Florida Case Law Update For Law Enforcement Legal Advisors And Their Agencies

(60 Or So State and Federal Cases of Interest To Florida Police Attorneys From The Past Year)

As Presented To
The Florida Association of Police Attorneys

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There are many cases of interest to Florida law enforcement announced in the past year that were not included in this summary. The cases included herein were selected to highlight ongoing issues and developments in Florida criminal law, and this summary should not be considered a complete review of all law enforcement cases of interest.

Do not rely on the summaries herein for a full understanding of the case reported. Citations have been provided to assist in locating and reading the full case.

Thanks to the Florida Attorney General Pamela Bondi and her "Criminal Law Alert" Editor Carolyn Snurkowski for their regular publication of "Criminal Law Alerts" (from which many of these summaries are derived) and to Tallahassee Police Legal Advisor Rick Courtemanche for sharing his periodic TPD case updates, too.

Florida Cases Of Interest To Police Attorneys
Michael Ramage
October 6, 2011

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U.S. SUPREME COURT:

First Amendment Protects Speech Activity Of Protestors At Military Funerals

By an 8-1 vote, the Court held that the First Amendment shields from tort liability the Westboro Baptist Church picketers who picketed near the funeral service of a soldier killed in Iraq. The soldier's father had been awarded $2.9 million in compensatory and punitive damages for intentional infliction of emotional distress and other torts. The Court found the protestors' actions related to issues of broad public interest ("…political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality and the military, and scandals involving the Catholic clergy…") and that their conduct occurred on public land next to a public street. "…the government may not prohibit the expression of an idea simply because society finds the idea itself offensive and disagreeable."

Snyder v. Phleps, 131 S.Ct. 1207 (3/2/11)

Police Questions To Wounded Citizen Were Not "Testimonial" Within Meaning Of Crawford v. Washington, 541 U.S. 36 (2004)

Applying the "primary purpose test" adopted in Davis v. Washington, 547 U.S. 813 (2006), the Court concluded that the victim's responses to the officers' questions, which included the victim's concern about when the paramedics would arrive, did not have a primary purpose "to establish or prove past events potentially relevant to later criminal prosecution." The officers' questions about what had happened, who had shot him, and where the shooting occurred were focused on meeting an ongoing emergency involving a gunman on the loose.

Michigan v. Bryant, 131 S.Ct. 1143 (2/28/11)

Isolated Brady Violation By One Prosecutor Does Not Support §1983 Liability

This case was mentioned in last year's summary. By a 5-4 vote, the U.S. Supreme Court held that a district attorney's office cannot be held liable under §1983 for a Brady violation by one of its prosecutors when no pattern of violations was shown. The Court noted that attorneys "…are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment." Accordingly, the Court indicated, "recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law" and does not fall within the "narrow exception" discussed in Canton v. Harris, 489 U.S. 378, 390 at note 10 (1989).

Connick v. Thompson, 131 S.Ct. 1350 (3/29/11)

Reasonable Conduct Of Police Prior To Exigency Means Warrantless Response To Exigency Is Also Reasonable

Lexington, Kentucky police followed a suspected drug dealer into an apartment building. While looking for the subject, police smelled marijuana emanating from an apartment. They knocked "loudly" on the apartment door and announced their presence. In response, they heard sounds consistent with evidence destruction. They announced their intent to enter, and a warrantless entry (a/k/a kicking in the door) was made. The Respondent and others were secured, and during a protective sweep, a large quantity of marijuana evidence was seized in plain view. A subsequent search produced additional evidence. After the trial court refused to suppress the evidence, Respondent entered a plea reserving the right to appeal. The Kentucky Court of Appeals affirmed the trial court. The Kentucky Supreme Court reversed, and ruled the evidence should be suppressed on the basis that this was a "police-created exigency" as a result of the police knocking

on the door. (The officers "deliberately created the exigent circumstances with bad faith intent to avoid the warrant requirement." 302 S.W. 3d 649, 656.) The Kentucky Supreme Court reasoned the police should have foreseen that their conduct would prompt the occupants to attempt to destroy the evidence. The U.S. Supreme Court, in an 8-1 vote (Ginsburg dissenting), disagreed. In this case, the officers' actions preceding the exigency and in response to the exigency were considered reasonable within the meaning of the 4th Amendment and there was no basis to exclude the evidence. The Court indicated a warrantless entry based on exigent circumstances is reasonable when the police did not create the exigency by engaging or threatening to engage in conduct violating the 4th Amendment. It noted the Kentucky Supreme Court's approach faulted officers for knocking on a door when they had enough probable cause to seek a warrant but did not do so; and found that analysis ran counter to standard and good law enforcement practices. The Court also noted that challenges cannot be based on subtleties such as the officers' tone of voice when announcing their presence or the forcefulness of their knocks. The U.S. Supreme Court indicated that any question about whether an exigency truly existed here would be better addressed by the Kentucky Supreme Court on remand. Reversed and remanded.

Kentucky v. King, 131 S.Ct. 1849 (5/16/11)

Confrontation Clause Does Not Allow Introduction Of Testimonial Forensic Report To Prove A Fact At A Criminal Trial Through An Analyst Who Neither Signed The Certification Nor Personally Performed Or Observed The Test

By a 5-4 vote, the Court ruled that testimonial statements of witnesses absent from trial are admissible only if the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine the declarant. In the case at chief, a forensic laboratory report was inadmissible because even though the original testing analyst was unavailable, attempting to introduce the report through a second analyst who neither performed or observed the tests not signed the certification denied the defendant of a meaningful right to cross examine and was in violation of the Sixth Amendment.

Bullcoming v. New Mexico, 131 S.Ct. 2705 (6/23/11)

NOTE: Cert has been granted in a case that may modify the Bullcoming holding. Williams v. Illinois, 131 S.Ct. 3090 (Certiorari granted June 28, 2011). Case below: Illinois v. Williams, 939 N.E. 2d 268 (2010). At issue is whether ─ in light of *Melendez-Diaz v. Massachusetts* and *Bullcoming v. New Mexico* ─ a defendant's Confrontation Clause rights are violated when an expert witness, relying on the DNA testing performed (and lab report prepared) by another DNA analyst, gave her expert opinion that there was a DNA match.

A Child's Age Is Relevant To The Miranda "Custody" Analysis

A 13-year old student was taken from class to a school conference room and was questioned about a crime by police and school officials. The North Carolina Supreme Court did not consider the situation to be a custodial interrogation and did not take the student's age into account. By a 5-4 vote, the U.S. Supreme Court held that a child's age is relevant to a *Miranda* "custody" analysis. The Court noted that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. The North Carolina Supreme Court's ruling was reversed.

J.D.B. v. North Carolina, 131 S.Ct. 2394 (6/16/11)

Evidence Seized In Good Faith Reliance On Pre-Gant Law Need Not Be Excluded

By a 7-2 vote, the Court ruled affirmed an 11th Circuit decision holding that evidence seized prior to the Supreme Court's decision in Arizona v. Gant, 129 S.Ct. 1710 (2009) need not be excluded when officers were acting in good faith in reliance of pre-Gant law.

Davis v. United States, 131 S.Ct. 2419, (6/16/11).

Certiorari Granted On Case Of Interest:

United States v. Jones, 10-1259, 131 S.Ct. 3064, (Certiorari granted June 27, 2011).

In this case, federal agents installed a global positioning system (GPS) tracking device on respondent's car, and then monitored the car's movements for 30 days. At issue is the following question: "Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent."

Case below: U.S. v. Maynard, 615 F.3d 544, (USCA DC, 11/17/09) which held that warrantless used of GPS on defendant's vehicle for a month was a search, that the automobile exception did not apply and admission of evidence from this search was not harmless; that the totality of defendant's movements over 28 days was neither actually or constructively disclosed to the public; that the prolonged GPS monitoring revealed an intimate picture of the defendant's life; and noted that surveillance that reveals only what is already exposed to the public, such as a person's movements during a single journey is not a search.

Filarsky v. Delia, 10-1018, 2011 WL 496619, -- S.Ct.--, (Certiorari granted 9/27/2011)

At issue is whether private attorneys hired to work with government employees on an internal investigation is prevented from asserting qualified immunity because of his status as a "private" lawyer rather than a "government employee."

Case below: Delia v. City of Rialto, et. al., 621 F.3d 1069 (USCA 9, 9/27/2010). A firefighter brought § 1983 action against city, fire department and officials, and a private attorney, alleging internal affairs investigation violated his constitutional rights. Appellant, a firefighter, brought a 42 U.S.C. § 1983 action against the City of Rialto, the Rialto Fire Department, Rialto Fire Chief Stephen C. Wells, two Rialto Fire Department Battalion Chiefs, Mike Peel and Frank Bekker, and a private attorney, Steve Filarsky. Delia alleges violations of his constitutional rights arising during a departmental internal affairs investigation. While being represented by counsel and interrogated at headquarters, he was ordered to go directly to his home while being followed by Battalion Chiefs Peel and Bekker in a City vehicle. He was ordered that when he arrived at his home he was to enter his home while in full view of the Battalion Chiefs, retrieve several rolls of recently purchased insulation, and bring them out of the house and place them in his front yard for inspection by the Battalion Chiefs. Delia was told earlier in the interview that if he failed to do this he could be found to be "insubordinate" and subject to disciplinary action including termination. This order was given a few minutes after Delia and his counsel refused to consent to a warrantless search of his home by Battalion Chief Peel The United States District Court for Central District of California granted summary judgment in favor of all defendants. The firefighter appealed. The CA9 held, that Delia's rights under the 4th Amendment were violated. However, it also found that this right under the facts or similar facts was not clearly established at the time of the violation. It affirmed the grant of qualified immunity to government employees and the city, but reversed the grant of immunity to Filarsky, indicating that private attorney was not entitled to qualified immunity.

Editor's note: A succinct overview of all U.S. Supreme Court 2010 Term cases of interest to law enforcement appears in the Florida Attorney General's July 19, 2011 Criminal Law Alert, found on the web at:

http://myfloridalegal.com/alerts.nsf/d1b346d5ba583c0585256642005da52a/347226bee6797a1a852578d200529874!OpenDocument

Individual opinions may be found at the USSC website:
http://www.supremecourtus.gov/

11th Court of Appeals:

Use Of Taser:
Denial Of Qualified Immunity For Officers. Even In Absence Of Case Law, Force Employed ("Tasered" 8 to 12 times) Was Such That Immunity Would Not Apply.

Orlando police officers Lori Fiorino and David Burk appealed the district court's denial of their motion for summary judgment on the basis of qualified immunity. The 11th Circuit, "after thorough review," concluded "that the officers are not entitled to qualified immunity on the claim of excessive force," and affirmed the district court's order denying qualified immunity to the officers. After noting that "Quite simply, though the initial use of force (a single Taser shock) may have been justified, the repeated tasering of Oliver into and beyond his complete physical capitulation was grossly disproportionate to any threat posed and unreasonable under the circumstances…" and agreeing with the district court "that the force employed was so utterly disproportionate to the level of force reasonably necessary that any reasonable officer would have recognized that his actions were unlawful" the 11th Circuit stated:

> The facts, when viewed in a light most favorable to Oliver, show that Oliver was neither accused nor suspected of a crime at the time of the incident, that Officer Fiorino tasered Oliver at least eight and as many as eleven or twelve times with each shock lasting at least five seconds, that the officers made no attempt to handcuff or arrest Oliver at any time during or after any Taser shock cycle, that the officer continued to administer Taser shocks to Oliver while he was lying on the hot pavement, immobilized and clenched up, and, finally, that these Taser shocks resulted in extreme pain and ultimately caused Oliver's death.

Oliver, et al., v. Fiorino, et al., 586 F.3d 898. (11th CA,10/26/09)

FLORIDA SUPREME COURT:

"Stand Your Ground" Defense: Trial Court Should Decide The Factual Question On Application of F.S. 776.032 Statutory Immunity

In Dennis v. State, 17 So. 3d 305 (Fla. 4th DCA 2009) the 4th DCA certified conflict with the 1st DCA's Peterson v. State, 983 So. 2d 27 (Fla. 1st DCA 2008) regarding the procedure to be used when one moves to dismiss a charge based on the "stand your ground" defense. In Dennis, the 4th DCA held that the existence of disputed issued of material fact required a denial of any such motion to dismiss. Peterson held that the existence of disputed issues of material fact did not warrant a denial of a such a motion.
The Supreme Court said such motions should be treated as a motion filed under Rule of Criminal Procedure 3.190(b) and not 3.190(c)(4). It disapproved the reasoning of Dennis and approved Peterson.

Dennis v. State, 51 So. 3d. 456, (Fla. 12/16/10)

Exclusionary Rule Applies To Violations Of Florida's "Knock and Announce" Statute

In reviewing Cable v. State, 18 So. 3d 37 (Fla. 2nd DCA 2009), the Supreme Court held after a lengthy analysis that a deputy's failure to announce his purpose before entering a motel room pursuant to a search warrant, the deputy failed to conform with the "Knock and Announce" statute, and the evidence obtained by reason of the search should be suppressed. It approved Cable and disapproved State v. Brown, 36 So. 3d 770 (Fla. 3rd DCA 2010).

State v. Cable, 51 So. 3d. 434, (Fla., 12/09/10)

Defendant Not In Custody When Statement Was Provided

Johnston, the defendant convicted of first-degree murder, appealed this case. Prior to his arrest, he saw his picture on TV regarding the murder and phone police to indicate he would come to the police station. He drove himself to the station and, without being advised of his *Miranda*[1] rights, Johnston made a statement to detective which he believed "would account for his whereabouts on the night of the murder and his use of the victim's ATM card." Somewhere during the taking of a statement, Johnston was given his *Miranda* rights, he waived those rights and continued with a statement. The appeal challenged the trial defense counsel's failure to move to suppress the statements provided by Johnston. On appeal of the denial of the 3.851 post-conviction relief motion, the Court first noted the trial defense counsel chose not to move to suppress Johnston's statement because it was the only evidence available to provide why Johnston was in possession of a murder victim's ATM card. The Court found the decision to be a reasonable strategic call by the trial counsel, and denied 3.851 relief. It then noted that a motion to suppress on this issue would have been meritless, since Johnston's statements were voluntary. The Court indicated, "no *Miranda* warning were required until Johnston was formally arrested" and observed that since Johnston was not in custody when he gave his initial statement, no *Miranda* rights were required. While later when he was given *Miranda* rights and waived them, the statement obtained after that waiver was also admissible since it was not derived from any earlier illegal police interrogation.

