

LEGAL BULLETIN

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

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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Florida Supreme Court

Law governing revocation of license for DUI convictions was part of regulatory scheme and not a criminal statute; therefore, no ex post facto violation occurred when Plaintiff's license was revoked without the opportunity to reapply.

Lescher was convicted DUI four times and his license was permanently revoked. During the period of time that he received his series of DUIs, Florida removed the statutory provision that allowed an individual to reapply for a hardship license five years after his revocation. Lescher was not allowed to reapply. He sued, claiming that the law penalized him ex post facto. The lower courts found no ex post facto violation.

The Supreme Court found that the prohibition against ex post facto laws applies only to criminal provisions and the statutes in this case were part of a regulatory scheme.

Heather Rose Cramer represented the Department.

[Lescher v. Florida Department of Highway Safety and Motor Vehicles, 7/3/08]



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“Police deception alone does not negate voluntariness.”

Wyche, convicted of burglary and grand theft, appealed the denial of his motion to suppress the saliva swabs and DNA test results. Wyche argued the investigator “gained his consent through trickery and that suppression was appropriate pursuant to the Fourth District’s decision in State v. McCord, 833 So. 2d 833 (Fla. 4th DCA 2002).” The 1st DCA affirmed the convictions and certified conflict with the McCord decision.

The record revealed that while Wyche was in custody for an unrelated charge, an investigator who suspected Wyche was involved in a rape case told him they were investigating a burglary of a Winn-Dixie grocery store and requested Wyche give saliva swabs for that investigation. Wyche consented and was cleared in the rape case investigation. However, his saliva swab was given to another investigator who was investigating the burglary of The Pink Magnolia, “a gift shop where Wyche had

worked.” There was a match and the DNA match was used in the prosecution of that burglary. The suppression hearing was based on the stipulated facts (listed in the opinion) that were agreed to and presented orally by the attorneys.

The Court referred to its decision in Washington v. State, 653 So. 2d 362, 364 (Fla. 1994) where it held “that the issue of whether consent is voluntary under the Fourth Amendment is to be determined from the totality of the circumstances.” Further, “the fact that Washington had not been informed that he was a suspect in the murder case did not render his consent involuntary.” The Washington decision further held that “once the samples were validly obtained, they could be used in the unrelated murder prosecution.”

The Court determined that Wyche, who was familiar with police procedures, knew his DNA was being requested for use in a criminal investigation. That the “custodial setting of Wyche’s consent and the investigator’s failure to inform Wyche of the actual purpose of the search were not factors so controlling as to overpower Wyche’s will.” Because there was no coercive show of authority and given the totality of the circumstances, the Court affirmed the district court’s denial to the motion to suppress the saliva swabs and DNA test results. The Court further noted it would “not disapprove the Fourth District’s decision in McCord because that decision likewise properly defers to the trial court’s factual findings and considers the totality of the circumstances surrounding McCord’s motion to suppress.”

Note: Justice Bell wrote a brief concurring opinion and noted his disturbance “by the level of intentional police misrepresentation in this case.” Dissenting opinions were written by Justice Anstead and Justice

Lewis who opined that Wyche’s consent was not freely given and further discussed the “need of recognizing that police fabrication is an important factor” to be considered on a case-by-case basis.

[*Wyche v. State*, 07/10/08]



2nd District Court of Appeals

The trial court erred when it granted the claimant’s motion to dismiss based on the value of the vehicle.

Trial court erred in considering value of vehicle when ruling on motion to dismiss forfeiture complaint in which Department of Highway Safety and Motor Vehicles sought to confiscate motor vehicle of claimant, who was charged with third-degree felony of driving while license was suspended or revoked as habitual traffic offender, a charge that was resolved by plea to misdemeanor of driving without a license. The trial court may not look to information outside four corners of complaint in considering motion to dismiss, and value of vehicle was not alleged in forfeiture complaint.

[*In re FORFEITURE OF 2007 FORD F350 PICKUP TRUCK*, 07/11/08]



3rd District Court of Appeals

Miranda rights; once invoked, apply to subsequent custodial interrogations.

Thompson, charged with driving under the influence (DUI), filed a motion to suppress his confession. The trial court granted the suppression motion and the State appealed.

