

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT

WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2002-01

January 2002 Editors: William P. Cervone and Rose Mary Treadway

A MESSAGE FROM

STATE ATTORNEY

BILL CERVONE

After this issue of the Legal Bulletin, I will be turning over editorial responsibilities to ASA Rose Mary Treadway, who I am sure nearly everyone in the Circuit knows. With the increased demands on my time in other areas and with the retirement of Inv. VonCille Bruce, who has assisted me with the Legal Bulletin since its inception, the time for a change has come.

My direction to Rose Mary is that she continue to include case and statute updates that can help the law enforcement community stay current with the law as well as information of a general interest to all of us such as personnel moves, awards, and the like.

I would like to encourage all agencies to help us with regards to those areas in two ways. First, if there is an area that you'd like to see addressed in the Legal Bulletin, please call Rose Mary and let her know. We will continue to provide whatever updates on the law are applicable and whatever procedural suggestions seem

appropriate. Second, if there is some news from your agency that you would like to pass on to the rest of the Circuit, let her know that as well. I know all of us know people across the Circuit and are interested in what might be happening elsewhere.

I'm sure that Rose Mary will develop her own editorial style and look forward to those changes. The over-riding goal of the Legal Bulletin remains to provide helpful and necessary information that will assist all of us in doing a better job, and your input is a vital part of that.

SAO PERSONNEL CHANGES

ASA **PAT CUMMING** retired on October 1st, leaving the office after 6 years, the last 4½ of which have been as Chief of the Juvenile Division. Pat's position as the Juvenile Division Chief has been taken by ASA **HEATHER JONES**.

Effective November 30th, the SAO's contract with the Department of Children and Families to provide Child Welfare Legal Services expired. As a result the

attorneys and support staff for the pilot project, which has been in place since August of 1996, have returned to DCF.

The expiration of this program as a part of the SAO is a matter of great disappointment to all concerned, at least on the local level. During the last 5 years the legal work in Child Welfare has by all accounts improved quite dramatically. There are many complicated reasons why a new contract could not be financially agreed upon, none of which are as important as our thanking all of the former SAO employees associated with this project for their hard work and dedication to a difficult field and wishing them well in their transition back to DCF.

ASA **STEVE PENNYPACKER**, who has been the Managing Attorney for the CWLS Project since June of 1998, remained with the SAO after the Project transferred back to DCF. Steve's initial assignment is to develop plans to deal with the new statutes on criminal child support that went into effect in October of 2001 and to provide backup in other divisions in Alachua County. He will also assume responsibility for Jimmy Ryce cases.

On December 1st, ASA **MILES KINSELL** resigned from his position handling County Court cases in Levy County in order to enter private

practice. His position has been taken by ASA **TODD HINGSON**, who transferred to Levy County from the Alachua County Juvenile Division. Todd was, in turn, replaced in that division by ASA **BETH ONDRIEZEK**, who had been handling domestic violence cases in Alachua County since joining the office in August of 2000. Beth's former caseload has been assumed by ASA **JOSH SILVERMAN**, who until now has been handling misdemeanor cases in the Gainesville office.

On December 31st, ASA **DENISE FERRERO** resigned from her position in order to enter private practice with the firm of Avera & Avera in Gainesville.

CONGRATULATIONS TO...

...SAO **Inv. VONCILLE BRUCE**, who has elected to retire effective December 31, 2001, after a law enforcement career including many years with the Alachua County Sheriff's Office and, since 1993, the State Attorney's Office. While with the SAO, Inv. Bruce has worked with virtually every other agency in the Circuit in coordinating various events and facilitating inter-agency communication and information sharing. Her work has greatly enhanced all of our working relationships with each other and will be missed.

... Belatedly, to the SAO's Union County secretary of many years, **KAY MINSHEW**, upon her retirement last year. After a career that started with the Clerk's Office in Lake Butler and ended with the SAO there, Kay and her husband James have decided that the time to enjoy life is now.