Johnston v. State, and *Johnston v. Buss, etc., 63 So. 3d 730 (Fla. 3/24/11, reh. Denied 6/3/11)*

Training And Certification Of K-9 To Detect Narcotics Standing Alone Does Not Establish Dog's Reliability For Purposes Of Determining Probable Cause

The Supreme Court reviewed Harris v. State, 989 So. 2d 1214 (Fla. 1st DCA 2008) as a direct conflict with Gibson v. State, 968 SO. 2d 631 (Fla. 2nd DCA 2007) and Matheson v. State, 870 So. 2d 8 (Fla. 2nd DCA 2003). After a lengthy discussion, the Court determined that "the reliability of a dog as a detector of illegal substances is subject to the totality of circumstances analysis." In the instant case, the Court found that the trial court erred in concluding sufficient evidence to establish probable

[1] *Miranda* v. Arizona, 348 U.S. 436 (1966). References hereafter in this document to the case refer simply to "Miranda."

cause to search Harris's truck had been presented. The Court quashed the Harris decision, disapproved cases cited by the Harris court and approved Gibson and Matheson to the extend they conformed with the Court's decision. The Court indicated:

> We hold the fact that a drug-detection dog has been trained and certified to detect narcotics, standing alone, is not sufficient to demonstrate the reliability of the dog. To demonstrate that an officer has a reasonable basis for believing that an alert by a drug-detection dog is sufficiently reliable to provide probable cause to search, the State must present evidence of the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability. The trial court must then assess the reliability of the dog's alert as a basis for probable cause to search the vehicle based on a totality of the circumstances.

The Court said because that "totality" in this case did not support a probable cause determination, the trial court should have granted the motion to suppress. Justice Canady dissented, stating "the majority imposes an evidentiary burden on the State which is based on a misconception of the federal constitutional requirement for probable cause."

Note: See how a DCA has applied Harris in Wiggs v. State discussed at page 32 of this summary. The AG's Office has sought a rehearing on Harris. If the Florida Supreme Court does not alter its holding, the AG may seek U.S. Supreme Court review. Florida's Criminal Justice Standards and Training Commission's current informal position is to not begin implementation of a formal statewide certification effort until the judicial review of Harris has concluded.

Harris v. State, 36 Fla. L. Weekly S163, ---So. 3d--, (Fla. 4/21/11)

Police Had Sufficient Probable Cause To Search Based On Behavior Consistent With Drug Exchange Even If Actual Narcotics Not Seen By Officer

The Florida Supreme Court reversed the 4th DCA's opinion reported at: Hankerson v. State, 32 So. 3d 175 (Fla. 4th DCA 2010). The 4th reversed Hankerson's conviction, ruling that the trial judge should have suppressed evidence. The Supreme Court disagreed and held that the refusal to suppress by the trial court was appropriate.

Officer Lucas of the Delray Beach Police Department (DBPD) had placed a residence under surveillance after receiving reports that drug dealing was occurring there. He observed Hankerson arrive at the residence, exit an SUV and approach a group of people on the front porch. While looking up and down the street, Hankerson opened his hand. Each of the three on the porch took "something" from Hankerson's hand and "quickly" gave him paper currency in return. Hankerson's contact with the people on the porch was characterized as "very brief." He put the currency in his pocket, returned to the SUV and drove off. The officer believed Hankerson had engaged in a narcotics transaction. The officer said the observed behavior was consistent with hundreds of illegal drug transactions he had witnessed as a law enforcement officer.

Lucas asked another DBPD officer (Schmidt) to make a traffic stop of Hankerson. Schmidt did so, using lights and siren. As he approached the car he saw Hankerson reach toward the center console and then down toward the floor. Schmidt asked Hankerson to exit the vehicle. Once out of the car, Hankerson was asked if he had any drugs or weapons. Hankerson stated he was "out of the game" and lifted his shirt to show his torso. Schmidt then asked if he had anything in his shoes. Before being asked to remove his shoes, Hankerson did so. Schmidt indicated Hankerson appeared "a little bit hesitant." Hankerson started to remove his right shoe, then switched and removed his left shoe. When he finally did remove his right shoe, he attempted to conceal in his hand a bag that was in that shoe. The bag contained smaller bags filled with cocaine. Schmidt estimated the street value of each small bag to be about $20. Schmidt also found $63 in Hankerson's right front pocket.

The trial court denied the motion to suppress, finding that Lucas had probable cause to believe he had seen a narcotic transaction even though he could not identify the substance involved. Hankerson was convicted of possession of cocaine for sale and sentenced to ten years in prison.

The Supreme Court agreed with the trial court that Hankerson's actions would have led a person of reasonable caution to believe he had committed a crime. It cited several "similar factual circumstances" cases. To support its determination that there was probable cause, the Court noted the surveillance was in response to reports of narcotics sales, the behavior of Hankerson was consistent with "hundreds" of narcotics transactions the officer had observed, and Hankerson's behavior and demeanor was consistent with one selling drugs. "When considered in their totality, the factual circumstances of this case support the trial court's conclusion that Officers Lucas and Schmidt had probable cause to search Hankerson."

State v. Hankerson, 65 So. 3d 502 (Fla. 4/21/11)

Probable Cause, Not Reasonable Suspicion, Must Support Dog "Sniff Test" At Private Residence

The Supreme Court reviewed State v. Jardines, 9 So. 3e 1 (Fla. 3rd DCA 2008) which had been certified in conflict with State v. Rabb, 920 So. 2d 1175 (Fla. 4th DCA 2006). At issue was whether a dog "sniff test" at the outside of the front door of a private residence is a "search" under the 4th Amendment and is so, whether reasonable suspicion or probable cause must support the action. The Court disapproved Jardines and approved Rabb. The instant case involved a Miami-Dade County Police Department investigation of a residence identified in a crime-stoppers tip as having marijuana growing in it. After a short unremarkable surveillance of the house, a K-9 unit arrived and the dog, on a leash, was walked to the front door. The dog alerted to the scene of contraband. The handler returned and reported the dog's alert to the detective, who walked to the door, to attempt to obtain consent to search, and smelled marijuana. Nobody responded to the detective's knock on the door. The detective also noted the air condition ran continuously, a typical indicator of an "indoor grow" operation in which grow lamps cause excessive heat. Using these observations, the detective obtained a search warrant. Marijuana and other evidence was seized.

The trial court suppressed the evidence, and the 3rd DCA reversed, indicating no search occurred. "The officer had the right to go up to the defendant's front door. Contrary to the holding in Rabb, a warrant was not necessary for the drug dog sniff, and the officer's sniff at the exterior door…should not have been viewed as 'fruit of the poisonous tree…moreover, the evidence should not have been suppressed because its discovery was inevitable." (Jardines, 9 So. 3d at 10). In contrast, the Rabb case equated a dog sniff with the Kyllo thermal imager, which allows law enforcement to use "sense-enhancing technology to intrude into the constitutionally-protected area of Rabb's house...." (Rabb, 920 So. 2d at 1184). The Rabb court found that law enforcement had crossed the "firm line" of the Fourth Amendment protection because the dog sniff revealed an "intimate detail" of the house no less than the ambient temperature inside Kyllo's house. Thus the dog sniff was deemed a "search" by Rabb, in direct conflict with Jardines.

The Supreme Court indicated the "sniff test" was an "intrusive procedure." The Court observed, "On the scene, the procedure involved multiple police vehicles, multiple law enforcement personnel…and an experienced dog handler and trained drug detection dog engaged in a vigorous search effort on the front porch…The entire on-the-scene government activity…lasted for hours." The Court was concerned that the sniff test took place in plain view of the public. "There was no anonymity for the resident." The "spectacle" invariably entailed "a degree of public opprobrium, humiliation and embarrassment for the resident…in the eyes of many…will be viewed an official accusation of a crime." *{Note: "opprobrium" means "a public disgrace or ill fame from grossly wrong conduct"}*

The Court was concerned that if a "sniff test" could be conducted at a private residence without any prior evidentiary showing of wrongdoing, "there is nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen." The Court said this "invites overbearing and harassing conduct."

It deemed the "sniff test" conducted at a private residence to be a "search" within the meaning of the 4th Amendment[2], and indicated that as such it must be preceded by an evidentiary showing of wrong-doing. The Court concluded that probable cause, not reasonable suspicion is the proper showing to justify a "sniff test" at a private residence:

> We have said that the Fourth Amendment draws 'a firm line at the entrance to the house.' That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant." Kyllo, 533 U.S. at 40 (citation omitted) (quoting Payton, 445 U.S. at 590). Given the special status accorded a citizen's home in Anglo-American jurisprudence, we hold that the warrantless "sniff test" that was conducted at the front door of the residence in the present case was an unreasonable government intrusion into the sanctity of the home and violated the Fourth Amendment.

The Court found there was a qualitative difference between a "knock and talk" and a "sniff test." The Court repeatedly characterized all the law enforcement activity, surveillance, etc. as making the sniff test different than simply walking up and "knocking." "In sum, a "sniff test" by a drug detection dog conducted at a private residence does not only reveal the presence of contraband, as was the case in the federal "sui generis" dog sniff cases discussed above, but it also constitutes an intrusive procedure…."

Justice Polston dissented, joined by Justice Cannady: "Despite the majority's focus upon multiple officers and the supposed time involved in surveillance and in execution of the search warrant, it is undisputed that one dog and two officers were lawfully and briefly present near the front door of Jardines" residence when the dog sniff at issue in this case took place. And despite statements about privacy interests in items and odors within and escaping from a home, the United States Supreme Court has ruled that there are no legitimate privacy interests in contraband under the Fourth Amendment."

{Note: On 8/19/11 USSC Justice Thomas denied application for a stay pending the filing and disposition of state's petition for writ of certiorari. Petition for cert is pending as of date of this printing.}

Jardines v. State, SC08-2101,26 Fla. L. Weekly S147, --So. 3d—(Fla. 4/14/11)

Felony Criminal Mischief Requires State To Prove Damages

In a case probably most remarkable because the issue even had to be addressed, the Supreme Court ruled that a defendant can only be convicted of felony criminal mischief if the damage in question is $1,000 or greater. The Court held that to prove *felony* criminal mischief, the state must introduce evidence to establish that (value) element of the crime. In the case at bar, a review of Marrero v. State, 22 So. 3d 822 (Fla. 3rd DCA 2009),the state attempted to introduce evidence that the temporary repairs to the front of a casino after the defendant drove his truck into it exceeded $1000. The actual structure include a handicap accessible automatic entry system, several impact-resistant glass doors (each 16 or 17 feet tall) and aluminum framing materials. The defense objected to the testimony and the court sustained the objection. The state failed to introduce evidence of the actual repair or replacement costs or an estimate of what those actual costs would be. That failure meant felony criminal mischief had not been proven.

Marrero v. State, 2011 WL 4089299, -- So. 3d— (Fla. 9/15/11)

[2] In footnotes 3 and 10 in its opinion, the Supreme Court distinguished the dog sniff at a private residence from the dog sniff of an apartment door that opened to a common area accessible to the general public. That type of sniff was held not to be a search in Stabler v. State, 990 So. 2d 1258 (Fla. 1st DCA, 2008). The Supreme Court indicated, "Stabler is distinguishable from Rabb."

Discovery Deposition Does Not Satisfies Right Of Confrontation

The Court reviewed Corona v. State, 929 So. 2d 588 (Fla. 5th DCA 2006) which conflicted with State v. Lopez, 974 So. 2d 340 (Fla. 2008) and Blanton v. State, 978 So. 2d 149 (Fla. 2008) on a question of law. The 5th DCA had held that a discovery deposition met the requirements outlined in Crawford v. Washington, 541 U.S. 36 (2004) that a defendant is entitled under the 6th Amendment to have a prior opportunity to cross-examine a declarant of a testimonial statement. The Florida Supreme Court had previously indicated depositions did not meet the Crawford test in its Lopez and Blanton decisions. The Florida Supreme Court quashed the 5th DCA's decision, holding that the deposition admitted as evidence violated Corona's 6th Amendment rights, and remanded the case for a new trial.

Corona v. State, 64 So. 3d 1232 (Fla. 6/9/11)

Driver's License Suspension For Refusal Can Occur Only If Refusal Is Incident A Lawful Arrest

This opinion addressed two consolidated cases. The issues before the Florida Supreme Court were: (1) whether an individual's driver's license can be suspended by the Florida Department of Highway Safety and Motor Vehicles (DHSMV) under F.S. 322.2615 for a "refusal" when the refusal is not incident a lawful arrest; and (2) whether the issue of whether the refusal was incident a lawful arrest is within the scope of review of a DHSMV hearing officer in a proceeding to determine whether sufficient cause exists to suspend the license for the refusal.

The Court held that a refusal can occur only incident a lawful arrest. It also indicated a driver ought to be able to challenge whether the refusal was incident to a lawful arrest in the proceedings before the hearing officer who is reviewing the legality of the license suspension. It answered (1) with "No and (2) with "Yes." It approved the reasoning of Hernandez v. DHSMV, 995 So. 2d 1077 (Fla. 1st DCA 2008) and quashed McLaughlin v. DHSMV, 2 SO. 3d 988 (Fla. 2nd DCA 2008).

DHSMV v. Hernandez and DHSMV v. McLaughlin,,36 Fla. L. Weekly S243, -- So. 3d--, (Fla. 6/9/11)

On Remand From U.S.S.C. The Florida Supreme Court Finds *Miranda* Warnings Sufficiently Conveyed Right To The Presence Of Counsel

On remand from Florida v. Powell, 130 S.Ct. 1195 (2010), the Florida Supreme Court—after a long analysis—determined the warnings given in the case to have sufficiently conveyed the right to the presence of counsel because the U.S. Supreme Court had determined those rights were sufficient under the Federal Constitution. The Court found they were likewise "sufficient under the Florida Constitution." Accordingly, the trial court was determined not to have erred in admitting Powell's post-*Miranda* statements into evidence. The case was remanded to the 2nd DCA for proceedings consistent with the opinion. (Justices Pariente and Quince dissented with opinions.)

State v. Powell, 66 So. 3d 905 (Fla. 6/16/11)

NOTE: The Court also remanded another case in reliance on the U.S. Supreme Court's Powell opinion, with an additional finding that the death penalty in the case was proportionate. Rigterink v. State, ,66 So. 3d 866 (Fla. 6/16/11).

