"Florida Case Law Update For Law Enforcement Agencies"

(Capsule Summaries Of 70 (Or So) Florida Cases of General Law Enforcement Interest From The Past Year And Discussion Of Several Cases Of Particular Interest)

Presented To
The Florida Intelligence Unit
November 19, 2008
(With "Goodfellows"HR 218 email and TSA "flying armed" discussions supplement at p. 42)

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DO NOT SOLELY RELY UPON THESE SUMMARIES FOR AN UNDERSTANDING OF THE CASES.
Read each case to be sure you obtain the court's complete facts and analysis.
Some cases in this summary may be on appeal or are otherwise not completely final.
You should check with your agency legal advisor on the status of any case listed in this summary before relying upon it.

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Florida Cases Of Interest To Law Enforcement

Michael Ramage

November 19, 2008

U.S. SUPREME COURT:

A person does not "use" a firearm under 18 U.S.C. §924(c)(1)(A) when he receives it in trade for drugs.

Title 18 U.S.C. §924(c)(1) imposes a 5-year minimum term of imprisonment upon a person who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." The U.S. Supreme Court held that the mere receipt of an unloaded firearm as payment for drugs does not constitute "use" of a firearm for purposes of that provision. (Editor's note: The U.S. Supreme Court's analysis relates to the "use" of firearm; not to "possession" of a firearm.)

Watson v. United States, --- U.S. ----, 128 S.Ct. 579, 586, 169 L.Ed.2d 472 (12/10/2007)

Neither a International Court of Justice ("World Court") ruling nor a Presidential Memorandum seeking enforcement of the World Court's Ruling is binding on a state when the ruling contradicts the state's criminal procedure rules. The Vienna Convention does not require states to relax their own criminal procedures in order to obey the World Court's ruling.

The U.S. Supreme Court held that the International Court of Justice's *Avena* decision, that the United States had violated the Vienna Convention by failing to inform 51 named Mexican nationals, including petitioner, of their Vienna Convention rights was not directly enforceable domestic federal law that preempted state limitations on filing of successive habeas petitions.

The Court also held that the President's Memorandum to United States Attorney General, that United States would discharge its international obligations under *Avena* by having state courts give effect to decision, did not independently require states to provide reconsideration and review of named Mexican nationals' claims without regard to state procedural default rules.

The decision, aside from its rebuff of presidential power, also treats the ICJ ruling itself as not binding on U.S. states, when it contradicts their own criminal procedure rules. The international treaty at issue in this dispute — the Vienna Convention—that gives foreign nationals accused of crime a right to meet with diplomats from their home country — is not enforceable as a matter of U.S. law, the opinion said. The ICJ ruling seeking to implement that treaty inside the U.S. is also not binding, and does not gain added legal effect merely because the President sought to tell states to abide by the decision, the Court added.

The Supreme Court ruled 6-3 that the President does not have the authority to order states to relax their criminal procedures to obey a ruling of the ICJ. Neither the ICJ ruling nor the Presidential Memorandum preempts state law restrictions on challenges to convictions, the Court said in it opinion written by Chief Justice Roberts.

Medellin v. Texas, --U.S. --, 128 S.Ct. 1346 (03/25/08)

Cert. Granted:

→Issue: Whether, under *New York v. Belton* (1981), police may conduct a warrantless search of a car if its recently arrested occupant poses no threat to officer safety or preservation of evidence. The Court rephrased the question presented as follows: **"Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?"** Although the Court had previously held that no such demonstration is required, the Arizona Supreme Court reached the opposite conclusion. (Arizona v. Gant, 07-542.)

→Issue: The question presented is "**[w]hether the Fourth Amendment requires evidence found during a search incident to an arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent**." Specifically, a clerk in a county sheriff's office mistakenly told another sheriff's office that there was an outstanding arrest warrant for petitioner. In Arizona v. Evans, 514 U.S. 1 (1995), the Court held that the exclusionary rule does not apply to evidence obtained incident to an arrest based on such a mistake when the negligent error was made by a court clerk. This case will resolve whether Evans extends to negligent errors made by law enforcement personnel. (Herring v. U.S., 07-513).

→Regarding the Confrontation Clause, what is the **constitutionality of prosecutors' offering a crime lab report as evidence in a criminal trial, instead of the live testimony of the expert who prepared the report**. (Melendez-Diaz v. Massachusetts, 07-591

→At issue is whether a criminal defendant "forfeits" his Sixth Amendment right to confront a witness whenever he causes the unavailability of that witness or whether such forfeiture only occurs if the prosecution further shows that the defendant's actions were undertaken for the purpose of preventing the witness from testifying. In this case, the California Supreme Court held that petitioner, by murdering a witness, forfeited his right to confront her regardless of whether he killed her to stop her from testifying. (Giles v. California, 07-6053.)

→Under the "consent once removed" doctrine recognized by most federal circuits, narcotics' investigators may make a warrantless entry into a home after an undercover agent who entered the home at the express invitation of the homeowner observes narcotics there. The two questions presented in the petition are: (1) whether the doctrine applies when the undercover individual is a confidential informant, rather than a law enforcement officer; and (2) whether the Tenth Circuit erred in denying qualified immunity to officers who entered a home after a confidential informant bought drugs inside the home. In addition, the Court asked the parties to brief the following question: "Whether the Court's decision in Saucier v. Katz, 533 U.S. 194 (2001) should be overruled?" In Saucier, the Court held that in §1983 actions courts must resolve the merits of constitutional claims first, even where it is obvious that the defendants would prevail at the end of the day because the alleged constitutional rights were not "clearly established." (Pearson v. Callahan, 07-751)

→Under 18 U.S.C. § 922(g)(9), it is a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The question presented is whether, to qualify as such a "misdemeanor crime of domestic violence," an offense must have as an element a domestic relationship between the offender and the victim. The Fourth Circuit held that it must, i.e., that persons who are convicted of misdemeanor crimes of violence against their spouses or children are barred from possessing a firearm only if they were convicted under a statute that includes the domestic relationship between perpetrator and victim in the formal definition of the offense. (United States v. Hayes, 07-608.)

→Whether a passenger in a car stopped for a traffic infraction may be subjected to a pat-down search. The case centers around a Tucson police officer who search a passenger in a vehicle, Johnson, "because he was wearing gang colors and seemed dangerous, not because he was suspected of having committed a crime." An Arizona appeals court overturned the conviction saying the evidence (gun and marijuana) should have been suppressed because the search was unconstitutional. At issue: Whether, in the context of a vehicular stop for a minor traffic infraction, an officer may conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but had no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. (Arizona v. Johnson, 07-1122)

11th Court of Appeals:

Arguing inconsistent theories as grounds for conviction does not violate due process. Failure to point out inconsistencies is not deficient defense performance.

Fotopoulos and his lover, Deidre Hunt, were tried separately for the murders of Kevin Ramsey, Bryan Chase, and the attempted murder of Fotopoulos's wife, Lisa. The record revealed that at Hunt's trial, the

State argued Hunt's involvement in these crimes was the "result of her love for power and money and not domination by Fotopoulos." At Fotopoulos's trial, the State argued that "Fotopoulos dominated Hunt" and that Fotopoulos was the "mastermind behind the murders" of Ramsey, Clark and the attempted murder of his wife. When Fotopoulos filed his federal habeas corpus petition, the district court granted relief on two grounds: 1) that Fotopoulos's trial counsel was ineffective because he "failed to utilize the inconsistent domination theories presented by the State to impeach the case of the State," and 2) that the "inconsistent positions by the State violated the Due Process Clause of the Fourteenth Amendment."

The 11th Circuit noted that after reviewing defense counsel's entire testimony at the evidentiary hearing, as opposed to "the snippet relied upon by the district court," there was ample support for the finding that defense counsel's decision to "not use that information" was a strategic decision. Because the decision was reasonable, defense counsel's performance was not deficient. The 11th Circuit concluded that its "confidence in Fotopoulos's sentence of death is not undermined when he does not dispute his primary responsibility for the orchestration of these bizarre and grisly crimes."

Noting that the United States Supreme Court has never held "that the due Process Clause prevents a State from prosecuting defendants based on inconsistent theories," the 11th Circuit said that "[w]e cannot say that the decision of the Supreme Court of Florida 'was contrary to . . . clearly established Federal law, as determined by the Supreme Court.'" 28 U.S.C. § 2254(d)(1).

Fotopoulos v. Sec'y, DOC, 516 F.3d 1229 (C.A. 11, 02/14/08);
cert denied, Fotopoulos v. McNeal, 129 S. Ct. 217 (2008)

FLORIDA SUPREME COURT:

Miranda warnings require express statement that the right to an attorney includes having that attorney present during any questioning.

In reviewing Powell v. State, 969 So.2d 1060 (Fla. 2nd DCA, 2007) the Florida Supreme Court determined that in order for a person to be "clearly informed" of his or her rights as required by Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny, the warnings must expressly state the subject has a right to an attorney being present during questioning. In the Powell case, the warnings read to the subject were:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

The Florida Supreme Court found the warnings to be deficient. It agreed with the 2nd DCA that previously had held that the warnings given to Powell were constitutionally flawed because "the right to talk to or consult with an attorney before questioning is not identical to the right to the presence of an attorney during questioning."

(Editor's Note: By reason of this opinion, it would appear that your department's Miranda warnings ought to include something similar to the following. Each department should resolve whether its currently-used Miranda warnings comply with the requirements articulated by the Florida Supreme Court.

1. *You have the right to remain silent.*
2. *Anything you say can and will be used against you in court.*
3. *You have the right to call or obtain an attorney at this time and have one present now or at any time during questioning.*
4. *If you cannot afford an attorney and you want one before or at any time during questioning, one will be provided for you.*
5. *If you decide to answer questions now, you have the right to stop answering at any time during questioning.*

Florida v. Powell, ---So.2d.---- (Fla. 9/29/2008)

When investigating an anonymous tip, independent corroboration of criminal activity is necessary, and confirmation of "innocent details" alone will not justify police intervention.

On December 30, 2004 at about 5:45 a.m. a Miami-Dade Police Officer received a radio dispatch that an anonymous caller had reported that a black male wearing a white T-shirt and blue jean shorts had waived a firearm in front of a grocery store at a given location. By the time the officer arrived at the scene, another MDPD officer had stopped a black male matching the description at gun point. With both officers' guns pointed at him, the subject, George Baptiste, was ordered to the ground. A citizen approached one of the officers and identified himself as the one who called in the tip, and confirmed that Baptiste was the person he had called in about. The citizen preferred to remain anonymous. He then disappeared, never to be identified.

Officers frisked Baptiste while he was on the ground. Baptiste indicated he had a gun, which was retrieved from his front pocket. Baptiste was charged with possession of a firearm by a convicted felon. He moved to suppress the firearm, arguing the tip was not sufficient to warrant his detention, and that once the officers arrived on the scene he did nothing to give rise to suspicion justifying his detention and frisk. Both of the initially arriving officers confirmed during the suppression hearing that they did not see Baptiste doing anything suspicious. Baptiste indicated he found the gun behind the grocery store and that he was walking to the front of the store with the gun in his hand, down by the side of his leg. Seeing nobody in the store, he put the gun in his pocket and walked across the street. He indicated that when he was about four houses from the store, he was ordered at gunpoint to lie down on the street, and place his hands behind his back.

The motion to suppress was denied, and Baptiste, as a habitual felony offender, was sentenced to fifteen years on the firearms charge, with mandatory minimum three years. The 3rd DCA affirmed his conviction at Baptiste v. State, 959 So.2d 815 (Fla. 3rd DCA 2007). The 3rd DCA tried to distinguish this case from Florida v. J.L., 529 U.S. 266 (2000) on the basis that the Baptiste tip indicated a dangerous open display of a firearm instead of a non-threatening concealed firearm in J.L., and that the anonymous tipster actually came forward at the Baptiste encounter where in J.L. the tipster remained anonymous.

The Florida Supreme Court accepted the case because it directly conflicted with the 2nd DCA case of Rivera v. State, 771 So.2d 1246 (Fla. 2nd DCA 2000) where an anonymous tip that people in a described car were exchanging gunfire with people in another described car was found not to provide reasonable suspicion to justify stopping a car matching the description.

Noting that Terry v. Ohio, 392 U.S. 1 (1968) speaks in terms of officers observing conduct to lead them to reasonably conclude that criminal activity may be afoot, the court noted there was "no evidence that the officers at the scene confirmed or observed any illegal activity, unusual conduct , or suspicious behavior to indicate Baptiste was carrying a firearm" before the first officer stopped him at gunpoint. The first officer drew her weapon and ordered Baptiste to the ground at gunpoint based only on her observation that Baptiste was a black male in a white T-shirt and blue-jean shorts—an outfit even less distinct than the plaid shirt in J.L. and not out of the ordinary in hot, muggy, Miami-Dade County.

The Court rejected the distinction found by the 3rd DCA (that the citizen came forward) because the citizen appeared after the gunpoint stop. It found no federal or Florida decisions that hold that an anonymous informer who appears post-seizure, then disappears, can be considered a "citizen informant." Instead, the Court analyzed the events as though dealing with an anonymous tipster. Finding the details of the anonymous tip to be reliable solely in "its tendency to identify a determinate person" and not "in its assertion of illegality" the Court found that the officers lacked reasonable suspicion to seize Baptiste. The stop and search violated the Fourth Amendment. The Court noted that subsequent observations might have supported reasonable suspicion, and that a citizen's contact was always available. The 3rd DCA Baptiste opinion was quashed and the 2nd DCA Rivera case approved and the case was remanded to the trial court.

Baptiste v. State, --So.2d---, (Fla. 2008) 33 FLW S662 (9/18/08).

Request by police to tape a defendant's confession is not "coercion" to overcome voluntariness of the confession itself.

Blake, convicted and sentenced to death for the first-degree murder, as well as convicted of armed robbery and grand theft of a motor vehicle, appealed arguing the trial court erred in denying his motion to suppress his recorded statement. Other issues were also raised in his appeal.

Blake was arrested by Detectives Louis Giampavolo and Ivan Navarro after they interviewed Richard Green about his and Blake's involvement in the death of "Mike" Patel. (Green was later convicted and sentenced to life for the death of Patel.) Blake was read his Miranda rights while being transported to the station. At the station, Blake was placed in an interview room with hidden audio and video equipment and he confessed to shooting Patel with a 9mm handgun he was carrying. The officers asked Blake to give an audio-taped statement.

However, Blake did not agree to taping the statement, but said "he would detail the events one more time." The officers surreptitiously videotaped the statement anyway. Blake confessed to shooting Patel with the 9mm handgun he was carrying and claimed it was an accident. Blake acknowledged he was treated well and had been given his Miranda rights in the patrol car by Giampavolo.

On appeal, Blake argued that the videotape confession was a result of an implied promise that it would not be taped. The Court concluded that there was no causal connection between the request to tape and the confession. Blake had already confessed, and while he declined the recording of his statement, he agreed to repeat the statement again and testified that he knew the detectives would be able to testify about it. He noted it would be their word against his.

The Court held that the request to tape did not overcome Blake's will nor did it induce his confession.

Blake v. State, 972 So.2d 839 (Fla. 12/13/07)

While in this case, search was not a "strip search," Court indicates a violation of "strip search" statute (F.S. 901.211(6)) does not require suppression of evidence.

After the hearing on his motion to suppress was denied, Jenkins, pled guilty to "possession of cocaine with intent to sell or deliver" and appealed the denial of his suppression motion. The 2nd DCA affirmed, holding that the officers had probable cause to search Jenkins and his vehicle, the search incident to the arrest was valid, and that the scope and manner of the search was "reasonable under the Fourth Amendment."

Even though the DCA concluded that the search "qualified as a 'strip search' under section 901.211 of the Florida Statutes, the 2nd DCA stated that "because the legislature explicitly addressed the issue of remedies in section 901.211(6) but failed to make any mention of the exclusion of evidence as a remedy," the "exclusionary rules does not apply to violations of section 901.211." The 2nd DCA certified conflict between its decision in the instant case and D.F. v. State, 682 So. 2d 149 (Fla. 4th DCA 1996), where the 4th DCA "held that suppression of evidence is the appropriate remedy for violation of the strip search statute."

The record revealed conflicting testimony as to the search of Jenkins. Jenkins contended that the officers, after finding no drugs during a pat down and inspection of his vehicle, "strip searched" him in a public place to recover drugs. The officers testified that Jenkins was "not required or forced to lower his trousers and boxer shorts in public while the officers conducted a search." The officer "merely pulled the boxer shorts away from his body at the waist," saw the plastic bag containing the drugs, and "reached in" the boxer shorts and removed the bag containing the drugs. The Florida Supreme Court determined that "nothing equivalent to a strip search occurred in the instant case." The search qualified as "a 'reach-in' search, where the suspect remains clothed during the search and the suspect's genitals are not visible to onlookers." See United States v. Williams, 477 F.3d 974, 977 (8th Cir.), cert. denied, 128 S. Ct. 237 (2007). When affirming the decision of the district court, the Court further concluded that the "plain language of section 901.211 does not expressly provide for exclusion of evidence as a remedy for a violation of the statute." Noting that "[t]he only references to remedies in the statute before us is located in subsection (6), and those remedies are civil and injunctive in nature."

Jenkins v. State, 978 So.2d 116 (Fla. 03/06/08)

Shooting into dwelling requires affirmative proof of "wanton" or "malicious."

Approving the 2nd DCA's decision in Kettell v. State, 950 So. 2d 505 (Fla. 2d DCA 2007), and disapproving the 5th DCA's decision in Holtsclaw v. State, 542 So. 2d 437 (Fla. 5th DCA 1989), the Florida Supreme Court held that "the wanton or malicious intent element of the crime defined by section 790.19, Florida Statutes, is not established solely by evidence that a defendant fired a shot at, within, or into a building. The State also must prove that the shooting was done wantonly or maliciously as those terms are defined in the standard jury instruction."

The applicable jury instruction defines "Wantonly" to mean "consciously and intentionally, with reckless indifference to consequences and with the knowledge that damage is likely to be done to some person." "Maliciously" is defined as "wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person." The Court remanded for further proceedings "consistent with this opinion."

State v. Kettell , 980 So.2d 1061 (Fla. 04/24/08)

The "testimonial hearsay" rule in Crawford v. Washington does NOT apply to community control or probation revocation hearings. Probation violation hearings do not equate to trials for 6th Amendment confrontation clause purposes.

Peters, whose probation had been extended several times since August 2000 for various violations, found himself at another revocation hearing in June 2004 because his April 2004 urine sample tested positive for amphetamines and methamphetamines after testing was done at PharmChem. At the revocation hearing the urinalysis report was submitted with a "Certification and/or Declaration of the Report as a Business Record Pursuant to 90.803(6), Fla. Evid. Code." The report was signed and notarized by the corporate records custodian. No one from the lab was at the hearing.

