

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT
WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2003-03
Editor: Rose Mary Treadway

July 2003

A MESSAGE FROM STATE ATTORNEY BILL CERVONE

I would be remiss if I did not use this space to thank the many long time members of our local law enforcement family who have retired within the last few weeks. There are occasionally times when it seems like we lose a larger number of veterans than normal for one reason or another, and this is one of those times. One reason is that the first round of DROP participants has all reached their five years at the same time. Other reasons vary by the individual. Regardless, the face of local law enforcement will be different in the future.

I don't remember a time when Everett Stevens wasn't the Chief at UPD. His service goes back to my undergraduate days at the University and while I certainly could not have imagined then that my own career path would eventually make us friends and co-workers, that is what has happened. Similarly, Tom Wolfe has, in my mind, always been the Chief in High Springs. I doubt that he'd remember it but Chief Wolfe was involved in the very first case I really handled as an intern for the SAO. While his town has changed, he has been a constant. These two men in particular have served long and productive terms in leadership positions that more often than not are subject to relatively quick turnover as political winds change. They have endured c

community changes and growth as the times have changed and have kept their respective departments current with, and in many respects, ahead of the curve. They have worked for the most part quietly, seeking only to do a good job for their constituents. Things just won't be the same without them. While life is change, some changes are less welcome than others. In wishing Chief Stevens and Chief Wolfe well as they leave their active roles with us, I readily admit to a selfish wish that we had a few more years with them.

To both of them and to all of our other friends who are recognized elsewhere in this issue as they retire after long and good careers, I extend my personal thanks and good wishes along with the hope that you will each continue to honor us with an occasional visit or insight in the future. We'll miss all of you.

SAO PERSONNEL CHANGES

ASA **BILL EZELL** has transferred into **MICHAEL BECKER'S** misdemeanor traffic position and ASA **MICHAEL BECKER** will assume ASA **STEVE WALKER'S** narcotics position in Alachua County. **STEVE WALKER** has resigned to take a position with the Tampa SAO.

ASA **MICHELLE SMITH** has re-joined the Juvenile Division.

ASA **BEVERLY MCCALLUM POLIAKOVA** has been re-assigned from the Alachua County Domestic Violence Division to County Court where she has assumed ASA **FRANCINE JOSEPHSON TURNEY'S** caseload. FRANCINE is now assigned to the Alachua County Domestic Violence Division.

ROBERT WILLIS has accepted a position as a new ASA in Levy County, pending his completion of the Florida Bar Exam in the summer. Former Levy County ASA **PAM BROCKWAY** has transferred to Gainesville to assume former ASA **ROSALYN MATTINGLY'S** caseload with post-conviction and Jimmy Ryce cases.

CONGRATULATIONS!

FDLE Special Agent Supervisor **KEN MOORE** and Special Agents **BILL DAVIS, ED DIX, DENNIS FISCHER** and **JOEL NORRED** were honored at a special retirement dinner on June 20 to celebrate their retirements from FDLE. Their combined term of service to the agency is over 130 years.

HIGH SPRINGS POLICE DEPARTMENT
CHIEF

UNIVERSITY POLICE DEPARTMENT
CHIEF

ASO Deputy **CHRIS FENWICK**

In May, at the BAKER COUNTY Sheriff's Office Seventh Annual Law Enforcement Officer Memorial Day, Baker County SHERIFF **JOEY DOBSON** presented the Detention Deputy of the Year Award to **KEITH JACKSON**; Communication Officer of the Year Award to **REBEKKA JORDAN**; Explorer of the Year Award to

RODNEY DRIGGERS; the Joseph Burtner Award to Deputies **CHARLES ROSS** and **MIKE LAGLE**; and the Morris Fish Award to Deputy **BILL WATSON**. The award for Outstanding Service to the Baker County Sheriff's Office was presented to **JEFFERY DAVIS**.