FLORIDA DISTRICT COURT OF APPEALS CASES:

2nd DCA "Punts" Shelton Issue To Supreme Court

On 9/28/11, the 2nd DCA in Florida v. Adkins, et. al, 2D11-4559, issued a "Certification Order Requiring Immediate Resolution By The Supreme Court" under Florida Rule of Appellate Procedure 9.125 on its own motion. At issue was a circuit court's dismissal of 42 defendants' cases on the ground that F.S. 893.13 is unconstitutional. That court's reasoning was based on the U.S. District Judge's decision in Shelton v. Secretary, Department of Corrections, 23 Fla. L. Weekly Fed. D11 (M.D. Fla. 7/27/11) and similar to a decision recently issued by a circuit court judge in the Eleventh Judicial Circuit of Florida. See State v. Washington, Nos. F11-11019, F10-36703, et al. (Fla. 11th Cir. Ct. Aug. 17, 2011). These decisions appear to conflict with another opinion from the Eleventh Judicial Circuit. See State v. Anderson, No. F99-12435(A), 2011 WL 3904082 (Fla. 11th Cir. Ct. Aug. 11, 2011). Like Anderson, a circuit court decision for the Thirteenth Judicial Circuit in Hillsborough County, Florida, also appears to be at odds with Shelton and Washington. See State v. Barnett, Nos. 11-CF-003124, 11-CF-005345, et al. (Fla. 13th Cir. Ct. Aug. 12, 2011).

While noting the ruling would "appear to control pending drug prosecutions in only one felony division of the Twelfth Circuit" the DCA noted the issue would "undoubtedly be raised in every felony division in all twenty circuits" and noted there will be different approaches to the issue leading to the untenable situation of having two or more felony divisions in the same circuit taking opposite positions on the issues. The DCA realized the issues will ultimately have to be resolved by the Florida Supreme Court, and to reduce the period of "great uncertainty throughout Florida" the DCA invoked Rule 9.125 to certify the issue of great public importance to the Supreme Court.

State v. Adkins, et. al., 2D11-4559 (Fla. 2nd DCA 9/28/11)

Failure To Instruct Jury On "Prescription Defense" In Hyrdocodone Trafficking Case Is Fundamental Error

The record revealed that the defendant (McCoy) had actual possession of a pill bottle, labeled as belonging to her husband, which contained Lorcet tablets. The husband testified at trial that he regularly took Lorcet for back pain and that he would place a small number of those pills in a prescription bottle and give to his wife to carry during the day because his clothing lacked pockets. When arrested McCoy was asked if she used the pills and she responded she had used some of the pills "in the past." At trial, McCoy said this was a reference to when she took her own prescribed Lorcet pills in the past. The First DCA, noting that the husband and wife had established a defense, which if believed, indicated an agency relationship authorizing McCoy to possess the pills on her husband's behalf. Also noting the State had presented evidence contradicting the McCoys' story and creating a jury question, the court first held the DCA did not err in denying the motion for judgment of acquittal.

However, the Court found the failure to instruct the jury on the "prescription defense", coupled with the prosecutor's repeated comments in closing that there was "no defense to…the possession of the pills" and that when the judge read the jury the law they "won't hear that she had a right to have them because, after all, Hyrdocodone is a controlled substance" and that the judge would not tell them "that it is a defense…because her husband has a prescription" constituted fundamental error. The conviction was reversed.

McCoy v. State, 56 So. 3d 37 (Fla. 1st DCA , 12/21/10)

Failure To Give "Prescription Defense" Jury Instruction May Be Fundamental Error

Glovacz, was convicted of trafficking hydrocodone.. An officer, posing as a woman in chronic pain, contacted Glovacz, went to her home, and purchased some thirty tablets. Glovacz claimed she had a valid prescription for the medication and raised an entrapment defense. Glovacz claimed that she did not receive money for the pills she gave the woman, but instead expected the woman to give her back the same amount in a week or so when she obtained her own prescription. Glovacz did not request that the jury be instructed that the possession of a prescription may be a valid defense to the

charge of possession of a controlled substance. The jury was instructed on possession as a lesser offense.

The 1st DCA looked at its recent decision in McCoy v. State, (above) as "instructive" and noted that the jury was not instructed that possession of prescription is a valid defense. The DCA considered the lack of such an instruction a fundamental error given the prosecutor's suggestion in this case that possession could support a conviction for trafficking." Based on the authority of McCoy, the 1st DCA reversed the conviction for trafficking in a controlled substance and vacated the sentence.

Glovacz v. State, 60 So. 3d 423, (Fla. 1st DCA, 3/2/11)

"Doctor Shopping" Statute (F.S. 893.13(7)(a)(8)) Makes It A Crime For A Person Seeking A Controlled Substance Not To Inform The Physician That The Person Has Obtained An Rx For Same Or Similar Substance Within Last 30 Days; Possessing Rx Allows Defendants To Raise "Valid Prescription" Defense.

This case combined two appeals, one filed by Knipp and the other by Kiser since they presented identical legal issues, even though the defendants were not co-defendants. They were represented by the same defense counsel and filed identical motions to dismiss. The trial court's ruling on both cases was the same, making issues on appeal and cross-appeal identical. Both defendants obtained prescriptions for oxycodone from physicians in Broward County, and within 30 days, obtained prescriptions for the same medication from other physicians in Broward County.
F.S. 893.13(7)(a)(8) makes it a crime to "withhold" from a medical practitioner the fact that the person has obtained a prescription for the same or similar controlled substance within the last thirty days. After being charged with "doctor shopping" under the statute, the defense moved to dismiss the charges, arguing that neither defendant affirmatively misled the second physicians, that "withhold" as used in the statute does not impose an affirmative duty to disclose that information unprompted, and that the physician in this case did not ask about any previous prescription. The trial court denied the motion to dismiss. The 2nd DCA affirmed the order denying the motion to dismiss on doctor shopping, holding that the statute does not qualify the withholding of information by requiring an affirmative request for such information. The DCA did affirm the trial court's dismissal of drug trafficking charges because the defendant possessed a "prescription issued by a licensed practitioner in the normal course of business" and the defendant has raised the "prescription defense." (Distinguishing this case from Simpson v. State, 33 So.3d 776 (Fla. 4th DCA 2010).

Knipp v. State, Kiser v. State, 67 So. 3d 376, (Fla. 4th DCA 8/3/11; reh. Denied 8/3/11)

Discovery Of Violation Of Agency Rules Internally Instead Of From Outside Source Means 180 Day Bill Of Rights Deadline Does Not Apply

A probation officer discovered that a convicted felon was living in Department of Corrections (DC) staff housing without permission. On 12/18/2008 the warden signed an incident report alleging that McQuade, a correctional officer, was violating DC rules because he had allowed the felon to live in the housing without permission. On 8/28/2009 McQuade participated in a predetermination conference and on 9/18/2009 he was dismissed from his position. He appealed his dismissal to the Public Employees Relations Commission (PERC) and argued that F.S. 112.532(6)(a) of the Law Enforcement and Correctional Officer's Bill of Rights barred his dismissal because more than 180 days had passed between the issuance of the incident report and DC's disciplinary action.[3]

PERC determined the 180 deadline did not apply because this case involved "an internal disciplinary matter arising from information provided by an Agency officer" as opposed to a complaint made by a private citizen. PERC applied Migliore v. City of Lauderhill, 431 So. 2d 986 (Fla. 1983) in reaching

[3] F.S. 112.532(6)(a) provides that "no disciplinary action, demotion, or dismissal shall be undertaken by an agency against a law enforcement officer or correctional officer for any act, omission, or other allegation of misconduct if the investigation of such allegation is not completed within 180 days after the date the agency receives notice of the allegation by a person authorized by the agency to initiate an investigation of the misconduct."

its decision. McQuade appealed to the DCA PERC's final order dismissing his career service appeal.

The DCA concluded PERC properly applied Migliore to the case at hand, finding that McQuade's violation of DC rules was discovered internally. The DCA also noted that PERC lacked authority to provide employee relief for a violation of the Bill of Rights, with injunctive relief through the circuit court being the only remedy available for a violation of the 180 day rule.

McQuade v. Department of Corrections, 51 So. 3d 489 (Fla. 1st DCA 11/30/2010)

Person Asked To Voluntarily Give Up Drugs Who Then Asks Companion For The Drugs Is Not Acting As "Agent" For Deputy

C.D.M. was a passenger in a vehicle driven by C.C. The car was stopped for a traffic violation. The deputy smelled marijuana while asking C.C. to step out of the vehicle. In court, the deputy testified he told C.C. that he could smell marijuana on C.C. and from the vehicle and that he thought there might be marijuana inside the car. He told C.C., "If you're willing to voluntarily give it up…go ahead and do so." C.C. then walked back to C.D.M. in the car and said, "Hey, give it to me." C.D.M. then gave C.C. the marijuana. In contrast, at trial, C.C. said the deputy asked him, "Where's the weed?" to which C.C. responded that it was in the car. C.C. then testified that the deputy told him, "Will you go over there and get it." C.C. indicated he felt he had no choice because the deputy told him to do it.

Ruling on C.D.M.'s motion to suppress, the trial court found C.C. was acting as an agent for the deputy when he asked C.D.M. to produce the marijuana, and suppressed the evidence. On appeal the 2nd DCA applied this test to determining whether someone is a government agent: (1) Whether the government was aware of, and acquiesced in the conduct; and (2) Whether the alleged agent intended to assist police or further his own ends. The DCA found that the deputy had no idea that C.C. would go ask C.D.M. to hand over marijuana, and since the deputy had no idea where the marijuana was located, was not using C.C. to get evidence against C.D.M. The DCA also found that C.C. was furthering his own ends when he asked C.D.M. to turn over the marijuana. The DCA held that C.C. was not a police agent. Also finding that the behavior was not coerced because the deputy had asked if he would voluntarily give up the marijuana. The order granting suppression of the evidence was reversed.

State v. C.D.M., 50 So.3d 659 (Fla. 2nd DCA, 2010)

Smashing Jewelry Case In Store Is Not Burglary

Colbert walked into a department store that was open and smashed a jewelry case from "the customer side" and stole jewelry. He was convicted of burglary and leaving the scene of an accident (based on Colbert backing his truck into an unoccupied car in the store's parking lot when he left the scene of his smash and grab). The 4th DCA overturned the burglary, rejecting the state's theory that since the interior of the jewelry display case was not open to the public (i.e. the customers), Colbert in smashing the case was breaking and entering. The Court found that the area where Colbert was standing when he smashed the case was open to the public and rejected the argument that in putting his hand in the case Colbert was "entering a dwelling, a structure, or a conveyance" at those terms are used in the burglary statute. The leaving the scene conviction was also reversed, with the Court finding that the car Colbert backed into was not being "driven or attended by any person" as required by F.S. 316.061(1).

Colbert v. State, 49 So.3d 819 (Fla. 4th DCA, 2010)

TSA Random Search Of Checked Luggage That Reveals Child Pornography Did Not Violate 4th Amendment

Higerd checked his luggage at the Pensacola Regional Airport. Outside his presence, his checked luggage was selected for a Transportation Security Administration (TSA) random luggage search. During the search, the TSA officer took out an accordion folder and opened it. The officer testified

that TSA procedures require officers to "thumb through" any thick stack of papers to search for potentially dangerous materials. While going through the papers, the TSA officer discovered 10 photographs of concern. She contacted her supervisor, who then called for an airport police officer, who was told the file contained child pornography. Airport police called local law enforcement and Higerd was arrested. He moved to suppress the evidence claiming the physical search of his checked baggage outside his presence violated his 4th Amendment rights. The trial court denied the motion.

The 1st DCA first noted that administrative searches in airports are an established exception to the search warrant requirement. Such searches may be conducted without probable cause within the security area of the airport as long as the search is reasonable and conducted solely for the purposes of discovering an immediate threat to air commerce. (See: Shaspiro v. State, 390 So. 2d 344 (Fla. 1980). Such a search is reasonable if (1) It is no more extensive than necessary to detect weapons or explosives; (2) It is confined in good faith for that purpose and (3) A passenger may avoid the search by choosing not to fly.

The DCA found TSA's protocol to physically open a certain number of randomly selected bags, swab their inner contents and test those swabs for indications for evidence of explosives to be no more extensive or intrusive than necessary given modern technology. The TSA officer testified that the purpose in flipping through the pages was to determine if there was a weapon or explosives. It was not a search for evidence of other criminal behavior. "The mere fact that a screening procedure ultimately reveals contraband other than weapons or explosives does not render it unreasonable." The DCA affirmed the trial court's denial of the motion to suppress.

Higerd v. State, 51 So. 3d 513 (Fla. 1st DCA, 12/21/10)

Officer's Direction To Turn Off Car Engine Is "Seizure" Requiring At Least Reasonable Suspicion

A Lauderhill Police officer encountered the defendant while patrolling the Lauderhill Mall at 4:15 a.m. The defendant was asleep, on the driver's side of the vehicle, with the motor running. The officer approached the car to determine whether the defendant was sick or injured, and when he finally got the defendant to wake up, he ordered him to turn the car off. The officer said he did so for his safety and the defendant's. The officer was not responding to any dispatch regarding suspicious or criminal activity when he encountered the defendant in the parking lot. The defendant did not smell of alcohol and showed no signs of impairment. During the encounter after the engine was turned off, the defendant was found to be driving while license suspended and in violation of probation. The trial court denied the defendant's motion to suppress all that was obtained in the encounter, relying on State v. Baez, 894 So. 2d 115 (Fla. 2004), and finding the officer "acted prudently in ordering the defendant to shut off his engine to protect the safety of the defendant and others."

On appeal, the defense did not dispute the initial encounter, characterizing it as a consensual interaction until the officer commanded that the engine be turned off. This was characterized as a "seizure" through a "show of authority." The defense maintained that all discovered after that point was "fruit of the poisonous tree." Relying on Popple v. State, 626 So. 2d 185 (Fla. 1993), the 4th DCA found the direction to turn off the engine to be a seizure and found there was no requisite reasonable suspicion. The order denying the motion to suppress was reversed and the case remanded.

A 3-page dissent by J. May indicates there was no meaningful distinction between taking a person's license for a warrant check and asking them to turn off the car while the check was being done. Both have a similar level of exertion of authority. The State Supreme Court has consistently found that no seizure occurs when an officer asks for identification and runs a warrant check. "I believe the request to turn off the car is no more intrusive than the warrant check and remains outside the confines of a constitutional violation."