Defense objected to the admission of the report, arguing that Peters' right to confrontation was violated, under *Crawford v. Washington, 541 U.S. 26 (2004).* . Defense further objected that "the report constituted hearsay, which cannot form the sole basis for finding a violation of community supervision," citing to Monroe v. State, 679 So. 2d 50 (Fla. 1st DCA 1996), and Williams v. State, 553 So. 2d 365 (Fla. 5th DCA 1989). The State argued "the report was admissible as a business record." Finding Peters guilty of the violation, the circuit court revoked community control and sentenced him to twenty-four months of incarceration. The 1st DCA affirmed, holding "the rule in Crawford does not apply to community supervision revocation proceedings." Peters v. State, 919 So. 2d 624 (Fla. 1st DCA 2006). The 1st DCA certified the following question of great importance: "Does the 'testimonial hearsay' rule set forth in *Crawford* apply in community control and/or probation revocation proceedings?"

The Florida Supreme Court noted that because the issue presented by certified question was whether a revocation proceeding is a "criminal prosecution" as that term is used in Crawford, it did not need to address the testimonial finding of the lab report. In a lengthy analysis, the Court referred to Morrissey v. Brewer, 408 U.S. 471 (1971), where the Supreme Court "began its opinion with the proposition that 'the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.'" The Supreme Court further emphasized its decision "was not an attempt 'to equate [a revocation hearing] to a criminal prosecution in any sense'" and noted that "parole arises after the end of the criminal prosecution, including imposition of sentence." The Supreme Court later "extended that holding to probation revocation proceedings." See Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)("Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty.").

The Court held "it would not extend the holding in Crawford beyond the bounds outlined by the United States Supreme Court." Because Crawford addresses the use of testimonial hearsay only in the context of criminal prosecutions, the Court held "that Crawford does not apply to revocation proceedings in the State of Florida."

Peters v. State, 984 So.2d 1227 (Fla. 05/01/08)

Admission of hearsay from alleged victim in probation revocation hearing does not deny 6th Amendment right of confrontation. However, hearsay cannot be the sole basis for the revocation.

Approving the 5th DCA's decision in Russell v. State, 920 So. 2d 683 (Fla. 5th DCA 2006), and disapproving the decision of the 4th DCA in Santiago v. State, 889 So. 2d 200 (Fla. 4th DCA 2004), and the decisions of the 2nd DCA in Colwell v. State, 838 So. 2d 670 (Fla. 2d DCA 2003), and Colina v. State, 629 So. 2d 274 (Fla. 2d DCA 1993), on a question of law, the Florida Supreme Court held that the decision in Crawford "is not applicable to probation revocation proceedings and that the trial court properly revoked Russell's probation."

The Court was presented with the following two questions: "(1) whether admission of hearsay from the alleged victim denied the defendant his Sixth Amendment right to confrontation; and (2) whether the trial court erred in sustaining the revocation of probation based only upon the hearsay statements of the victim and observation of an injury to the victim."

In Peters v. State, (discussed above), the Court held that "revocation of probation or community control proceedings are not criminal prosecutions and therefore Crawford does not apply to revocation proceedings." The Court held in the instant case, as in Peters, that "because Crawford addresses the use of testimonial hearsay only in the context of criminal prosecutions, the decision does not apply to Florida revocation proceedings." Because Crawford does not apply to revocation proceedings, the admission of hearsay testimony from the victim was proper."

Regarding the second issue, the trial court properly noted "that hearsay is admissible in a revocation proceeding but could not be the sole evidence used to find a violation." The record revealed that the trial court considered more than just the victim's hearsay statement and direct testimony of observation of victim injury. The trial court heard testimony regarding the demeanor of both the victim and Russell . . . and the court was able to directly assess the credibility on the stand of both Russell and the deputy. The Court held that the "trial court properly concluded that the greater weight of the evidence demonstrated that Russell committed a battery and, thus, a willful and substantial violation of the terms of his probation."

Russell v. State, 982 So.2d 642 (Fla. 5/01/08)

Admission of certified FDLE lab report at trial without producing the analyst for cross examination violates Crawford and the 6th Amendment right of confrontation.

The Court reviewed the following question, certified to be of great public importance: "Does the admission of a Florida Department of Law Enforcement lab report establishing the illegal nature of substances possessed by a defendant violate the confrontation clause and Crawford v. Washington, 541 U.S. 36 (2004), when the person who performed the lab test did not testify?" The Court answered yes.

The trial court allowed the submission of the lab test results from Florida Department of Law Enforcement (FDLE) analyst Anna Deakin, that "was used to establish the illegal nature of the substances Johnson possessed." Johnson argued "the lab report was inadmissible hearsay and that its admission without the presence of the person who prepared the report violated his Six Amendment right to confront his accuser."

Deakin, who by then was working in another state, was willing to fly in and testify the next morning, however, the State argued this was "an unreasonable expense and inconvenience" and submitted the report as a business record. The 2nd DCA, when certifying the question listed above, reversed and remanded because it found "the State did not go to reasonable lengths to procure Deakin's testimony even though she was able and willing to fly down the next day. Thus, the 2nd DCA found that Deakin was not unavailable and this part of the Crawford test was not met.

After its lengthy *Crawford* analysis, the Court determined that "[b]ecause the FDLE lab report is testimonial, its admissibility depends on the Crawford requirements of the unavailability of the declarant and a prior opportunity to cross-examine the declarant." Because the State did not make a good faith showing of attempting to secure the witness, the "unavailability of the witness" prong of the Crawford analysis has not been satisfied. The Court determined that the FDLE lab report was prepared for the sole purpose of litigation to prove an essential element of the crime charged. The admission of the FDLE lab

report without the live testimony of the technician was, therefore, in violation of the Confrontation Clause and Crawford."

State v. Johnson, 982 So.2d 672 (Fla. 5/01/08)
Cert dismissed, Florida v. Johnson, 129 S.Ct. 28 (2008)

Breath test affidavit is testimonial in nature and must conform with Crawford when offered at trial. Failure to depose state's breath test technician does not waive right under 6th Amendment to confront witnesses.

When the 4th DCA reversed and remanded for a new trial it certified the following question of great importance: "Does admission of those portions of the breath test affidavit pertaining to the breath test operator's procedures and observations in administering the breath test constitute testimonial evidence and violate the sixth amendment's confrontation clause in light of the United States Supreme Court's holding in Crawford v. Washington, 541 U.S. 36 (2004)?"

At issue was the county court's admission of the breath test affidavit of the breath test technician, Rebecca Smith, who did not testify at trial and over the defendant's objection who argued his right to confrontation, per Crawford, was violated by Smith's non-appearance at trial. When affirming the conviction, the circuit court held "the breath test affidavit was not testimonial in nature and that Crawford did not preclude its admission." Noting that "breath test affidavits are usually prepared by law enforcement agencies for use in criminal trials or driver's license revocation proceedings," the 4th DCA reversed and remanded for a new trial finding that "such affidavits qualify as statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial."

The Florida Supreme Court referred to the decisions rendered in Crawford and in Davis v. Washington, 547 U.S. at 822 (2006), and concluded that the breath test affidavit is testimonial. The State, which met its burden proving the technician was not available for trial, argued there is no Crawford violation because "Belvin waived his opportunity to cross-examine her prior to trial by failing to depose her under Florida Rule of Criminal Procedure 3.22(h)(1)(D)." In its review of Blanton and Lopez, the Court concluded "that the exercise of the right to take a discovery deposition under rule 3.220 does not serve as the functional substitute of in-court confrontation of the witness." See State v. Lopez, 974 So. 2d 340, 349-50 (Fla. 2008; Blanton v. State, 33 Fla. L. Weekly S184, S186 (Fla. Mar. 13, 2008).

Thus, the Court held that Belvin did not waive his opportunity to cross-examine the technician by failing to depose her under rule 3.220(h)(1)(D). Further, while "the defendant has the right to subpoena the breath test operator as an adverse witness at trial, the statutory provision does not adequately preserve the defendant's Sixth Amendment right to confrontation." The Court further held the "4th DCA did not err in concluding that the circuit court violated a clearly established principle of law by deciding the case contrary to the holding in Crawford."

State v. Belvin, 986 So.2d 516 (Fla. 5/01/08)

Evidence based on DNA admissible even though the subject's DNA sample was obtained through trickery and not accompanied by full disclosure of the sample's intended use.

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.

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, 987 So.2d 23 (Fla. 7/10/08)

FLORIDA DISTRICT COURT OF APPEALS CASES:

Exigent circumstances justified entry 12 seconds after knock and announce.

The state appealed the suppression of evidence (two firearms, marijuana, heroin, electronic scales, currency, and documents) obtained during the search of the subject's home. Pruitt was identified as a "key participant" in a large-scale heroin trafficking operation and as a distributor of heroin in the St. Petersburg area. A warrant was issued and the St. Petersburg Tactical Apprehension and Control Team (TACT) executed the warrant on January 6, 2004 at 5:15 a.m. TACT waited twelve seconds after knocking and announcing their purpose before forcibly entering the home. Pruitt moved to suppress the evidence arguing the "forced entry violated Florida's knock-and-announce statute, section 933.09, Florida Statutes (2003)." The trial court granted the motion holding that the "twelve-second delay between the knock and announce and TACT's entry was insufficient." The State appealed arguing exigent circumstances, "specifically law enforcement's knowledge that Pruitt was a suspect in a murder investigation in which the murder weapon was an AK-47," justified the short delay.

Section 933.09, Florida Statutes, requires that before forcibly entering a home, law enforcement must first announce its authority and purpose, and second, officers must have been refused admittance. "Refusal can be express or implied, and lack of response is deemed a refusal," Richardson v. State, 787 So. 2d 906, 908 (Fla. 2d DCA 2001). The 2nd DCA concluded that "there is no bright line answer" in Florida's case law to determine how much time should be allowed "before the lack of response may be deemed by law enforcement officers at the scene to be a refusal," other than a "reasonable opportunity" to respond.

Pruitt was under an ongoing active six-month investigation for a murder committed with an AK-47, as such, that information (immaterial to the purpose of the warrant) was given to TACT before the execution of the warrant for planning purposes, "to enable TACT to make on-the-spot decisions as to the best way to execute the warrant at the scene." Testimony provided by the TACT Commander at the suppression hearing revealed that he waited approximately "twelve seconds after his initial knock and announce before calling for a breach of the door of the residence"; that he believed that was a reasonable amount of time to wait; that he knew Pruitt was a violent felon and a suspect in a homicide using an AK-47; that as he was counting up to 10, 11, and 12, he knew that "now the team has been compromised . . . the risk definitely increases where we may return fire . . . ," and that the TACT team's "body armor was not capable of stopping rounds from an AK-47," therefore, the TACT teams' safety risk would be increased. It was further revealed that the TACT team is used to execute warrants only "with high-risk situations," and the execution of this warrant on Pruitt's residence was considered a "high-risk situation in which information was given fitting the criteria where firearms or the subject involved is known to use violence."

The 2nd DCA concluded that exigent circumstances existed that justified TACT's entry into Pruitt's house after waiting twelve seconds and reversed the trial court's suppression order.

State v. Pruitt, 967 So.2d 1021 (Fla. 2DCA 11/2/07)

The prohibition against the use of force to resist an arrest under F.S. 776.051(1) does not apply to post-arrest intake procedures. Deputies failed to prove they were "acting in the lawful execution of any legal duty," when they failed to comply with F.S. 901.211(5), when attempting to strip search the defendant.

Pursuant to Broward County Sheriff's Office policy, Perry was moved to the strip search room as part of his booking into jail. Perry refused the search, and a fight erupted between Perry and two BSO deputies. Perry was charged with battery on a law enforcement officer and resisting an officer with violence. After being convicted of resisting an officer with violence, he appealed to the 4th DCA, which affirmed the conviction. (Perry v. State, 846 So.2d 584 (Fla. 4th DCA, 2003). The Florida Supreme Court, relying upon Tillman v. State, 934 So.2d 1263 (Fla., 2007), quashed the 4th DCA's opinion and returned it for reconsideration. See: Perry v. State, 953 So.2d 459 (Fla. 2007).

On review, the 4th DCA overturned the conviction. Section 901.211(5), Florida Statutes (1997), states: "No law enforcement officer shall order a strip search within the agency or facility without obtaining the written authorization of the supervising officer on duty." The 4th DCA held that "the prohibition against the use of force to resist an arrest under section 776.051(1) does not apply to post-arrest intake procedures such as the strip search in this case."

Because the state failed to prove the deputies were in compliance with section 901.211(5), it failed to prove that when the officers attempted to strip search Perry, they were acting "in the lawful execution of any legal duty." The 4th DCA remanded with directions to discharge Perry. "A strip search conducted in violation of the statutory requirements set forth in section 901.211, in essence, establishes police misconduct and constitutes a Fourth Amendment violation." State v. Augustine, 724 So. 2d 580, 581 (Fla. 2d DCA 1998).

Perry v. State, 968 So.2d 70 (Fla. 4th DCA, 11/07/07)

One burned out brake light on back of vehicle with three brake lights does not justify traffic stop.

Zarba, was stopped by a police officer because his Ford Explorer's right rear brake light was not working. A license and registration check revealed Zarba's driver's license had been revoked, and Zarba was arrested. The trial court rejected Zarba's argument that his vehicle was not a traffic hazard because two of the three brake lights (left rear and center brake light) were working. Zarba pled nolo contendere to a third-degree felony of driving while his license was revoked (habitual traffic offender) and reserved his right to appeal the circuit court's denial of his dispositive motion to suppress his statements and the other evidence obtained after the traffic stop.

At the suppression motion hearing, Officer Sweat testified he stopped Zarba because the "right rear brake light was not working." Michael Zemaitis, a passenger in Zarba's vehicle, testified that the vehicle was equipped with three brake lights: "one at the left rear of the vehicle, one at the right rear of the vehicle, and a center high-mounted stop lamp," and that two of the three brake lights were operating. Zemaitis further testified that when they picked the vehicle up from the impound lot, they tested and found that "the left rear brake light and the center high-mounted stop lamp" were working and that the right rear brake light was not working.

Citing State v. Perez-Garcia, 917 So. 2d 894 (Fla. 3d DCA 2005), the prosecutor argued that even if Zarba's vehicle complied with section 316.222(1), "the statute requiring '[e]very motor vehicle . . . [t]o be equipped with two or more stop lamps' - the traffic stop was lawful under section 316.610," which addresses vehicle safety and inspections. The prosecutor argued that the decision in State v. Burger, 921 So. 2d 847 (Fla. 2d DCA 2006), did not address whether F.S. 316.610 applied to a vehicle that had two out of the three stop lamps operating and that the Perez-Garcia decision held that under similar circumstances the officer had the authority under F.S. 316.610 to stop a vehicle with one out of the three stop lights not operating.

The 2nd DCA noted its decision and the authority of Burger, where the 2nd DCA held that "if two of the vehicle's three brake lights were operational, this was sufficient to comply with the requirements of section 316.222(1), Florida Statutes (2004)." More specifically, "[t]he statute does not require that the operable lights be parallel to one another but only that they be located in the rear of the vehicle." The statute only requires that two of the three brake lights be operational on a vehicle equipped with a center high-mounted stop lamp. The 2nd DCA also noted the Florida Supreme Court's recent decision Hilton v. State, 961 So. 2d 284 (Fla. 2007), where it held that "a cracked windshield violates section 316.610 only if it renders the vehicle in 'such unsafe condition as to endanger any person or property,'"

The state had not presented any evidence that Zarba's vehicle "posed a safety hazard." Consequently, the 2nd DCA concluded that it was "unwilling to assume" that having two functional brake lights, out of three, on the vehicle's rear, when the vehicle is equipped with a center high-mounted stop lamp, posed such an unsafe condition as to endanger any person or property." It ruled the traffic stop unlawful, held that the circuit court erred in denying Zarba's suppression motion, and certified conflict with "the Third District's decision in Perez-Garcia."

Zarba v. State, --- So.2d ----, 32 FLW D2745, (Fla. 2nd DCA, 11/16/07)

Removal of M&M's container under "plain feel" doctrine ruled unlawful.

(Cylinder M&M containers)

Crawford was a passenger in a vehicle that was stopped by Officer Bush of the St. Petersburg Police Department for running a stop sign. According to Bush's testimony, after exiting the vehicle, Crawford kept "fumbling at his waistband" and the officer noticed a "cylindrical shaped bulge approximately five or six inches long and a few inches wide" in Crawford's right pants pocket. Officer Bush testified that Crawford's "behavior was making him nervous," and Crawford consented to his request for a pat-down. The officer testified that during the pat-down he "felt the cylindrical tube and immediately recognized it as a cylindrical M&M candy container," that the container "rattled" when he patted it, and that he knew from the sound of the rattle that the container contained cocaine. Officer Bush removed and opened the container and found ten pieces of crack cocaine. The officer further testified that he had worked narcotics investigations for ten years, he had more than "100 arrests where crack cocaine was found inside cylindrical candy containers," and that he had "never seen anything other than crack in those containers." Officer Bush testified that he did not observe Crawford involved in any criminal activity, nor was any evidence presented to suggest such activity.

In Minnesota v. Dickerson, 508 U.S. 366, 375-376 (1993), the Supreme Court explained "if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized."

The 2nd DCA concluded that Officer Bush requested and was given consent to pat-down Crawford out of concern for officer safety; that once Officer Bush identified the bulge in Crawford's pocket as a candy container and not a weapon, the officer "had no more authority than that reasonably conferred by the terms of Mr. Crawford's consent." Further, because the officer could tell by touch that the object was a cylindrical candy container but could not tell by touch what was inside the container, the 2nd DCA concluded that Officer Bush did not meet the requirements established for the "plain-feel" doctrine in Dickerson. The court held that the officer's search of Crawford's pocket was "beyond the scope of a weapons check and the subsequent seizure and opening of the M&M container were constitutionally invalid actions."

Crawford v. State, 980 So.2d 521 (Fla. 2nd DCA, 11/28/07)

Smell of marijuana from vehicle stopped for speeding gives probable cause to search driver and passenger.

Jennings was a passenger in a vehicle that was stopped by two Broward County deputy sheriffs, for speeding and having no tag light. As the officers approached the vehicle, they both smelled "the odor of marijuana coming from the open windows of the vehicle." Both the driver and Jennings were asked to exit the vehicle. The driver, when questioned, told one law enforcement officer that he had marijuana in the driver's side visor.

Because Jennings was acting "very jittery," the other officer asked for consent to search his person. Jennings only responded with a nodding gesture of his head, lifting up his arms and shrugging his shoulders. A packet of cocaine was found on his person.

The trial court granted Jennings' suppression motion finding that "based on the totality of the circumstances the search was not done for officer safety purposes and the consent indicated by a shrug was simply an acquiescence to police authority."

The record revealed that both officers testified they smelled marijuana coming from the vehicle as they approached it and testified to their training and experience "in detecting marijuana by smell." The 4th DCA determined "[t]he deputies were not required to rely on the statements of a suspect to assure them that the only violation of the narcotic's law consisted of what the suspect tells them." Once the officers smelled the marijuana, they had probable cause to search the occupants of the vehicle. "Probable cause exists where 'the facts and circumstances within their (the officers') knowledge . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.'" State v. Betz, 815 So. 2d 627, 633 (Fla. 2002). The 4th DCA held the officers had probable cause to search the occupants of the vehicle and that the cocaine was found during a lawful search.