...University of Florida Police Department **Inv. ED MIGNONE**, named UPD's 2001 Officer of the Year at the Department's annual awards ceremony in August. Also recognized were **BARBARA CARROLL** as Communications Officer of the Year, **RUSTY WILLIAMS** as Parking Patroller of the Year, **STEVEN FIELDS** as Police Service Technician of the Year, and **MARLA CUMMINGS** as Support Person of the Year.

...Outgoing Starke Police Department **Chief JIMMY EPPS**, who retired on October 1st, and his replacement at SPD, **Chief GORDON SMITH**, who was elected in September and took office on October 2nd.

...ASA **KEVIN ROBERTSON** and his wife, Laura, who became the proud parents of a son, Noah, on October 21st.

...Bradford County SAO secretary **ALICIA ETHERIDGE** and her husband J.J., who became the equally proud parents of a daughter, Lexie Paige, on September 4th.

...Chiefland Police Department's **EDWIN JENKINS**, who was appointed Acting Chief on November 19th after

the resignation of former Chief **EDDIE LEVITZKE**.

DOUBLE JEOPARDY AND MULTIPLE ASSAULT CASES

The 4th DCA issued an opinion styled Russo v State in October which limits the ability of law enforcement officers to place multiple charges against an individual who commits a series of sequential but connected assaults on another person.

In the case, the victim was operating an earthmoving machine behind the defendant's apartment. The defendant's wife complained to the victim about something and the victim insulted her, which she returned home and reported to her husband. He then went out with a beer bottle and confronted the victim. After some cursing back and forth, the defendant broke the bottle and threatened to kill the victim with it. The victim told the defendant to put the bottle down and they'd "go at it."

The defendant dropped the bottle, at which point the victim stood up from his seat on the equipment. The defendant then grabbed a shovel that was apparently nearby and swung it at the victim.

Based on these facts, the State charged the defendant with two separate counts of Aggravated

Assault, one for threatening the victim with the bottle and a second for threatening him with the shovel. A jury convicted him of both, but the appeals court ruled that, based on double jeopardy principals, there could be only one conviction under these facts.

In so doing, the court noted that the general analysis used to determine whether multiple offenses can arise from a single episode requires a consideration of whether separate victims are involved, whether separate locations are involved, and whether there has been a temporal break between the incidents. Using those rules, the court concluded that under these facts there had been only one victim, there was only one location, and there was no significant temporal break between the two threats. As a result, the court concluded that only one all encompassing count of Aggravated Assault could stand.

The principal behind this decision is simple to understand, but its application is more of a problem. For example, the court drew a distinction between these facts and an earlier case in which the defendant had thrown a brick through the rear window of a house and then run to the front of the house and thrown another brick through a front window. That was allowed to stand as two counts. Although the separation in time and space in that case seems only

marginally greater, the court noted that it still allowed for a finding of two discrete decisions by the defendant, thus allowing for two discrete charges, one for each decision. The court also compared this situation to resisting cases, where many cases have held that resistance is an on-going event regardless of how many officers are involved and that only one count of resisting per episode, as opposed to one count per officer, is allowed. (Bear in mind that this applies to resisting, not to Battery - Law Enforcement Officer charges, where there can be separate victims.)

The reasoning in this case applies not just to Aggravated Assault cases but also to Aggravated Battery cases. The bottom line is that there must be a significant break in the action in order for multiple charges to be made.

**MIRANDA QUESTIONS: WHEN IS
THE DEFENDANT IN CUSTODY?**

As everyone knows, Miranda warnings apply when custodial interrogation is involved. If a defendant is not in custody, there is no requirement that Miranda warnings be given to a defendant. Usually, this is easily applied. For example, there is obviously no custody when a phone interview is involved.

There would also be no custody in most situations where a defendant has on his own voluntarily come to a police station and has been told that regardless of anything else he is free to come and go as he chooses.

A more difficult situation arises when there is some degree of contact between a law enforcement officer and a citizen that might be characterized as custodial by some people but not by others. In such situations, courts will generally look at what was really being accomplished as well as what might be perceived by a reasonable person to be the case in deciding if there is "custody" to the degree that Miranda is required.