Gentles v. State, 50 So. 3d 1192 (Fla. 4th DCA, 12/22/10)

Error For Officer To Testify In Armed Robbery Trial Where Gun Had Not Been Found That It Was "Common" To Not Find A Gun In Armed Robbery Cases

The defendant was charged with armed robbery, but was convicted of robbery with a weapon. A cabbie was robbed by a person outside his cab. The driver then followed the fleeing perpetrators who were quickly arrested by police a short distance from the robbery, but no gun was recovered. The cabbie testified a perpetrator used a gun, but he was not sure if it was real. The officer testified that is was not "unusual when a gun is not found."
The 4th DCA found the officer's statement to be admitted in error, and that it was "used to bolster the charge that this was an armed robbery even though no gun was found and tied to this defendant." Since armed robbery was charged, the statement meant the jury was being asked to infer this defendant committed an armed robbery because other such robbers are often found without a gun. Finding that the same testimony contributed to the jury's finding of robbery with a weapon, the court reversed and remanded for a new trial.

Neal v. State, 50 So. 3d 96 (Fla. 4th DCA, 12/15/10)

Arrest By School Resource Officer For Misdemeanor Assault Not Viewed By Officer Unlawful. Juvenile Could Not Obstruct Or Oppose Officer During Illegal Arrest.

A middle school student in Tampa was being disrupted in class. Artis, a school administrator, was called to remove the student from the classroom. Artis walked the student to the student affairs office, but the student refused to enter the room, and began shouting profanities. He threw his books to the ground and threatened to his Artis if he did not "get out of his…face." The school resource officer arrived shortly thereafter. After talking with the student for about 15 minutes, the officer went to place him under arrest for assault. There was no indication on the record that the officer viewed the actions of the student in threatening Artis.

While finding Artis' testimony to be credible, the circuit court judge found the evidence insufficient to establish that the student committed an assault, but did find the student had committed the delinquent act of obstructing or opposing an officer (by bowing up and refusing to place his hands behind his back to be handcuffed).

After finding that there was no evidence to suggest an assault had occurred in the officer's presence, the 2nd DCA found that the officer was not engaged in the lawful execution of a legal duty in trying to arrest the student for that assault, so that the state had failed to establish the obstruction offense. The court indicated is was not inclined to hold that Artis' knowledge should be imputed to Officer Smith under the "fellow officer rule" to support the student's arrest. The matter was remanded for an order of dismissal.

M.W. v. State, 51 So. 3d 1220, (Fla. 2nd DCA, 1/14/11)

Placing Person In Police Vehicle Does Not Solely Provide Basis To Pat-Down Or Search The Person Being Put In The Vehicle

A juvenile was taken into custody as a possible runaway in need of services pursuant to F.S. 984.13. The officer was going to take the juvenile home in the police cruiser, but before placing the juvenile inside the cruiser he handcuffed and searched him "as was his practice." Inside one of the juvenile's pockets the officer found keys with a screw-top container known by the officer to be commonly used to store illegal drugs. After rattling the container, the officer suspected pills were inside. He opened it and found a controlled substance. The seizure of the keys was not preceded by a pat-down.

The 2nd DCA found that the officer did not have a legal basis to search the juvenile. "Circumstances that allow a juvenile to be taken into custody under section 984.13 are not crimes; therefore, the search incident to arrest exception to the warrant requirement does not apply." The officer testified that he searched the juvenile "solely because it was his policy to search people before transporting them in his cruiser." Relying on L.C. v. State, 23 So. 3d 1215, 1219 (Fla. 3rd DCA 2009) ("Although we appreciate the concern of officer safety, we are aware of no case that stands for the proposition officers can search an individual without having performed a pat-down simply because the individual

is being placed in a police vehicle.") the reversed and remanded, finding the trial court erred in denying the motion to suppress.

A.B.S. v. State, 51 So. 3d 1181 (Fla. 2nd DCA, 12/29/10)

Circumstantial Evidence Established "High Crime Area" For Purposes Of Supporting Resisting Offense

In C.E.L. v State, 24 So. 3d 1181 (Fla. 2009) the court held that continued flight, within a high-crime area, in defiance of a police officer's verbal order to stop, constituted the offense of resisting, obstructing, or opposing an officer without violence. At issue the this case was whether the state properly proved the behavior occurred in a "high-crime area."

Officer Raya was dispatched by reason of an anonymous call about a young black male who possible was involved in a police shooting (in apartments at NW 135th Street and NW 30th Avenue) three days prior. The caller provided a description of the male's shirt and location. A second officer indicated by radio that he saw someone matching the tip and was going to approach him. When approached, the subject ran away. Other officers established a perimeter to prevent the person from escaping the area. Officer Ray then saw a black male behind some bushes two houses away from his location (the location identified in the tip). He was wearing clothing matching what had been described in the tip. The officer ran toward him, yelling, "stop police" In response, the subject turned and quickly headed back in the direction from which he had just come. The officer chased and tackled the subject. Cocaine and marijuana was found on him. The trial court refused to suppress the evidence and the case was appealed to the 3rd DCA.

At issue was that in the trial court, the state failed to elicit from the witnesses any indication that the area (NW 89th Street and NW 20 Avenue in Miami-Dade County) was a "high-crime area." However, the court noted, "Had the argument been made below, the State could have recalled the officer and elicited such testimony. We find it difficult to believe that the officer would have testified that this was not a high crime area." The DCA concluded that the lack of "high-crime" testimony was overcome by the anonymous tip, the description provided of the subject, his concealment in the bushes, and flight from the police a second time . The officer was deemed to have had probable cause to arrest the subject. "We conclude that the lack of testimony as to whether this was a high crime area was amply overcome by the anonymous tip, the description, the concealment and the second flight."

Williams v. State, 55 So. 3d 596 (Fla. 3rd DCA, 12/29/10)

Stop And Pat-Down Of Jaywalker

After an officer observed Nichols jaywalking, he activated his emergency lights, stepped out of his car, and made contact with him. During the stop, prompted by the jaywalking, Nichols raised his arms up, and the officer observed a bulge in his waistband, giving the officer reason to believe Nichols may be armed. He patted him down and upon determining the bulge was the grip of a firearm, removed a Colt revolver from Nichols' waistband. The trial court suppressed the gun, concluding the stop was invalid and that there was no probable cause for the pat-down.

The 5th DCA held the trial court erred. F.S. 316.130(12) states that when there is no available cross-walk, an individual must cross the street by a route at right angles to the curb or the shortest distance possible. Nichols was observed crossing the street in a diagonal direction, which the DCA noted, was neither at a right angle or the "shortest" option. The officer had probable cause to stop Nichols to issue a citation. An officer is permitted to pat down a subject when the officer has probable cause to believe that the individual is armed with a dangerous weapon and poses a threat to the officer or other persons. (F.S. 901.151(5)). The observation of the bulge in the waistband created an objectively reasonable suspicion that the defendant was armed and posed a threat. Reversed and remanded.

State v. Nichols, 52 So. 3d 793 (Fla. 5th DCA, 12/30/10)

Fourth Amendment Protections (Expectation Of Privacy) Do Not Extend To Front Steps Of House

Hill committed a pedestrian violation in a police officer's presence, giving the officer probable cause to stop him for that noncriminal infraction. The officer had a basis to approach Hill and detain him for the time necessary to write a citation. Hill had reached the steps of his front porch before he heeded the officer's command to stop. As he approached Hill, he detected a strong odor of marijuana on him. The officer conducted a warrantless search and found marijuana. The trial court granted the motion after finding that "Hill enjoyed the same Fourth Amendment protections on his front steps as he would inside the house."

The 5th DCA held the warrantless search was reasonable under the totality of circumstances. ("[O[ne does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time." State v. Morsman, 394 So. 2d 408 (Fla. 1981), citing State v. Detlefson, 335 So. 2d 371 (Fla. 1st DCA 1976). State v, E,D,R,, 959 So. 2d 1225, 1227 (Fla. 5th DCA 2007).)

State v. Hill, 5D09-1598, 54 So. 3d 53, (Fla. 5th DCA, 1/14/11).

"Consent" Derived From Totality Of Circumstances

The 4th DCA characterized this case as "…a paradigm for a type of case that is common in our courts, where 'consent' to search is found under objectively questionable circumstances." The defendant was charged with trafficking in cocaine and possession of cannabis. Judge Andrew Siegel, of the 17th Judicial Circuit of Broward County denied defendant's motion to suppress evidence and this appeal was made.

The testimony of law enforcement related the following. An anonymous tip that a person with dreadlocks was selling narcotics from a certain apartment was received by police detectives. Placing the area under surveillance from across the street, the detectives saw Ruiz leave his apartment. Ruiz had dreadlocks. The detectives, in their unmarked car, drove into the apartment complex parking lot and "nonchalantly" or "casually" approached Ruiz. One detective asked him his name, and he responded "calmly" that it was "Freddie" and that "he had identification in his apartment if they would like to see it." One detective said he would like to see it and they went to the entrance to the apartment. Ruiz went inside and "motioned" or "nodded" for the detectives to enter, so they went inside. Ruiz went to a bedroom and one detective followed and waited at the bedroom door. From this vantage point he saw a scale and silver spoon with cocaine residue in the scoop part of the spoon. The detective asked Ruiz if it was cocaine and he said it was. The detective then "detained" Ruiz and read him his Miranda rights. A "most cooperative" Ruiz told them additional cocaine was in a Barbasol shaving cream can and that "weed" was in his dresser drawer.

The testimony of Ruiz related the following: He was on his way back from a store when the detectives stopped their vehicle in front of him, jumped out with guns drawn, ordering him not to move. He did not think he was free to go. When asked for identification, he indicated he did not have any on him. The detectives told him he would be arrested if he could not produce identification, and he said he had some in his apartment. The officers "escorted" him to his apartment. When he opened his door, without his permission, the officers entered him apartment and "searched through everything."

The trial judge found the officers' testimony "very credible" and Ruiz's testimony "not credible." The court deemed from the totality of the circumstances that this was a "citizen's encounter" where the detectives were allowed by Ruiz to enter his apartment.

The DCA summarized the law related to consent, noting the state must prove voluntariness by a preponderance of the evidence, but if there is an illegal detention, the state must establish by clear and convincing evidence that the consent was not a product of the illegal police action. (Cases cited in the opinion.) The Court stated, "… 'consent' has come to mean that set of circumstances that the law will tolerate as an exception to the probable cause or warrant requirement. What passes for 'consent' today would not have survived a motion to suppress 25 years ago…The 'totality of circumstances' approach has expanded the concept of 'consent'…(to allow) a trial court to rely on

other factors that swallow aggressive police conduct and contract the limits of Fourth Amendment protection."

The Court continued, "Cases like this one call into question the fairness of some trial court proceedings. On the pages of the record, the story told by the police is unbelievable—an anonymous informant gives incriminating information; police surveillance uncovers no criminal conduct; the defendant is "nonchalantly" and "casually" approached by the police on the street; the defendant cooperatively leads the police back to his apartment to obtain his identification and invites the police inside, where a detective sees contraband in plain view, a fact certainly known to the defendant when he issued the invitation; after his arrest, the defendant tells the police about all the hidden drugs in the apartment." The DCA indicated, "Yet, as an appellate court, we must defer to the express finding of credibility made by the trial court. We were not there. We did not see the witnesses testify…This case demonstrates the importance of an independent judiciary. This case involves the search of a person's home, but were the factors bearing on the voluntariness of the consent scrutinized with 'special care?' Without an unbiased and objective evaluation of the testimony, judges devolve into rubber stamps for law enforcement. The judge may have punctiliously performed the duties of his office in this case, but when considering the large number of 'consent' cases that have come before us, the finding of 'consent' in so many curious circumstances is a cause for concern." Case was affirmed.

Ruiz v. State, 50 So. 3d 1229 (Fla. 5th DCA, 1/12/11)

Drawing Of Blood Was Outside Scope Of Implied Consent Law But Blood Was Provided Voluntarily

Murray and Brink were street racing and crashed, killing another motorist. They remained at the scene of the crash. The investigating troopers indicated neither man appeared to be impaired nor smelled of alcohol and that they had "no probable cause to arrest either man for driving under the influence or to request a breath, urine or blood sample from them." However, both men were asked to voluntarily provide a blood sample, and were told the samples would be tested for the presence of alcohol and drugs, and were aware of the potential for criminal charges arising from the crash. Both men signed consent forms giving permission for the blood draw. No "implied consent" warnings were given.

The men were charged with vehicular homicide. The blood test results were of significance in the prosecution, but the opinion does not detail what was found by reason of the blood tests. The trial court found the men had voluntarily consented to a blood draw but suppressed the test results because "…they should have been informed that the implied consent law requires submission only to a breath or urine test, and that a blood test is offered only as an alternative."
The 5th DCA rever4sed the suppression because both men consented to the blood test. It found that the implied consent law is not the exclusive manner by which blood tests may be admitted into evidence. Recognizing the trial court's reliance on Chu v. State, 521 So. 2d 330 (Fla. 4th DCA 1988) the 5th DCA indicated "Unlike Chu, this case does not involve implied consent…If Chu is read to require a contrary result, we acknowledge our direct and express conflict with it."[4]

State v. Murray and Brink, 51 So. 3d. 593 (Fla. 5th DCA, 1/7/11)

[4] Chu was a case involving a one car crash in which she overturned her car. Paramedics were at the scene. Smelling a strong odor of alcohol on her breath and seeing Chu was sometimes incoherent, the Trooper read her implied consent warnings and obtained written consent for the blood test. The trooper opted for the blood test instead of breath test because the paramedics were "already there" and he thought it would be the easiest and most accurate way to test her. At issue were the limitations on blood testing found at F.S. 316.1932(1)(c) and F.S. 316.1933(1)(a) (2007). The 4th DCA affirmed denial of Chu's motion to suppress, but indicated a blood test could be accepted but only if the person is fully informed that the implied consent law requires submission only to a breath or urine test and that the blood test is offered as an alternative. Chu at 332.

Subject Entering Vehicle And Driving Off After Direct Eye Contact With Patrol Sergeant Does Not Provide Reasonable Suspicion

While on patrol in a known high-crime area a patrol Sergeant noticed Hill standing next to a vehicle in a parking lot of a closed gas station. The Sergeant testified that Hill "looked right at me, went to his driver's door, got in and took off…." He also said there was nothing remarkable about how Hill drove away or the way he continued to drive. Since the station had been closed for over two hours and was in a high crime area and because of Hill entering his car and driving off after making direct eye contact with the Sergeant, he stopped Hill's car, called for backup from a "nearby K-9 unit" and dispatched another officer to the station to determine if there was damage or criminal mischief at the location. The K-9 alerted and the search revealed marijuana and a loaded firearm. Hill was charged with carrying a concealed firearm and possession of cannabis. After his motion to suppress was denied, Hill pled no contest and reserved the right to appeal the motion's denial.