State v. Jennings, 968 So. 2d 694 (Fla. 4th DCA,11/21/07)

Firearm on front seat of vehicle, under bouquet of flowers, can be a concealed firearm.

Hinkle was stopped for speeding and when the officer approached the vehicle, Hinkle stuck both hands out of the window and told the officer that he had a firearm in the vehicle and did not have a concealed weapons permit. The firearm was under a bouquet of flowers on the front passenger seat.

A concealed firearm, per Section 790.001(2), F.S., is defined as "any firearm . . . which is carried on or about a person in such a manner as to conceal the firearm from the ordinary sight of another person." The record revealed that the firearm was readily accessible to Hinkle because it was on the seat next to him and that it was covered by a bouquet of flowers "which had to be removed to reveal its presence," as such, the 4th DCA concluded that the State presented a prima facie case and held that the trial court "erred in granting the motion to dismiss."

State v. Hinkle, 970 So. 2d 433 (4th DCA, 11/28/07)

Re-Initiation of contact with police after invoking Miranda rights was voluntary when suspect asked what he was going to be charged with.

This case discussed several issues, one of which related to Miranda rights. Perez, convicted of attempted second-degree murder with a firearm and aggravated battery and sentenced to twenty-five years in prison on the attempted second-degree murder charge and fifteen years in prison on the aggravated battery charge, appealed his convictions and sentences.

The record reflected that Detective Ballata read Perez his *Miranda* rights and when Perez invoked his right to counsel, Ballata "ceased conversation and started to leave the room." Perez then stopped Ballata and asked him "what charges would be filed against him."

Ballata showed Perez a photo of the other suspect in the case, Hector Laurencio, and told Perez both "he and Laurencio were being charged with a home invasion robbery." Perez denied knowing him. Ballata

then showed him a picture of Laurencio and Perez together and Perez responded that the picture "was taken before Laurencio went to jail." Without any other conversation the detective left the room.

In his motion to suppress and in his appeal, Perez argued that "Ballata's use of the picture of Laurencio was tantamount to custodial interrogation in violation of his right to remain silent and his right to counsel."

After a review of the record, the 3rd DCA concluded that Perez "reinitiated the conversation" when he asked about the charges. The court found that the detective could "not have intentionally planned to introduce the photographs to elicit an incriminating response when he did not even know he would have a further opportunity to do so after interrogation had ceased." The showing of the photographs to Perez "was not the functional equivalent of interrogation" and the DCA held the statements were properly admitted.

Perez v. State, 980 So.2d 1126 (Fla. 3rd DCA, 3/18/08)

Trial court erred by not allowing testimony that manslaughter victim had been involved in severely beating two other people just minutes before he encountered defendant at a law office. Such information is directly relevant to "self-defense" assertion.

Behanna appealed his judgment and sentence for manslaughter with a weapon arguing that the trial court erred when it denied his motion for judgment of acquittal because the State failed to rebut his evidence of self-defense; that the trial court committed reversible error when it excluded evidence that the victim, Robert Mears severely beat two other people minutes before his encounter with Behanna; and that the trial court committed reversible error when giving an incomplete jury instruction on self-defense.

The record and trial testimony revealed that Mears, who lived across the street from the law office where Behanna worked, came out of his apartment and walked across the street to the law office in a "very agitated and angry" state, he appeared to be drinking and his behavior was very erratic. A confrontation ensued between Behanna and Mears and one witness testified he saw Mears throw Behanna to the ground "like a rag doll" and another witness testified that Mears "grabbed Behanna and slammed [him] on the ground."

Mears left the property; Behanna followed him and another fight ensued. At this point Behanna testified that Mears grabbed him by the throat, choking him and he started to black out; that he could not push Mears off him and fearing for his life, he pulled out his pocket knife and pushed the knife into Mears. When Mears did not let go of him, Behanna pushed the knife into Mears again and he let go of Behanna. It was later determined that the second knife push went into Mears' heart and caused his death.

There was conflicting testimony presented by two other witnesses, friends of Mears, that Mears had tried to "push off" Behanna, in an attempt to get away from him, and that Mears was not choking Behanna.

The State sought via a motion in limine to exclude the evidence that just minutes before Mears walked across to the law office, he had beaten up his male roommate and a woman at his apartment. "Beaten up pretty badly" and "pulverized" were the terms used to describe their condition.

Defense counsel argued that the two assaults (on the roommate, the woman, and on Behanna) were "tied together"; that the prior beating of the roommate and woman "was a continuing episode that culminated a few minutes later with the confrontation between Mears and Behanna"; that the prior beatings "showed Mears' motive, intent, and state of mind"; and that the prior beating was "evidence of Mears' physical capabilities."

The trial court granted the motion to exclude the evidence on the basis that it was inadmissible reputation and character evidence because Behanna was not aware of what Mears had done just before Behanna's encounter with him.

The 2nd DCA concluded that because the evidence was excluded, the jury never heard that Mears (who was 5'10" and weighed 159 pounds) had severely beaten his roommate (who was 6'3" and weighed more than 200 pounds) before he accosted Behanna (who is 5'7" and weighs 172 pounds). The State, in its closing argument "characterized Mears as a kid who was 'having a bad day' and that he 'wasn't out there, trying to cause trouble.'"

The DCA determined that Behanna is entitled to have a "fair trial on his self-defense claim" and he is "entitled to have the jury know that Mears had been engaged in a violent encounter with two people just minutes earlier." Noting that the issue in this case was "whether Mears was choking Behanna when Behanna stabbed Mears or whether Mears had pushed Behanna away," the 2nd DCA held that the trial court abused its discretion in excluding the evidence. The conviction was reversed and the case remanded for a new trial.

Behanna v. State, 985 So.2d 550 (Fla. 2nd DCA, 12/07/07)

One non operational tag light is not enough to justify a traffic stop. Must be able to articulate the tag was illegible when viewed from a distance of 50 feet to the rear.

Langello was stopped for a broken tag light. During the course of the traffic stop, he was found to be in possession of marijuana and to be carrying a concealed firearm. He pled nolo and appealed the denial of his motion to suppress. He argued that the statute only requires one operational tag light; that the officer "erroneously focused" on whether both tag lights were operational instead of whether the tag was "clearly legible," and that because of this, he was not violating the statute and the officer "did not have probable cause to stop him."

Section 316.221(2), Florida Statutes (2004) requires vehicles to be equipped with either a tail lamp or a separate lamp that is "placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of 50 feet to the rear." The officer testified at trial that she stopped Langello because only one of the two tag lights was operational on his vehicle and she believed this violated F.S.316.221(2). She could not recall whether the tag was rendered illegible because of the one malfunctioning light.

The 2nd DCA determined there was no evidence submitted to establish that the defendant's vehicle was not equipped as required by law, nor any evidence to establish that the vehicle was unsafe. As such, the officer's belief there was an equipment violation because only one tag light was working was a mistake of law which did not establish probable cause to stop Langello's car. Having found the stop to be illegal, the DCA indicated the motion to suppress should have been granted. The case was reversed, with instructions to discharge Langello.

Langello v. State, 970 So.2d 491 (Fla. 2nd DCA,12/19/07)

Statutory requirement that a temporary tag be "clearly visible" must be given common sense interpretation. A "visible" temporary tag that is covered with tinted cover that makes details unreadable is not "clearly visible."

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

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. When the officer 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 under F.S. 320.131(4), 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 make the traffic stop.

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. This would have given 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, *970 So.2d 912 (Fla. 5th DCA,12/28/07)*

Officers' workplace search overturned. Those providing access to the searched computer had no authority over the constitutionally protected area and could not consent to the officers' entry and search. Officers' reliance on their permission was not reasonable. Incriminating statements given were "Fruit of Poisonous Tree."

Young's suppression motion for the evidence obtained during a warrantless search of his office and workplace computer, along with the statements he made during a subsequent interrogation, was granted and the State sought review of that order.

Young was a pastor at Ft. Caroline United Methodist Church which was under the supervision of the United Methodist Church. "Questionable web site addresses" were found on Young's computer after the church administrator ran a "spybot" program on all of the church's computers. Kenneth Neal, district superintendent of the Church, after discussing the matter with the bishop, instructed Kenneth Moreland, chairperson of staff parish relations, to contact law enforcement officials. Moreland met with the officers, unlocked Young's office, and signed "consent to search" forms for the office and computer. Young was interrogated by the officers and "made some incriminating statements related to child pornography."

At the suppression hearing the officers testified they "understood Moreland to be a 'representative of the church' whose authority to consent was based on instructions from a supervisor at the church." They did not question nor make any inquires regarding Moreland's authority. Neal told one officer that "he never used Young's computer, did not work in Young's office, and did not keep property there." Moreland testified he did not work or keep property in Young's office.

Further testimony revealed that Young was provided with a desktop computer in a private office that came with a "special lock that could not be opened with the Church's master key." There were three keys to the office; Young had two and the church administrator had one. The computer was not networked and no one was permitted in Young's office without his permission.

The 1st DCA determined that Young had a "legitimate expectation of privacy" in his office and workplace computer. There was no policy in place regarding the use of the computer; it was not networked to another computer; it was in a locked office; and no one was allowed in that office without Young's permission. Under constitutional standards, neither Moreland, Neal, nor any of the church officials were able to prove that they had "common authority" over Young's computer and its files.

The officers relied "on the officials' representations of authority," but by their own admissions, "they knew nothing of Moreland" except he had been instructed by a supervisor to consent to the search. The officers made no effort to "ascertain whether the consenting officials had any regular access to or control over the office and the computer." Thus, their actions were "not reasonable under constitutional standards."

The 1st DCA further concluded that the argument that the trial court had to "accept that the search was proper to avoid a violation of the ecclesiastical abstention doctrine" was misplaced because the doctrine is an "issue of subject-matter jurisdiction." The church was not a party in the case. While the church may have had the authority to "implement its doctrine," this authority "did not extend beyond the realm of religion and did not remove from the court the prerogative of enforcing the rules of evidence and ensuring that government agents comply with the constitutions of the United States and Florida."

State v. Young, 974 So.2d 601 (Fla. 1st DCA, 2/25/08); *rev. denied* State v. Young, 988 So.2d 623 (Fla. 2008)

Sitting quietly in patrol car in residence's driveway, hand-cuffed and not objecting to consent to search being provided by another is not "present and objecting."

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."

The evidence was discovered by police searching on the basis of consent provided by a co-tenant to Prophet's home. At the time consent was provided, Prophet was near the home, sitting hand-cuffed in a patrol car in the home's driveway. Prophet did not object to the search.

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." (Commonly referred to a "present and objecting.") The record showed that Profit was not physically present nor was he objecting at the residence because he was "handcuffed in the back of a patrol car, voicing no objection to the search."

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

Prophet v. State, 970 So.2d 942 (Fla. 4th DCA, 01/02/08)

Phrase, "None of 'em" in response to question as to whom the subject would be comfortable speaking was not "unequivocal assertion of right to terminate questioning."

Davis who was charged with the first-degree murder with a firearm of his father moved to suppress the statements and admissions he made to officers during his interview, along with the suppression of the 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.

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.

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 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 DCA determined that Davis's statement, "none of 'em," was **not** an unequivocal or unambiguous request to terminate further questioning. 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. The officers were under no obligation to clarify Davis's intent or to terminate further questioning. The 1st DCA held the trial court reversibly erred by partially granting the motion to suppress, and reversed that order.

State v. Davis, III, 971 So.2d 1017 (Fla. 1st DCA, 01/10./08)

State must establish "specific intent to do violence to the person of another" to prove "Aggravated Assault On A Law Enforcement Officer With A Deadly Weapon."

Swift was charged and convicted with aggravated assault on a law enforcement officer with a deadly weapon, resisting law enforcement officers without violence, and fleeing or attempting to elude a law enforcement officer in a marked patrol with siren and lights activated.

The record revealed that Officer Sweat spotted Swift's sports utility vehicle (SUV) parked illegally at a convenience store, after receiving a tip from a confidential informant that a suspect named in a felony arrest warrant was a passenger in the vehicle. After Officer Sweat activated the lights on his patrol vehicle, Swift moved the SUV into a driveway at a nearby residence. Officer Sweat informed Swift he had been parked illegally, requested Swift's drivers license and returned to his patrol vehicle, where he requested assistance. Sergeant Green responded and the two officers approached the SUV on the passenger side. The men inside the SUV did not respond to the officer's commands to get out of the vehicle. Swift started to back the SUV and then moved it forward to reposition the vehicle so he could then back out between the two police vehicles that had partially blocked him in the driveway. As the vehicle moved forward, Officer Swift ran behind the SUV and was behind the SUV when Swift backed out. Officer Swift had to jump out of the way of the SUV to avoid being hit as it backed out of the driveway and then drove away. A chase ensued and Swift was apprehended, however, the passenger was no longer in the vehicle. Swift's departure from the driveway formed the basis of the aggravated assault charge.

At trial, defense moved for a judgment of acquittal on the aggravated assault charge, arguing there was "no evidence that [Mr. Swift] intentionally or knowingly threatened Officer Sweat," and the trial court denied the motion. After the jury rendered its verdict, the trial court dismissed the charge of resisting without violence and adjudged Swift to be guilty on the remaining two charges. On appeal, Swift challenged "the sufficiency of the evidence to support his conviction on the aggravated assault charge" arguing that "the State failed to establish the elements of an assault."

The 2nd DCA determined that the State failed to establish that Swift "had a specific intent to do violence to the person of another." While Officer Sweat "was in fear of imminent violence" when Swift backed the SUV directly at him, "Officer Sweat's reaction was insufficient to establish that Mr. Swift intended to threaten him." Because the evidence did not establish that Swift knew that the Officer had run behind the SUV as he pulled the vehicle forward and before he backed the vehicle out of the driveway, the 2nd DCA held that the trial court erred in denying Swift's motion for judgment of acquittal on the aggravated assault charge; reversed Swift's judgment and sentence for aggravated assault on a law enforcement officer; and affirmed Swift's "judgment and sentence for fleeing and attempting to elude a marked patrol vehicle with siren and lights activated."

Swift v. State, 973 So.2d 1196 (Fla. 2nd DCA 01/16/08)

Testimony must establish the "duty" and how officers are "engaged in the lawful execution of a legal duty" to support "resisting an officer without violence" conviction.

Davis appealed his conviction and sentence for resisting an officer without violence arguing the trial court erred in denying his motion for judgment of acquittal because the "State did not establish that the officers were engaged in the lawful execution of a legal duty."

The record revealed that Davis was arrested for battery and resisting an officer with violence after a scuffle ensued between Davis and Officers Rizer and Milam at the Green Room Restaurant. The officers

responded to a complaint by employees of the restaurant to investigate a "suspicious incident" involving Davis. Davis, charged with two counts of battery on a law enforcement officer and resisting an officer with violence was found guilty of the lesser offense of resisting an officer without violence; not guilty on one count of battery on a law enforcement officer and after sentencing, the State dismissed the other battery charge.

In its analysis, the 2nd DCA looked to the legal standards "governing the officer's duty at the point that the resistance occurred," for determining if the officers were "engaged in the lawful execution of a legal duty." See Tillman v. State, 934 So. 2d 1263, 1271 (Fla. 2006).

The 2nd DCA concluded there wasn't any evidence presented to support the nature of the complaint or "suspicious incident" being investigated. Thus, "there was no way to determine whether the officers were engaged in the lawful execution of a legal duty when they detained Davis to investigate the complaint." Because it could not direct a judgment for a lesser-included offense, the 2nd DCA reversed and remanded with instructions to discharge Davis. See § 924.34, Fla. Stat. (2005).

Davis v. State, 973 So.2d 1277 (Fla. 2nd DCA, 02/20/08)

CI's "tip," coupled with officer overhearing subject's promise to deliver a "yard of crack" provided PC for arrest. Since subject had just exited vehicle when he was arrested, vehicle could be validly searched incident the arrest.

Clark, charged with possession of cocaine with intent to sell, manufacture, or deliver, and possession of not more than twenty grams of marijuana, sought suppression of the evidence, arguing that the informant whose information led to his arrest lacked "a prior record of providing reliable information." He argued that in the totality of the circumstances, the police "had nothing more than a reasonable suspicion that he was either committing or about to commit a crime," and lacked "probable cause to arrest him." The lack of PC meant the search his truck as incident arrest was illegal. The circuit court, relying on State v. Flores, 932 So. 2d 341 (Fla. 2d DCA 2006), granted the motion to suppress, and the State appealed.

The record revealed a confidential informant informed a detective she could "telephone several individuals–including Mr. Clark–and arrange for them to deliver crack cocaine to her." The CI was hoping to gain leniency for an unrelated offense, but the CI's "reliability was untested." However, the CI described Clark and the vehicle he used when making deliveries. While monitoring all calls made to Clark, the detective activated the "speaker function" of the cell phone and was able to hear both sides of the conversation, including Clark's agreement to deliver a "yard of crack cocaine" to the CI.

Clark travelled to the agreed upon sale site and was handcuffed, arrested and searched after exiting his truck; no controlled substances were found on his person. The truck was searched and cocaine and marijuana were found in the truck's passenger compartment.

The 2nd DCA determined that in the absence of a search warrant one of the ways in which a vehicle may be searched is incident to a lawful arrest of a recent occupant of the vehicle. Although Clark had stepped out of the truck before the police had any contact with him, the court noted that "Clark was in close temporal and spatial proximity to his vehicle when he was arrested and searched." The 2nd DCA held that because Clark was a "recent occupant" of the truck, "the vehicle search was lawful."

The DCA further held that based on the totality of the circumstances, the police officers had probable cause to arrest Clark "as soon as he stepped out of his pickup truck because they had verified all of the details 'except for the final one of the commission of the crime.'" Contrasting the facts in this case to Flores, the Court noted the Clark informant "provided specific details regarding the suspect and the vehicle he was driving" and the detective was able to "corroborate every detail that the informant had provided." Further, the fact the detective actually heard the suspect agree to deliver a "yard of crack cocaine" to the drop site weighed heavily "in favor of a finding of probable cause."

(The Flores case involved a controlled buy in which a confidential informant that the police had never used before arranged to purchase crack cocaine from one of his suppliers. The CI had been arrested earlier in the day for possession of cocaine and possession of drug paraphernalia. An officer was present when the CI arranged the meeting by telephone, and the CI provided the officers with the following information: The CI was to meet a man named Chico in fifteen minutes at a particular 7-Eleven to purchase $50 worth of crack cocaine; Chico, a Hispanic male in his mid twenties, would be driving a dark-colored Nissan; Chico would arrive at the west side of the

convenience store; and Chico would be alone. A car matching the description given by the CI arrived at the arranged place at the arranged time; however, there were two people in the car. Officers approached the car with guns drawn and opened the car door. As the driver (Flores) exited the vehicle, officers observed him drop cocaine from his hand. The officers arrested the driver for possession of cocaine. The 2nd DCA in Flores held the officers had reasonable suspicion to detain Chico when he drove up. Once the cocaine was dropped, they had probable cause to arrest.)

