

LEGAL BULLETIN

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

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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1st District Court of Appeals

A vehicle stop for a cracked windshield is permissible when the crack renders the vehicle in such unsafe condition so as to endanger any person or property

The 1st DCA set aside its earlier opinion in this case and pursuant to Florida Supreme Court's holding in *Hilton v. State*, 961 So.2d 284 (Fla. 2007). The court determined that section 316.610(1), Florida Statutes, authorizes vehicle stops for equipment that is "not in proper adjustment or repair" does not include windshield cracks." The only time a vehicle stop for a cracked windshield is permissible is when the crack renders the vehicle in such unsafe condition so as to endanger any person or property.

[State v. Howard, 6/02/08]



Howard.doc

Post-Miranda statements are admissible; officer did

not use the "question first - warn later" strategy that undermines Miranda.

Jump pled guilty to three drug offenses and two traffic misdemeanors and reserved his right to appeal the "denial of the motion to suppress his statements concerning the non-traffic, drug offenses."

At the suppression hearing, Deputy Burnham testified he arrested Jump for driving under the influence (DUI). The passenger of the vehicle, also the owner of the vehicle, was arrested for possession of cocaine and "a subsequent search of the vehicle uncovered other drugs." While at the DUI processing center, Jump questioned Burnham as to how much trouble he was in and the deputy told him "he was not in as much trouble as the owner of the vehicle." Jump then volunteered that most of the drugs belonged to him. The Deputy testified he was surprised as he thought all the drugs belonged to the owner of the vehicle. He asked Jump for clarification to which Jump told the Deputy that only one bag did not belong to him. Deputy Burnham gave Jump Miranda warnings and Jump then repeated his claim. See Miranda v. Arizona, 384 U.S. 436 (1966). The trial court also viewed the taped conversation between Jump and Burnham while at the DUI processing center and at the conclusion of the hearing granted the motion to suppress his pre-Miranda statements and denied the motion to suppress his post-Miranda statements.

On appeal, Jump argued that “the ‘question first - warn later’ interrogation technique used by Officer Burnham is prohibited by the Fifth Amendment to the United States Constitution, citing Seibert” and that the trial court erred in admitting his post-Miranda statements. Missouri v. Seibert, 542 U.S. 600 (2004).

The 1st DCA noted that Justice Kennedy offered the “narrowest grounds” in his concurring opinion in the plurality decision rendered in Seibert, “specifically . . . Justice Kennedy employed ‘a narrower test applicable only in the infrequent case . . . in which the two-step interrogation technique was used in a calculated way to undermine the Miranda warnings.’” Seibert, 542 U.S. at 622. He added that “[t]he admissibility of post warning statements should continue to be governed by the principles of Elstad unless the deliberate two-step strategy was employed.” Oregon v. Elstad, 470 U.S. 298 (1985).

Determining that there was “no deliberate use of a two-step strategy to undermine Miranda,” the 1st DCA held the trial court was correct in admitting Jump’s post-Miranda statements. Further, because the State never filed a cross-appeal “nor brought forward a record sufficient to demonstrate error,” the 1st DCA held the trial court correctly suppressed the pre-Miranda statements.

[Jump v. State, 06/10/08]



1D07-1527Jump.pdf

2nd District Court of Appeals

Miranda warning, by itself, does not transform a consensual encounter with police officer to an investigatory stop.

Caldwell appealed his judgments and sentences for three burglaries, along with the violation of probation sentence imposed on him. Caldwell pled guilty and reserved the right to appeal the denial of his motion to suppress his statements made to the officer during the investigation of the burglary.

The record revealed that Officer Crisco was called to the Vinoy Towers because some vehicles had been burglarized in the parking lot. Crisco viewed a “poor quality” security camera videotape of the burglar breaking into vehicles. The next day Officer Crisco observed Caldwell with a group of people in a nearby park. Drawn to the likeness of Caldwell to the burglar in the videotape, the officer approached Caldwell and asked if he could speak with him. Caldwell agreed and went back to the patrol car with the officer. Crisco told Caldwell he viewed the surveillance tape of the vehicle break-ins at the Vinoy and knew he was the person that did it. Caldwell denied any involvement and Crisco read Caldwell his Miranda rights **and** advised him that he was not under arrest. Miranda v. Arizona, 384 U.S. 436 (1966). The officer testified at the suppression hearing that he “administered the Miranda warnings in full knowledge that he did not have reasonable suspicion,” but if Caldwell confessed, he wanted Caldwell to understand the confession would be used against him in court and he was free to leave at any time. Caldwell requested to see the video and the officer offered Caldwell a ride in his patrol car to the Vinoy to view the tape. Crisco also told Caldwell

he would have to “frisk” him before allowing him in the patrol vehicle. Caldwell accepted the ride, did not object to the frisk, voluntarily got into the patrol car and was not restrained during the ride to the Vinoy. Once at the Vinoy and before seeing the tape, Caldwell confessed to Officer Crisco.