In an interesting case styled Johnson v State that was issued in October, the 1st DCA discussed this in the context of a routine traffic investigation. In the case, the defendant was detained briefly in the course of a traffic investigation, was not given Miranda warnings, and made statements that ultimately contributed to his being convicted of an Aggravated Battery. The court allowed the statements to be used and the conviction to stand, ruling that, although detained, the defendant was not in custody as meant by the Miranda decision.

In the case, the defendant and the victim became engaged in a dispute when the defendant believed that the victim had cut him off in traffic. Both

stopped their vehicles and got out and a fight ensued, during which the defendant at one point hit the victim with a rake. Others joined in and while the fighting was still going on officers arrived on the scene.

According to the defendant, one of the responding officers told him to move his car into a parking lot and wait for her there. She shortly walked over to him and, without providing any Miranda warnings, asked him "What happened?" His response included an admission to having hit the victim with the rake. After being arrested, the defendant sought to have this admission suppressed because he had not been given his Miranda warnings. His claim was that the officer's instruction to wait for her amounted to custody such as to require Miranda warnings.

The officer, incidentally, did not recall the exchange quite the same way. She only recalled asking the defendant to move his truck and testified that he was free to leave. Regardless of whether or not she told him to wait for her, which she did not recall saying, she did agree that she had then questioned the defendant without benefit of Miranda. One thing that was clear was that the officer, having just happened upon the scene, had no idea who had done what much less any reason to target the defendant as a criminal suspect.

In its analysis, the

court noted the general principal that, of course, an officer is required to advise a suspect of his constitutional rights if he is in police custody and if there is to be an interrogation. Whether a suspect is in custody is determined by an objective standard under which courts are to consider the manner in which the questioning comes about, the purpose, place, and manner of the interrogation, the extent to which the suspect is confronted with evidence of guilt, and whether the suspect is told that he may leave. This test focuses on the circumstances of the restraint and not on mere labels either side may put on it.

The court then went on to say that a person is in custody "if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest." From this, the court noted, it follows that there can be some forms of restraint that do not require Miranda. The court also noted the very reasons why Miranda warnings are required to being with, including to prevent situations where undue influence or coercion of any sort produce a confession, and concluded that those concerns do not exist when there is in essence public questioning of someone not even yet suspected of something.

As a result, the court

concluded that the defendant, although briefly detained, was not in custody for Miranda purposes and therefore was not entitled to be provided with Miranda warnings. The officer's conduct simply did not, the court said, approach what the United States Supreme Court had in mind when it issued the Miranda decision. There was no isolation of the defendant and no confrontation. Moreover, the circumstances involved an officer trying to clear a roadway, sort through the facts and deal with issues of public safety and traffic control. As put by the court, "It would be unrealistic to require officers to give every injured person and every potential witness a Miranda warning in a situation like this merely because one of them might eventually be charged with a crime."

This case is important in understanding the non-custody situations that can impact the need for Miranda warnings. It is also important as a 1st DCA case because cases from that court control legal decisions in our Circuit. When in doubt, Miranda should always be given. As this case illustrates, however, there are situations where, without doubt, Miranda is not required.

**MORE MIRANDA: WHEN IS
QUESTIONING INTERROGATION?**

In an opinion from late October, the 1st DCA has also spoken about when questioning an in custody suspect is interrogation. The case, Moore v State, draws some important distinctions between the kind of routine booking questions that can be asked and other innocuous comments that inadvertently produce an incriminating statement from a defendant and questions that amount to an interrogation and are thus subject to all of the usual Miranda requirements, including not only rights advisement but under the facts of the case cessation of questioning when those rights are invoked.

In the case, a search warrant had been executed at a hotel room resulting in the seizure of some clothing and drugs. The defendant was arrested later and after being given his Miranda warnings invoked his right to remain silent. Intending only to return the clothing to him, an officer afterwards asked the defendant whether certain of the items of clothing belonged to him. The defendant pointed out what was his. Those responses were ultimately used to tie him to the drugs that had been seized.