State v. Clark, 986 So.2d 625, (Fla. 2nd DCA, 02/22/08)

Failure to prove "intent to sell" dooms conviction of possession of cocaine with intent to sell within 1000 feet of a park. Detective saw no behavior consistent with someone trying to sell drugs. Packaging was consistent with both dealing and with personal use.

On appeal, Valentin, convicted for possession of cocaine with intent to sell within one thousand feet of a publicly owned park, argued the evidence failed to prove his intent to sell and maintained that the circuit court erred when denying his judgment of acquittal motion.

Valentin was observed by Sergeant Curry of the Martin County Sheriff's Department of dropping a "white object into the bushes" before he entered the Lamar Howard Park playground. The Sergeant retrieved the object (a ziplock bag containing seventeen smaller bags; each containing a white powdery substance). Suspecting drugs, the Sergeant arrested Valentin and the substance in the bags tested positive for cocaine.

The sergeant testified at trial (based on his education, training, and experience) the packaging was consistent with "cocaine that is packaged for sale on the streets." However, he also acknowledged on cross-examination that it was possible that the "quantity and packaging were consistent with personal use." He did not see Valentin talking with anyone or doing anything to suggest "an intent to sell in the park."

Because there was no evidence produced at trial "showing an intent to sell within the park," the 4th DCA held that the trial court erred in denying the motion for judgment of acquittal. The 4th DCA reversed and remanded with "directions to enter judgment for simple possession of cocaine."

Valentin v. State, 974 So.2d 629 (Fla, 2nd DCA, 02/27/08)

Certification of drug dog alone is not enough to establish probable cause to search based on the dog's "alert." Officer could not establish dog's "track record" or other indicia of reliability. Retention of license while "field interrogation cards" are being completed and additional questions are being asked does not constitute "detention."

On appeal, Tedder who was convicted and sentenced for armed home invasion robbery and five counts of armed kidnapping, argued the trial court erred in failing to grant his motion to suppress the evidence obtained from a search of his truck. Tedder contended that the K-9 alert was insufficient to provide probable cause for a search of the truck. Tedder also contended that he was "illegally detained" because the officers did not return his drivers license after the completion of a warrants check.

Tedder and Michael Varnum were questioned as to what they were doing in the area by Sergeant Creghan after the sergeant noticed the white pick-up truck parked in a dark area behind a 24-hour gas station in the early morning hours. Tedder's suspicious explanation led to a warrants check on both men. The check came back clear. Other officers separately interviewed both men to complete "Field Interrogation Cards." While the cards were being completed, Officer Short arrived with his narcotics detection dog, Rex, who "alerted to the passenger door of the truck." No drugs were found. However, "duct tape, masks, and other items that connected Tedder to a home invasion robbery that had occurred two weeks earlier" were found.

At the suppression hearing, Officer Short testified that "Rex was certified as both a patrol dog and a narcotics detection dog," and listed many of the dog's credentials. Officer Short further testified "no records were kept concerning how accurate Rex had been at detecting narcotics in the field." Short denied that "Rex ever made a false alert," opining that "the failure to find drugs after an alert does not constitute a false alert."

The 2nd DCA referred to its decision in Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003), where it

held that "the certification of a narcotics detection dog, standing alone, is insufficient to establish that the dog is reliable so as to allow the dog's alerts to constitute probable cause for a search." The trial court must consider several other factors, including "the 'track record' of the dog up until the search (emphasis must be placed on the amount of false alerts or mistakes the dog has furnished)." Because there was no record regarding "Rex's 'track record,' including the number of false alerts or mistakes Rex made in the field," the 2nd DCA held that the trial court erred and the evidence obtained from the search of Tedder's truck should have been suppressed. The 2nd DCA certified direct conflict with State v. Coleman, 911 So. 2d 259 (Fla. 5th DCA 2005), and State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005), rejecting Matheson's requirement the State "adduce evidence establishing 'the dog's performance history' to meet the State's burden of proof."

Rejecting Tedder's contention he was "illegally detained," the 2nd DCA concluded that there was "no indication in the record that Tedder at any point manifested an unwillingness to cooperate or ever attempted to terminate the encounter." Based on the totality of the circumstances, "the retention of Tedder's driver's license after the warrants check did not in itself transform the encounter into a detention." The trial court correctly denied the suppression of Tedder's statements.

> Note: This opinion regarding the K-9's performance history is not universally followed throughout the state. However, keeping the K-9's history seems to be a good practice.

Tedder, Jr., v. State, --So.2d—(Fla. 2nd DCA, 03/07/08), 33 Fla. L. Weekly D704

Failure to follow Hilton case and determine that cracked windshield "constituted a safety hazard" makes traffic stop unlawful. Conviction for possession of cocaine found during stop reversed.

Swagerty, convicted and sentenced for possession of cocaine, appealed the denial of his motion to suppress alleging the officer's stop of his vehicle, based on his vehicle having a cracked windshield, was unlawful.

The record revealed that the stop of Swagerty's vehicle was based on a cracked windshield, however, "the trial court could not find that the cracked windshield constituted a safety hazard."

The 1st DCA referred to the decision of the Florida Supreme Court in Hilton v. State, 961 So. 2d 284 (Fla. 2007), where that Court concluded that "the provision of section 316.610 which "authorizes vehicle stops for equipment that is 'not in proper adjustment or repair,' § 316.610(1), Fla. Stat. (2001), does not encompass windshield cracks. Thus, a stop for a cracked windshield is permissible only where an officer reasonably believes that the crack renders the vehicle 'in such unsafe condition as to endanger any person or property.'" Based on this decision, the 1st DCA reversed.

Swagerty v. State, 982 So.2d 19 (Fla. 1st DCA, 03/18/08)

"Knock and Talk" encounter led to valid consent to search. Trial court improperly suppressed evidence.

The trial court, granting Triana's motion to suppress, found that Triana was "illegally seized and, as such, a subsequent consent to search by Triana was involuntary, resulting in the suppression of certain evidence." The State appealed.

A confidential informant who was personally known by the police and who had previously provided reliable information, informed Detective Delguitiz that Triana was growing marijuana at his two-acre residence.

Detective Delguitiz and three officers went to the residence and waited outside the gate for Triana to appear. Once Triana appeared at the gate, Sergeant Falcon introduced himself, determined Triana was the owner of the residence, and explained they received a complaint that marijuana was being grown in the residence and requested for consent to search the residence. Triana agreed and opened the gate.

Once inside the home, Falcon saw another building in the back and requested for consent to search the back building. Triana agreed. Falcon took out a written consent to search form, read it to Triana, Triana signed the written consent form and proceeded to take the officers to the building in the back. Inside the

building the officers found a "hydroponics lab for growing marijuana." The officers seized 103 pounds of marijuana at the residence.

The trial court held that "the officers 'effectively seized Mr. Triana' and that, at the time of the encounter, the detectives did not have reasonable suspicion that Mr. Triana had committed a crime," and that Triana's consent to search given after this illegal detention was involuntary.

The 3rd DCA noted that "no level of suspicion was required before the officers arrived at the gate of Mr. Triana's residence and questioned him." The "knock and talk," is considered a legitimate procedure "as long as the encounter does not evolve into a constructive entry." At the initial meeting with Triana, the officers were outside Triana's property, supporting the conclusion that "the defendant was not in custody." No drawn weapons nor "coercive demands" were made of Triana. The 3rd DCA concluded the officers presence outside the gate "does not render the encounter non-consensual." Reviewing the "totality of the circumstances," the 3rd DCA held no "constructive entry" occurred. Based on the facts presented, there is "no basis for concluding that a reasonable person in Mr. Triana's situation would believe that he was either under arrest or otherwise compelled to leave the house." The DCA found the initial entry into Triana's residence "occurred through a consensual encounter with police followed by consent to enter the residence." Triana was "not illegally detained when he gave consent to search his residence and the outside building."

State v. Triana, 979 So.2d 1039 (Fla. 3rd DCA, 03/19/08), *rev. denied* Triana v. State, 991 So.2d 389 (Fla. 2008)

A "securely encased" firearm does not fall within Florida's "private conveyance" exception if the firearm is on the person (in a "fanny pack") of someone on a motorcycle.

Doughty was convicted of carrying a concealed firearm without a permit, in violation of section 790.01(2), Florida Statutes (2006). At trial he had moved for dismissal on the ground "that his conduct fell within the private conveyance exception in section 790.25(3)(l), Florida Statutes (2006)." The trial court denied his motion and Doughty appealed.

The record revealed that Doughty, after a near-miss collision between the motorcycle he was driving and an unmarked car that happened to be "occupied by three off-duty, out-of-state law enforcement officers," pulled up next to the unmarked car and told the occupants of the vehicle that "you almost ran me over."

A verbal argument ensued. After Doughty stated, "I have a gun, I'll kill you" and proceeded to reach into a leather pack that was around his waist and grabbed "what the officers believed was a weapon," the officers exited their vehicle with guns drawn, announced they were police, and proceeded to handcuff him. A loaded .40 caliber Smith & Wesson handgun was recovered and after the local police arrived, Doughty was charged with carrying a concealed weapon without a permit.

Section 790.25(3)(l), Florida Statutes (2006), provides "it is lawful for a person to carry a concealed firearm without a license, if that person is 'traveling by private conveyance when the weapon is securely encased.'" The private conveyance exception, detailed in section 790.25(5), provides that the concealed weapon may be carried "within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use." This section further provides, "[*n*]*othing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person.*" (Emphasis added).

The 4th DCA concluded that the express terms of the private conveyance exception of carrying a concealed weapon "within the interior of a private conveyance," is interpreted to "require a person carrying a concealed weapon without a permit, while riding a motorcycle, to keep the concealed weapon securely encased *and* in an interior compartment of the motorcycle." The 4th DCA affirmed the trial court's decision.

Doughty v. State, 979 So.2d 1048 (Fla. 4th DCA, 03/19/08)

Movement of reasonably detained person from site of detention to scene of burglary exceeded scope of a lawful stop.

Kollmer appealed the denial of his motion to suppress the victim's identification of him asserting "he was illegally stopped, detained, and ultimately transported back to the scene of the burglaries for a 'show-up' identification, in violation of his constitutional rights."

Officers responded to the scene after the dispatcher reported a car robbery in progress. The vehicle in question was owned by Brian Paris. One officer saw a white male "fleeing into the wooded area." A second officer deployed his dog, Chico, to track the suspect. Chico located a CD player and black container and, using the "scent from those items." tracked Kollmer, who was found lying on his back on the ground. A third officer handcuffed Kollmer, placed Kollmer in the police car, and transported Kollmer (in the officer's words) "back to the scene of the burglary for the victim, Mr. Paris, to identify."

F.S. 901.151, requires that no person shall be temporarily detained longer than is reasonably necessary and requires that any such temporary detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof. Concluding the officers "had a reasonable suspicion" that Kollmer was the person who committed the burglary of the vehicle, the 1st DCA held the officers were "authorized to conduct an investigatory stop."

However, the officers exceeded the scope of a lawful investigatory stop when they transported Kollmer back to the scene for the victim to identify him. The DCA reversed the court's denial of the motion to suppress the identification and remanded with directions to vacate Kollmer's conviction.

Kollmer. v. State, 977 So.2d 712 (Fla. 1st DCA, 03/25/08)

After withdrawn consent for a pat-down, the strong odor of burned marijuana about a person does not provide basis to conduct pat-down anyway.

Officer Dixon and other officers were conducting a "walk-through" in a parking lot "known for public drinking, narcotics, and fights" behind a nightclub. The officers could smell "a strong odor of burned marijuana" as they approached four individuals in the back of the parking lot. Dixon testified at the suppression hearing stated he did not see Robinson or the other three individuals smoking marijuana.

Robinson initially consented to a search but withdrew his consent when he refused to turn around. He later turned around and it was during the "pat-down" a weapon was retrieved from Robinson's back pocket. Robinson was arrested and marijuana was found in his front pants pocket.

While the trial court found that "Robinson's consent to search had been withdrawn," it concluded that Dixon surmised Robinson was hiding marijuana and that the refusal to turn around increased his reasonable suspicion in support of the pat-down. Robinson's motion to suppress was denied.

Robinson pled no contest to drug and weapon charges and appealed the denial of the suppression motion. Robinson argued he had not consented to the search; that the generalized odor of marijuana did not justify a search of all the individuals in the parking lot, and that "without the particularized odor of marijuana on a specific individual located in a public place, the officers did not have reasonable suspicion or probable cause to search."

The 2nd DCA noted "there was no testimony that Officer Dixon believed Robinson was armed or posed a threat to anyone." The "mere suspicion that a person is carrying illegal drugs is insufficient to supply probable cause for a search." State v. Witherspoon, 924 So. 2d 871 (Fla. 2d DCA 2006). The fact that Robinson and his friends were "surrounded by the odor of burned marijuana" was insufficient to supply more than a mere suspicion that Robinson possessed marijuana. Robinson's withdrawn consent did not give the officer probable cause to search for marijuana. The denial of the motion to suppress was reversed because no probable cause existed for the search.

Robinson v. State, 976 So.2d 1229 (Fla. 2nd DCA, 03/28/08)

Initial "citizens encounter" to check on safety of automobile's occupant transformed into illegal "stop" when officer moved to other side of the car and ordered driver to roll window down (exposing contraband that was basis for driver's arrest).

Greider was parked in a legal parking space in his black sedan, with towels rolled up in the windows and hanging down "like curtains," late at night, when Officer Perna parked his patrol vehicle directly behind Greider's sedan. Concerned for the occupants' safety, the officer testified he walked up to the passenger

side of the vehicle to see if anyone was in the vehicle, Greider rolled down the passenger window and told the officer he was fine.

While he thought it was strange Greider was in the vehicle with towels covering the windows, "he did not think that Mr. Greider had committed or was about to commit a crime." The officer testified he then walked around the car to the driver's side and ordered Greider to roll down the driver's window. When the towel fell, the officer saw what appeared to be a glass crack pipe in the center console next to the gear shift. The officer also observed Greider taking a small opaque orange vial from between his legs and placing it inside a compartment in the driver's side door. Officer Perna opened the car door, directed Greider to get out of the vehicle, looked in the compartment and observed crack cocaine pieces. Greider was arrested and subsequently pled guilty to possession of crack cocaine and drug paraphernalia, reserving his right to appeal the court's failure to suppress the evidence.

The 2nd DCA determined there were "two police-citizen encounters" in this incident, and noted the trial court's ruling denying the suppression motion did not distinguish the interaction on the passenger side of the vehicle from that which occurred on the driver's side.

The first consensual encounter was Officer Perna's initial contact with Greider at the passenger side window. The officer was doing a "welfare check" and the officer's own testimony reflected his concerns for safety were "dispelled" after this initial contact. While the officer was suspicious of the towels in the windows, the record reflected that he did not believe any criminal activity had occurred or was about to occur.

The second encounter occurred when Officer Perna walked around to the driver's side window and ordered Greider to roll the window down. With the order to roll the driver's window down, this encounter became an "investigatory stop." However, there was no reasonable suspicion to support the stop. As a result, it was the unlawful detention and seizure of Greider from the driver's side of the car that ultimately resulted in the plain view of the paraphernalia.

Once the officer determined that Greider was "okay" and not involved in any criminal activity, the officer lacked the proper authority to order Mr. Greider to lower his window. Finding that Greider was illegally detained and searched, the 2nd DCA reversed and remanded for discharge. The trial court erred in denying Mr. Greider's motion to suppress.

Greider v. State, 977 So.2d 789 (Fla. 2nd DCA, 04/04/08)

Officer's visual determination that driver was "speeding" supports basis of traffic stop. Use of speed device not necessary.

Allen, defendant in this case was charged with various counts including possession of contraband and paraphernalia. Detective Rylott testified at trial that Allen appeared to be driving at a high rate of speed and that he had to "accelerate quite a bit" to catch up to Allen; that the posted speed limit was twenty-five miles per hour and that "he had to drive well over fifty miles per hour to catch up to Allen" and to make the traffic stop. It was during the course of the stop that the contraband and paraphernalia was observed.

The trial court suppressed the evidence, finding that Rylott did not testify as to the Defendant's actual speed. The 3rd DCA referred to its previous decisions where it has held that "police may stop a vehicle for a speeding violation based on the officer's visual or aural perceptions and that verification of actual speed by the use of radar equipment or clocking is not necessary to justify the stop." State v. Joy. 637 So. 2d 946 (Fla. 3d DCA 1994); State v. Eady, 538 So. 2d 96 (Fla. 3d 1989).

The DCA further noted that other states have also concluded "that an officer's observations of a vehicle may provide reasonable suspicion that the vehicle is speeding." State v. Barnhill, 601 S.E.2d 215, 218 (N.C. Ct. App. 2004). Based on the above, along with the detective's testimony and the court's specific finding that "Allen's vehicle appeared to be speeding," the 3rd DCA held that probable cause existed for the detective to stop Allen's vehicle for the speeding infraction and reversed the granting of the suppression motion.

State v. Allen, 978 So.2d 254 (Fla. 3rd DCA, 04/04/08)

Illegal entry onto residential property tainted subsequent consent provided by resident. Evidence obtained by reason of consent search is fruit of poisonous tree and must be suppressed.

Grant appealed his conviction and sentence to eighty counts of misdemeanor cruelty to a dog arguing the trial court erred in its ruling that he voluntarily consented to a search of his property.

Deputies Wright and Harris, investigating a report that more than one hundred dogs were on Grant's property, went to Grant's home and when no one answered the door, they "peered over and through the slats of a six-foot privacy fence" and only saw some chained or caged dogs. While there was no evidence suggesting any mistreatment of the dogs, the Deputies "walked through a gate and searched the property" and found more than one hundred dogs chained to kennels. Many dogs had scars, were emaciated and had no food or water.

The Deputies left the property, called for backup and waited for Grant to return home. When Grant arrived, Deputy Wright told Grant they had searched his property and asked him to "show them around the property and explain the dogs' conditions." Grant showed them around the property but refused to allow them in the house. The deputies obtained a search warrant and found "mistreated dogs and other evidence inside" and arrested Grant for animal cruelty.

The trial court denied Grant's motion to suppress stating that "although the State failed to demonstrate that the deputies entered the property lawfully under the plain view doctrine or because of exigent circumstances, the search was lawful because of Mr. Grant's consent and the inevitable discovery rule."

The 2nd DCA determined that the illegality of the deputies' initial search was not cured by Grant's later consent to show them around his property. While Grant's refusal to allow the deputies inside his home proved he understood his right to refuse consent to search his property, the fact that the deputies had already searched his property, demonstrated to Grant "they had an absolute right to search and that his 'consent' to any further search was a mere formality which he could not refuse."

