it “significant that the alleged illegibility of the expiration date was caused by the State, not by the defendant.”

The 5th DCA determined that it was Tullis’ “own actions that prevented the officer from being able to confirm the validity of the temporary tag without having to first detain Tullis.” Even if the officer had been able to read the tags after stopping the vehicle and had approached Tullis’ vehicle for the sole purpose of “informing Tullis of the reason for the stop, the officer still would have detected the odor of cannabis emanating from Tullis’ car.” Thus, giving the officer “probable cause to search Tullis and his vehicle.” See Blake v. State, 939 So. 2d 192, 197 (Fla. 5th DCA 2006); State v. T.P., 835 So. 2d 1277, 1279 (Fla. 4th DCA 2003).

**[State v. Tullis, 12/28/07]**



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

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