The 1st DCA noted that the Sergeant lacked knowledge of facts relating to a specific criminal offense, and that this fact was underscored by the use of the canine unit. In alight most favorable to the State, the circumstances indentified by the Sergeant as prompting the stop did not constitute reasonable suspicion. The State argued Hill's leaving the station constituted "headlong flight" that provided adequate basis for a stop, relying on Illinois v. Wardlow, 528 U.S. 119 (2000). Noting that driving away while obeying traffic regulations when leaving a location when a police car arrives is the equivalent of a person who simply walks away from an officer on foot, the DCA reversed the order denying the motion to suppress, reversed the conviction and vacated the sentence.

Hill v. State, 51 So. 3d 649, (Fla. 1st DCA, 1/24/11)

Giglio Violation Can Be First Raised On Appeal. When Prima Facie Evidence Of Possible Violation, An Evidentiary Hearing Is Required To Give Defense A Chance To Show State Knowingly Presented False Testimony And If Established, For State To Demonstrate The Testimony Was Harmless Beyond A Reasonable Doubt.

Leroy Mackey appeals a first degree murder conviction. The core of the appeal focuses on a gun tied to the murder which contained a fingerprint of Mackey, a print of an unknown person, and a third print not of quality to be linked to anyone and a DNA test on DNA lifted from the firearm. Trial evidence included an eyewitness who saw the shooting murder from across the street. The witness recognized the shooter as Mackey, who also lived in the neighborhood. Less than a minute after the shooting a man in the neighborhood who heard the shots saw Mackey walking quickly away from the area where the shooting occurred. Later in the day Mackey showed up at another woman's apartment, looking puzzled and different than normal. Mackey asked her to hide a gun for him. She refused but told him to hide it under the stairs of her building. She watched him hide the gun, with a distinctive silver stripe, under those stairs. She recognized the gun as one the defendant's cousin had in his possession the night before. Post-*Miranda*, the defendant claimed he was riding around town with a friend who lived above a Laundromat at the time a shooting occurred. Police could not locate anyone by that name and confirmed there was no apartment over the named Laundromat.
Police located the gun under the stairs. During ballistic testing the gun's hammer broke and had to be replaced. Testing confirmed that this was the gun used in the shooting. Police never compared the unknown fingerprint to the defendant's cousin.

At trial, the investigating detective testified that two months before the trial he checked with the lab about the status of the DNA tests and was told tests were handled in the order in which evidence was received, that tests could not be expedited, and testified the lab did not complete the testing before trial. The firearms and other evidence was admitted. The eyewitness woman who claimed to have seen the defendant shoot the victim was impeached by the defense at trial. At closing the defense argued it was the cousin who shot the victim. The defendant was convicted and sentenced to life in prison.

A motion for a new trial based on newly discovered evidence (RCrP 3.600(a)(3)) was filed. It was supported by an affidavit from the defendant's investigator that the DNA lab COULD expedite tests if the request was made in writing, and that the detective never made such a request. The trial court denied the motion (and other arguments in the motion for a new trial) without an evidentiary hearing.

The 4th DCA noted the defense was on appeal relying on "prosecutorial misconduct" related to the DNA issue, based on RCrP 3.600(b)(5) and Giglio v. U.S., 405 U.S. 150 (1972). The court agreed with the state that the defense failed to preserve these issues for appeal having failed to raise them in its motion for a new trial. However, citing Johnson v. State, 44 So. 3d 51 (Fla. 2010), the DCA noted that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, meaning a Giglio violation may be raised for the first time on appeal even if not properly preserved. The DCA found the record did not conclusively refute the alleged violation. It found the defense investigator's affidavit was a prima facie indication that the detective may have knowingly testified falsely and that the trial court should have held an evidentiary hearing to resolve the allegation.[5]
The DCA cautioned that not every allegation of a Giglio violation warrants a hearing. Determination must be on a case-by-case basis. The case was affirmed in part, and remanded for an evidentiary hearing on the motion for a new trial and the alleged Giglio violation.

Mackey v. State, 55 So. 3d 606 (Fla. 4th DCA, 1/19/11)

Refusal To Provide Identification Not A Crime Unless Person Is Either Lawfully Detained Or Under Arrest

M.M. was one of several juveniles who got into a loud disagreement at a Starbucks in a shopping center. A deputy arrived but the disturbance (an argument over money) had subsided. After determining from Starbucks personnel what had happened, the deputy approached the group, which was sitting outside, to request that it leave. This provoked a "lot of protest and cursing and yelling." Eventually all the group dispersed except M.M. The deputy made it clear that she wanted M.M. to leave the entire shopping center and eventually M.M. began walking "extremely slowly" toward a Publix, insisting he did not have to leave the shopping center. He went in the Publix. At this point the deputy approached him and asked for his name and identification. He twice refused, claiming he had no identification on him. He was then arrested for resisting without violence and for trespass. M.M. was adjudicated delinquent for the resisting charge, and he appealed.

The 1st DCA noted that to sustain a conviction or delinquency adjudication, the state must show: (1) The officer was lawfully executing a legal duty; and (2) the defendant's actions constituted obstruction or resistance of that legal duty. (Citing: S.G.K. v State, 657 So. 2d 1246, 1247 (Fla. 1st DCA 1995). If an officer is not engaged in executing process on a person, not legally detaining the person, or has not asked the person for assistance with an ongoing emergency that presents a serious threat of imminent harm to a person or property, a person's words alone can rarely rise to the level of obstruction. (See: D.G. v. State, 661 So.2d 75, 76 (Fla. 2nd DCA 1995). Providing false information to a police officer during a valid arrest or stop can rise to that level. (E.g. Sauz v. State, 27 So. 3d 226, 227 (Fla. 2nd DCA 2010). However, the DCA noted that failing to give one's correct identity is not a crime unless the person is legally detained. (Citing Sauz at 228 and Burkes v. State, 719 So. 2d 29, 30 (Fla. 2nd DCA 1998).

Since M.M. was not under arrest or otherwise lawfully detained when he declined to give the deputy his name (Valente's investigation into the Starbucks disturbance had "long since ended"), his refusal to provide his name or identification did not obstruct Valente in executing a legal duty. Adjudication for resisting an officer without violence was reversed.

M.M. v. State, 51 So. 3d 614 (Fla. 1st DCA, 1/13/11)

Impeachment By Prior Convictions

Stallworth was arrested after tossing a prescription bottle, containing a controlled substance, from his parked vehicle. A defense witness, Ducree, testified that the bottle was placed there by someone else. Attempting to impeach Ducree's credibility, the State questioned Ducree and asked if he had

[5] The Florida Supreme Court held in *Johnson* that to establish a *Giglio* violation, the defense must establish the prosecutor presented false testimony, knew it was false, and that the evidence was material. Once the first two elements are established, the burden shifts to the state to prove that the false evidence was immaterial by showing it was harmless beyond a reasonable doubt (i.e. no reasonable possibility that the error contributed to the conviction.)

ever been convicted of a felony. Ducree admitted he had and when questioned how many times, Ducree responded numerous times. The State asked: "Would eight times sound right?" Ducree responded: "Could be right." Over several objections, the State was allowed to continue its questioning of Ducree regarding his prior convictions and the nature of those crimes.

The 1st DCA noted that pursuant to Section 90.610(1), Florida Statutes, it has held that "the prosecutor is permitted to attack the [witness's] credibility by asking whether the [witness] has ever been convicted of a felony or a crime involving dishonesty or false statement, and how many times." Gavins v. State, 587 So. 2d 487, 489 (Fla. 1st DCA 1991). The 1st DCA stated that if the witness "admits the number of prior convictions, the prosecutor is not permitted to ask further questions regarding prior convictions, nor question the [witness] as to the nature of the crimes." However, if "the [witness] denies a conviction, the prosecutor can impeach him by introducing a certified record of the conviction." The 1st DCA concluded the trial court abused its discretion by allowing the State to continue questioning Ducree as to the exact nature of all eight of his convictions and reversed and remanded for a new trial.

Stallworth v. State, 53 So. 3d 1163, (Fla. 1st DCA, 2/7/11)

Failure To Object To A Non-Sworn Motion To Dismiss Considered A Waiver By State Of Motion's Deficiency. With No Traverse Filed, Motion To Dismiss Should Have Been Granted.

Despite the requirement that the facts on which the motion (to dismiss) should be alleged specifically and the motion sworn (FRCrP 3.190(c)) the 4th DCA found the state's failure to traverse a non-sworn motion to dismiss or to object to its form as not being sworn "amounted to a waiver of the deficiency", and found no error in a trial court's granting of the motion on the basis of the non--sworn, and non-traversed motion.

State v. Pitts, 53 So. 3d 1191, (Fla. 4th DCA, 2/9/11)

Failure To Conduct Inventory Search Pursuant To Standardized Department Policy Results In Suppression Of Evidence

Kilburn was arrested for driving under the influence (DUI) and was charged with a felony based upon his three prior DUI convictions. Following the arrest, Kilburn's truck was towed to an impound lot. An inventory search was conducted and upon discovery of a pill bottle in the truck that was opened and found to contain illegal controlled substances (marijuana and alprazolam), possession charges were also filed against Kilburn. At the motion to suppress the deputy testified that the Sheriff's Office policy required an inventory search but that "…there were no standardized criteria or procedures for conducting such a search."

The First DCA noted that for the inventory search exception to apply, an inventory search must be conducted according to standardized criteria (citing State v. Wells, 439 So. 2d 464 (Fla. 1989). Finding that the trial court made no finding of standardized criteria and noting that there was no evidence at trial that it was standard policy t open any closed containers found during such searches, the 1st DCA reversed the trial court's order denying the motion to suppress the pill bottle's contents.

EDITOR'S NOTE: Review your agency's policy regarding inventory searches. Does it specifically state that closed containers may be opened? If not, this case suggests it should.

Kilburn v. State, 54 So. 3d 625 (Fla. 1st DCA, 2/22/11)

Consent To Search Home Given By Handcuffed Person On The Ground Found To Have Been Voluntarily Provided

Gonzalez pled no contest to trafficking in cannabis, reserving his right to appeal the dispositive motion to suppress. Detectives were conducting a plain clothes surveillance of Gonzalez's house after an anonymous tip. They "made contact" with the defendant, his girlfriend and her friend. The front door to the house was open and the detectives smelled the odor of cannabis coming from

inside. Gonzalez was advised the detectives were conducting an investigation, was cuffed, and placed on the ground. Gonzalez told the detectives there were cannabis plants in the house and consented to a search of the house. He was picked up, placed in a police vehicle, and the cuffs were removed. He again gave oral consent to enter the house and signed a consent form. 52 cannabis plants were found in the house.

At the hearing, Gonzalez testified he was cuffed while one detective held a gun to his head and was told to sign the consent form or they would get a search warrant. He said he finally signed it because they threatened to arrest his girlfriend if he did not. The girlfriend corroborated Gonzalez's version and said she did not hear him give consent to enter the house. The trial court denied the motion to suppress, finding the consent was freely and voluntarily given.

The 4th DCA noted the police had sufficient facts to arrest the defendant during the initial encounter. The DCA noted the defendant's spontaneous admission that he had cannabis plants in his house provided further grounds for his seizure. Under these circumstances, cuffing and placing on the ground was not unlawful or unreasonable. Noting the absence of any coercive or threatening circumstances being present, the DCA found that under the totality of circumstances, the defendant's consent was voluntary rather than acquiescence to police authority. The suppression motion's denial was affirmed.

Gonzalez v. State 59 So. 3d 182, (Fla. 4th DCA, 3/9/11)

After Balancing All Factors Court Finds A Reasonable Person Would Not Have Believed Self To Be In Custody Under Facts Of Case

The State appealed the suppression of Perez's admissions to a detective after the trial court found Perez was in custody and should have been given *Miranda* rights prior to the questioning. He facts were as follows: An 11-year-old girl told police that she and her 13-year-old girlfriend went to Perez's home and had sex with Perez's friend, Jamal. The girl showed police where the sexual encounter took place. The detective later returned to Perez's home and advised he was investigating a sexual assault that was reported to have occurred in the home. The detective identified Jamal as the suspect and told Perez he wanted to question him about what he knew about the incident. Perez asked that his mother be present for the interview. While waiting for the mother to arrive from her work, the detective and Perez continued to converse "casually." The mother never objected to the detective being in her home or interviewing Perez. The mother and Perez knew Jamal had been arrested for having sex with an underage female in their home. The mother believed the detective was there to discuss Jamal's involvement, not Perez's. The detective asked the mother to leave the room as he was "going to discuss sexual issues" and he indicated some people are uncomfortable talking about such things in front of their mothers. The mother agreed, and left. During this discussion, Perez admitted having sex with the 13-year-old.

The defense argued Perez was in custody and was not given his rights under *Miranda*. The trial court believed the detective deceived Perez into believing he was investigating Jamal, when in fact he was investigating Perez's encounter with the second female. The 5th DCA found that conclusion unsupported by the record and noted that even if it were true, it would be only one of many factors to consider under the four-part test in Ramirez v. State, 739 So.2d 568, 574 (Fla. 1999) to be applied to determine whether one is in "custody" or not. Finding that the questioning was in a non-threatening manner in Perez's own home, and that Perez was never confronted with evidence of his own guilt, the DCA found the questioning not to be custodial. It recognized that the detective's failure to advise Perez the questioning could end at any time and the detective asking the mother to leave the room weighed in favor of finding Perez was in custody, but nevertheless found that balancing all factors, a reasonable person would not have believed he was in custody. The suppression order was reversed, and the case remanded.

State v. Perez, 58 So. 3d 309, (Fla. 5th DCA, 3/4/11)

Inappropriate Re-Initiation of Contact After Invoking Right To Counsel

Defendant O'Brien was arrested at the home of a victim of a sexual battery on a child less than 12 years old. Once O'Brien explained that he and the child "had just been messing around" the deputy advised him of his *Miranda* rights. O'Brien "unequivocally" asked to have an attorney present, and interrogation ceased. O'Brien was handcuffed and placed in a patrol car. About 40 minutes later a Sergeant initiated a conversation with O'Brien, who was still in the patrol car, asking if he was "willing to reconsider" and talk with him. The Sergeant told O'Brien the 11 year old victim was going to be interviewed and "the truth would come out" anyway. After being transported to the Sheriff's Office, O'Brien was given *Miranda* warnings again and he waived his right to an attorney. An interrogation began and O'Brien confessed. The trial court denied suppression of this confession, finding that O'Brien had made a voluntary decision to waive the right to have counsel present.

