

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT

WILLIAM P. CERVONE, STATE ATTORNEY

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Editor: Rose Mary Treadway

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A MESSAGE FROM

STATE ATTORNEY

BILL CERVONE

The summer months are sometimes a bit more relaxed than the rest of the year and offer a good time to catch up on a variety of things of interest to the Circuit.

First, for those of you who may not know, Jeanne Singer has been promoted to the position of Chief Assistant State Attorney. This is a move that I am sure will enhance many areas of our work and that Jeanne has earned with her years of experience. Although her new responsibilities will center in Alachua County because of the workload there, you will see her throughout the Circuit on various assignments. To accommodate this change, the four lead attorneys for the Gainesville Felony Divisions (Ralph Grabel, Geoff Fleck, Jay Welch, and Marc Peterson) will be given increased responsibilities for their divisions.

Our Federal gun grant position is now up and running. Brian Kramer, who has that assignment, has

spent much of the last few months coordinating not only a database to monitor gun cases but also completing policy and procedure statements designed to focus our efforts in gun cases, especially those that qualify for 10-20-Life sentencing. I expect that this will allow us to be more effective with those cases in all six counties.

Additionally, I have created a new position dedicated to handling post-conviction proceedings. Rosalyn Mattingly has moved to that job, which I feel is a necessary area of specialization given the increasing number of motions attacking convictions after sentence is imposed.

In part, these moves are now possible because state budgets have improved significantly. After September 11, as happened to all state agencies, the SAO suffered major funding cutbacks. At its worst, our budget had been reduced to the point where over a dozen positions were left vacant because of lack of funds. The recently ended legislative session, however, restored the SAO budget to nearly pre-September 11th levels,

resulting in our ability to fill those empty positions.

As a part of that, you'll see many new faces around the Circuit. Our new Assistant State Attorneys are named in this issue. To better serve the Levy-Gilchrist County areas, one of those positions has been shifted to the Bronson office.

I hope to be able to assign an additional attorney position to Bradford County as well within the next year, although that will have to be on hold until courthouse construction in Starke is completed since there is currently literally no place for a new attorney to work.

Finally, we are beginning to plan for next Fall's Law Enforcement Training Day, which is tentatively set for October 25th. This year I am planning to bring in some outside lecturers who will focus on better preparation for trials and how to be a more effective witness. Given the scrutiny law enforcement officers are under, it is critical to our success that we make the best presentation possible in the courtroom. Our training session will emphasize ways to do that in addition to the areas we have traditionally included such as recent legislative changes and case law changes. In addition to that, if you or your agency have any specific topics you would like to have covered, please let me know. I hope

to have details finalized and circulated along with registration information later this summer and will look forward to meeting with everyone then.

SAO PERSONNEL CHANGES

GLENN BRYAN joined the State Attorney's Office on May 1 as an ASA. A graduate of FSU Law School, Glenn is assigned to **Bronson** County Court.

BILL EZZELL is the new misdemeanor ASA in **Alachua** County Court as of May 22. He is a graduate of the University of Alabama Law School.

TERESA DRAKE returned to the SAO on April 15, and is assigned to the **Alachua** County Domestic Violence unit. She previously worked in the CWLS Project from 1996 through the termination of the Project in 2001, and has since been with DCF continuing to do dependency work. She replaces **KRISANNE RUSSELL** who transferred to the **Alachua** County Juvenile Division on May 1.

BEVERLY MCCALLUM is a new ASA in the Gainesville Domestic Violence Unit. Beverly is a 2001 UF law school graduate who previously worked for the Department of Revenue in Child Support Enforcement.

PAM BROCKWAY is a new ASA in **Bronson**. Pam is a 1990

graduate of FSU Law School and has previously worked as an ASA in the 18th Circuit and more recently at Three Rivers Legal Services in Lake City.

ASA **TIM BROWNING** has transferred from the Gilchrist County office to Gainesville to handle sex crimes. ASA **PHIL PENA** will take his place in Gilchrist County.

CONGRATULATIONS!!

Former ASA **SUSANNE WILSON-BULLARD** and her husband Barry are the proud parents of new baby Wilson Preston Bullard who was born on March 11.

New ASA **SEAN BREWER** and his wife are the new parents of bouncing baby Justin, born May 4.

ASO Deputy **KATHY LONG** was recognized as Deputy of the Month in March by the Gainesville Downtown Rotary Club.

MADD honored statewide law enforcement officers and volunteers at a recognition luncheon in Tallahassee recently. Included was ASO Deputy **TRAVIS DEVINNY** from our Circuit. **TRAVIS** also was married on April 27.

ASA **STEVE WALKER** was married to Robyn on May 4.

UPD Detective **DON ROGERS** retired on April 25 after

more than 20 years with UPD. Don will re-locate to Citrus County where he has a new grandchild.

ASO Lt. **BOB MCLENDON** retired in April after 36 years of service to the citizens of Alachua County.

On April 22, the **ASO Victim Advocate Unit** received the 2002 Governor's Peace at Home Award for "outstanding accomplishments and contributions in Children's Services". The Governor recognized this ASO program as a model program in the state for its services to children, survivor support, justice system programs, research, public education and awareness.

GPD Officer **JEFF MCADAMS** was awarded the C. ARTHUR SANDEEN IMPROVING THE QUALITY OF LIFE AWARD by the University of Florida Student Government for his work to improve relations between students and police.

UPD Officer **ANGELA MANDRELL** was named Officer of the Quarter by the Downtown Gainesville Rotary Club at their meeting on May 15. She is especially involved in community liaison activities, including the correct installation of child and infant car seats.

The FLORIDA COUNCIL ON CRIME AND DELINQUENCY, Chapter V Awards Banquet was held on May 21 and the following persons were honored by the Council in their specific

categories: Corrections,
L.E. (PETE) TURNER, Warden
Hamilton Correctional
Institution; Judicial, **C.**
RICHARD PARKER, Public
Defender, Eighth Judicial
Circuit; Law Enforcement,
JOEY DOBSON, Sheriff of Baker
County; Criminal Justice,
MIKE YAWN, firearms
instructor, Santa Fe
Community College; Juvenile
Justice, **GRETCHEN HOWARD**,
Project Payback Program
Manager, State Attorney's
Office, Eighth Judicial
Circuit; and Louie L.
Wainwright award, **JOHN**
WHITEHEAD, retired Sheriff,
Union County.

AL RAWLS JR., longtime ASO
deputy, was honored at a
retirement luncheon on June
17. Al served ASO for 22
years.

The University Police
Department has announced
the following Command
changes: Captain **ERIC RICE**,
Commanding Officer of the
Investigations Division;
Lieutenant **GERALD LAPINSKY**,
Commanding Officer of the
Training Division;
Lieutenant **BRAD BARBER**,
Commanding Officer of the
Patrol Division; and Major
TONY DUNN, Commanding
Officer of the Business
Operations/Personnel/Record
Division.

PATTY MECUSKER was promoted
to Warden at Lawtey
Correctional Institution and
TOM FORTNER is the new
Warden at Baker Correctional
Institution.

UPDATE:

AGGRESSIVE CARELESS DRIVING

In 2001, the legislature
passed a new designation for
"Aggressive Careless
Driving", which is defined
as the combination of two or
more simultaneous or
successive acts of speeding,
unsafe or improper lane
change, following too
closely, failure to yield
the right of way, improper
passing, or violating
traffic control signal
devices.

This designation **does not** as
of now create a new
violation or offense. It
merely allows for the
designation of existing
offenses as Constituting
Aggressive Careless Driving.

The purpose of this new
designation is to provide a
method to collect data on
the number of such instances
that might arise through the
inclusion of a checkbox on
Uniform Traffic Citations.
It is possible that after
study of that data the
legislature may create a new
violation for Aggressive
Careless Driving with
enhanced penalties, but that
is not the case currently.

When encountering traffic
situations that qualify for
this designation, the
citation or citations being
issued should **not** recite the
statute number for
Aggressive Careless Driving,
which is 316.1923. Instead
those citations should
recite the appropriate

number for whatever the particular facts may be, such as speeding, improper lane change, and the like. **In addition**, the box for aggressive driving should be checked.