In March, Mothers Against Drunk Driving Florida held its annual awards luncheon in Tallahassee honoring law enforcement officers. Area officers recognized for their DUI arrests included ALACHUA COUNTY Sheriff's Deputies **TRAVIS DEVINNY** and **SCOTT ANDERSON**.

On March 29, ASA **FRANCINE JOSEPHSON** wed Paul Turney. Congratulations to the new Mrs. Turney.

The **FLORIDA STATE PRISON** softball team, won the 22nd Annual Secretary's Softball Tournament, held in St. Augustine in May. FSP rebounded from its only loss in the tournament, which came at the hands of TAYLOR CORRECTIONAL INSTITUTION, to beat Taylor in the championship game. Having repeated as tournament champs, FSP will host the event again in 2004.

BAKER COUNTY DEPUTY SHERIFFS: Chief Investigator **CHUCK BRANNAN**, Investigator **MIKE COMBS**, Investigator **RANDY CREWS**, and Investigator **SCOTTY RHODEN** were chosen as the Officers of the Year for Region II. Region II consists of eleven County Sheriff's Offices, nineteen City Police Departments, and three FDLE offices all located in North Florida.

ASAs **BEVERLY MCCALLUM POLIAKOVA, MICHELLE SMITH** and **GREG WILSON** all passed the Florida Bar Exam recently and were sworn in as Bar members.

BARRY WARREN of the Starke Police Department was promoted to Lieutenant.

On June 27, the Florida Council on Crime and Delinquency presented awards to the following recipients: **BRAD CARTER**, Corrections; **RON TADLOCK**, Louie L. Wainwright; **JUDGE MARVIN MOUNTS**, Judicial; **DANNY PEARSON**, Law Enforcement; **MICKEY AGNER**, Juvenile Justice; and **AARON BEAN**, Criminal Justice.

A LETTER FROM ATTORNEY
GENERAL
CHARLIE CRIST

The following is re-printed from a letter recently circulated by Attorney General Crist in order to familiarize all agencies with what the AGO is doing in the area of consumer fraud.

On the first day of this administration, our office established the Attorney General's Fraud Hotline. The hotline provides a toll free number to report suspected consumer fraud, scams and corporate malfeasance. The Fraud Hotline is open to people across the country to report instances of consumer fraud or scams that affect or involve Florida citizens or companies.

Since January 8, 2003, well over 6,000 calls have been received through the Fraud Hotline. Our consumer advocates assist callers in matters of consumer fraud and identity theft. We provide tips, information, and referrals to assist individuals in resolving their complaints. As a civil enforcement authority, our enforcement efforts are targeted to organized multi-circuit consumer fraud committed against Florida citizens by businesses domiciled within the United States. Additionally, we investigate Florida businesses whose conduct bears

scrutiny whether or not it affects Florida consumers.

Our role is to protect the consumer and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce. We work with the Federal Trade Commission and other federal agencies to make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.

Effectively addressing fraud also requires close communication with your office and local law enforcement authorities throughout the state.

Often, individual complaints present possible criminal violations or activities which should be immediately brought to the attention of local authorities for investigative and prevention purposes. If you have a contact person or an economic crime/white collar crime section to whom we should direct such complaints, please let me know or contact the Fraud Hotline directly at 1-866-966-7226 (1-866-9-NO-SCAM).

I look forward to working with you to protect Floridians from consumer fraud. Thank you for your friendship and support.

A MESSAGE FROM THE
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

Methamphetamine and other illegal drug labs are becoming more prevalent in Florida. This dangerous combination of chemicals and temperature sensitive components may be explosive and the fumes and substances toxic. Awareness and recognition of these labs before officers approach the area is imperative.

Due to their mobility, these illegal labs may be

found in campgrounds, vehicles, sheds, or most any location. A typical lab will be composed of a collection of bottles, hoses and pressurized cylinders, and could include modified propane tanks, water coolers, fire extinguishers, scuba tanks or soda dispensers, used to store anhydrous ammonia or hydrochloric acid, both highly toxic and corrosive.