The record revealed that Thompson was initially pulled over because he and his vehicle fit the description of an alleged arm robber that was given to police by the victim at a convenience store. After Thompson was removed from the vehicle, handcuffed, and placed in the back seat of the police car, he gave the officers his consent to search his vehicle and nothing incriminating was discovered. Thompson was read his Miranda v. Arizona, 384 U.S. 436 (1966), warnings and denied any involvement in the robbery and he admitted he had drunk two beers earlier in the evening. When Sergeant Agins arrived on the scene, Thompson was again read his Miranda warnings. After smelling alcohol on Thompson's breath, Sergeant Agins conducted field sobriety exercises and arrested Thompson for DUI and he was taken down to the DUI intake room at the Sheriff's station and was videotaped. Thompson refused to submit to a mandatory breathalyzer test and then invoked his right to counsel under Miranda. He invoked his right several times and "Sergeant Agins did not question Thompson any further about the robbery or DUI on the videotape," nor did he inform the

other officers that Thompson had invoked his right. Thompson spent the night in the jail and the next day two robbery detectives escorted Thompson to the Sheriff's office where he was again videotaped and shown signing a waiver of his Miranda rights and confessing to the previous night's robbery and other crimes.

"Miranda rights are not investigation-specific; once invoked, they apply to subsequent custodial interrogations even if those interrogations are unrelated to the offense for which the suspect is in custody." See Arizona v. Roberson, 486 U.S. 675, 684 (1988). The State asserted that "non-testimonial physical evidence, like a breathalyzer test result, does not implicate Miranda's protection against self-incrimination—no 'interrogation' is taking place." Thus, "Thompson made an anticipatory and ineffective invocation of his right to counsel, because he was not being interrogated."

The 3rd DCA determined that the breathalyzer test "was not the dispositive circumstance. The initial traffic stop and questioning identified the alleged robbery as the focus of the officers' interest." Further, "prolonged police custody of a suspect after that suspect requests counsel creates a presumption that any subsequent waiver of Miranda rights is the result of police coercion." Arizona, at 686. The police reinitiated contact with Thompson which therefore created that presumption of coercion.

The 3rd DCA affirmed the trial court's order suppressing Thompson's confession.

[State v. Thompson, 07/16/08]



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4th District Court of Appeals

Police lacked reasonable suspicion of criminal activity to justify stop and detention of defendant.

Jean was arrested and charged with unlawful possession of controlled substances. After his suppression motion was denied, Jean accepted a plea agreement (preserving his right to appeal) and appealed the denial of his suppression motion arguing “the police lacked reasonable suspicion to support his detention.”

The record revealed that Jean and his friends were picked-up after a be-on-the-lookout (BOLO) alert was issued regarding an attempted burglary of a residence. The officer testified that Jean matched the description in the BOLO, he stopped his vehicle, approached Jean and his friends, and ordered them to the ground. Jean was *Mirandized*, handcuffed and searched. Miranda v. Arizona, 384 U.S. 436 (1966). Some controlled substances were found on his person and he was arrested and charged with unlawful possession of controlled substances. Jean testified he had been visiting with friends in the neighborhood. Two back-up officers testified that Jean met the description in the BOLO. “However, neither officer provided the description of the suspects in the BOLO and there was no in-court identification.” No evidence was presented that Jean and his friends “were acting suspiciously or attempting to flee” and he had a reasonable explanation for his presence in the

neighborhood.

The 4th DCA concluded that “other than the conclusory statement that Jean matched the BOLO’s description of one of the suspects, there was no evidence presented that would provide a reasonable suspicion of criminal activity that would justify the stop and detention.” The 4th DCA reversed.

[*Jean v. State*, 07/23/08]



4D07-3824Jean.op.pdf

Defamation suit against Sheriff was properly dismissed because the press release he issued was within the scope of his duties.

Sheriff Crowder posted information on “deadbeat parents” in a press release. One of the parties mentioned sued for defamation. The Sheriff moved to dismiss the case based on immunity but his motion was denied by the trial court.

The Fourth District granted the Sheriff’s petition for certiorari and found that the issuing of a press release concerning the official duties of the sheriff was within the scope of the office of the sheriff; therefore, the sheriff was entitled to immunity.

[*Crowder v Barbati*, 07/16/08]



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ATTORNEY GENERAL OPINIONS

Court costs and other statutorily imposed surcharges and fees must be imposed and collected for a violation of sections 316.2935 or 316.610, Florida Statutes.

Court costs and other statutorily imposed surcharges and fees must be imposed and collected for a violation of sections 316.2935 or 316.610, Florida Statutes, when the person cited complied with the provisions of section 318.18(2)(c), Florida Statutes and has his or her fine reduced.



Law Enforcement must provide Domestic Violence Reports to the nearest certified domestic violence center within 24 hours of receipt.

The timely receipt of the initial police report by the records custodian of a law enforcement agency triggers the 24-hour time requirements for the agency to submit a copy of that report and other related reports to the nearest certified domestic

violence shelter pursuant to section 741.29(2), Florida Statutes .



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