Relying on Raysor v. State, 795 So. 2d 1071 (Fla. 4th DCA 2001), Caldwell argued the Miranda warning “transformed a consensual encounter into an investigatory stop.” Caldwell asserted the stop was illegal because there was no reasonable suspicion he had committed any crime, therefore, his confession should have been suppressed. He further argued that being frisked prior to getting into the patrol car “implied that he was not free to leave” and also “transformed the encounter to an investigatory stop.”

Certifying conflict with the Raysor court’s decision, the 2nd DCA instead held that “the mere administration of the Miranda warning to a potential suspect with whom the officer is engaged in a consensual encounter does not, by itself, transform that encounter into an investigatory stop.” See Luna-Martinez v. State, 2008 WL 782889 *6 (Fla. 2d DCA, Mar. 26, 2008)(“We reject any suggestion that the giving of the warnings to the defendant here in itself indicated that he had been taken into custody.”). Based on the totality of the circumstances and the fact that Caldwell was given Miranda warnings followed by a clarifying statement that he was not under arrest, the 2nd DCA concluded that “a reasonable person would be on notice that he is free to disengage from the encounter should he wish to do so.”

The 2nd DCA further held that “an officer need not have any reasonable suspicion to frisk a person who is about to voluntarily become a passenger in that officer’s vehicle. To hold otherwise would be to

declare that a law enforcement officer is not entitled to protect himself or herself from potential danger while driving with passengers in his or her own police vehicle.”

[Caldwell v. State, 06/06/08]



3rd District Court of Appeals

While the “methodology used” in administering defendant’s Miranda rights was less than perfect, the district court held that under the totality of the circumstances the waiver was valid.

The State appealed a pre-trial ruling granting the suppression of statements made by Roman to the police. Roman, a minor at the time of the incident, and four adult co-defendants were charged in a seven-count indictment with first-degree murder, attempted first-degree murder with a deadly weapon, kidnapping with a weapon, armed robbery with a firearm, and armed sexual battery. The trial court determined that Roman “was not clearly informed of his Miranda rights and that his Miranda rights were not validly waived.” Miranda v. Arizona, 384 U.S. 436 (1966).

The record reveals that “Roman gave a detailed statement to the police describing the events surrounding the crime” and that

“the entire statement was recorded, as well as the pre-statement interview.” The interview of Roman was conducted in the Miami Beach office with two officers. His mother, Evelyn Roman, was connected into the pre-statement interview from the Orlando office via teleconference. She had a bilingual Florida Department Law Enforcement (FDLE) agent with her that helped translate the questions and answers into Spanish for her benefit. Mrs. Roman gave the officers permission to interview her son without a lawyer present and again consented to the interview after her son was sworn in and given his Miranda rights. Roman executed a valid Miranda rights waiver form. At the suppression hearing the officer acknowledged that he did not read out loud every right on the form and he did not ask Roman to read each right out loud before initializing each Miranda right. However, the recording and transcript show the detective walking through each of the rights on the form, along with asking both Roman and his mother if they understood each of the rights.

The 3rd DCA concluded that “there is some support for the trial court’s finding that obtaining the written waiver was ‘perfunctory at best.’” However, this does not mean “that Roman did not voluntarily waive his rights.” Roman “executed a valid rights waiver form.” His mother was “included” in the pre-statement interview that was conducted at the station house in Miami; the tape recording reflects the officers were courteous and professional and Roman never indicated he did not understand what was going on. Further, Roman did not hesitate to answer “yes,” after the detective asked him: “[A]fter reading all these rights, do you give me permission to speak to you without a lawyer?” The recording reflected that Roman calmly gave his detailed confession and “there was no evidence that Roman was coerced or deceived during the

questioning.”

The 3rd DCA determined that Roman executed a valid rights waiver form. While the “methodology used by the police in this case in administering Roman his Miranda rights was less than perfect,” the State met its burden by showing that Roman read and understood the form. Based on the totality of the circumstances, the 3rd DCA found “that the waiver of the Miranda rights was knowing, intelligent, and voluntary,” and reversed the “Amended Order Granting Defendant, Jesus Roman’s, Motion to Suppress Statements.”

[State v. Roman, 06/11/08]



3D06-1949Roman.pdf

4th District Court of Appeals

Temporary detention of UPS packages was not a seizure.

Lindo appealed his conviction and sentence or trafficking in marijuana greater than 25 but less than 2,000 pounds. Contending the trial court erred in denying his suppression motion, Lindo argued that “law enforcement lacked reasonable suspicion to detain packages at a United Parcel Service [UPS] facility to allow a drug dog to sniff the packages.” Further, the packages were “seized in violation of his rights under the federal and state constitutions.” See Amend. IV, U.S. Const.: Art. I, § 12, Fla. Const.

The record revealed that a local U.S. Border Patrol Agency received a tip from an

Orlando deputy regarding two packages “alleged to contain narcotics that had been shipped to South Florida” and he also provided the tracking numbers for the packages. The next day the two packages, at the UPS facility, were set out in a line-up with other packages and a canine alerted to the two suspect packages. A warrant was obtained and a search of the packages revealed “a plastic bin inside each one containing a bale of marijuana wrapped in plastic.” The marijuana was tested and another search warrant for the residence where the packages were to be delivered was obtained which authorized the detectives to attempt delivery “and once the packages were delivered to someone in the house, enter the residence.” Once that warrant had been executed and the packages inside the residence were identified as the same packages retrieved from UPS and delivered to the house, Lindo was read his Miranda warnings. Miranda v. Arizona, 384 U.S. 436 (1966). Lindo told the detective he was paid to accept the packages and he did not know the last name of the person paying him.

In its analysis, the 4th DCA cited to several “dog sniff” cases regarding luggage detention and package detention. In United States v. Beale, 736 F.2d 1289 (9th Cir. 1984), that court held “that the investigative method employed by law enforcement in momentarily detaining the luggage to conduct the dog sniff was not so intrusive as to ‘interfere, in any meaningful way,’ with the defendant’s possessory interest in his luggage.” In United States v. LaFrance 879 F.2d 1, 5 (1st Cir. 1989), that court “made an important distinction between luggage detention and package detention cases.” Luggage detention implicates both “possessory and liberty interest because it affects a person’s travel itinerary while the detention of a shipped package implicates only a possessory interest.” Thus, the issue when analyzing the impact on a possessory

interest, is whether the length of the detention “was so unreasonable as to constitute a seizure within the meaning of the Fourth Amendment.”

The 4th DCA, applying the rationales from both Beale and LaFrance, held the temporary detention at the UPS facility of the two packages was “not so unreasonable as to ‘interfere, in any meaningful way’ with the defendant’s packages.” Thus, the temporary detention was not a seizure “within the meaning of the Fourth Amendment,” and as such, “there was no need for the State to establish reasonable suspicion.” Further, the dog sniff was not a search and the 4th DCA affirmed the trial court’s denial of the suppression motion.

[Lindo v. State, 06/04/08]



4D07-1126LindoopC060308.pdf

“Drop and stop” gives officers probable cause to investigate.

The State appealed a non-final order granting Matul’s motion to suppress physical evidence and verbal statements.

The record revealed that during a consensual citizen encounter, as four officers approached a group of men in front of a residence, Matul walked away and threw an “Aquafina water bottle” on the ground. An officer inspected the bottle and found a “hidden compartment with crystal methamphetamine” inside.

The 4th DCA held that “once Matul threw the bottle, the officers had probable cause to investigate” and reversed saying that the suppression motion should have been

denied. The 4th DCA referred to its decision in Johnson v. State, 640 So. 2d 136 (Fla. 4th DCA 1994), where it held that “. . . there is no unlawful seizure when the person ‘drops then stops,’ even where the drop occurs after an order to stop.”

[State v. Matul, 06/11/08]



4D07-3476Matul.opC061008.pdf

Record does not support defendant’s consent to let law enforcement enter his home.

Herrera-Fernandez appealed the judgment and sentence for trafficking in cannabis arguing the trial court erred in denying his suppression motion because “the officers violated his Fourth Amendment right when, without a warrant, they arrested him inside his home and seized physical evidence found inside.”