After citing Edwards v. Arizona, 451 U.S. 477 (1981) the First District Court of Appeal noted that a valid waiver of one's right to an attorney can be determined only if the individual waiving the right is the one responsible for reinitiating contact with the police. (Quoting from Sapp v. State, 690 So.2d 581, 584 (Fla. 1977) and noting Maryland v. Shatzer, 130 S.Ct. 1213 (2010)). The DCA, noting the contact in this case was initiated by the Sergeant held that there was no valid waiver of the right to counsel and that the confession should have been suppressed. The conviction was reversed and the case remanded for further proceedings.

O'Brien v. State,, 56 So. 3d 884, (Fla. 1st DCA, 3/16/11)

Conviction For "Escape" Reversed Because State Failed To Demonstrate Defendant Was "Validly Arrested And In Lawful Custody"

Moncrieffe was originally picked up by Sunrise Police Department after being called to the scene by a drugstore manger complaining he was acting suspiciously. During a pat-down in the drug store's parking lot, the officer felt a bulky object and asked Moncrieffe to empty his pockets. Moncrieffe placed on the hood of the police car keys to a Honda, a cell phone, and a wallet. Inside the wallet the officer found four counterfeit bills. Looking in the Honda parked in the lot, an officer noticed a driver license on the front passenger seat that "obviously did not belong to the Defendant." A warrantless search of the car produced the license, some tools, a hat and a pair of gloves. The Honda and the cell phone were subsequently found to have been stolen from a person in Tamarac. Moncrieffe was arrested for loitering and prowling and transported to the Sunrise Police Department.

Sunrise contacted the Broward Sheriff's Office with information that Moncrieffe may have committed a crime in BSO's jurisdiction. A BSO detective responded, gave Moncrieffe his *Miranda* rights and obtained a written waiver. The BSO detective obtained the phone owner's permission to scroll through the cell phone to look at numbers called by the phone. The detective called one of the numbers and spoke to a woman who claimed to have been raped earlier that day and who had reported it to the Lauderhill Police Department. The woman's description of the assailant matched Moncrieffe. Tolls and clothing used during the rape matched some of the items found in the Honda.

Lauderhill sent an officer to Sunrise to interview Moncrieffe. In the interim, the rape victim selected Moncrieffe in a photographic lineup. In the interview, Moncrieffe admitted having sex with the victim, but maintained it was consensual. Moncrieffe was subsequently charged with sexual battery and burglary with a battery. The Lauderhill officer transported Moncrieffe to BSO's Tamarac holding facility, which rejected him because he was still under the influence of "Xanax." The Lauderhill officer then transported him to the Florida Medical Center. Moncrieffe escaped from the Florida Medical Center while still in custody of the Lauderhill officer.

At issue was the authority of the Lauderhill officer to arrest Moncrieffe while he was physically in Sunrise. The 4th DCA noted an arrest would have been authorized only if in hot pursuit or by warrant. The state argued that the transportation from one jurisdiction to another was appropriate as cooperative efforts from officers from different jurisdictions during the investigation. However, the state failed to introduce a Mutual Aid Agreement that would provide legal authority for a Lauderhill officer to make a warrantless arrest of Moncrieffe outside his jurisdiction (i.e. Lauderhill).

The DCA found that the Lauderhill officer "exceeded his authority by taking the defendant into custody outside the territorial limits" of his city without a warrant. The fact that there was probable cause to arrest Moncrieffe was not controlling. Because Moncrieff was not in the lawful custody of the Lauderhill officer at the time he fled the Florida Medical Center, the conviction and sentence for the escape was reversed and the case remanded for discharge as to the escape charge. (The sexual battery and burglary with battery charges had been severed and were not affected by this "escape" trial.)

Moncrieffe a.k.a. Reuben Foster v. State, 55 So. 3d 736(Fla. 4th DCA, 3/16/11).

Driver Of Stolen Vehicle Has No Standing To Challenge Search Of The Vehicle

The trial court granted a motion to suppress evidence seized pursuant to a vehicle search and the state appealed. On appeal the state maintained that one who has stolen a vehicle has no reasonable expectation of privacy in the vehicle and has no standing to challenge the search.

Gentry was seen at a 4-way stop at 4AM with the car's brake lights engaged, for a period of about 20 minutes. The Sergeant who observed him was not in his (Holly Hill) jurisdiction, so he called Daytona Beach officers who responded and saw Gentry in his vehicle. When Gentry started to drive away, the Daytona Beach officer initiated a traffic stop. Gentry was determined not to have a valid driver's license and was cuffed and placed in a patrol car. The Daytona Beach officers searched the car and seized several items. They also determined the car was stolen.

Relying on Arizona v. Gant, the trial court approved the initial approach and arrest for not having a valid driver license, but suppressed evidence found in the car because Gentry had been arrested and removed from the area of the car. The 5th DCA found that "the driver of a stolen vehicle does not possess standing to challenge the search of the vehicle." State v. Singleton, 595 So.2d 44, 45 (Fla. 1992) which cited Rakas v. Illinois, 439 U.S. 128 (1978).

In reality, Gentry admitted on appeal that he lacked standing, but then argued the officer lacked suspicion to engage in the initial traffic stop. Citing Bailey v. State, 319 So.2d 22, 26 (Fla. 1975) the 5th DCA found the officer's concerns justified the stop. The suppression order was reversed.

State v. Gentry, 57 So.3d 245 (Fla. 5th DCA, 3/11/11).

Detectives' Behavior Was Functional Equivalent Of Questioning But Since Evidence Of Guilt Was Overwhelming Error Was Harmless

Three Winter Haven Police detectives took Horne into custody and brought him to an interrogation room. They did not give him *Miranda* warnings before they showed him a picture of the victim, played a recorded statement by Horne's brother indicating Horne had admitted to him he committed the crime, and showed Horne a recovered firearm used in the crime. Upon being presented all of the evidence, he confessed. He was then given *Miranda* rights and subsequently actually questioned by the detectives.

The 2nd DCA concluded the detectives' actions were the "functional equivalent of interrogation" and should have known what they were doing was "reasonably likely to elicit an incriminating response from Horne." The Court indicated the trial court erroneously failed to suppress his pre-*Miranda* statement. However, the court found the error was harmless beyond a reasonable doubt, given the overwhelming evidence of guilt. (See: Ross v. State, 45 So. 3d 403, 434 (Fla. 2010). There were several eyewitnesses to the crime. The Court found there was no "reasonable probability that the error in admitting Horne's pre-*Miranda* statements contributed to the guilty verdict." Judgment and sentence were confirmed.

Horne v. State, 57 So. 3d 927 (Fla. 2DCA, 3/25/11).

Common Pocketknife Is Not "Weapon" Banned From Schools By F.S. 790.115(2)

R.H. was adjudicated of violating F.S. 790.115(2) by possessing a common pocketknife on school property. Section 790.115(2) reads, in pertinent part, as follows:

> *A person shall not possess any firearm, electric weapon or device, destructive device, or other weapon as defined in s.790.001(13), including a razor blade or box cutter, except as authorized in support of school-sanctioned activities, at a school-sponsored event or on the property of any school, school bus, or school bus stop . . . .*

On appeal of a denied motion to dismiss under Rule 8.110(k), the 4th DCA noted that a "weapon" as used in Chapter 790 is defined as being "any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife, plastic knife, or blunt-bladed table knife." Since a common pocketknife is excluded, the Court found that R.H. could not have violated the statute. Case remanded for entry of judgment of dismissal.

R.H. v. State, 56 So. 3d 156 (Fla. 4th DCA, 3/23/11)

"Encouraging Or Requesting A Person To Tell The Truth" Does Not Make Confession Involuntary

A seven year old girl was taken to the doctor's office complaining of pain in her "private area." The doctor discovered she had an STD and had suffered physical trauma to the affected area. The victim identified Garcia as causing the injuries. Police were called. They made initial contact with Garcia outside the doctor's office. The detective identified himself, read Garcia his *Miranda* rights and advised him their conversation was being recorded. Garcia denied molesting the victim. He was then handcuffed. During this initial conversation the detective made several statements including: "I don't want you to confess because we have handcuffs on you. All I'm trying to tell you is right now it's your chance to say you made a mistake. If you admit to things, you make mistakes, you made a bad choice; but if you deny this, in my book, you are a criminal."

Garcia then admitted to molesting the girl. He was taken to the police station, given *Miranda*s again and he again admitted molesting the girl. The trial court held the statements were voluntary. The 4th DCA affirmed. "Here the detective did not engage in improper conduct because he merely encouraged Garcia to confess."

Garcia v. State, 60 So. 3d 1097 (Fla. 4th DCA, 4/20/11)

16 Year Old Invited To Come To The Police Station And Talk Further With Detectives Was Not In Custody

Ladson appealed his conviction for manslaughter by culpable negligence with a firearm (a lesser to the charge of Second Degree Murder With A Firearm) and argued his confession should have been suppressed. He was 16 at the time of the incident. He became "a person of interest" in the shooting death of a motorcyclist after police fielded numerous Crime Stopper tips implicating him. Nine days after the shooting, Ladson was seen on the street and was approached by a detective and three other officers. He was asked if he was willing to come to the station and talk further with the detective about the investigation. He was standing outside a patrol car, and was not in handcuffs. Ladson replied, "No problem," but asked if he'd be back at school in time for football practice. The detective indicated that it depended on how the interview went. Ladson was not advised that he did not have to go with the officers. He was frisked for officer safety and rode to the police station in the front seat of a patrol car. Following some preliminary interview questions Ladson signed a written wavier of *Miranda* rights. He first denied involvement in the shooting, then he implicated another person in the shooting, and then finally admitted he was the shooter. After additional questions and a break for food, Ladson was again given his *Miranda* rights and provided a videotaped sworn confession. The detective indicated at the suppression hearing that he "(D)id not consider Ladson in custody until after he had provided the sworn statement."

The trial court found that Ladson voluntarily accompanied the officers to the station and that the initial encounter was consensual and not a "Terry stop." The 3rd DCA agreed with the trial court. Applying the tests of Ramirez v. State, 739 So. 2d 568, 574 (Fla. 1999) and Roman v. State, 475 So. 2d 1228, 1231 (Fla. 1985), it determined that a reasonable person in Ladson's position would not have believed he was not free to go or functionally under arrest before providing his confession.

Ladson v. State, 63 So. 3d 807(Fla. 3rd DCA, 5/4/11)

Subject's Indication "I want a lawyer…" Meant Questioning Should Have Stopped

Moss received *Miranda* warnings. Near the end of the warnings (which were audio taped) he was heard to say "I want a lawyer…(unintelligible)…I want to talk to a lawyer." The detected asked, "Before you talk to me?" Moss responded, "Yes."

The Detective persisted. "Okay. So that means, if you request to talk to a lawyer before you talk to me, then we won't be able to talk about what happened in this incident." To which Moss responded, "I understand all that." After this exchange, the interrogation continued.

The trial court ruled Moss's invocation to be "equivocal" and denied the motion to suppress. He was convicted of petit theft. On appeal, the 4th DCA found the invocation to be unequivocal. It was the Detective, not Moss, who re-initiated the conversation. The Court noted the interrogation "never paused" and was a strategy to wear down Moss's resistance and make him change his mind about consulting with a lawyer. The conviction was reversed and remanded for new trial with direction that the statement be suppressed.

Moss v. State, 60 So. 3d 540 (Fla. 4th DCA, 5/4/11)

Consent To Search For Weapons And Drugs Is Not Consent For General Search

A Fort Lauderdale ordinance requires registration of bicycles, and a red/white label under the bike's seat indicates such registration. An officer saw A.L.T. with a bike having no such label and approached him for questioning. The officer asked A.L.T. if he could search him for weapons or drugs. A.L.T. responded, "[T]hat's fine, I don't mind." The officer retrieved a wallet from A.L.T.'s rear pocket and searched through it. He found a Florida ID card belonging to an elderly female, a condom, and a picture of a young woman. When asked why he searched the wallet, the officer indicated "narcotics can commonly be found within the billfold, underneath and in front of the wallet." The officer questioned A.L.T. about why he had the wallet. A.L.T. said he had found it, was planning to return it, but had spent $40 that was in it and was afraid the owner would hassle him about spending the money. A records check revealed a burglary six days prior at the address on the Florida ID card. About 30 minutes later, A.L.T. was released by the officer. After the case was turned over to a detective, an arrest warrant was secured and a BOLO issued for A.L.T.'s arrest. A.L.T. was arrested, given *Miranda* rights, and confessed to the burglary. A.L.T. moved to suppress information obtained from the Florida ID card, claiming its discovery was beyond A.L.T.'s consent to search. His motion was denied. A.L.T. pled no contest, reserving the right to appeal the denial. The 4th DCA distinguished this situation from the one in Aponte v. State, 855 So. 2d 148 (Fla. 5th DCA 2003) in that the Aponte consent was to a general search, while the consent in this case was limited to a search for "weapons and drugs." The ID card, the woman's photo and the condom were neither weapons nor drugs and, according to the court, should not have been inspected. A consent to search for drugs and weapons is "not an open invitation to remove all the contents from one's wallet." Denial of the suppression motion was reversed and the trial court was directed to vacate the disposition order.

A.L.T. v. State, 63 So. 3d 855 (Fla. 4th DCA, 6/8/11)

Vehicle That Partially Extended Into Driveway Portion Of Right-Of-Way Was Not Within The "Curtilage"

At issue in this case is whether the vehicle was located within the curtilage of a resident that was the subject of a search warrant. The trial court concluded that since the vehicle was partially overlapping a portion of the driveway to the residence, it was within the curtilage, and refused to suppress a firearm and drugs located within the vehicle. The 5th DCA reversed the trial court, finding the car was not in the curtilage.

After conducting a controlled purchase of drugs, police obtained a search warrant for the involved residence. The warrant authorized search of any vehicle within the residence's curtilage. The Appellant, who was not under investigation and did not live at the residence happened to parked in his car in front of the residence with a female companion at the time the warrant was executed. They were in the car at the time of the search.