The 2nd DCA determined the search of Grant's property prior to Grant's consent was illegal and therefore tainted the consent and rendered the evidence inadmissible as "fruit of the poisonous tree." See Wong Sun v. United States, 371 U.S. 471, 488 (1963); Wheeler v. State, 956 So. 2d 517, 518-19, 522 (Fla. 2d DCA 2007). Because there was no evidence suggesting any mistreatment of the dogs, the State failed to prove that the evidence seized after Grant gave his consent to search the property was not obtained by exploiting what they discovered during the prior search. Further, the evidence was not admissible under the inevitable discovery doctrine because the deputies lacked any basis to secure a warrant absent their observations after they entered the property. Any assertion that they would have discovered evidence of animal cruelty absent the illegal conduct is speculative. Thus, the 2nd DCA reversed Grant's conviction.

Grant v. State, 978 So.2d 862 (Fla. 2nd DCA, 04/09/08)

Pre-Miranda statement obtained by "functional equivalent of interrogation" should be suppressed, but is not a statement "obtained by coercion" that would lead to suppression of the post-Miranda confession.

The State appealed an order suppressing statements made by Lebron, who was charged with multiple offenses in connection with the abduction and murder of Ana Maria Angel and the abduction and attempted murder of Nelson Portobanco.

Lebron was in custody at the Orlando Florida Department of Law Enforcement office with an FDLE agent. His Miranda rights had not yet been administered. When Lebron began to cry, the FDLE agent said, "I hope you know what kind of trouble you are in," and Lebron replied, "Yes, I know. I killed her." He added he had told Ms. Angle to get on her knees and the gun fired after the third time he pulled the trigger.

The agent left the room and informed other FDLE agents what had transpired. Approximately one half hour later, FDLE agents administered Miranda rights and recorded the session. Lebron signed the waiver form and gave a detailed confession, which included admitting to the abduction of both victims, the theft of the victims' jewelry, credit cards, bank cards, and property, the sexual assault and murder of Ms. Angel, and the attempted murder of Mr. Portobanco.

The trial court suppressed the pre-Miranda statement upon finding that the FDLE agent asked a question which was the functional equivalent of interrogation, prior to the administration of Miranda warnings. The trial court, relying on the decision in Missouri v. Seibert, 542 U.S. 600 (2004), suppressed the post-Miranda statements, concluding that the pre-Miranda question rendered the post-Miranda statement inadmissible.

The 3rd DCA found that because the FDLE agent's statement referencing the underlying crime was not only likely to but did elicit an incriminating response from Lebron, the trial court properly held that the agent's statement amounted to interrogation. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

Opining how the decision in Seibert was a "plurality opinion" that represented the views of four Justices and must be "read with caution," the 3rd DCA noted that "fifth vote was supplied by Justice Kennedy." "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'" Marks v. United States, 430 U.S. 188, 193 (1977)(quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976)). The "plurality opinion" was aimed at "stopping a growing police practice of question first, warn later." The question first technique was "a complete and unwarned interrogation" which was then followed by Miranda warnings, followed by an interrogation covering the same ground. Justice Kennedy stated in his opinion "it would be extravagant to treat the presence of one statement that cannot be admitted under Miranda as sufficient reason to prohibit subsequent statements preceded by a proper warning." Seibert at 620 (citing Oregon v. Elstad, 470 U.S. 298, 309 (1985)).

The 3rd DCA determined that in the instant case, as in the Elstad decision (Oregon v. Elstad, 470 U.S. 298, 309 (1985)), there was no claim that Lebron's pre-Miranda statement or the post-Miranda statement were coerced, therefore, the post-Miranda statement should not have been suppressed. The DCA affirmed the trial court's holding that the pre-Miranda statement should be suppressed and reversed the order "insofar as it suppressed the post-Miranda statement.

State v. Lebron, 979 So.2d 1093 (Fla. 3rd DCA, 04/09/08)

Exigent entry to apartment and observations consistent with gunshots having been fired inside justified initial and repeat "pat-down." Scope of officer's search of defendant's person, following defendant's consent for such search, was within the limits approved by defendant in both his oral replies and his body language and not a mere acquiesce to apparent police authority.

Watson pled guilty to actual or constructive possession of a controlled substance, MDMA, "popularly known as 'Ecstasy,'" thereby reserving his right to appeal the denial of his dispositive suppression motion.

Gainesville police officers were dispatched to the Gardenia Gardens Apartment complex after receiving a report of a gunshot and disturbance at Unit I-2. Officer Knighton testified that after she entered the apartment from the front door, she walked through the apartment and let the other officers in through the back door. The officers saw a spent casing on the floor, bullet holes were observed in the wall and two men were calmly sitting on the couch.

Officer Knighton did an initial pat-down of the two men on the couch. The officers did not have their guns drawn, there was no yelling and the two men were not handcuffed while they sat on the couch. Sergeant Nechodom, knowing a weapon had been fired and not sure the couch had been searched, testified he requested, in a police manner, the men stand up so he could search the couch and told the men "[t]hat way, we can talk, figure out what's going on here. I'll feel more comfortable." Finding nothing in the couch, Officer Nechodom told Watson that he knew he had already been patted down, but that he wanted "to double-check, make sure that you don't have any weapons or anything" Watson consented to the second pat-down search and a small plastic Ziplock bag with pills was located in Watson's pocket. No weapon was found. Officer Nechodom, a narcotic's investigator, believed "the pills were consistent with MDMA." The pills were seized, confirmed to be MDMA, and formed the basis of the plea that prompts the appeal.

Watson, who did not reside in the apartment, argued the warrantless entry was illegal and "the State failed to prove by clear and convincing evidence that the chain was broken between the initial police misconduct and Appellant's subsequent purported free and voluntary consent to search his pockets."

Watson contended his "consent" was not given freely; he acquiesced to the "apparent authority of the police." The State asserted the entry was "justified by the exigent or emergency circumstances known then by the officers" and Watson did not have standing to challenge the warrantless entry since he did not reside at the apartment.

Citing Hicks v. State, 852 So. 2d 954, 959 (Fla. 5th DCA 2003), the 1st DCA noted that "[t]emporary visitors or short-term invitees . . . are generally unable to advance a position of privacy with success." The 1st DCA held Watson's warrantless entry claim was "waived or abandoned and is procedurally barred" because he never proved his standing and the trial court never ruled on that claim. Notwithstanding the standing issue, the court noted the officers were dispatched to the apartment because of a reported disturbance and gunshot(s), therefore, the warrantless entry was "lawful and justified by the exigent or emergency circumstances known by the officers." Further, because the record was void of any testimony "that the officers acted in a coercive, oppressive, or dominating manner," the 1st DCA held that Watson's "consent was not mere acquiescence to apparent police authority" and affirmed the trial court's denial of the suppression motion. In support of its holding, the Court cited United States v. Mendenhall, 466 U.S. 544, 554-55 (1980); State v. Parrish, 731 So. 2d 101, 103 (Fla.2d DCA 1999).

Watson v. State, 979 So.2d 1148 (Fla. 1st DCA, 04/17/08)

When multiple Miranda warnings are provided, the totality of the completeness and legality of the warnings provided will be taken into account in determining whether incriminating statements will be allowed into evidence.

Martelus was in custody for an outstanding warrant for robbery. Officer Franquiz testified that before interrogation commenced he read Martelus his *Miranda* rights from a card that contained the language that Martelus "had the right to have an attorney present during questioning."

In less than an hour of being orally read his *Miranda* rights, Officer Jenkins presented Martelus with a written waiver form that did not advise Martelus of his right to have counsel present during questioning. Martelus then provided a statement to Jenkins. After this statement was taken, Officer Franquiz questioned Martelus about whether "Martelus had read and understood the *Miranda* rights form," to which Martelus answered in the affirmative. After this exchange, Officer Franquiz "took another statement from Martelus regarding the robbery."

Martelus testified at the suppression hearing that Officer Franquiz never verbally advised of him of his *Miranda* rights. The trial court rejected Martelus' assertion and found that the oral rights had been administered. The trial court found that Martelus was actually given two *Miranda* warnings; that he was properly informed of his *Miranda* rights; and while the second failed to inform him of his right to have an attorney present during questioning, that fact "did not take away from the fact that less than an hour earlier Martelus was orally advised of the rights and acknowledged that he understood them."

Martelus argued on appeal that his incriminating statements were not made in response to the legally sufficient (oral) warnings but rather were made in response to the (written) deficient *Miranda* warnings which were administered closer in time to when he gave his statements.

The 4th DCA relied on the Florida Supreme Court's decision in Nixon v. State, 572 So. 2d 1336, 1344 (Fla. 1990), that recognized "[t]here is no requirement that an accused by continually reminded of his rights once he has intelligently waived them." The Nixon court found that the defendant was given full *Miranda* warnings at least four times and while his last warning was an "abbreviated *Miranda* warning," Nixon understood his rights and knowingly and intelligently waived them prior to the challenged statement.

In affirming the decision of the trial court, the 4th DCA concluded that in the instant case, as in the Nixon decision, Martelus "was provided legally adequate *Miranda* warnings which he acknowledged that he understood," and "his receipt of deficient warnings shortly thereafter does not require suppression of his statement."

Martelus v. State, 979 So.2d 1137 (Fla. 4th DCA, 04/16/08)

"Stand your ground" law (F.S. 776.032(1)) provides immunity from prosecution, not just an affirmative defense.

Peterson sought a writ of prohibition to "review an order denying his motion to dismiss based on the statutory immunity established by section 776.032(1), Florida Statutes (2006)." He had been charged with one count of attempted first-degree murder for shooting his brother with a firearm. Prior to trial, he sought to dismiss the information on the ground "that he was immune from criminal prosecution pursuant to section 776.032, Florida Statutes (2006), because the shooting occurred when petitioner's brother assaulted him after having been asked to leave petitioner's home." After considering deposition evidence during a hearing on the matter, trial court concluded that the alleged victim's testimony was "clear and reasonable" and that "prosecution for attempted murder [would not be] precluded as a matter of law because the facts do not establish a self-defense immunity." The trial court denied the dismissal motion finding that "immunity had not been established as a matter of fact or law."

In its analysis, the 1st DCA referred to the "Stand Your Ground" law, Ch. 2005-07, Laws of Fla., which provides "that a person who uses force as permitted in section 776.013 is justified in using such force and is immune from criminal prosecution as well as civil action for the use of such force." The Court found that the Legislature made clear its intent to "establish a true immunity and not merely an affirmative defense." .

The 1st DCA held that "a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches." Further, the trial court applied the correct standard by imposing the same burden of proof as it would in motions for post-conviction relief or motions to suppress. The 1st DCA affirmed the trial court's finding that "immunity had not been established as a matter of fact or law."

Peterson v. State, 983 So.2d 27 (Fla. 1st DCA, 04/23//08)

The "plain feel" pat down exception requires the nature of what is seized to be "immediately apparent" and did not apply to permit warrantless search of defendant's front pants pocket or the seizure of a dollar bill containing cocaine.

Perkins pled *nolo* to possession of cocaine and reserved his right to appeal the trial court's denial of his suppression motion. Perkins argued that the "plain-feel" doctrine does not apply to the cocaine found in his pants pocket during a pat-down following a traffic stop.

During a traffic stop, an officer observed a pocketknife in Perkins front jeans pocket. Perkins was asked twice to keep his hands out of that pocket and twice he did not comply with the officer's request. The officer then conducted a pat-down to search for other possible weapons. While removing the pocketknife, the officer felt another object and testified that he " . . . put his hand back on top of the object and ran the tips of his fingers over the edge of the object and could feel that it was a square object, like a folded piece of paper. He ran his finger tips back over the object, down its side and could feel a large lump in the middle." He believed the lump was cocaine, based on his experience. When he removed the object it was a folded up dollar bill with less than one gram of powder cocaine wrapped inside.

The United States Supreme Court in Minnesota v. Dickerson, 508 U.S. 366 (1993), applied the "plain-feel doctrine and reasoned that because the incriminating nature of the object was not 'immediately apparent' to the officer, who had to conduct a further search in order to determine it was, in fact, contraband, the Court held that the officer's seizure of the contraband violated the Fourth Amendment." The 1st DCA determined that, as in Dickerson, the "plain-feel" doctrine does not apply in the instant case because it was only after the officer's further exploration of Perkins' pocket that he was able to determined the "lump was, in fact, contraband."

Perkins v. State, 979 So.2d 409 (Fla. 1st DCA, 04/23/08)

When "consent" is at issue in motion to suppress, trial court cannot shift burden to defendant to "disprove" consent. Court does not have to believe officers' testimony at suppression hearing even if no defense testimony is offered.

Lewis pled *no contest* to the charges of possession of drug paraphernalia and possession of cocaine after the trial court denied his suppression motion based on Lewis' assertion that the evidence was the product

of an illegal search.

Lewis was stopped at night by Officers Gillette and Oliver for riding a bicycle with no headlight. The officers were patrolling the area as part of a "street level narcotics crime operation." Both sides stipulated that the pat-down was not supported by reasonable suspicion. The trial court found that the initial stop for riding a bicycle with no headlight was valid.

At issue is whether Lewis freely and voluntarily consented to the pat down. Detective Gillette testified that while Lewis was still on the bicycle, Gillette asked him, in a conversational tone, "if he had any guns, weapons, or drugs, or anything else that [Gillette] needed to know about while [Gillette] was talking to him." Lewis answered in the negative. Gillette testified that he followed up by asking, "Just for my safety and yours, while we're standing here talking like this, you mind if I do a quick pat down for any weapons or drugs." Lewis answered, "Yeah, okay."

Lewis straddled the bicycle and spread his arms. While running the palm of his hand over areas where weapons are commonly concealed, Gillette felt "a hard cylindrical object ... over [Lewis's] left front pant pocket." Based on Gillette's knowledge and experience, he immediately thought "it could be a pipe used for smoking crack cocaine." Gillette asked Lewis "what the object was [that he] was feeling" and Lewis responded, "It's a stem." Gillette testified that "stem" is slang for "crack pipe, or a pipe used to smoke crack cocaine."

Gillette removed the object from Lewis's pocket and confirmed that the item was a crack pipe, as it had burn residue and a wire mesh filter. Gillette arrested and handcuffed Lewis. During a search incident to arrest, Deputy Ruggeri found several small bags of a powdered substance which turned out to be cocaine.

Through cross-examination, Lewis's counsel brought out the fact that the arrest affidavit written that night stated that "Detective Gillette *advised* the subject that he was going to pat him down for weapons. The defendant stated okay." (emphasis supplied). Gillette testified that he "did not say to Mr. Lewis 'I'm going to pat you down' " but instead asked whether Lewis had anything on his person about which the officers should know.

Detective Oliver testified that "Detective Gillette asked Mr. Lewis if he has any drugs, weapons or knives on him." Oliver admitted that he did not word the question in the police report as it was actually posed. Oliver explained, "The reason why I used 'advised' instead of 'asked' is ... advised to me is actually asking the Defendant a question ... all my reports are written that way."

Lewis never testified at the suppression hearing. The trial court, when denying the motion to suppress, voiced its concern over the conflicting testimony provided by the officers and expressed its wish that Lewis had testified to clarify what went on at the stop. Lewis' attorney voiced concerns over the shifting of the burden in the suppression hearing, but the trial court indicated it was bound by the testimony presented and evidence before it.

The 4th DCA determined that the trial court did not conduct the necessary fact-finding but merely shifted the burden to the defense to produce some affirmative evidence to disprove the testimony of the officers. The defense did not have that burden, and the trial court erred in failing to weigh the evidence and determine the facts. The Court noted that as explained in *Maurer v. State,* 668 So.2d 1077, 1079 (Fla. 5th DCA 1996), a judge acting as fact-finder is not required to believe the testimony of police officers in a suppression hearing, even when that is the only evidence presented; just as a jury may disbelieve evidence presented by the state even if it is uncontradicted, so too the judge may disbelieve the only evidence offered in a suppression hearing. The case was remanded for reconsideration by the trial judge.

Lewis v. State, 979 So.2d 1197 (Fla. 4th DCA, 04/23/08)

4th DCA determines that U.S. Supreme Court's Knights decision overrules Florida's Soca decision regarding searches of probationer's residence.

Benya's probation order "provided for warrantless searches of the probationer's residence without probable cause." A confidential informant informed the police that Benya was in possession of illegal drugs and had a firearm. The police informed Benya's probation officer that they had a reasonable

suspicion of criminal activity and the probation officer agreed to "set up a search" of Benya's residence with the participation of the police.

On the date of the search, the surveillance team that was already in place watched Benya back his van out of the driveway and park it on the street. As Benya walked back to the residence, the van rolled backwards and hit the vehicle parked behind it and the surveillance team immediately approached Benya and began talking with him about the matter. It was during this mishap that the probation officer and investigating officer arrived and it was then that the officer investigating the matter announced to Benya they were there to conduct a search of his residence. The search resulted in "enough drugs to charge and convict for trafficking and a firearm to charge and convict for possession by a convicted felon." Benya argued that "all of this was a pretense for police officers to do an improper search of his residence without probable cause."

The 4th DCA referred to Soca v. State, 673 So.2d 24 (Fla. 1996), where the Court held "that the evidence obtained in a warrantless search of a probationer's residence by a probation supervisor, although tipped-off and accompanied by a police investigator, was admissible in a probation revocation hearing, even though it would not be admissible in the criminal case unless that search met all the usual constitutional search and seizure requirements."

Subsequent to Soca, the United States Supreme Court in United States v. Knights, 534 U.S. 112 (2001), held that "warrantless searches of a probationer's residence, supported by a reasonable suspicion but not probable cause, are reasonable under the Fourth Amendment." Thus, the evidence seized would be admissible even in resulting criminal prosecutions.

The 4th DCA found that the search of Benya's residence was proper and noted that "[i]n light of Knights, it is no longer necessary for police armed with a reasonable suspicion to go through the subterfuge of having the probation officer perform a routine, 'administrative' search of the residence under the warrantless search provision in the probation order."

Benya v. State, 985 So.2d 578 (Fla. 4th DCA, 04/23/08)

31 baggies of marijuana coupled with detective's statement that he'd never seen someone possess that number of baggies for personal use supports "sale" determination.

Rawlings had been picked up with 31 individual bags of marijuana on him with a total weight of 28.8 grams by veteran narcotics officer, Sergeant Tim Gahn. Sergeant Gahn testified at trial that "he had never known a buyer to purchase more than 5 bags at a time for personal use," that the amount Rawlings was picked up with "was consistent with possession with intent to sell rather than possession for personal use," that he based this conclusion on the "quantity and the amount of money it took to buy the quantity," and that "this was how marijuana was normally packaged for sale and that he'd never seen a person purchase 31 baggies for his personal use."

Rawlings argued that Gahn's testimony "was not enough to meet the State's burden" and cited to Phillips v. State, 961 So. 2d 1137 (Fla. 2d DCA 2007). The Phillips case was similar where the defendant was picked up with 26.6 grams of marijuana packed in ten small baggies and that court determined that the totality of the testimony of the officers was not enough to meet the State's burden since one of the officers also testified the amount was not inconsistent with personal use.