The record revealed that after an agent with the Drug Enforcement Agency (DEA) received a tip from an informant that Herrera-Fernandez’s “address harbored a ‘grow house’ of marijuana,” the agent, who did not speak or understand Spanish, enlisted the help of a Spanish speaking Pembroke Pines Police Department detective to visit the defendant’s home. At the suppression hearing the DEA Agent testified the detective spoke with the defendant after the door was opened, that he did not understand their conversation, and at one point, the defendant “allowed us to enter the residence, *which I assumed he received permission for us to come inside.*” Right after entering the home the detective spoke with the defendant and soon thereafter cuffed and arrested Herrera-

Fernandez. The detective testified that when the defendant opened the door he announced “Police department. We are here because, you know, we received information - at that particular moment, boom, you can smell it. I decided not to proceed with any other questions and go ahead and place him into custody.” The trial court’s order denying Herrera-Fernandez’s suppression motion stated that “[w]ith the consent of Defendant, law enforcement entered the residence. They then conducted a protective sweep, during which time they discovered a large amount of marijuana growing in the garage” Without a warrant, over 10,000 pounds of cannabis was seized from the home.

The 4th DCA determined that Herrera-Fernandez’s consent to enter his home was not supported by the record. The district court noted that the detective’s testimony failed to mention any consent to enter the home from the defendant and that “[t]he state’s only basis for consent to enter is the non-Spanish speaking agent testifying that he assumed the Spanish-speaking detective ‘received permission for us to come inside.’” The detective further testified that once he smelled “live marijuana” he decided to place the defendant in custody and “not proceed with any other questions.”

“If a law enforcement officer does not have consent, a search warrant, or an arrest warrant, he may not enter a private home or its curtilage except when it is justified by exigent circumstances.” Rodriguez v. State, 964 So. 2d 833, 837 (Fla. 2d DCA 2007).

In reversing the trial court’s order denying Herrera-Fernandez’s suppression motion, the 4th DCA held the “record fails to support the finding of consent, and no exigent circumstances were present, the warrantless entry and arrest of Herrera-Fernandez amounted to an unreasonable

seizure, in violation of the Fourth Amendment.”

[Herrera-Fernandez v. State, 06/18/08]



4D06-3743HerreraFernandez.mrC061708.pdf

5th District Court of Appeals

The 5th DCA opined that the Department met requirements of Section 316.1934(5) by submitting at the hearing the breath alcohol test affidavit, the agency inspection report, and the department inspection report to establish the date of performance of most recent required maintenance on Intoxilyzer at issue

The Department of Highway Safety and Motor Vehicles seeks certiorari review of order of circuit court finding that Department departed from essential requirements of law in sustaining driver license revocation, and reasoning that driver's breath test results were inadmissible because Department produced no evidence showing that breath test machine was properly maintained. The circuit court applied the incorrect law in determining that, because there was no

evidence establishing date of most recent required maintenance on the Intoxilyzer at issue, Department did not meet requirements of Section 316.1934(5) (e).

The 5th DCA opined that the Department met requirements of Section 316.1934(5) by submitting at the hearing the breath alcohol test affidavit, the agency inspection report, and the department inspection report to establish the date of performance of most recent required maintenance on Intoxilyzer at issue. The district court found that error resulted in miscarriage of justice requiring certiorari relief, because it has precedential value and circuit court is applying same error to numerous other administrative proceedings involving suspension of driver's licenses

[Department of Highway Safety and Motor Vehicles v. Falcone, 6/11/08]



Falcone.pdf

Circuit court sitting in its appellate capacity erred when it departed from essential requirements of law when it reweighed the evidence.

Circuit court acting in its appellate capacity departed from essential requirements of law when it granted licensee's petition for writ of certiorari and quashed administrative license suspension order based upon its reweighing of evidence regarding lawfulness of stop. The arresting officer's probable cause affidavit was sufficient to establish that initial contact with licensee was a consensual encounter where affidavit

reflected that officer “pulled up” to licensee's parked car and then made contact with her while she was sitting in front seat of her vehicle

[Department of Highway Safety and Motor Vehicles v. Luttrell, 6/20/08]



Luttrell.pdf

When police discovered that there was an outstanding warrant for the owner of a vehicle, they made a traffic stop. The driver, who was not the owner, fled from the stop. The 5th DCA opined that there was a lawful stop when police stopped the defendant.