Reciting the statute number for Aggressive Careless Driving has caused some cases to be dismissed by the courts because there is no such specific crime. Officers can avoid this by understanding the mechanics involved with this designation and by being certain to charge the offenses themselves that constitute this designation, whatever and however many of them there might be.

CASE LAW UPDATE NARCOTICS

The First DCA has reversed Eighth Circuit Judge Larry Turner's dismissal of pending drug charges in **ST V MYERS**, issued in April.

The SAO Special Investigations Unit had enlisted a probationer to act as a cooperating source in a drug investigation. Under the supervision of SIU, this probationer took part in two drug purchases from Myers, resulting in Myers' arrest and prosecution. The defense moved to dismiss alleging that the use of a probationer to make drug cases was outrageous, contemptuous and illegal conduct resulting in a

violation of the Defendant's due process rights. Judge Turner proceeded to dismiss all charges on the basis that failure to secure permission of a sentencing judge before using a probationer as an informant, where the informant would be allowed or required to violate conditions of probation, would transgress the Defendant's due process rights under the Florida and federal constitutions.

The State appealed. The First District Court of Appeal held that use of a probationer in a sting operation as a confidential informant did not implicate the Defendant's due process rights under either the State or Federal Constitutions. The Court recognized that the Florida Supreme Court had dismissed other convictions due to "due process" violations based upon a CI receiving a contingency fee based on all civil forfeitures arising out of successful criminal investigations and also cases where a law enforcement agency had manufactured illegal drugs later used to carry out reverse sting operations. The First DCA held that the instant scenario did not rise to those levels so as to violate the Defendant's due process rights.

While this case allows the use of a probationer as a CI, even without court approval, caution should be exercised in that regard

because of the inherent credibility problems involved. If such person's involvement reaches a level where he or she will have to testify at trial, the defense can be expected to strongly impeach the person's testimony in a variety of ways, including by arguing that a probationer has a very real reason to exaggerate or slant testimony to the State's favor in order to reduce his own sentence.

Credit goes to ASA **LEE LIBBY**, who originally handled this case in Bradford County and who initiated the appeal that ultimately resulted in Judge Turner's opinion being reversed.

SCOPE OF AUTO SEARCH

Also in April, the Florida Supreme Court held in **BETZ V ST** that the smell of burnt marijuana **in combination** with other circumstances provides probable cause to search the entirety of a motor vehicle.

Officers in Clearwater stopped Betz for a traffic offense. Betz quickly exited the vehicle, closing the door behind him. Officers then smelled a strong odor of marijuana coming out of the rolled-down window of the vehicle, saw gray smoke in the vehicle and smelled a marijuana odor coming from the Defendant's shirt. Upon patting down the Defendant,

a plastic baggie containing marijuana was found. The officers arrested Betz, searched the car and, ultimately, the trunk. Inside the trunk was a briefcase; inside the briefcase was a metal box; and inside the metal box was a second bag of marijuana. The combination of the amounts from the passenger compartment and the trunk resulted in a felony amount of marijuana being seized.

Betz was convicted in the trial court but on appeal to the 2nd DCA, that court suppressed the marijuana found in the trunk, citing the US Supreme Court decision in CALIFORNIA V ACEVEDO, which stands for the proposition that even if an officer believes that a certain compartment or area of a vehicle contains contraband, that does not justify search of the entire vehicle. The Florida Supreme Court, however, distinguished ACEVEDO and explained that the smell of marijuana **in combination** with other circumstances, constituted probable cause to search the entire vehicle because the officer did not know precisely where the marijuana was secreted. The court noted the Defendant's attempt to draw the officer away from the rear of the vehicle, his nervous and jittery behavior with the officer, his suspicious behavior in pushing off of the car twice during the officer's frisk and the fact that during his frisk, the

officer found a storage bag of marijuana. Here the officer knew the car contained marijuana, but did not know precisely where it was secreted within the vehicle, thus justifying the search of the trunk.

AUTO THEFT PASSENGERS

The Second DCA has again reiterated the law in Florida on after acquired passengers in a stolen car and their culpability for auto theft. (An "after acquired passenger" is someone who was picked up **after the actual theft** of the vehicle.)