The 4th DCA distinguished Phillips and noted that Gahn's testimony was that "given the amount of marijuana and the facts of the case . . . it was more consistent with possession for sale." Unlike the testimony in Phillips, Gahn also testified that the amount of marijuana found on Rawlings was "inconsistent with personal use." The 4th DCA found "Officer Gahn's testimony sufficient to allow the issue of intent to reach the jury" and to the extent the opinion may conflict with the second district's holding in *Phillips*, the DCA certified conflict.

Rawlings v. State, 979 So.2d 1238 (Fla. 4th DCA, 4/30/08)

Involuntary consent to search residence obtained while officers were in process of getting a search warrant does not require suppression of evidence that, but for the bad consent, was going to be inevitably discovered when the warrant was executed.

Brian and Christopher McDonnell (appellants), appealed the denial of their motions to suppress "evidence recovered from a search of their home and statements they made while in police custody" asserting that "Christopher's consent to search the home was involuntary."

Investigator Mathis testified at the suppression hearing that he was investigating the theft of an ATM from the Bay Point Marriott; he had the tag number of the truck used in the theft of the ATM and that truck was registered to appellants' father. He further testified they also had a video of an earlier crime committed at the Marriott where an employee identified the appellants as the men in that video. The father told Investigator Mathis that his son Eric had the truck. Mathis and other officers went to appellants home at 4:00 in the morning and when Christopher answered the door in a bath towel, Mathis told him they were investigating an ATM theft at the Marriott and asked if "he had anything in the house linking him to the theft."

After Christopher said he did not, Mathis requested permission to search the home and Christopher refused. Mathis "left to obtain a warrant while the other officers stayed behind." Christopher remained on the front porch, in his bath towel, for approximately an hour and a half to two hours. During that time another officer requested and received permission to search the house. A warrant was never obtained and the search revealed "incriminating items linking appellants to a number of offenses."

The trial court denied the motion to suppress the evidence and the statements ruling that "even though a search warrant was never obtained, the police were in the process of getting a warrant, and would have done so because they had sufficient probable cause."

In its lengthy analysis the 1st DCA first noted that it was "undisputed the police did not have a warrant to search the residence" and relied on Christopher's consent to search. However, based on the totality of the circumstances, the 1st DCA concluded that Christopher's consent to search was involuntary. The factors considered in this conclusion were: the hour the encounter took place with four police officers present; the fact that Officer Mathis left to get a search warrant while the other officers remained behind; two requests for permission to search; along with the fact that Christopher was informed that he was a suspect in a criminal investigation, which "exacerbated" any coercive effect of the police presence on his property.

Even though the 1st DCA found Christopher's consent to search was not voluntary, it affirmed the trial court's denial of motion to suppress the evidence and statements based on the "inevitable discovery doctrine." Noting that while the trial court's dismissal never "explicitly" mentioned the doctrine, it did find that "but for Christopher's consent, the police would have obtained a search warrant because sufficient probable cause existed to support the issuance of a warrant."

The 1st DCA stated that the record contained "competent, substantial evidence" to support that "Officer Mathis was in the process of obtaining a warrant when Christopher consented to the search," and the record demonstrated that "probable cause existed upon which a warrant could have been obtained." The 1st DCA held that "[b]ecause the state has shown by a preponderance of the evidence that the search warrant would have been issued based on probable cause, the application of the inevitable discovery doctrine in this case is appropriate." (Also see Conner v. State, 701 So. 2d 441, 442 (Fla. 4th DCA 1977)).

McDonnell v. State, 981 So.2d 585 (Fla. 1st DCA, 5/12/08), *rev. denied* McDonnell v. State, (Fla. 2008)

Prohibited "Question first, warn later" tactic was not present when officer responds to defendants questions prior to administering Miranda. Pre-Miranda statements were suppressed, but post-Miranda statements were allowed into evidence.

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 Missouri v. Seibert, 542 U.S. 600 (2004). He also argued that the trial court erred in admitting his post-Miranda statements. .

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. Kennedy also noted 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." (Citing 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, 983 So.2d 726 (Fla. 1st DCA, 6/10/08)

Administering Miranda warnings does not, alone, convert citizen's encounter into a detention. Okay to frisk a person who is voluntarily entering a police car to be transported to another location.

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.

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. 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, 985 So.2d 602 (Fla. 2nd DCA, 6/06/08)

Detaining a UPS package in transit to submit to canine sniff impacts less of a possessory interest than detaining one's luggage. The delay of the package in transit to conduct the sniff lineup does not infringe the 4th Amendment.

Lindo appealed his conviction and sentence for 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.

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 provided the tracking numbers for the packages. The next day at the UPS facility the two packages 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 (anticipatory) search warrant for the residence where the packages were to be delivered was obtained which authorized the detectives enter the residence once the packages were delivered. 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. 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, 983 So.2d 672 (Fla. 4th DCA, 6/04/08)

"Less than perfect" administration of Miranda rights still found to be sufficient to allow defendant's statement to be use against him.

Roman, a minor at the time of the incident, and several adults were under investigation for serious charges including murder, attempted murder, kidnapping and sexual battery. Roman gave a detailed statement to the police describing the events surrounding the crime and 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 trial court suppressed Roman's statements on the basis of insufficient Miranda warnings, and the state appealed. The 3rd DCA noted that "there is some support for the trial court's finding that obtaining the written waiver was 'perfunctory at best.'" However, this did 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.

Based on the totality of the circumstances, the 3rd DCA found that even though the administration of Miranda rights was less than perfect, the overall circumstances demonstrated that the waiver of the Miranda rights was knowing, intelligent, and voluntary, and the DCA reversed the trial court's suppression of Angel's statements.

State v. Roman, 983 So.2d 731 (Fla. 3rd DCA, 6/11/08)

Abandonment of evidence during consensual citizen encounter means subject cannot complain that evidence was unlawfully seized or searched.

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 the trial court's suppression of the evidence and Matul's statements. 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, 984 So.2d 611 (Fla. 4th DCA, 6/11/08)

Reasonable belief is all required to seize evidence in open view. Officers do not have to "know" the item is contraband. 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.

During the course of a traffic stop, the officer noticed the subject had a white powdery substance under his nose, that the vehicle registration papers and the vehicle did not match, and that the subject was

nervous. He called for backup. As the encounter continued, the subject was asked to step from his vehicle, at which time two officers noticed a white powdery substance on the dark leather seat. Both identified it from their training to be cocaine. A field test confirmed their suspicion. The trial court suppressed the cocaine and evidence obtained after its discovery, on the basis that the officers did not "know" the substance was cocaine so they had no probable cause to arrest the subject ("…"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.")

The 5th DCA reversed the suppression order. The Court noted that 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 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.'" Citing Walker, 729 So. 2d at 464.

State v. Fischer, 987 So.2d 708 (Fla. 5th DCA, 6/13/08)

Faulty assumption by non-Spanish-speaking officer that consent had been provided during subject's Spanish conversation with another officer dooms entry into house and subsequent discovery of evidence.

Herrera-Fernandez appealed his trafficking in marijuana conviction, claiming the entry into his residence that resulted in the discovery and seizure of the evidence leading to his conviction was not by reason of consent and that the trial court erred in not suppressing the evidence.

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 Detective was indicating the smell of live marijuana was so overwhelming it ended the need for more conversation.

After Herrera-Fernandez was cuffed, the officers then conducted a protective sweep, during which time they discovered a large amount of marijuana growing in the garage." Without securing a warrant, officers seized over 10,000 pounds of cannabis 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."

The DCA reversed the trial court, and indicated the entry into the residence was not lawful. "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). 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, 984 So.2d 644 (Fla. 4th DCA, 6/18/08)

Miranda rights are not investigation-specific. If person is in custody and invokes his rights, that invocation must be honored. Defendant who invoked his Miranda right to counsel after refusing to submit to a mandatory breath test could no longer be questioned by police officers on any matter, and officers' initiation of contact with defendant after he invoked his right created a presumption of coercion in defendant's subsequent waiver of his Miranda rights.

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.

The 3rd DCA affirmed the trial court's suppression of Thompson's confessions given that following day. "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 since no "interrogation" is taking place." It characterized Thompson's invocation of his right to an attorney as "an anticipatory and ineffective invocation of his right to counsel, because he was not being interrogated."

The 3rd DCA determined that "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 after he asked for an attorney, and this contact created that presumption of coercion.

State v. Thompson, 987 So.2d 163 (Fla. 3rd DCA, 7/16/08)

Defendant, who was formally charged and represented by counsel, was placed in company of undercover cop pretending to be a "hit man." Solicitations to kill victim and witness in the pending case are inadmissible in evidence.

Sosnowsky appealed his conviction of attempted second degree murder arguing the "court erred in admitting appellant's conversations in which he solicited an undercover officer to kill the victim and another witness."

The record revealed that following his arrest and while he was an inmate, Sosnowsky tried to arrange, through a cellmate, to have the victim and witness in the instant case killed. The cellmate actually placed Sosnowsky in touch with an undercover officer who portrayed himself as a hit man. Sosnowsky solicited the officer to commit murder and the conversations were taped. While the solicitation was not the charge in the instant case, the trial court admitted the taped conversations over Sosnowsky's objections.

The 4th DCA referred to the decision in Massiah v. United States, U.S. 201 (1964), where the Supreme

Court held "that incriminating statements elicited by a government agent outside the presence of counsel cannot be admitted in evidence." The Court noted that Sosnowsky was represented by counsel at the time he made those statements to the undercover officer. The 4th DCA held that those statements were not admissible. Further, the gun that was recovered because of those statements was not admissible as fruit of the poisonous tree. The 4th DCA reversed and remanded the case for a new trial.

Sosnowsky v. State, -- So.2d --, (Fla. 4th DCA, 7/30/08) 33 Fla. L. Weekly D1881,

Search warrant affidavit as follow up to a controlled buy at grocery store parking lot was deficient. Link between the controlled buy and residence was speculation.

Dyess, arrested after a controlled buy took place in a grocery store parking lot, appealed the denial of his dispositive motion to suppress arguing "that the controlled buy was not sufficiently controlled to support issuance of a search warrant and that no probable cause exists to support a search warrant for a home."

After the controlled buy in the parking lot, Officer Hausner arrested Dyess and completed an affidavit to obtain a search warrant for the property at 2314 Truman Avenue. Two trailers were located on the property; one supplied by FEMA and the other unlivable. The affidavit alleged that the premises were occupied by or under Appellant's control and that officers had observed Appellant leaving the residence to go to the controlled buy. The affidavit also chronicled Dyess' activities following the controlled buy, including the search of Dyess' vehicle, incident to his arrest, where 20 grams of marijuana were found. The money given to Dyess in the controlled buy, in exchange for the 28 grams of cocaine sold to him, was not located in the vehicle. The affidavit further stated that Dyess denied being at 2314 Truman Avenue, however, the officers found keys to both trailers in Dyess's pockets.

Officer Hausner averred in his affidavit that he had reason to believe that certain items of contraband were on the premises and provided a laundry list of items he believed would be found. The 1st DCA concluded that the controlled buy clearly provided probable cause to search the site of the sale. However, "the controlled buy did not provide probable cause to search the residence, because the facts, as alleged in the supporting affidavit, did not establish a fair probability that the laundry list of items to be searched for would be found there." The 1st DCA determined that the inference that other drugs and paraphernalia might be found in the residence, "is nothing more than speculation," as such, "the supporting affidavit does not provide probable cause to search the Truman Avenue home."

Further, the good faith exception to the exclusionary rule did not apply "because the supporting affidavit here fails to establish a nexus between the objects of the search and the residence to be searched." The 1st DCA reversed the conviction and sentence of Dyess, holding that his suppression motion should have been granted.

Dyess v. State, --So.2d.--- (Fla. 1st DCA, 8/04/08) 33 Fla. L. Weekly D1908

"Fear" element of robbery can be proven circumstantially. Test is whether a reasonable person would be afraid, not whether the victim was actually afraid.

In reviewing an appeal, including the state's argument that one count of robbery was inappropriately dismissed, the 1st DCA held that in determining whether a victim was put in fear in the course of a taking, the question is whether the circumstances surrounding the incident would cause a reasonable person to be afraid, not whether the victim was actually afraid. *See Cliett v. State*, 951 So. 2d 3, 4 (Fla. 1st DCA 2007); *Magnotti v. State*, 842 So. 2d 963, 965 (Fla. 4th DCA 2003); *Woods v. State*, 769 So. 2d 501, 502 (Fla. 5th DCA 2000); *State v. Baldwin*, 709 So. 2d 636, 637 (Fla. 2d DCA 1998). At trial, the first victim testified and directly established the "fear" element, but the second victim did not testify. The two counts of robbery were based on the same incident. After the jury returned a verdict of guilty on both counts, upon motion the court dismissed the second (non-testifying) victim's robbery count on the basis that "fear" had not been directly established. The Court found that the facts surrounding the offenses at issue, as testified to by the victim identified in Count I, would cause, as the jury found, a reasonable person to be afraid. As such, it matters not that the victim identified in Count II did not testify. *See Johnson v. State*, 888 So. 2d 691, 692 (Fla. 4th DCA 2004) (holding that the fact that the victim of the aggravated assault did not testify and, thus, could not describe or articulate any fear did not bar a conviction because the jury could find that a reasonable person under the circumstances present in the case would be afraid and that the victim was, in fact, in fear); *L.R.W. v. State*, 848 So. 2d 1263, 1266 (Fla. 5th DCA 2003) (noting that

the victim did not testify but holding that the trial court could conclude that the appellant's actions would put a reasonable person in fear); *McClain v. State*, 383 So. 2d 1146, 1147 (Fla. 4th DCA 1980) (holding that there was no requirement that a victim in an assault actually testify as to his or her own state of mind with respect to whether or not he or she was afraid). The DCA remanded, with instructions to reinstate the jury's verdict on Count II.

Thomas and Colson v. State, ---So.2d ----, (Fla. 1st DCA, 9/4/08) 33 FLW D2117b

Running when seeing police in high-crime area provides basis for an investigative detention. Continuing to run after being ordered to stop is resisting an officer without violence.

C.E.L. is a 16 year old African-American male. When first observed by officers who were responding to a "high crime area" after a report of drug dealing, nothing C.E.L. was doing provided the officers to make a Terry stop. As noted in the concurring opinion, C.E.L. was standing with one other teenager in the public area of an apartment complex. The apartment complex is in a neighborhood immediately northwest of University Square Mall in Hillsborough County. The neighborhood is sometimes referred to as "suitcase city" and is locally regarded by law enforcement as a "high-crime neighborhood." This teenager lives with his mother about a mile from where he was arrested. The "high-crime neighborhood" is where he lives.

The two deputies involved in this arrest arrived at the apartment complex at 8:50 p.m. They got out of their car wearing vests with the words "Sheriff's Office" appearing on them. When the two teenagers saw the deputies, the teenagers ran. Under the U.S. Supreme Court's decision in Illinois v. Wardlow, 528 U.S. 119 (2000), because of the nature of the neighborhood in which these teenagers live, their decision to run created a reasonable suspicion of criminal activity sufficient to then justify a Terry stop. Thus, once the teens ran, the deputies were legally authorized to order the two teenagers to stop. After being ordered to stop, the teens continued to run. C.E.L. was ultimately apprehended and it was determined that there was a warrant outstanding for his arrest. C.E.L. was charged with obstructing or opposing an officer without violence for running after being ordered to stop.

On appeal, C.E.L. contended that the circuit court's denial of his motion for judgment of dismissal was erroneous because the State failed to prove that his flight obstructed the officers in the performance of their legal duties. Based on D.T.B. v. State, 892 So. 2d 522 (Fla. 3d DCA 2004), and J.D.H. v. State, 967 So. 2d 1128 (Fla. 2d DCA 2007), C.E.L. argues that "the flight cannot be both the basis for the detention and the obstruction itself" and that C.E.L. "did not obstruct any duty [the officers] were performing when he fled because the officers had no grounds to detain [C.E.L.] *before* he fled."

The 2nd DCA noted that F.S. 843.02 provides that "[w]hoever shall resist, obstruct, or oppose any officer . . . in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree." The threshold for establishing the commission of an offense under this statutory provision is that the officer be in the "lawful execution" of a "legal duty." The Court continued by noting that flight in knowing defiance of a law enforcement officer's lawful order to stop constitutes an act of resisting, obstructing, or opposing an officer in the lawful execution of a legal duty. For example, in D.M. v. State, 681 So. 2d 797 (Fla. 2d DCA 1996), circumstances where the defendant fled from an officer attempting to carry out an investigative detention were addressed. In that case the 2nd DCA held that to establish the commission of an offense under section 843.02, "the state must establish that [(1)] the defendant fled with knowledge of the officer's intent to detain him and [(2)] the officer was justified in making the detention due to his founded suspicion that the defendant was engaged in criminal activity." 681 So. 2d at 798; *see also J.R.P. v. State*, 942 So. 2d 452, 453-54 (Fla. 2d DCA 2006); *F.E.C. v. State*, 559 So. 2d 413, 414 (Fla. 2d DCA 1990).

The 2nd DCA held that a defendant who flees from the police is culpable under F.S.843.02 if (a) a law enforcement officer issues a lawful order to the defendant to stop, (b) the defendant has knowledge of the order and that it is issued by a law enforcement officer, and (c) the defendant refuses to obey the order.

The court receded from its previous case, J.D.H. v. State, 967 So. 2d 1128 (Fla. 2d DCA 2007): "…Contrary to our statement in J.D.H., we now conclude that an offense under section 843.02 is committed by a person fleeing the police who defies a lawful order to stop even if the justification for detaining that person does not exist before he initially flees from the police. Accordingly, we hold that the

evidence against C.E.L. was sufficient because the police command to stop was issued in the lawful performance of a legal duty and C.E.L.'s knowing defiance of the command was an act of resisting, obstructing, or opposing an officer. We now recede from our decision in *J.D.H.* to the extent it is inconsistent with our decision here. It is of no consequence that the police lacked a justification for detaining C.E.L. before his initial flight from them. And it is of no consequence that the initial flight was not a crime. Once the police obtained justification based on Wardlow to stop C.E.L. and acted pursuant to that justification, C.E.L. was required to comply. Although the mere act of running from the police was not an offense under section 843.02, once a lawful command to stop had been issued by an officer, knowing defiance of that command was such an offense…."

The effect of the Court's opinion is that even if officers have no legal justification to detain a person when they first encounter them in a high crime area, if the person runs upon seeing the officers, the officers order the person to stop, and the person continues to run with knowledge that he has been ordered to stop, it is a violation of F.S. 843.02. Is makes no difference that the initial flight itself was no crime.