The residence was on a city street. It was surrounded by a chain-link fence, with an opening for ingress and egress through a dirt driveway. Appellant was parked outside the fence, parallel to the road within the city right of way, very close to the paved portion of the right of way. Part of Appellant's vehicle was parked over the driveway portion of the right of way, impeding, but not blocking ingress/egress through the opening in the fence. The sole issue is whether the vehicle was on the curtilage or not.

Restating discussion of curtilage from United States v. Dunn, 480 U.S. 294 (1987) (e.g. "intimately tied to the home itself"), the court then restated Dunn's "Four Factors" in determining "curtilage." (1) The proximity of the area to the home (2) Whether the area was within an enclosure surrounding the home (3) The nature of the uses to which the area is put and (4) The steps taken by the resident to protect the area from observations of people passing by. (Dunn at 301).

Applying the factors, the DCA found the area outside the residence's chain link was outside the curtilage. Only the "proximity" factor favored the state. The vehicle was partially parked in a small area outside the chain link fence that was used for ingress and egress, but was within an area designated as a public right of way. In Footnote 4, the court noted that typically the state tries to define "curtilage" narrowly, and had there been a police car where the Respondent was parked, and plain view observations were the basis of a search warrant, the state would be arguing the area was not "curtilage." The denial of the suppression was reversed, case remanded with instructions to grant the motion and to vacate judgment and sentence.

Wheeler v. State, 62 So. 3d 1218 (Fla. 5th DCA, 6/10/11)

Weird Behavior At Bank Did Not Amount To "Reasonable Suspicion"

A bank manager called "911" to report a customer "acting weird" and "attempting to withdraw $17,500." The manager indicated the customer wanted the check payable to the driver of a Nissan parked in front of the bank. The customer kept going back and forth between the Nissan and the bank, acting "strangely" and having discussions with persons in the Nissan. The manager thought the customer might be on drugs. The "911" dispatcher thought the customer was being forced to do the transaction by the people in the Nissan. The manager also reported that some of the people involved were "pacing and wanting to know why the transaction was taking so long" and that the activities were causing the bank employees concern. The information was conveyed to responding officers.

As officers arrived on the scene, the Nissan was attempting to back out of a parking space. The officers blocked the exit with their vehicles. Majors was arrested, and evidence seized from him. At the suppression hearing, the officers admitted they had seen no criminal activity and were not aware of any criminal activity prior to stopping the Nissan. Their only basis was that the car was "involved in the call the were investigating." The trial court denied the motion to suppress and Majors pled nolo contendere to 6 counts of criminal activity resulting from his interactions with police at the bank, reserving his right to appeal.

The state conceded the blocking of the car was an investigatory stop, and argued the attempt to leave the bank supported reasonable suspicion. Citing Hill v State, 51 So. 3d 649 (Fla. 1st DCA 2011) the 1st DCA noted that a vehicle driving away from a scene in an "unremarkable fashion" is not likely to give rise to a reasonable suspicion of criminal activity. It found that in light of the failure of the officers to articulate any factual grounds for suspecting the driver or occupants of the Nissan to be engaged in criminal (as opposed to "weird") behavior, there was no reasonable suspicion under the facts of this case. It also rejected the state's alternative argument based on the "community caretaking doctrine." Under this doctrine an officer may stop a vehicle without reasonable suspicion if necessary for public safety and welfare. See e.g.: Shively v. State, 2D09-3149, --So. 3d—(Fla. 2nd DCA 5/25/11) and Gentiles v. State, 50 So. 3d 1192 (Fla. 4th DCA 2010). However, the court noted, even these stops must be supported by specific articulable facts showing that the stop was necessary for the protection of the public. The court found that the stop of the Nissan under either theory was based on "sheer speculation" rather than facts. Judgment and convictions were reversed with directions to grant the motion to suppress and to discharge Majors.

Majors v. State, 1D10-4442, 36 Fla. L. Weekly D1355, -- So. 3d – (Fla. 1st DCA, 6/23/11)

Unjustified Police Entry Onto Property's Curtilage Dooms Discovery Of Evidence

Police received an anonymous tip that a home was being used as a marijuana hydroponics lab. As part of the investigation, the property was placed under surveillance. The one acre lat was completed enclosed by tall fences and hidden from view by a tall hedge. The house was set back in the lot, and not visible from the street. There was a U-shaped driveway, and each end of the driveway was obstructed by a closed metal gate, controlled by remote control. The mailbox was outside the fenced perimeter. At some point during the surveillance, an officer who could view the house indicated someone was getting into a car in the driveway. When the gate was opened by remote control, a Sergeant entered through the opening, and waved for a detective to come in. The detective drove his car into the driveway "a couple of feet" from the defendant's car, blocking the defendant's exit through the gate.

The Sergeant approached the defendant and indicated he needed to talk to him. The detective came up to car and two other officers entered through the still-opened gate. The Sergeant asked for consent to search the residence and the defendant and two officers walked back toward the house. Once on the porch the defendant sat down and asked for clarification of what the Sergeant was asking. The Sergeant replied they just wanted consent. The defendant refused to sign a consent form but opened the door for police. Inside the residence, police found 144 marijuana plants. The defendant was charged with possession of cannabis with intent to sell. A motion to suppress based on police trespassing, the warrantless entry; invalid consent and lack of exigent circumstances was filed. The defense argued that the initial illegal entry tainted the remainder of the encounter. The trial court denied the suppression motion and the defendant pled, reserving his right to appeal.

The 3rd DCA reversed the denial of the suppression motion. The Court ruled "When Sergeant Falcon slipped into the gate that serendipitously opened while the police were surveilling the property, he committed a trespass onto the defendant's property. The consent arguably obtained after the trespass did not cure the taint of the illegality." The court then turned to a traditional 4th Amendment analysis, noting that a yard adjacent to a residential dwelling, particularly one blocked from view from the street "is clothed with a reasonable expectation of privacy…" (citing Potts v. Johnson, 654 So. 2d 596 (Fla. 3rd DCA 1995) and other cases.) The court found that this property's enclosed area constituted curtilage that falls under the same constitutional protections as the residence it surrounds.

The state argued that when the gate opened, the Sergeant was free to enter. The court recognized that a policeman may enter the curtilage surrounding a home in the same way as a salesman or visitor could, but deemed the gate opening here to be a "momentary opening" for the express purpose of leaving. The court noted this was not an opening to invite the public into the area. After noting that "trespass" under F.S. 810.011(1) includes entry onto the curtilage of a structure or building, the court deemed the officers' actions as "effectively a trespass onto the property" and ruled that the entry "violated the defendant's Fourth Amendment rights and any evidence seized after such entry must be suppressed."

Further, the subsequent consent did not remedy the effect of the illegal entry. The unlawful police action presumptively taints and renders involuntary any consent to search, absente any clear and convincing evidence that there was a clear break in the chain of events sufficient to dissolve the taint. There was no such break in this case. The order denying the defendant's suppression motion was reversed. The state had already indicated the motion was dispositive of the case, and it was remanded, with an order to dismiss the case on remand.

Fernandez v. State, 63 So. 3d 881 (Fla. 3rd DCA, 6/15/11)

Driver Speeding, Smelling Of Alcohol And Having Bloodshot, Watery Eyes Provides Reasonable Suspicion For DUI Investigation

Castaneda was pulled over for speeding around 1:00 AM. He was traveling in excess of 60 MPH in a posted 40 MPH zone. When the officer approached Castaneda he noted he "smelled the odor of an alcoholic beverage" on his breath and saw he had "bloodshot, watery eyes." In response to being asked if he had been drinking, he said he had not. The officer then requested Casteneda to do some roadside sobriety exercises. An arrest ensued and Castenada was charged with one count of possession of cocaine and one count of driving under the influence (DUI). The trial court suppressed the results of the field sobriety exercise and derivative evidence indicating that the officer did not have reasonable suspicion to detain Castenada for a DUI investigation because he did not exhibit additional signs of impairment such as staggering.

The 4th DCA noted that to detain someone for a DUI investigation, the officer must have reasonable suspicion the detainee committed the offense, based upon facts that can be interpreted in light of the officer's knowledge and experience. Here the office made the same observations the 4th DCA had previously deemed to constitute reasonable suspicion in Origi v. State, 912 SO. 2d 69 (Fla. 4th DCA 2005). The DCA reversed the trial court's order suppressing the results of the field sobriety exercise.

State v. Castenada, 36 Fla. L. Weekly D1347, --So. 3d—(Fla. 4th DCA, 6/22/11)

Robbery By Snatching Requires Property Snatched To Be "ON" Person, Not "Next To" The Person

A victim sitting at a bus stop with her purse next to her had it snatched by Wess. He was charged with robbery by sudden snatching. At close of the State's case, the defense moved for a judgment of acquittal, arguing the proof did not establish the purse was in the victim's physical possession as required by F.S. 812.131. At most, the facts established a simple theft. The motion was denied and Wess appealed.

F.S. 812.131 states:

> (1) "Robbery by sudden snatching" means the taking of money or other property *from the victim's person*, with intent to permanently or temporarily deprive the victim or the owner of the money or other property, when, in the course of the taking, the victim was or became aware of the taking. (Emphasis added.)

The 1st DCA held that the specific language of the statute required property to be on a victim's person, not next to that person. While the purse was in the victim's proximity, it was not on the victim's person. The court rejected the state's argument that "from the victim's person" meant taking property away from the victim's person. The DCA deemed Wess guilty of theft, not robbery. The conviction for robbery by sudden snatching was reversed and the case remanded for sentencing of Wess for theft.

Wess v. State, 36 Fla. . Weekly D1640a, -- So. 3d --, (Fla. 1st DCA, 7/28/11)

Constructive Possession Of Child Pornography Proven Despite Fact That Household Computer Was Under More Than One Person's Control

Bussell was a boat captain and would download pornography to CD's to take during his long trips at sea. He used a peer-to-peer network. Since that network was often used to download and share child pornography, investigators monitored users closely. Upon seeing downloads of child pornography being done using the network, investigators determined the computer doing the downloads, and seized it by search warrant. During the execution of the warrant, the computer appeared to actively downloading child pornography using the peer-to-peer network.

The state called Bussell's wife who indicated she had assisted him in downloading pornography to take with him, but never any child pornography. Bussell's son was called by the state and he indicated he was at school when the several downloads of child pornography had occurred. An investigator testified that no child pornography downloads occurred while Bussell was at sea. Bussell took the stand in his own defense, and indicated he never downloaded child pornography but did admit he was in town the dates the child porn had been downloaded. He was convicted, and his motion for judgment of acquittal denied. He appealed.

Bussell argued culpable dominion and control cannot be inferred when multiple parties have access to a computer. The 1st DCA determined that the state presented sufficient circumstantial evidence to establish Bussell had constructive possession over the child porn. Constructive possession is a frequent issue in drug possession appeals; thus, the DCA found those opinions (discussing and defining constructive possession of drugs) to be instructive. The Court noted that where contraband is found on premises in joint possession, knowledge of the contraband can be established with actual knowledge or circumstantial evidence from which the jury could infer guilt. Here, the State put forth circumstantial evidence from which the jury could infer that Bussell was the person who downloaded the child pornography onto the family computer. Bussell's wife and son both testified they did not download the pornography. When the evidence is in conflict, "it is within the province of the trier of fact to assess the credibility of witnesses, and upon evaluating the testimony, rely upon the testimony found by it to be worthy of belief and reject such testimony found by it to be untrue." I.R., 385 So. 2d at 687. Bussell worked offshore and admitted he was not working on the days the pornography was downloaded. Additionally, the investigator testified no illegal material was downloaded when Appellant was away working. Therefore, the evidence was sufficient for the jury to determine whether Bussell downloaded the illegal material. The DCA affirmed the trial court's decision.

Bussell v. State, 66 So. 3d 1059 (Fla. 1st DCA, 8/4/11)

Color Of Vehicle Not Matching DHSMV Records Gave Officer Reasonable Suspicion To Stop Vehicle To Determine If Tag Had Been Switched

A deputy on patrol ran the records on Aders' black Honda vehicle. The records indicated the car should have been light blue. This struck the deputy as "odd" and he effected a traffic stop because he did not know if the tag belonged to the vehicle and thought it might be a stolen car. During the stop, Aders presented registration and insurance information and indicated he had painted the car but had not yet notified DHSMV of the change of color. Aders' documents were returned and then the deputy asked if Aders would consent to a search of the passenger area. Aders consented, and volunteered he had drug paraphernalia in the center console. A search produced marijuana and pills. The trial court denied the defendant's motion to suppress, which asserted Aders had no reasonable basis to make the initial stop.

The 4th DCA acknowledged there is no law mandating reporting of the change of vehicle's color, but found that the inconsistency in the car's color and what DHSMV records indicated did give the deputy the cause to further investigate. In order to lawfully conduct a traffic stop, at the very least, an officer must have an articulable and reasonable suspicion that the driver violated, is violating, or is about to violate a traffic law. The DCA agreed with courts from other states holding that a color discrepancy between a car and its computer registration creates sufficient reasonable suspicion to justify a traffic stop for further investigation. The state could not cite to a regulation or statute that Aders violated by failing to notify the department that he had painted his blue car black. However,

the deputy suspected Aders of improperly transferring a license plate, which is a second-degree misdemeanor under section 320.261, F.S. A color discrepancy is enough to create a reasonable suspicion in the mind of a law enforcement officer of the violation of this criminal law.

Aders v. State. 67So. 3d 368 (Fla. 4th DCA, 7/27/11)

K-9 Basis For Reliance To Establish Probable Cause Not Sufficient

This case is a recent example of how appellate courts are applying Harris v. State and its restrictions on how K-9 "alerts" are to be evaluated. A deputy stopped Wiggs' vehicle for running a red light. During a detention while a warning was being issued, a drug-detection dog named Zuul alerted to Wiggs' vehicle. A search of the vehicle revealed the cocaine.

Wiggs filed a motion to suppress the cocaine in which he argued that Zuul's alert did not provide probable cause to search his vehicle. Wiggs challenged Zuul's reliability and cited evidence of numerous "false alerts" by the dog in the field. The trial court denied the suppression. The appeal followed.

The 2nd DCA then went through Zuul's history and examined the testimony of Zuul's handler. The Court discussed in detail Zuul's extensive training history and qualifications. However, regarding Zuul's field performance, the Court found the following facts:

> In summary, (Zuul's handler) Deputy Indico and Zuul had been summoned to seventeen vehicle stops between May and August of 2007. Ten of these encounters resulted in Zuul alerting on the vehicle with no discovery of drugs. Four post-alert vehicle searches, including Wiggs', resulted in the discovery of drugs. And three encounters ended with no alert. (Emphasis added).