In CANADY V ST, the Court held that an after-acquired passenger **cannot be convicted of auto theft even if he knew the car was stolen.** This is an important distinction in cases where police spot a stolen car being driven with one or more passengers inside. Therefore it is important to question the passenger(s) to determine if the passenger was present at *the time* of the theft and was aware of the incriminating nature of the taking. Otherwise, the passenger can only be charged, at most, with trespassing. To charge Auto Theft, the passenger would have to have been knowingly and intentionally involved in the stealing of the vehicle.

RESIDENCES AND ARREST WARRANTS UPDATE

The Fourth DCA has issued an opinion in V.P.S V ST that clarifies how and when a residence can be entered pursuant to an arrest warrant.

Martin County deputies were trying to arrest a person pursuant to an arrest warrant listing the name, address and description of the suspect. Deputies went to that residence in late afternoon during normal work hours and were met by a juvenile who answered the door. The deputies told the boy that they were there for the suspect and showed him the arrest warrant. The boy identified himself, told them that he lived with his mother who was at work and that the suspect was not there. One of the deputies asked if they could search the apartment and the boy said "okay.". While searching the apartment, the deputies noticed drug paraphernalia, which the boy admitted to owning. He was arrested. The original suspect was not found at the residence.

Attorneys for the boy filed a motion to suppress the evidence against the boy alleging that the search was illegal because the deputies had no reasonable belief that the suspect was inside the residence nor were they given proper consent to

search.

The trial court had held that there was a reasonable belief that the arrestee was in the house and even if the belief was not reasonable, there was consent to the entry by the boy. The 4th DCA **reversed**, saying that the US Supreme Court case of PAYTON V NEW YORK holds that the officer must have a reasonable belief that the location to be searched is the suspect's dwelling AND that the officer must have reason to believe that the suspect is inside that dwelling. The 4DCA felt that the deputies could not show a reasonable belief that the suspect was inside the residence in order to lawfully gain entry.

No "common sense" factors were present to supply a reasonable belief that the suspect was there. The Court held that the deputies did not attempt to serve the arrest warrant in the early morning hours but arrived in the later afternoon, at a time when the boy's mother was still working. There was no verification of the suspect's presence through any third party or checking the immediate area for the suspect's vehicle. Also, the deputies were affirmatively told by the juvenile that the suspect was not there. The Court held that without a reasonable belief that the suspect was currently present, the officers were not free to enter the

premises based upon the arrest warrant.

The Court also found that the boy's consent was involuntary because it was based on acquiescence to authority. Even though the juvenile was shown the arrest warrant, he was not told it was only an arrest warrant and not a SEARCH warrant. The Court cited the U.S. Supreme Court again in BUMPER V. NORTH CAROLINA, which held: "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search..."

So, because the 4th DCA felt that the deputies could not show a reasonable belief that the suspect was actually inside the residence at the time they arrived with the arrest warrant, the arrest warrant itself did not convey the power to enter the residence, nor did the involuntary consent of the juvenile allow lawful entry.

BUS SEARCHES AND CONSENT

The U.S. Supreme Court issued an opinion on June 17th in U.S. V DRAYTON holding that the Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to search.

The driver of the bus on

which the defendants were traveling allowed three Tallahassee Police officers to board the bus as part of a routine drug and weapons interdiction effort. One officer knelt on the driver's seat, facing the rear of the bus, while another officer stayed in the rear, facing forward. Officer Lang worked his way from back to front, speaking with individual passengers as he went. To avoid blocking the aisle, Lang stood next to or just behind each passenger with whom he spoke. He testified that passengers who declined to cooperate or who chose to exit the bus at any time would have been allowed to do so without argument; that most people are willing to cooperate; that passengers often leave the bus for a cigarette or snack while officers are on board; and, although he sometimes informs passengers of their right to refuse to cooperate, he did not do so on the day in question.

As Lang approached the defendants, who were seated together, he held up his badge long enough for them to identify him as an officer. Speaking just loud enough for them to hear, he declared that the police were looking for drugs and weapons and asked if the defendants had any bags. When both of them pointed to a bag overhead, Lang asked if they minded if he checked it. Defendant Brown agreed, and a search of the bag revealed no contraband.

Lang then asked Brown whether he minded if Lang checked his person. Brown agreed, and a pat-down revealed hard objects similar to drug packages in both thigh areas. Brown was arrested. Lang then asked Defendant Drayton, "Mind if I check you?". When Drayton agreed, a pat-down revealed objects similar to those found on Brown, and Drayton was arrested. The defendants had taped cocaine between their shorts.

Charged with federal drug crimes, the defendants moved to suppress the cocaine on the ground that their consent was not voluntary. The 11th Circuit reversed their convictions holding that bus passengers do not feel free to disregard officer's requests to search absent some positive indication that consent may be refused.

The U.S. Supreme Court **reversed** and reinstated the convictions. The Court found that the encounter was cooperative, not coercive or confrontational, there was no overwhelming show or application of force, no intimidating movement, no brandishing of weapons, no blocking of exits, no threat and no command nor authoritative tone of voice. The Court held that a bus encounter does not on its own transform standard police questioning into an illegal seizure. The display of a badge nor the presence of holstered firearms is not

dispositive of coercion absent brandishing of the weapon. The consent was voluntary.

2002 CRIMINAL LEGISLATION

Although the October issue of the Legal Bulletin will, as usual, feature this year's new criminal legislation, the following are several new laws already in effect. These were passed by the legislature during its special sessions at the end of 2001 and are, for the most part, designed to address post-September 11th anti-terrorism concerns.

2001-356 Creating 775.30 to define terrorism as a violent or dangerous act or violation of 815.06 that is intended to intimidate, injure, or coerce the civilian population, influence government policy by intimidation or coercion, or affect the conduct of government through destruction of property, assassination, murder, kidnapping or aircraft piracy; amending 907.041 to add terrorism as a qualifying offense for pre-trial detention. EFFECTIVE DATE: December 10, 2001.

2001-357 Creating 775.31 to provide a one degree reclassification for any felony or misdemeanor that facilitated or furthered an act of terrorism and to provide that a 1M offense so reclassified to a 3F offense is a guidelines Level 2

offense and any felony that is so reclassified is ranked one level above where it would otherwise be; amending 782.04 to add felonies that constitute acts of terrorism or are in furtherance of acts of terrorism as predicate acts for Felony Murder I,II, and III. EFFECTIVE DATE: December 10, 2001.

2001-358 Amending 859.01 to add the introduction or addition of any bacterium, radioactive material, virus, or chemical compound to any product designed for ingestion or application to the body or to any water supply to the definition of poisoning food or water, a 1F Level 9 offense. EFFECTIVE DATE: December 10, 2001.

2001-359 Amending 934.07 to authorize wiretapping in aircraft piracy cases and by FDLE for terrorism crimes. EFFECTIVE DATE: December 10, 2001.

2001-361 Creating 119.071 and 286.0113 to exempt from public records disclosure and sunshine law requirements information concerning security system plans. EFFECTIVE DATE: December 10, 2001.

2001-362 Creating 395.1056 to exempt from public records disclosure of hospital emergency management plans related to terrorism. EFFECTIVE DATE: December 10, 2001.

2001-363 Creating as yet un-numbered provisions to exempt from public records disclosure of information related to pharmaceutical capabilities related to terrorism. EFFECTIVE DATE: December 10, 2001.

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 352-374-3672.

2001-364 Amending 119.07(3)(b) to exempt from public records disclosure of information requested by law enforcement from another agency, both from the requesting law enforcement agency and the custodial agency, while a criminal investigation remains active, and providing that the requesting law enforcement agency shall notify the custodial agency when the investigation is no longer active. EFFECTIVE DATE: December 10, 2001

2001-365 Amending 943.03 to require FDLE to coordinate and direct responses to acts of terrorism, including by establishing regional domestic security task forces. EFFECTIVE DATE: December 10, 2001.

2001-366 Creating 775.30 to define terrorism as also provided in 2001-356; creating 943.0321 to establish the Florida Domestic Security And Counter-Terrorism Database within FDLE. EFFECTIVE DATE: December 10, 2001.

FOR COPIES OF CASES...