The concurring opinion of Judge Altenbernd noted that "…Under *Wardlow*, because of the nature of the neighborhood in which these teenagers live, their decision to run created a reasonable suspicion of criminal activity sufficient to justify a *Terry* stop. Thus, the deputies were legally authorized to order the two teenagers to stop. Because the teenagers did not stop running when ordered to do so, this court now concludes that the teenagers committed the misdemeanor of resisting an officer without violence under section 843.02. In the span of a few seconds and perhaps seventy-five feet, the teenagers were transformed from free persons protected by the Fourth Amendment into misdemeanants subject to arrest.

"If these teenagers lived on Bayshore Boulevard in Tampa, or in Carrollwood or Temple Terrace, they would have been free to run when they saw the deputies. Running would not have created a basis for a Terry stop or the foundation for a misdemeanor. But these teenagers are poor and live in a 'high-crime neighborhood.' There are no signs telling these teenagers that the neighborhood is a region with reduced Fourth Amendment rights. This neighborhood is classified as a 'high-crime neighborhood' not by some objective statistical measurement, but by the subjective testimony of individual law enforcement officers…It is likely that almost all judges in Florida live in neighborhoods unaffected by this court's holding today." The Judge observed that any experienced officer could likely order a teenager to stop in a manner to provoke the teen to run away, and expressed concern that the opinion gives officers the ability to arrest virtually any teen at will in a bad neighborhood.

C.E.L. v. State. – So.2d—(Fla. 2nd DCA, 9/5/08) 33 FLW D2120a

Fleeing from officers gave them basis to arrest defendant. It is irrelevant that after stopping him they arrested him prior to a K-9 "alert" on his vehicle confirming presence of drugs.

The State of Florida appealed a trial court order suppressing some seventy pounds of marijuana seized by police from a motor vehicle in the possession of the defendant, Raul Herrera, on the ground that the seizure was incident to an illegal arrest. On June 20, 2001, Herrera was arrested by Miami-Dade County police in the parking lot of a Home Depot at a local shopping center. The arrest was the culmination of a day's work by a confidential informant and police, during which the informant had fingered Raul Duarte as a local drug dealer. The informant and Duarte agreed to consummate a deal at the location. Duarte told the informant the drugs would be in a Toyota 4Runner, and that he would be following in his personal vehicle. As it turned out, Herrera was the driver of the 4Runner. Police stopped Duarte as the two vehicles approached the Home Depot. There was no contraband in Duarte's car. Before police could stop the 4Runner, Herrera parked his vehicle and went into the store.

Several hours later, Herrera emerged from the store. Again before police could stop Herrera, he entered the car and began driving away. When police activated their emergency lights to signal him to stop, Herrera tried to outrun the authorities, running over two curbs and crossing a mall entryway before he finally was detained. The officers handcuffed him and held him until a narcotics detection dog arrived. After the dog alerted to a small quantity of marijuana in the front console and a much larger quantity in two black duffel bags in the backseat, Herrera was charged with trafficking in marijuana.

On appeal, the State argued the police had a founded suspicion the defendant was engaging in illegal activity at the time the police vehicle activated its emergency lights, and by fleeing, the defendant committed the crime of resisting an officer without violence, a violation of F.S. 843.02, giving police probable cause to arrest the defendant. The cascading of these events, argues the State, gave the police the right to search the vehicle.

Examining this series of events in the order argued by the State, the first and most critical question is whether the police had a reasonable articulable suspicion that illegal activity was afoot at the time they sought to stop Herrera. In making this determination, courts "look at the cumulative impact of the circumstances perceived by the officers." The DCA found that the day's events justified the stop. On the morning of the stop, the confidential informant, who previously had provided "good information" to authorities, advised Miami-Dade police that he knew a subject by the name of Raul Duarte, who had come by a large quantity of marijuana that he wanted to sell. Police responded to Duarte's residence and began to surveil him. Shortly thereafter, Duarte called the confidential informant and asked to meet him at a nearby gas station. After the call, officers saw Duarte leave his residence and tailed him to a nearby strip mall, where he retrieved a large shopping bag and placed it in his car. As Duarte was returning from the strip mall, officers conducted a traffic stop and search of Duarte's person and vehicle. The search revealed no contraband and Duarte was released. Because police knew Duarte had no contraband, they ordered the confidential informant to cancel the meeting. Duarte then went to another residence, apparently unaware he was still being tailed by police.

At this residence, police observed Duarte in the front yard, speaking with the confidential informant. Herrera was standing there with him. Duarte told the informant he had the narcotics and requested that the confidential informant meet him there. Police ordered the informant to change the location of the deal to a nearby shopping center. Duarte agreed and told the informant that two cars would proceed to the mall, and that the drugs would be in a gray Toyota 4Runner with Duarte following in a separate vehicle. There was not a scintilla of difference between what the informant said would happen and what did happen. Both vehicles proceeded from this residence to the mall where the takedown occurred. Viewing the circumstances as known to the police at the time they commenced the execution of the stop in this case, the court found inescapable the conclusion that the police had a founded suspicion to conduct an investigatory stop of the 4Runner.

Noting that the trial court dismissed Herrera's charges on the basis that he was arrested before the drug sniff confirmed the presence of drugs in his vehicle, the DCA found the trial court's actions to be in error. Although the police decided to conduct a dog sniff before seizing the drugs, the dog sniff was legally irrelevant to both the arrest of the defendant and the seizure of the drugs. The defendant was subject to arrest at the moment he began to flee. *See* F.S. 843.02. It is not necessary that the underlying criminal activity providing the basis for the arrest result in a charge or conviction; it is only necessary that the officer has a founded suspicion of criminal activity to make the detention. Upon his lawful arrest, the police had authority to search the vehicle.

Florida v. Herrera, -- So.2d—(Fla. 3rd DCA, 9/3/08) 33 Fla. L. Weekly D2108a

Owner of apartment did not have authority to consent to search of live-in boyfriend's personal duffle bag stored in apartment closet.

Evans was convicted of attempted robbery with a firearm, aggravated battery with a firearm causing great bodily harm, and aggravated assault with a firearm. The evidence showed that Evans entered an Xpress Food Mart intending to rob it and fired a handgun at least twice, wounding the cashier. A passing motorist heard gunshots and observed a man jump into a red car. The motorist followed the car to an apartment complex and notified the authorities. Using a canine, the officers tracked Evans to apartment #5503 and also learned that the red car belonged to Sharon Dorsey, who loaned it to Evans that evening. Evans had been living in Dorsey's apartment for about a month.

The police went to Ms. Dorsey's apartment, #5515, within the same complex. Ms. Dorsey consented to a search of her apartment. She told the officers that Evans kept his duffle bag in her children's bedroom closet, but that he slept on the sofa, and there was no space in the apartment that was exclusively his. When the officers searched the closet, they found a .22 caliber handgun, which ballistic tests later determined to be the gun fired at the scene. They also found Evans' duffle bag. Although Dorsey told the

officers that the duffle bag belonged to Evans, the officers relied on her consent to search his bag. (At the suppression hearing, Dorsey testified that Evans never told Dorsey that she could go into his duffle bag, nor did she assure him that she would not go into it, although, as an ethical matter, she and her children would not go through his belongings without permission. She believed that, as the homeowner, she had the right to consent to a search of the bag.)

The search of the duffle bag uncovered a partially loaded handgun magazine, a wool ski mask, and an ID. Evans moved to suppress the evidence found in the duffle bag because Dorsey did not have express or apparent authority to consent to its search. The trial court denied the motion to suppress, ruling that Dorsey had the authority to consent to the search of the duffle bag because it was in her home and under her care, custody, and control.

The 5th DCA noted that Dorsey's comment to the officers that the duffle bag belonged to Evans put them on notice to make further inquiry sufficient to establish that she had both common control over the property and mutual use of it, and that the search of the duffle bag was based upon faulty consent from Dorsey. The Court held that the officers' search of Evans' duffle bag was unreasonable because Dorsey did not have common control or mutual use of it, and, therefore did not have apparent authority.

Evans' victory was hollow, however, since the Court found failure to suppress the evidence from the duffle bag to be harmless error. Absent the contents of the duffle bag, the evidence at trial included the convenience store employee's positive identification of Evans and the eye witness's report of the gunshot, getaway vehicle, and its destination. The red car's description then led the canine unit to Evans and the vehicle's owner, with whom Evans had been living. Finally, the officers found in the closet Evans shared the .22 caliber handgun which ballistic tests established as the firearm used in the robbery. His conviction was affirmed.

Evans v. State, ---So.2d--- (Fla. 5th DCA, 9/5/08) 33 FLW D2119a

INSERTED AS DISCUSSED ON 11/19—

→"Goodfellows" email on HR 218. South Dakota prosecutes cop despite HR 218. Was charged with carrying concealed firearm into bar, which is prohibited for everyone under SD law. Misdemeanor. "Bad guy" bikers versus
"Law Enforcement Officer" bikers altercation at bar. According to my sources in SD, charges have been dropped. Case was not SD saying HR 218 is not law. It was based on the SD state prohibition of concealed weapons in bars.

→Flying armed. As of 11-15-08 your agency must contact TSA via NLETS and get unique alpha-numeric number for your flight. TSA sends it back via NLETS. The NLETS message plus your agency's letter, signed by agency head, will allow you to fly armed. Failure to present NLETS will cause delay in clearing you for flight. Ultimately, the NLETS approach will be used and requirement of agency letter will likely end. See TSA info, on following pages.

FDLE Case Law Updates 08-1 through 08-09 are attached.

Updated Procedures for State and Local LEOs Flying Armed

On November 15, 2008 the Transportation Security Administration (TSA) will begin transition to a National Law Enforcement Telecommunications System (NLETS) message for State and local law enforcement officers (LEOs) flying armed. The NLETS message sent by the employing agency will be in addition to the current Original Letter of Authority, signed by the Chief or agency head, required under 49 CFR § 1544.219. This change is being implemented to provide a more secure means of confirming the identity of LEOs.

Once the NLETS message is received by TSA, a return NLETS message will be sent to the employing agency with a Unique Alphanumeric Identifier for verification at the airport on the day of travel.

Failure to use the NLETS message in addition to the Original Letter of Authority may result in delays due to the additional verification requirements during the transition period. After the transition period the use of the Nlets message, in lieu of the letter, will become mandatory.

Frequently Asked Questions

Sample Employing Agency Nlets Message to TSA

Sample Message Returned to LEO for Day of Travel

Nlets Advisory Message (Part One) Transmitted November 7, 2008

Nlets Advisory Message (Part Two) Transmitted November 7, 2008

STATE AND LOCAL LEOS FLYING ARMED FREQUENTLY ASKED QUESTIONS

What are the requirements for a State or local Law Enforcement Officer to fly armed?

The Requirements for a LEO to fly armed aboard commercial aircraft are outlined in 49 CFR § 1544.219 *Carriage of Accessible Weapons*. The complete text of this section can be found on-line at the Government Printing Office web site at: http://www.gpoaccess.gov/cfr/.

Unless otherwise authorized by TSA, to fly armed a LEO must;

- Be a Federal law enforcement officer or a full-time municipal, county, or state law enforcement officer who is a direct employee of a government agency.
- Be sworn and commissioned to enforce criminal statutes or immigration statutes.
- Be authorized by the employing agency to have the weapon in connection with assigned duties.
- Completed the training program "Law Enforcement Officers Flying Armed."

What are the procedures for a State or local Law Enforcement Officer to fly armed?

1. Have the operational need to fly armed.
2. The LEO's employing agency transmits a properly formatted message, via Nlets, to ORI VAFAM0199.
3. An Nlets receipt, with Unique Alphanumeric Identifier, is transmitted from the Transportation Security Operations Center (TSOC) to the LEO's employing agency.
4. On the day of travel the LEO checks-in with the airline ticket counter, identifies his/herself and presents the Original Letter of Authority from his/her Chief or Agency Head. The LEO fills out the armed traveler paperwork provided by the airline and proceeds to the Armed LEO Screening Checkpoint.
5. At the Armed LEO Screening Checkpoint the LEO provides the Unique Alphanumeric Identifier from the Nlets message and displays his/her badge, credentials, boarding pass, a second form of government identification, and required airline paperwork, commonly referred to as Person Carrying Firearms (PCFA) forms.
6. The LEO will complete the LEO Logbook and proceed to his/her boarding gate.
7. At the boarding gate the LEO will provide the airlines armed traveler paperwork and inform the gate agent of his/her presence and status.
8. The LEO then meets with the Pilot in Command, Federal Air Marshals, Federal Flight Deck Officers, and/or other Law Enforcement Officers onboard the flight as directed.

When should the Nlets message regarding armed State or local LEO travel be submitted?

It is recommended that agencies transmit the Nlets message a minimum of 24 hours prior to travel to ensure routing of the information prior to day of travel.

What if a LEO has not submitted an Nlets message but does have the Original Letter of Authority from his Chief or Agency Head?

The designated LEO checkpoint personnel will ask the LEO to contact his/her employing agency and have an immediate Nlets request transmitted to ORI VAFAM0199. If the Nlets message Unique Alphanumeric Identifier cannot be provided, additional verification steps will be required which may cause delays.

After the period of transition, use of the Nlets message will become mandatory.

What happens if a LEO advises that his/her employing agency sent an Nlets message but does not know the Unique Alphanumeric Identifier?

The LEO will be asked to contact his/her employing agency to obtain the Unique Alphanumeric Identifier.

If unable to contact his/her employing agency, verification using the Original Letter of Authority is authorized during the transition period; however, a delay may occur due to the additional verification steps.

After the transition period the Original Letter of Authority will no longer be accepted.

What happens if a LEO has the Nlets alphanumeric ID number without a signed letter of authority from his/her chief?

During the transition period the Original Letter of Authority remains a regulatory requirement and will be required at check-in by the air carrier.

Does the Nlets message replace the requirement to notify the Air Carrier of the LEO's intent to fly armed or complete the required paperwork?

No. LEOs with an operational need to travel armed must present acceptable credentials as outlined in 49 CFR § 1544.219 to the Air Carrier. In addition, LEO's must present an Original Letter of Authority and complete any required airline paperwork, commonly referred to as Person Carrying Firearm forms (PCFA).

What is the three letter airport code that is required in the Nlets message and where can I find these codes?

The airport code is a three letter designator for a commercial airport. These are the codes that airlines and pilots use to identify airports and are used in timetables, baggage tags, tickets, advertisements, airline and global reservation systems. There are approximately 9000 codes currently in use.

The three letter airport code can be found on the airlines website, on travel itineraries, or by searching the internet.

The below link will redirect you to the Federal Aviation Administration's page where searches for three letter airport codes can be made.

http://www.faa.gov/library/glossaries/

What if a LEO experiences an unexpected itinerary change (weather, delays, re-routing)?

If the change(s) do not affect the Date of Travel, the existing Nlets message will be accepted as long as the LEO is traveling through the same airports.

If the Date of Travel or airport information changes, a new Nlets message will be required.

What information should be entered into the EIT (Escorted Individual Type), EIN (Escorted Individual Name), or CAP (Connecting Airport) fields if a LEO is not escorting a dignitary/transporting a prisoner or traveling through a connecting airport?

The EIT, EIN and CAP fields, if not applicable, may be omitted from the message.

NOTE: Sample message is deleted since this document is a public record. –M. Ramage

* * * *

NLETS ADVISORY MESSAGE (PART TWO) TRANSMITTED NOVEMBER 7, 2008

UNKNOWN.VAFAM100-00005874 NLETS 20081107 15:10:54 20081107 15:10:53
TS
CTL/
ATN/

AM.VAFAM0102
13:14 11/07/2008 00433
TXT (AP)
* Powered by NLETS *

REQUEST FOR NATIONAL BROADCAST

NLETS: (TO LAW ENFORCEMENT GROUPS ONLY)

INSTRUCTIONS FOR STATE AND LOCAL LAW ENFORCEMENT OFFICERS (LEOS) FLYING ARMED.

EFFECTIVE NOVEMBER 15 2008, FOR STATE OR LOCAL LEO TO FLY ARMED THE EMPLOYING AGENCY MUST SEND AN NLETS ADMINISTRATIVE MESSAGE TO THE LEO FLYING ARMED ORI: VAFAM0199.

A RECEIPT, WITH UNIQUE ALPHANUMERIC IDENTIFIER, WILL BE RETURNED FROM TSA TO THE EMPLOYING AGENCY. THIS IDENTIFIER SHALL THEN BE VERIFIED AT THE AIRPORT ON THE DAY OF TRAVEL.

IN ADDITION TO THE UNIQUE ALPHANUMERIC IDENTIFIER, LEOS MUST CONTINUE TO PROVIDE THE ORIGINAL LETTER OF AUTHORITY UNTIL OTHERWISE NOTIFIED. THEREAFTER, THE USE OF THE NLETS MESSAGE, IN LIEU OF THE LETTER, WILL BECOME MANDATORY.

FAILURE TO PROVIDE THE UNIQUE ALPHANUMERIC IDENTIFIER MAY RESULT IN DELAYS DUE TO THE ADDITIONAL VERIFICATION REQUIREMENTS.

SAMPLE AGENCY MESSAGE TO TSA (NOTE: OMITTED SINCE THIS FDLE HANDOUT IS PUBLIC RECORD – M. RAMAGE)

* * * *
Please distribute this message to all law enforcement officers and agencies, particularly those operating in and around airports in the United States. Chiefs of Police, sheriffs and law enforcement agency administrators are requested to distribute this message accordingly. If you have questions or comments regarding the Law Enforcement Officer Flying Armed program please contact the Federal Air Marshal Service, Office of Flight Operations, Liaison Division at LEOFA@dhs.gov.

ROBERT S. BRAY
ASSISTANT ADMINISTRATOR, OFFICE OF LAW ENFORCEMENT
DIRECTOR, FEDERAL AIR MARSHAL SERVICE

OFFICE OF GENERAL COUNSEL

FLORIDA CASE LAW UPDATE 08-01

Case: Board of County Commissioners of Highlands County vs. Colby, 2nd DCA, 2008 WL 199888

Date: February 4, 2008 (Opinion filed January 25, 2008)

Subject: Charging for Labor Costs for Responding to Public Records Requests

FACTS:

Preston Colby presented a request to Highlands County for certain public records. The county administrator believed that handling the request would involve "extensive" "labor cost" and required Colby to pay a special service charge in advance based on the administrator's estimate of that cost, based on §119.07(4)(d)[1]. The county calculated the service charge by multiplying the employee's salary and benefits by the estimated time for response, in this case 4 hours. The County defined "extensive" as a request that would "take more than 15 minutes to locate, review for confidential information, copy and re-file the requested material", a standard derived from *Florida Institutional Legal Services, Inc. v. Florida Department of Corrections*, 579 So.2d 267 (Fla. 1st DCA 1991).

Colby filed suit against the County and argued that because he only wanted to inspect the records, he should not have been assessed the special service charge. Furthermore, he argued that the County should not include employee benefits when calculating the labor cost for the service charge.

The trial court agreed in part with Colby, ruling that the benefits could not be included as part of an employee's labor cost. The court impliedly agreed with the County however, that the service charge could be assessed and collected in advance.