Referring to a United State Supreme Court case from 1980, Rhode Island v Innis, the 1st DCA noted first that a statement directed to a suspect in custody constitutes an interrogation if it is one

"that the police should know is reasonably likely to elicit an incriminating response from the suspect." Interrogation occurs, the court said, when there is express questioning or "its functional equivalent," meaning any word or action on the part of police other than those normally attendant to arrest and custody that police should know is reasonably likely to elicit an incriminating response. This focuses on the perception of the suspect, not the intent of the police because Miranda is designed to protect a suspect against coercive police tactics regardless of objective proof of the intent of the police. The intent of the police remains relevant as to whether or not whatever was said or done was reasonably likely to evoke a response that was incriminating, but it is not dispositive.

The court concluded in this new case that the perception of the suspect was that he was being interrogated, and that that interrogation violated his rights because he had already invoked his right to remain silent. As a result, the admissions about ownership of the clothing were suppressed.

What this means is that extreme care should be taken with any comment made to an in custody suspect after Miranda has been invoked. Regardless of there being an innocent purpose or one unrelated to whatever the arrest involves, it will be

far easier for a defendant to claim that he thought he was being questioned and had to answer than it will be for an officer to show that the opposite is true.

ALACHUA COUNTY CIVIL
TRAFFIC HEARING SCHEDULE
CHANGES

Alachua County will be changing civil traffic infraction hearings from Friday to Monday starting in January of 2002. Following is a re-print of a memo from Circuit Judge Frederick D. Smith to Alachua County Clerk of the Court Buddy Irby explaining the reasons for this. All Alachua County agencies and officers should be aware of the change. Please carefully check all of your court dates for infraction hearings while adjusting to this transition.

"Recently, the Supreme Court of Florida placed a hiring freeze upon all of the circuits. Consequently, Court Administration is unable to hire a much needed Guardian Ad Litem attorney.

In an attempt to ameliorate the situation, and with the approval and direction of the Chief Judge, Stan R. Morris, I have decided to ask Ms. Sapp to change her Friday traffic hearings to Monday, thereby allowing Ms. Sapp to assist with Guardian Ad Litem cases on Fridays, in her capacity as the Guardian Ad

Litem attorney.

I acknowledge the fact that changing the Friday traffic hearings to Mondays is not an easy task for the Clerk's Office due to a lack of personnel. I appreciate your willingness to assist us with this change. With the understanding that you believe the change is possible, I ask that the traffic clerk begin scheduling the normal Friday traffic hearings to Mondays as early as possible. I am told that notices for December hearings have gone out thereby preventing a change in the schedule until January 2002."

SAO AWARDED FEDERAL GUN
PROSECUTION GRANT

The SAO has been awarded a \$120,000 grant from the Office of Justice Programs of the United States Department of Justice under the federal government's Community Gun Violence Prosecution Program. The grant is designed to facilitate the identification and prosecution of gun cases. The grant money involved will allow for the funding of a dedicated position at the SAO for calendar years 2002-2004. That position will be used to enhance our prosecution of 10-20-Life cases throughout the Circuit. Criteria for this new attorney position and the implementation of the grant are being developed

now and an Assistant State Attorney will be assigned to it shortly. Further details will be provided as they are worked out.

MEDICAL MALPRACTICE AND HOMICIDE CASES

Since at least 1912 the law in Florida has been that a defendant could not escape responsibility for his acts that caused the death of another through a claim that death was the result of medical mis-treatment of the victim. The 4th DCA, however, issued an opinion styled Donohue v State in late October that has changed those rules, holding that evidence of medical malpractice is admissible at a homicide trial.

In the case, the defendant beat the victim, who was taken to a hospital for treatment of what would not likely have been life threatening injuries. En-route paramedics tried to intubate the victim but the tube was erroneously inserted into the victim's esophagus rather than into his trachea, which at least arguably resulted in his asphyxiation and ultimate death.