Thus, the specific question before the court was whether Zuul's alert to the exterior of Wiggs' vehicle provided probable cause to support a warrantless search of the vehicle's interior. The DCA applied Harris a case in which the Florida Supreme Court held that a dog's training and certification, in itself, was not sufficient to establish probable cause. The Harris court explained that "when a dog alerts, the fact that the dog has been trained and certified is simply not enough to establish probable cause to search the interior of the vehicle and the person."

The Harris court reasoned that the certification and training of drug-detection dogs was not subject to a uniform statewide or nationwide standard. Additionally, the fact of the dog's training and certification did not account for the possibility of false alerts, handler error, and alerts to residual odors. Finally, allowing the fact that a dog has been trained and certified to provide a prima facie case of probable cause would improperly place on the defendant the burden of production of evidence solely within the control of law enforcement.

The Harris court adopted a "totality of the circumstances approach" that places the burden of producing evidence to establish the dog's reliability on the State. The State's presentation of evidence that the dog is properly trained and certified is but the beginning of the analysis. Because there is no uniform standard for training and certification of drug-detection dogs, the State must explain the training and certification so that the trial court can evaluate how well the dog is trained and whether the dog falsely alerts in training (and, if so, the percentage of false alerts). Further, the State should keep and present records of the dog's performance in the field, including the dog's successes (alerts where contraband that the dog was trained to detect was found) and failures ("unverified" alerts where no contraband that the dog was trained to detect was found). The State then has the opportunity to present evidence explaining the significance of any unverified alerts, as well as the dog's ability to detect or distinguish residual odors. Finally, the State must present evidence of the experience and training of the officer handling the dog. Under a totality of the circumstances analysis, the court can then consider all of the presented evidence and evaluate the dog's reliability.

The 2nd DCA then applied the Florida Supreme Court's totality of the circumstances test to Zuul.

The Court reviewed Deputy Indico and Zuul's training and certification, additional police training in various environments, and field performance records. The Court found Zuul's field performance records problematic. Zuul had conducted seventeen vehicle sniffs in the field and alerted fourteen times. Drugs were only found after four of those fourteen alerts. Based solely on the number of sniffs in which Zuul's alerts uncovered narcotics, Zuul's field accuracy rate was four out of fourteen, or approximately 29 percent, a rate insufficient to establish reliability.

The 2nd DCA held that under the totality of these circumstances, the trial court erred in determining that the State established probable cause based on Zuul's alert on Wiggs' vehicle. The Court remained unconvinced of the sufficiency of the State's evidence of Zuul's field performance records as it related to his alerts on residual odors. The State's lack of evidence regarding Zuul's alert made it impossible for the trial court to complete a totality of the circumstances analysis of the reliability of Zuul's alert as a basis for probable cause to search Wiggs' vehicle. The evidence did not establish probable cause to believe that contraband actually would be found in the vehicle after Zuul's alert. Accordingly, the Court reversed the trial court's denial of Wiggs' motion to suppress.

Editor's Note: The DCA was clearly concerned that in 10 out of Zuul's most recent 14 alerts NO drugs were found. A 29% "found drugs" rate is not facially compelling. Agencies utilizing K-9's need to prepare for the obvious critical analysis and questioning that will occur about those "unproductive alerts." There should be testimony introduced at the suppression hearing regarding how long it normally takes for residual odors to dissipate before a K-9 no longer alerts. Trainers should develop agency documentation showing how long in training scenarios ("controlled situations") it takes before a particular K-9 no longer "alerts." Future predictable problems will be that generalized statements about dogs generally do not relate to establishing with specificity how long a particular dog requires. Even with particular statistics being provided regarding how long it takes to dissipate odors of drugs that "once were in the car," the nagging problem is that if a dog's "unproductive alert" level is high such as Zuul's, it is virtually per se evidence that there is no probability that there are drugs in a car that's been alerted to by him. The transitory nature of vehicles means things, including dope, "come and go" in the car. Alerting on "residual odors" does not provide a present indication that drugs are in a vehicle. These are issues that records and testimony will not necessarily address.

Wiggs v. State, 36 Fla. L. Weekly D1688a, --So. 3d—(Fla. 2nd DCA 8/8/11)

Harris' Totality Test For K-9 Probable Cause Met

In this case (which reviewed a trial court's ruling that probable cause was established with regard to the use of a K-9 "alert") the 5th DCA noted that the "…dog handler gave extensive testimony about his and the dog's training, testing and certification…the dog's history and search record, including ample information concerning both accurate alerts and false alerts" and observed that while the training records were not introduced into evidence by the state, they had been provided to the defense and were used to cross-examine the dog handler. Given these facts, the DCA held that the trial court "had ample information upon which to determine that probable cause was established."

Joe v. State, 2011 WL 4102288, --So.3d—(Fla. 5th DCA, 9/16/11)

Government's Use Of "Real Time" Cell Site Location Information To Track Defendant's Vehicle On Public Roads Does Not Violate 4th Amendment. Exclusionary Rule Not Authorized Remedy For Violation Of This Chapter 934 Violation.

After the trial court denied his motion to suppress evidence derived from "real time" or "prospective cell cite location information" (CSLI), Shawn Tracey was convicted by a jury of possession of more than 400 grams of cocaine, fleeing an eluding, driving while license revoked as a habitual offender, and resisting arrest without violence. He appealed the denial of his motion to suppress.

The 4th DCA held that there was no 4th Amendment violation because law enforcement used real time CSLI to track Tracey's location only on public roads. While the DCA found there had been a violation of a provision of Chapter 934, it also noted the exclusionary rule is not an authorized remedy to address the violation.

In October of 2007 a Broward County Sheriff's Detective obtained an order authorizing the use of a pen register and a trap and trace device regarding Tracey's cell phone. (Pen registers document phone numbers of outgoing calls; Traps and Traces captures the numbers of incomings calls. See: F.S.S. 934.02(20) and (21).) The application for the pen register and trap and trace device did not mention the collection of real time cell site location information. Although there was no request for it in the application, the order of the circuit court directed the cell phone company to provide the sheriff's office, "(i)n accordance" with 18 USC § 2703(d) "historical Cell Site Information indicating the physical location of cell sites, along with cell site sectors, utilized for the calls." The order did not address prospective or real time CSLI. However, it did call for a different type of information than incoming and outgoing telephone numbers.

The DCA then cited language from In ret the Matter of the Application of the United States (Lenihan), 534 F.Supp. 2d 585, 589-90 (W.D. Pa. 2008) to explain the CSLI technology. In brief, that language indicates that cell phones relay their signal information to cell towers that serve their network and scan for the strongest signal/best reception tower. This process, called "registration", occurs about every seven seconds. As a user changes locations, the phones automatically switch towers. When a call is received, a mobile telephone switching office MTSO gets the call and locates the user based on the nearest tower and the call is sent to the phone via that tower. The process is reversed when a user places a call. In urban areas, where tower placement is concentrated, the tracking of the location of the nearest tower can place the phone within approximately 200 feet. The location range can be narrowed by tracking which 120° "face" of the tower is receiving the cell phone's signal. By "triangulating" signal information of the three nearest cellular towers, the location can be refined. Alternatively, over 90% of current cell phones have built-in global positioning systems (GPS) and cellular service providers store cell tower registration histories and other information in their systems as they "retain extensive personal location information on their subscribers and the cell phones in use."

Back to the case at hand, calls between Tracey and an informant indicated Tracey would be coming to Broward County to pick up drugs to transport back to the Cape Coral area, where Tracey resided. Monitoring Tracey's and his "cohort" Guipson Vilbon's, locations using real time CSLI generated by cell calls between Tracey and Vilbon, officers tracked Tracey's eastward trip across Florida. Officers set up surveillance at known "stash houses" of Vilbon, and the CSLI showed both Tracey and Vilbon converging upon an area of one of the stash houses. Seeing Tracey driving an GMC Envoy and knowing his license was suspended, a traffic stop was made and a Tracey was arrested for that offense. A search uncovered a kilogram brick of cocaine in the Envoy. Vilbon was stopped and they found $23,000 in cash in his car.

In his motion to suppress, Tracey argued real time or prospective cell site information required police to obtain a warrant. He argued the actions of the officers exceeded the authority granted by the pen register/trap and trace order because there was only authority to capture inbound and outbound dialed digits. He argued the order did not authorize acquisition of real time cell site information and that to obtain CSLI, probable cause must be established. The state argued that Tracey had been seen committing a crime on a public street, which gave them an independent reason to stop him.

The trial court found that Tracey had standing to challenge the order with regard only to his cell phone, not Vilbon's; the application set forth sufficient basis for a pen register and trap and trace but not enough as a basis for issuance of a warrant; and that law enforcement had used Tracey's cell phone as a tracking device to locate him behind the wheel of the vehicle. The court ruled that while there was no probable cause established, Tracey had been seen committing an independent crime of a public street where he had no reasonable expectation of privacy. Accordingly the 4th Amendment did not require suppression of evidence acquired after the arrest for that independent crime. It denied the motion to suppress.

The DCA indicated that since the case concerned the government's tracking of an individual's location on public roads, no 4th Amendment violation had occurred (citing U.S. v. Knotts, 460 U.S. 276 (1983). It noted the monitoring revealed, as in Knotts, no information that could not have been obtained through visual surveillance. The monitoring of CSLI occurred only when Tracey's vehicle was on public roads, where it could have been observed "by the naked eye" so no 4th Amendment violation occurred. The DCA acknowledged that a compelling argument could be made that CSLI falls within a legitimate expectation of privacy in that location information can be "extraordinarily

personal and potentially sensitive." (Quoting Lenihan, 534 F.Supp.2d at 586, n.6.) Despite these concerns, the DCA felt compelled to follow U.S. Supreme Court precedent interpreting the 4th Amendment that holds a person's location on a public road is not subject to 4th Amendment protection.

It then noted that most non-content based electronic surveillance is regulated by statute, and discussed the Electronic Communications Privacy Act of 1986 (ECPA). It noted the scheme has four broad categories: 1) wiretaps, requiring a "super-warrant", 2) tracking devices, requiring probable cause, stored communications and subscriber records, requiring specific and articulable facts, and 4) pen register/trap and trace, requiring certified relevance. The same concepts are captured in Chapter 934, Florida Statutes. The DCA noted that the federal Third Circuit recently held the government could obtain historical CLSI by satisfying the "specific and articulable" facts standard of 18 USC § 2703(d). (See: In re the Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government, 620 F.3d 304 (3d Cir. 2010). However, in the same opinion, the federal court also noted the power—"to be used sparingly"—of magistrates to require the government to show probable cause and obtain a warrant for CSLI.

The DCA noted there is "a disagreement" among courts as to the standard to be used to obtain "real time" CSLI information, with some courts requiring only "specific and articulable facts" and others requiring a showing of probable cause. In the case under consideration the DCA indicated it need not decide whether prospective CSLI is subject to a probable cause requirement because in this case the state failed to even meet the less-stringent "specific and articulable facts" standard.

However, the DCA noted that "To say the state violated section 943.23 in obtaining real time CSLI toes not mean that an exclusionary rule applies" to exclude the evidence obtained. "Under federal law, suppression of evidence is not a remedy for violations of the ECPA." (Citing cases.) The ECPA and its Florida counterpart (F.S. 943.28) indicate the exclusionary rule is not a remedy, and that civil and/or criminal sanctions provided in the law are the exclusive judicial remedies and sanctions. The DCA found the trial court correctly denied the motion to suppress, even though law enforcement relied on real time CSLI to locate Tracey without complying with Chapter 934. It affirmed Tracey's conviction.

Tracey v. State, 2011 WL 3903075, --So. 3d – (Fla. 4th DCA, 9/7/11)

---End Of Summary—

REMEMBER! This is a representative sampling of cases issued over the last year. It is not an exhaustive compilation of "every" case that may be of interest to law enforcement agency legal advisers and officers.

A note to law enforcement officers about the impact of reported cases:

Unless overturned or modified by the U.S. Supreme Court, all decisions rendered by the Florida Supreme Court are mandatory or "binding authority" on all state courts in Florida.

A decision of a District Court of Appeal (DCA) is binding on all trial courts within the geographic boundaries of the DCA's jurisdiction. The decision *may* be treated as binding throughout the State if no other DCA has given its opinion on that particular issue of law. A DCA first looks to see whether it has issued an opinion on the issue, or a very similar issue. A decision within the same DCA is given great weight by the DCA. If the DCA has not ruled on an issue, the DCA will look to the other Florida DCAs to see if there is an opinion that will assist it in reaching its decision. However, a DCA is not required to accept another DCA's opinion on an issue, and if two DCAs disagree, the matter is usually certified to the Florida Supreme Court as a "conflict" for final resolution.

The internet makes court rulings and opinions from around the state and country known almost as soon as they are issued. Opinions issued by courts *other than* the DCA in which your agency resides, the Florida Supreme Court, or the U.S. Supreme Court are considered "persuasive authority" and are NOT binding. Such "persuasive" authority may, or may not, be given weight by the court considering the issue. Florida courts are not bound to follow another state's court opinions, but the opinion may be considered "persuasive authority" by the Florida court. Unless the opinion involves the United States Supreme Court addressing a Fourth Amendment issue (which Florida's courts must, as required by Florida's Constitution, follow) or interpreting a Florida Supreme Court opinion, Florida courts are not bound to follow federal opinions. Nevertheless, Federal opinions are often given great "persuasive" weight by Florida appellate courts when dealing with new issues. A ruling on a statute's constitutionality by a trial court judge binds only that judge, but may (or may not) be voluntarily accepted by other trial court judges. Such a ruling may prompt an appeal to a DCA or the Supreme Court which would ultimately provide "binding" law.

Sometimes new binding court opinions may require a change in agency operational procedures, policy or training approaches. These are matters to be implemented by your employing agency after a careful review of the opinion and its impact. Any question you may have whether a court case requires you or your agency to change how it conducts its mission should be resolved by your agency legal advisor and your agency command.

If there is a case in this summary that concerns you, locate and read the entire case. Do not rely solely on the summary for a full understanding of the case itself. Discuss it with your legal advisor or supervisors. Remember, just because a court "somewhere" has issued an opinion does not necessarily mean it applies to your agency. Let your agency legal advisor assist you in determining whether, and to what extent, a new court opinion affect you and your agency.

Here are Florida's District Courts of Appeal geographic boundaries: