

# LEGAL BULLETIN

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## 1st DISTRICT COURT OF APPEAL

### **Trial court erred; testimony regarding general behavior patterns of drug dealers was inadmissible as to defendant's guilt.**

Austin, convicted for the crime of trafficking in cocaine, appealed his conviction arguing "the trial court erred by allowing a Florida Highway Patrol trooper to testify about the general behavior patterns of drug traffickers."

The record reveals that Trooper Harrison stopped Austin and "subsequently found cocaine in a closed compartment within the rental car" he was driving. The vehicle "was rented several weeks earlier by his wife, Tameka Austin, who was not in the vehicle at the time of the stop." At trial over defense counsel's objection, the Trooper was allowed to testify that based on his experience and training, drug dealers will often use vehicles that have been rented by someone else (third-party-rentals) to distance themselves from any contraband that might be found in the vehicle should they be stopped by a police officer. Defense counsel objected repeatedly about the officer testifying to the habits and methods used by drug dealers, along with the inference "that my client is

acting in the same manner that the drug dealers do, so it's highly prejudicial, it's not relevant." The trial court overruled the objection. During closing argument the prosecutor reminded the jurors of the trooper's testimony regarding the practice of drug dealers and third-party-rental vehicles.

The appellate court noted that "Trooper Harrison was not offered or accepted as an expert witness at trial." Austin argued the "state failed to prove that he knew the cocaine was in the car." There was no evidence to connect him to the bag, or "to indicate that he knew of the presence of the cocaine, other than the fact that it was found in the car."

The 1<sup>st</sup> DCA wrote that "[t]estimony about the general behavior of certain kinds of offenders is inadmissible as substantive proof of a defendant's guilt." "Every defendant has the right to be tried on the evidence, not on the general characteristics or conduct of certain types of criminals." See Dean v. State, 690 So. 2d 720, 722 (Fla. 4<sup>th</sup> DCA 1997); Lowder v. State, 589 So.2d 933, 935 (Fla. 2d DCA 1991). The 1<sup>st</sup> DCA found the trial court erred in allowing the trooper to testify about "the general behavior patterns of drug traffickers." The court was "unable to conclude beyond a reasonable doubt that the error was harmless" and remanded for a new trial.

[*Austin v. State*, 10/06/10]

Opinion:  [1D09-1276Austin.pdf](#)

## 3rd DISTRICT COURT OF APPEAL

### **Police Officer's pre-employment psychological exam was outside the scope of discovery.**

An officer shot and killed a teenager. During the resulting lawsuit, the teenager's personal representative requested production of the pre-employment psychological exam of the police officer. The court ordered the police officer and the County to turn over the exam and then the police officer filed a writ of certiorari.

The Third District found that no psychotherapist-patient privilege applied because the exam was conducted for pre-employment purposes. The Court also held that the argument regarding public records exemption was misplaced since this was a discovery situation. However, the Third District determined that the request was outside the scope of discovery. The Court said, "...we conclude that the request for production of these documents is outside the scope of permissible discovery. Because the County has conceded that the officer's acts took place during the course and scope of his employment, the only allowable theory of liability against the County is respondeat superior. That being so 'the negligence of the employer is immaterial . . .' It follows that the requested discovery is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence."

*[Delaurentos and Miami Dade County v. Peguero 10/20/10]*



[3dcacvDelaurentos.pdf](#)

## 5th DISTRICT COURT OF APPEAL

### **Breath Alcohol Test Affidavit containing results of licensee's breath test administered on Intoxilyzer 8000, Agency Inspection Report, and Department Inspection Report contained all of the statutorily required information.**

Berne's driver's license was administratively suspended for having an unlawful alcohol level in excess of .08. Trooper Hawkins of the Florida Highway Patrol was investigating a crash involving Berne. Upon completion of this crash report, Trooper Hawkins read Berne his Miranda Warnings and Berne admitted to driving the vehicle. Additionally, Trooper Hawkins detected an odor of alcoholic beverages emitting from Berne's breath. Berne performed poorly on the field sobriety exercises and was subsequently arrested by the trooper and transported to the Orange County Breath Testing Center when Berne submitted samples of .137 and .131.

Berne requested an administrative hearing and the hearing officer sustained the administrative suspension.

Berne then filed with the circuit court a petition for writ of certiorari. The circuit court sitting in its appellate capacity, opined that the driver rebutted the presumption that DHSMV complied with rules and regulations concerning the Intoxilyzer 8000 and that the agency failed to prove substantial compliance with the rules. The circuit court found reversible error and granted Berne's petition for writ of certiorari.

The Department filed a petition for writ of certiorari in the district court. The 5<sup>th</sup> DCA opined that the Breath Alcohol Test Affidavit containing results of licensee's breath test administered on Intoxilyzer 8000, Agency Inspection Report, and Department Inspection Report contained all of the statutorily required information necessary to admit affidavit containing breath test results into evidence and to establish that Intoxilyzer 8000 used for test was properly inspected and maintained, that it performed appropriately, and that it produced accurate and reliable test results.

The district court found Berne failed to overcome the presumption of when he attacked the presumption of impairment by presenting evidence that the Intoxilyzer 8000 devices used in Florida were never subjected to an approval study required by FDLE Rule 11D-8.003. Berne did not attack that the administrative rules were not substantially complied with, but rather that the software was not approved. The 5<sup>th</sup> DCA opined that the circuit court applied the wrong law and granted the department's petition.

DHSMV Attorney Heather R. Cramer represented the agency in the case.

*[Department of Highway Safety and Motor Vehicles v. Berne, 10/8/10]*



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