RULING:

In a clear, easily understood opinion, the district court ruled that the plain meaning of the term "labor cost" as used in §119.07(4)(d) includes benefits as well as salary. The court also pointed out that the language of the statute on its face states that the special service charge may be assessed for inspection or copying.

Finally, the court ruled that collecting a deposit in advance is permissible as long as "it is reasonable and based on the labor costs . . . actually incurred by or attributable to the County." The statutory requirement of reasonable charges based on actual costs with enforcement by the courts should be sufficient to prevent any abuse by governmental entities.

Steve Hurm
Regional Legal Advisor
Florida Department of Law Enforcement

[1] F.S. 119.07(4) If a fee is not prescribed by law, the following fees are authorized:
(d) If the nature or volume of public records requested to be inspected or copied pursuant to this subsection is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or both, the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both.

Case: Kollmer vs. State, 33 Fla. L. Weekly D833a, 1st DCA

Date: March 26, 2008 (Opinion filed March 25, 2008)

Subject: Investigatory stops; show-ups; relocating subject

FACTS:

Late one night in June 2006, Benjamin Kollmer burglarized a car owned by a man named Paris and stole some property. Mr. Paris saw Kollmer as he ran away. The Jacksonville Sheriff's Office (JSO) was called and one of the responding officers saw a white male run into a wooded area. A K-9 was used to follow the running man's scent, and found Kollmer lying on the ground. JSO officers handcuffed Kollmer and transported him in a police car back to the scene of the burglary where he was identified as the burglar by Mr. Paris.

Kollmer moved to suppress the identification by Mr. Paris and the motion was denied by the trial judge. Kollmer then entered a guilty plea, reserving his right to appeal the denial of the suppression motion. On appeal, he argued that the officers violated his Fourth Amendment right against unreasonable seizure by handcuffing and transporting him to the burglary scene where Mr. Paris was waiting.

RULING:

The district court reversed, agreeing with Kollmer that he should not have been moved from the location he was found by the K-9. The court summarized the three types of police-citizen contacts: consensual encounters, which by their nature do not involve constitutional safeguards; investigatory stops for which reasonable suspicion is required; and arrests, which require probable cause.

Kollmer's case was an investigatory stop, and the court said that police definitely had reasonable suspicion to justify his detention. However, the officers exceeded the scope of the investigatory stop when they moved Kollmer to the burglary scene for a show-up with Mr. Paris. The court pointed to the language of F.S. §901.151(3) that states the temporary detention authorized in an investigatory stop "shall not extend beyond the place where it was first effected or the immediate vicinity thereof." Because officers moved Kollmer out of the immediate vicinity of the investigatory stop, the subsequent identification should have been suppressed and Kollmer's conviction was reversed.

NOTES:

This case is a great refresher regarding investigatory stops and show-ups. The general rule with show-ups is to take the witness to the suspect, not the other way around. Apparently, the prosecution did not argue that police had probable cause to arrest Kollmer, as noted by the court: "The State does not contend it had probable cause to arrest appellant at that time, nor does it suggest appellant consented to be transported." As a general rule, moving a person involuntarily from a point of detention to another location means that person is under arrest, which must be supported by probable cause. Unless probable cause is clear, officers should not move a suspect from the immediate area where he or she is temporarily detained.

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Case: Caldwell v. State, 2nd DCA, 2008 WL 2312627

Date: June 23, 2008 (Opinion filed June 6, 2008)

Subject: Impact of Miranda warnings and frisk on consensual encounter

FACTS: A condominium security camera videotaped a car burglar sufficiently for police to determine it was a slightly built white male, wearing dark pants, a dark shirt and a dark baseball cap worn backwards. The next day, a St. Petersburg police officer saw Caldwell in a park and noted that he looked similar to the person in the video. He approached Caldwell and asked to speak to him. The officer told Caldwell that he had seen the videotape of the car burglaries and knew Caldwell had committed them. Caldwell denied it. The officer then read Caldwell his Miranda rights, but assured him he was not under arrest. Caldwell asked if he could see the videotape and the officer offered to drive him to the condominium to view it. Caldwell accepted the offer and the officer told him he had to frisk him before he could ride in the car. Caldwell did not object; the officer found nothing incriminating during the frisk. The officer and Caldwell rode to the condominium in the patrol car, and the officer stated again his conviction that Caldwell was the burglar. When they arrived at the condominium, before seeing the videotape, Caldwell confessed. He later reiterated his confession both verbally and in writing. The trial court denied Caldwell's subsequent motion to suppress his confessions. On appeal, Caldwell argued that by reading Miranda, the officer transformed a consensual encounter into an investigatory stop since Miranda gave the message that Caldwell was in custody. Because the officer admitted he did not have reasonable suspicion to justify custody, Caldwell argued that the trial court should have suppressed his confessions.

RULING:

The Second District Court disagreed with Caldwell and ruled that merely reading Miranda warnings to a potential suspect does not transform an otherwise consensual encounter into an investigatory stop. Citing the U.S. Supreme Court's opinion in U.S. v. Mendenhall, 446 U.S. 544 (1980), the Court said that an encounter moves from consensual to investigatory only when, based on all of the circumstances, a reasonable person would have believed he was not free to leave. In this case, the Court stated that Caldwell clearly was free to leave at any time. The Court noted that the officer told Caldwell he was not under arrest after he read the Miranda warnings.

Likewise, the frisk did not convert the consensual encounter into a custodial encounter. The Court said that an officer does not have to have reasonable suspicion to frisk someone who is going to voluntarily become a passenger in the officer's patrol car. Officers are entitled to protect themselves from potential danger when transporting passengers in their vehicles.

NOTE: On both issues (Miranda and the frisk) this opinion is arguably plowing new ground, since previous cases have held the opposite of this case. (*See, e.g.,* Raysor v. State, 795 So.2d 1071 (Fla. 4th DCA 2001) and Hidalgo v. State, 959 so.2d 353 (Fla. 3rd DCA 2007)) The Caldwell opinion distinguished both of these but it is uncertain what will happen if the Florida Supreme Court attempts to resolve the conflict. Before relying on the Caldwell opinion, officers should review these matters with their agency legal advisors.

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FLORIDA CASE LAW UPDATE 08-04 *(corrected, issued 6/30/08)*

Note: The highlighted word "not" (below) was inadvertently omitted from the originally circulated CLU 08-04.

Case: State v. Roman, 3rd DCA,

Date: June 23, 2008 (Opinion filed June 11, 2008)

Subject: Juveniles and Miranda

FACTS:

After a young couple was kidnapped, robbed and the woman was raped and murdered by a group of young men in Miami Beach, police identified sixteen year old Jesus Roman as one of the perpetrators. FDLE agents arrested Roman in Orlando and drove him back to Miami Beach for processing; prior to that, police did not question him. That afternoon, Detective Marrero (who had worked the case from the beginning and had not slept in at least 25 hours) prepared to interview Roman. A Spanish-speaking FDLE agent went to Roman's mother's home in Orlando to translate for her as she listened by telephone to the early part of the interview in Miami Beach. The interview began at 5:00 p.m. and involved Roman, Marrero and another detective in Miami Beach, and Mrs. Roman and the FDLE agent on the telephone.

Mrs. Roman granted permission twice at the beginning of the interview for police to question her son. Marrero gave Roman a Spanish language notice of constitutional rights and he initialed each of the five Miranda-required rights, including the one that he had a right to a court-appointed counsel. Roman signed the bottom of the form as well. Verbally, Marrero gave only a "paraphrased summary" of the constitutional rights, and that is all that Roman's mother heard over the telephone. Marrero did not read the constitutional rights and neglected to say that Roman had the right to court-appointed counsel. Although he asked Roman about his education level, he did not ask if Roman could read Spanish. During the interview, Roman confessed to his involvement in the crimes. The trial court suppressed the confession and the state appealed.

RULING:

The appellate court reversed the suppression "because Roman freely executed a Miranda rights waiver form, and both the recording and the testimony at the motion to suppress indicated that he knowingly, voluntarily, and sufficiently waived his rights." The court noted that the state bears a heavy burden to show that a juvenile defendant knowingly and intelligently waived his rights. In this case, the "perfunctory verbal description" of the written waiver form did not mean Roman did not voluntarily waive his rights. The court noted that though there are numerous cases holding that an adult suspect's execution of a written waiver alone is sufficient to constitute a valid waiver, there are no such cases (until this one) involving a juvenile.

NOTES:

The court stated that it is "better practice" to make sure the suspect understands his or her rights by reading the entire form out loud or having the suspect do so. Also, the court reiterated that the Constitution does not require "that police notify a juvenile suspect's parents prior to questioning, and the failure to do so would not by itself vitiate the voluntariness or sufficiency of the juvenile's waiver." See S.V. v. State, 2007 WL 1201761 (Fla. 4th DCA May 11, 2007), covered in CLU 07-04.

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FLORIDA CASE LAW UPDATE 08-05

Case: State vs. Fischer, 5th DCA, 2008 WL 2387194

Date: June 25, 2008 (Opinion filed June 13, 2008)

Subject: Search based on "open view" doctrine

FACTS: A deputy stopped Fischer for an improper tag. Fischer was nervous and had a white substance under his nose. The deputy, suspicions aroused, called for back-up. When two other deputies arrived at the scene, they asked Fischer to step out of his car. When he did so, the deputies could see a white powder on the black upholstery in the interior of the vehicle. Based on the texture and color, the deputies thought it was cocaine and seized it. A presumptive test proved them correct and Fischer was arrested. Additional cocaine and oxycontin pills were found in Fischer's wallet during a search incident to arrest.

ISSUE: The trial court granted Fischer's suppression motion, ruling that the deputies did not have probable cause to believe that the substance they saw in open view on the seat of Fischer's car was cocaine. The trial judge said that cocaine is indistinguishable in appearance from other white powdery substances and suppressed the evidence seized from the car and from Fischer's wallet.

RULING: The appellate court reversed, and ruled that the deputies had probable cause justifying the seizure of the cocaine in the car. Because the arrest was valid, the drugs found in Fischer's wallet were also admissible in court against him.

The court's opinion distinguished between the "plain view" and "open view" exceptions to the search warrant requirement[1]. Although plain view requires that the illegal nature of the item seized be immediately apparent to the seizing officers, a "pre-intrusion open view" case does not. The appellate court said that the deputies did not have to "know" that the powder was cocaine; the probable cause standard does not require that specificity. "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.'" (citation omitted.)

NOTE: The opinion noted the experience of one of the deputies and the "drug school" training of another as important factors in the totality of circumstances evaluation of this case. Also, see Sawyer v. State, 842 So.2d 310 (Fla. 5th DCA 2003) where the same DCA (and one of the same judges) ruled the opposite way where an officer saw what he thought was an MDMA pill on a car's console during a traffic stop. They used the plain view "illegal nature immediately apparent" requirement to suppress the MDMA pill. The Fischer opinion does not mention Sawyer.

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[1] *See Ensor v. State, 403 So.2d 349 (Fla. 1981) for an in-depth distinction between the two exceptions. Essentially, plain view applies when both the officer and the item to be seized are in a constitutionally protected area. In an "open view" situation, the item to be seized is in a constitutionally protected area, but the officer is not.*

FLORIDA CASE LAW UPDATE 08-06

Case: Wyche v. State, 2008 WL 2678058

Date: July 11, 2008 (Opinion filed July 10, 2008)

Subject: Consent to search gained by misrepresentation

FACTS:

Lake City police suspected Earl Wyche in a sexual assault investigation. They requested his consent to take saliva samples for DNA testing, telling him they suspected him of committing a burglary at a Winn Dixie store. The burglary was fictitious. Wyche consented to give the samples, which exonerated him of the sexual assault charge. The lab matched the samples to DNA found at a gift shop burglary in Lake City however, and the State charged Wyche with that crime. Wyche moved to suppress the DNA evidence, arguing that the police misrepresentation regarding the fictitious burglary rendered his consent involuntary. The trial court denied the motion and the First DCA affirmed the denial.

The Florida Supreme Court accepted the case because of conflict with a Fourth DCA opinion – State v. McCord, 833 So.2d 828 (4th DCA 2002). Police told McCord, who they suspected of robbery, that his saliva was needed to exonerate him in a fictitious rape case. The 4th DCA affirmed the trial court's decision granting McCord's motion to suppress because the police misrepresentation amounted to coercion and made McCord's consent involuntary.

ISSUE: Under the totality of the circumstances, was Wyche's consent to the saliva swabs was voluntary or coerced?

RULING: The Supreme Court upheld the use of the swabs in Wyche and distinguished the McCord case. After noting holdings of the U.S. and Florida Supreme Courts that police deception alone does not negate voluntariness, the Court ruled that existing case law does not require the suppression of the saliva swabs and the DNA test results based on the sole fact of the fictitious burglary.[1]

The Court distinguished McCord because in that case police told the defendant that they suspected him in a rape case. Justice Wells wrote, "[t]he trial court in Wyche could have reasonably concluded that being accused of burglary does not entail the same pressure as being accused of rape."

NOTE: Officers must not view this case as opening the door to wholesale deception. Justice Bell (joined by Chief Justice Quince) wrote a concurring opinion, in which he said he was "disturbed by the level of intentional police misrepresentation" in Wyche's case. He went on to write that his hope "is that law enforcement will resist the temptation to interpret this decision as an endorsement of intentional deception as acceptable, routine police practice." This seems to be a clear suggestion that if we do not "resist the temptation," future cases will likely restrict our options in seeking consent from suspects and result in fewer successful prosecutions.

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[1] See, for example, Frazier v. Cupp, 394 U.S. 371 (1969) and Washington v. State, 653 So.2d 362 (Fla. 1994).

Case: Lee v. State, 1st DCA, 2008 WL 2694955

Date: July 12, 2008 (Opinion filed July 11, 2008)

Subject: Miranda – "in custody"

FACTS: Seventeen year old Anthony Lee was interviewed at his home by a Levy County Deputy regarding an allegation that Lee had a sexual relationship with an underage girl. Lee's parents kept him out of school to meet with the deputy, who told the parents and Lee that the meeting was necessary to get Lee's "side of the story." The deputy did not advise Lee of his Miranda rights and began questioning him about the relationship while the parents were present. When Lee continued to deny having sex with the girl, the deputy asked the parents to step outside for a moment; before leaving, the deputy told Lee to "hang on, I'll be right back." The deputy returned alone, continued interrogating Lee and told him that police had seized the victim's bed sheets and underwear as evidence against him. Eventually, Lee admitted to having sexual relations with the girl and was criminally charged.

ISSUE: Lee moved to suppress his admissions. Although the trial judge specifically found that Lee and his parents believed that Lee had no choice but to talk to the deputy and the parents believed they had to allow the deputy to interrogate Lee outside their presence, the judge denied the suppression motion. The issue on appeal was whether, under the trial court's findings, Lee was "in custody" during the interrogation and thus entitled to Miranda warnings.

RULING: The First DCA reversed the trial court, holding that Lee was in custody for Miranda purposes even though the interrogation occurred in Lee's home. The Court, in applying a four-part objective test to determine whether Lee was in custody for Miranda purposes, noted that Lee was the subject of the investigation, not a witness and he was kept out of school in order to meet with the deputy. Second, the purpose of the interrogation was to obtain incriminating responses, and even though it occurred in Lee's home, removing the parents and isolating Lee "suggests a custodial environment." Third, Lee was told his denials were useless because the evidence against him (the girl's statement and the physical evidence) was overwhelming. Finally, the deputy never told Lee he was free to leave. The trial court found that both Lee and his parents felt a restraint on the freedom of their movement similar to that associated with arrest.

The Court said under the totality of circumstances, a reasonable person in Lee's position would not have felt free to leave or to refuse to answer the deputy's persistent questions and terminate the encounter. Under those circumstances, Lee was in custody and should have been read Miranda.

NOTE: Because Miranda is required only for "custodial interrogations" officers may be tempted to think that a person must be under arrest or at least be located in a police car or a police station before the Miranda rights have to be read. This case demonstrates that a person may be "in custody" even in his home.

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OFFICE OF GENERAL COUNSEL

FLORIDA CASE LAW UPDATE 08-08

Case: State v. Thompson, 3rd DCA, 2008 WL 2744341

Date: July 24, 2008 (Opinion filed July 16, 2008)

Subject: Miranda right to counsel

FACTS:

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; 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. The trial court suppressed Thompson's confession and the State appealed.

RULING:

The 3rd DCA affirmed the trial court's decision. "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.

NOTE:

This case is the latest reaffirmation that once a subject is in custody, has been advised of his Miranda warnings, and invokes his 5th Amendment right to counsel, he may not be approached or questioned about ANY offense, even unrelated ones, until he either initiates the discussion, or until there has been a break in custody. **Special thanks to John Kemner, FDLE Legal Advisor in Jacksonville, and the Office of the Attorney General for this case law update.**

Steve Hurm
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Florida Department of Law Enforcement
Tallahassee and Pensacola Regional Operations Center

Case: Martin v. State, 2nd DCA, 2008 WL 3349065

Date: August 26, 2008 (Opinion filed August 13, 2008)

Subject: Miranda -- unequivocal invocation

FACTS: After a detective read him Miranda warnings, Martin stated, "Really I ain't got nothing to say. I really don't got nothing to say." The detective continued with questioning and ultimately Martin made incriminating admissions. He moved to suppress these statements, and then appealed the trial judge's denial of the suppression motion.

RULING: The 2nd DCA reversed, stating that Martin "unequivocally invoked his right to remain silent" by his response to the detective after the Miranda warnings were read. The court based its decision of the Florida Supreme Court's 2007 opinion in Cuervo v. State, 967 So.2d 155. In that case, the FSC held that a defendant's statement "I don't want to declare anything" was a clear invocation of his right to remain silent.

NOTES: This opinion seems to conflict with Owen v. State, 862 So.2d 687 (Fla. 2003) in which the Florida Supreme Court ruled that a defendant who said “I don’t want to talk about it” and “I’d rather not talk about it” did not unequivocally invoke his right to remain silent. “I ain’t got nothing to say”, “I don’t want to talk about it”, and “I don’t want to declare anything” seem to be indistinguishable, yet they have resulted in different rulings.

Officers should be attentive to any indication by a suspect of a desire to not answer questions. You can always reinitiate contact with a suspect who invokes his right to remain silent after a “significant period of time.” The U.S. Supreme Court in Michigan v. Mosley, 423 US 96 (1975) recognized two hours to be sufficiently “significant,” so wait at least that long before reinitiating contact. Remember however, if the suspect invokes his right to an attorney, you cannot reinitiate contact despite the passage of time.

It is probably wiser to respect an ambiguous invocation of silence and go back later to try again to question a suspect, than to force the issue and risk losing admissions or a confession. If despite your efforts, some uncertainty remains, you may want to clarify what the subject means by the vague language. “I don’t got nothing to say” could mean, “I’ll talk to you, but I don’t know anything about this” just as easily as it could mean “I am invoking my right to remain silent.” Asking the subject to explain what he’s intending to say could clarify whether he’s invoking his rights or not.

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