Relying on a Florida Supreme Court decision from 1912 that has been applied consistently since then, the trial judge refused to allow a defense expert to testify to malpractice actually being the cause of death, not the beating. Without

this evidence, the defendant was convicted but the 4th DCA reversed that conviction, holding that the evidence was relevant to whether or not the beating caused the death and that it should have been given to the jury for its consideration.

While this is fairly esoteric and not likely to be an issue very often, it is noteworthy. Cases do come up where life support is maintained after an injury and death actually results only after the life support is terminated. The opinion in Donohue could apply to cases where there is a difference of medical opinion as to what kind of treatment might have helped a badly injured person. It may also allow for defense arguments that currently are not permitted, although hopefully judges and juries will see the difference between a treatment situation and one where a victim would clearly have survived but for medical malpractice. The bottom line is that the courts are again broadening the defenses available to a person charged with homicide, albeit in a way that will be applicable to only a small number of cases.

RECORDING SUSPECT INTERVIEWS

We have as a law enforcement community recently engaged in conversations concerning the need to record interviews,

especially of suspects, in order to present that evidence to juries in the most positive and persuasive fashion possible. As you know, the SAO encourages that recording be done whenever practical, and that all agencies take steps to make recording available.

This is not a topic unique to our Circuit. In order to provide some input as to why recording should be done, following is an excerpt from a Duval County Grand Jury report issued in August of 2001. That Grand Jury investigated a case in which a defendant who had been acquitted of homicide charges despite the existence of two separate confessions accused Duval County deputies of coercing him into confessing, both by physical and verbal assault.

Although many other issues were discussed in the full report, the following section directly addressed the views of that Grand Jury concerning law enforcement recording confessions.

"As was set forth above, we have been advised that it is the policy of the Jacksonville Sheriff's Office at the request of, or on the advice of the State Attorney's Office of the Fourth Judicial Circuit NOT to record the substance of any interviews of suspects.

We believe this policy should be re-evaluated and recording of interviews should be encouraged. We recognize under some circumstances videotaping is not possible, but given the

importance of this type of evidence, it should not be left to a swearing contest between those involved. We have heard the reasoning of the State Attorney and his assistant in charge of homicide prosecutions, but we find their concerns do not outweigh the need for accuracy in this type of evidence. We recognize that there is a legitimate concern with the cost imposed on the court system when the venue of a case is changed due to the news media publicizing a recorded statement. We would hope that the media would be responsible enough not to risk a person's right to a fair trial by reporting statements, allegedly made by them, near to the time of the trial of the case. But, we do not believe that such irresponsibility should thwart a policy that would serve to preserve valuable evidence and assure the public that their officers are acting in an appropriate manner."

The importance of this commentary from a Grand Jury is evident. Above everything else, that group of citizens is saying to us that they want confirmation of what an officer says. The underlying facts were that two separate officers had testified that the defendant had confessed to murder. But because neither statement was recorded not only did the trial jury acquit the defendant but also a subsequent Grand Jury issued this report,

basically saying that recording should be done as a matter of course.

The reasons not to record are in today's climate far outweighed by the need to record.

PICKUP TRUCK BURGLARIES

A late October opinion of the 4th DCA styled Barton v State continues the recent series of cases refining burglary law, this time as applied to the open bed of a pickup truck.

In the case, the defendant reached in over the side rails of a pickup and removed a bike that was in the bed. He was charged with and convicted of both burglary and theft of the bike. The appeals court allowed the burglary count to stand, reasoning that the defendant had "crossed ... an invisible plane by reaching in over the top of the side rails of the truck" to steal the bike. This was considered by the court to be a sufficient entry for the purpose of stealing to be burglary.

The concept of the defendant crossing an invisible plane to make an entry is a helpful one in distinguishing these facts, which are burglary, from situations where the defendant does not cross such a plane while, for example, stealing hubcaps, which is not burglary.

MULTIPLE OFFENDER CONFESSIONS

Many cases - sometimes it seems like almost all of them - involve more than a single defendant. Multiple defendant cases pose unique problems, starting with how probable cause is alleged and going all the way through presenting enough evidence to avoid the court dismissing the case and to securing a jury conviction.