The registered owner of vehicle had outstanding warrant. Police made traffic stop. When defendant exited the car, officer realized he was not the wanted person. However, defendant immediately fled the scene. Officers pursued and, upon apprehending defendant, they discovered a loaded firearm and narcotics. The stop was good. Defendant's fleeing, leaving a truck he did not own on the road, was sufficient reason to support the pursuit.

[Livingston v. State, 6/13/08]



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Trial court erred; the standard for establishing probable cause is not that law enforcement officers have to “know” that a certain item is contraband.

The trial court granted Fischer's motion to suppress the drugs found in his vehicle and on his person after he was arrested and the State appealed. At issue was “whether the trial court applied the correct law in determining that two law enforcement officers did not have probable cause to believe, based on their training and experience in the detection of illegal narcotics, that the substance they saw in open view on the seat inside Ross Fischer's vehicle was cocaine.”

The record revealed that during a traffic stop for an improper tag, Deputy Radecki, observed that Fischer “was nervous and had a white substance under his nose.” The deputy called for back-up because he thought that Fischer “might be hiding something along with the registration and the vehicle not matching up.” Deputies Lakey and Barker arrived and after Radecki warned Barker to keep an eye on Fischer because he thought “something was going on,” Deputy Barker asked Fischer to step out of the vehicle. As Fischer got out of the vehicle, Deputy Barker saw “a white powder he identified as cocaine” sitting on the black interior of the driver's seat where Fischer was just sitting. Deputy Lakey also saw the substance and identified it as cocaine. Barker tested the substance and the field test produced a positive result for cocaine. Fischer was arrested and a search of his person revealed cocaine and oxycontin pills in his wallet. Fisher was read his Miranda v. Arizona, 384 U.S. 436 (1966) warnings, acknowledge his rights and freely spoke to

the deputy about the drugs found on his person. Both deputies testified at the suppression hearing regarding extensive training and experience in narcotics detection. The trial court found “the two deputies did not have probable cause to believe that the white powder they saw was cocaine because law enforcement officers, despite their training and experience in illegal drug detection, simply cannot distinguish cocaine from any other white powdery substance.”

After its analysis regarding open view and plain view doctrines, the 5th DCA determined that the trial court misapplied controlling law by utilizing the plain view doctrine to reach its conclusion. The 5th DCA concluded that “courts have specifically held that once the law enforcement officers have probable cause, they may enter a vehicle on a public road without a warrant and seize the suspected item.” See State v. Green, 943 So. 2d 1004, 1006-07 (Fla. 2d DCA 2006). To establish probable cause, “[a] police officer does not have to ‘know’ that a certain item is contraband.” State v. Hafer, 773 So. 2d 1223, 1225 (Fla. 4th DCA 2000). “Rather, it is enough that ‘the facts available to the officer would lead a reasonable man of caution to believe that certain items may be contraband.’” State v. Walker, 729 So. 2d 464 (Fla. 2d DCA 1999).

The 5th DCA determined that “two well-trained and experienced deputies observed in open view what they each identified as cocaine on the seat of Fischer’s car. Whether they knew for certain it was cocaine or whether it was within the realm of possibilities that the substance could have been something other than cocaine is not the standard; the proper standard is whether ‘the facts available to the officer would lead a reasonable man of caution to believe that certain items may be contraband.’” Walker, 729 So. 2d at 464.

Thus, the 5th DCA reversed and remanded for further proceedings.

[State v. Fischer, 06/13/08]



5D07-1096Fisher.op.pdf

ATTORNEY GENERAL ADVISORY LEGAL OPINIONS

Amount of court costs and fines to be imposed for certain equipment violations. ss. 316.610, 316.2935, 318.121, 318.18, Fla. Stat.

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 complies with the provisions of section 318.18(2)(c), Florida Statutes, and has his or her fine reduced.

[Opinion Link](#)

Names of law enforcement or correctional officers are not exempt from public record disclosure during the investigation of a complaint.

The AG opined that public records identifying correctional officers who have been placed on administrative duty by the Orange County Sheriff's Office are subject to inspection and copying. Such records are not confidential and exempt pursuant to section 112.533(2)(a), Florida Statutes, as either a complaint filed against an officer or as information obtained pursuant to the investigation of such a complaint.

[Opinion Link](#)

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