This article will briefly address one aspect of these cases: the detail necessary in a confessional statement for that statement to be truly incriminating.

Under the law, mere presence at the scene of a crime is insufficient to establish guilt. This is always so even when a single defendant is involved. When there are co-defendants it is even more important to remember that mere presence is not enough because each of several defendants can and will claim that they were merely uninvolved bystanders to the crime.

To defeat this, the State must show some degree of participation beyond mere presence. In other words, there must be evidence that the defendant contributed in some degree to the commission of the crime or intended to benefit to some degree from it. Being an accomplice is, after all, a step more than being present.

Confessions from multiple defendants can establish this but only if

those statements include an acknowledgement of actual involvement. Officers should not stop with statements that admit being with others when a crime was committed. Those will inevitably be refuted later on when the defendant testifies at trial. To defeat that kind of defense, go beyond just that and ask the defendant to itemize exactly what he was doing or expecting. If he had any role whatsoever, even if slight, it is critical to know that. Did the defendant offer any suggestion as to how to commit the crime? Did he provide anything in aid of the crime, such as a weapon or information that would help someone else? Was he an active lookout and if so what was he looking for and what was he to do if he saw it? Did he expect to receive anything from the crime? All of these questions are intended to show involvement, not just presence. The key is just that: involvement.

To sum things up, do not write a mittimus or present a case that simply says that Defendant B admitted being present when Defendant A committed the crime. That's not enough. What's required is that Defendant B admit that he was not only present but also that he knowingly assisted Defendant A in some specified way.

SEARCH AND SEIZURE: LIMITATIONS ON PAT-DOWNS

A November decision from the 2nd DCA provides a good review of the limitations that apply in particular to pat-down searches and in general to any consensual search.

In the case, styled M.A.W. v State, two officers patrolling for alcohol and tobacco violations came across the defendant and a group of his friends behind a restaurant. As soon as they arrived, the defendant threw a cigarette to the ground and started to walk away. He was asked to stop, which he did, and one of the officers asked for permission to conduct a pat-down because his pant pockets appeared to be full. The defendant agreed but instead of a pat-down the officer lifted the defendant's shirt, which allowed him to see a baggie of marijuana hanging out of the pocket.

In suppressing this search, the court noted that the scope of what the defendant had consented to had been exceeded. Before even if justified as a search for weapons, before the officer could have lifted the defendant's search he must first have conducted a pat-down indicating the possible presence of a weapon. Although there is an exception when an officer can articulate seeing a bulge believed to be a concealed weapon, those

facts were not present in this case.

The point of this case is twofold. First, be careful that you do not do more than has been consented to.

Either ask for broad enough permission to cover your intentions or do not go beyond the agreed upon actions without additional justification. Second, if there is such additional justification, be certain do add it to your mittimus or report. Otherwise, as in this case, the result will be a loss of evidence.

LEGAL BULLETIN GOES ON-LINE

The Legal Bulletin is now available on-line, including old issues beginning with calendar year 2001. To access the Legal Bulletin on-line, go to the SAO website at <www.co.alachua.fl.us> and click on the "Legal Bulletin" box.

Additionally, for various reasons related to things ranging from simple economics and delivery logistics to new concerns about mail handling after September 11th, we are exploring e-mail delivery of future issues of the Legal Bulletin. Further information on that will be provided as details and possibilities are explored with various departments.

IN MEMORIAM

... Retired GPD Officer **MIKE WHIDDON**, who also served with the Alachua County Sheriff's Office as a bailiff in Gainesville, died unexpectedly on November 24th.

... FDLE Special Agent **JOE NICKMEYER**, who worked out of FDLE's Jacksonville office and assisted 8th Circuit agencies in many cases over the past few years, also died unexpectedly on November 24th.

FOR COPIES OF CASES...

For a copy of the complete text of any of the cases mentioned in this or an earlier issue of the Legal Bulletin, please call ASA Rose Mary Treadway at the SAO at 352-374-3680.