If a lab is suspected, secure the area and maintain a cautious distance. Avoid breathing the fumes or handling lab equipment or chemicals unless you are specifically trained in handling hazardous materials.

To safely respond to the scene, contact your appropriate local officials then call the **State Warning Point at 1-800-320-0510**. The Department of Environmental Protection (DEP) Division of Law Enforcement's Bureau of Emergency Response, can provide trained responders to sample and analyze the materials.

The Division of Law Enforcement's Bureau of Environmental Investigation will also be contacted to evaluate additional criminal charges for dumping of hazardous materials and environmental impact. The drug related charges will remain in the jurisdiction of the initiating agency, and with the federal Drug Enforcement Agency.

Further information regarding Environmental Crimes can be obtained by visiting the agency web site at www.dep.state.fl.us or by calling the Office of Public Education and Training at (850) 245-2883. This office can refer you to agency contacts or can provide the comprehensive guide to environmental crimes enforcement "A Handbook to State Environmental Crimes for Patrol Officers, Investigators and Regulatory Specialists.

SEARCH & SEIZURE:
READABLE TAG

A Hillsborough County Deputy saw a vehicle driven by Diaz pass with a tag on top of the rear window. Because he could not read the tag, the deputy stopped the vehicle. Upon approaching the car, the deputy was able to read the tag including the expiration date and found nothing improper. He walked up to Diaz and requested his driver's license. The license had been suspended and Diaz was arrested.

The Florida Supreme Court has ruled in **St v Diaz** that once the officer was able to read the tag upon approaching the car, there was no justification for further detention of the motorist or checking his license and registration. "Permitting an officer to further detain and interrogate a motorist, after the officer is fully satisfied that the motorist has not committed a violation of the laws of the State..., violates the... law...". "Having verified the total validity of Mr. Diaz's temporary tag, the sheriff's deputy could lawfully make personal contact with Mr. Diaz only to explain to him the reason for the initial stop." "...Anything more than an explanation of the stop was a violation of Mr. Diaz's Fourth Amendment rights."

SEARCH & SEIZURE:
ANONYMOUS TIP

A Polk County Deputy received a call from his dispatcher that there was a disturbance at a specific mobile home park. The deputy was told that the disturbance involved a white man who was armed and wearing jean shorts and black tank top carrying a white shirt.

The deputy proceeded to the park and found Young walking down the road, fitting the description. Young was not acting suspiciously nor was there evidence of a firearm.

The deputy conducted a TERRY stop and

performed a pat down for officer safety due to the information about Young possibly being armed. The pat down revealed a hard object that the deputy concluded might be a knife. When he reached into Young's pocket, a piece of aluminum foil came out with the hard object, a cigarette lighter. The foil contained Methamphetamine.

The Second DCA in Young V St found that the initial TERRY stop was unlawful as the initial anonymous telephone tip lacked sufficient indicia of reliability to justify a Terry stop. The Court held that although it could not fault the deputy for his actions in this case, the dispatcher should have revealed the nature of the source of the tip information. "Law enforcement agencies may need to modify the procedures they use to dispatch officers and issue BOLOs so that patrol officers know the nature of the source of the information received by the dispatcher. Likewise, occasionally it may be necessary for the State to call witnesses in addition to the arresting officer in order to establish the reliability of the information upon which the law enforcement agency acted when initiating a TERRY stop."

MORE SEARCH & SEIZURE OF PASSENGER

Contrast Faulkner v St featured in the April newsletter with this Fourth DCA case of St v McClendon involving an officer's ability to direct that a passenger remain in the vehicle while the officer is investigating a traffic stop.

In Faulkner, the Second DCA had held that a law enforcement officer, who approached a car stopped for a traffic violation, had no right to order a passenger to remain in the vehicle as the passenger attempted to exit. The Court ruled that since the officer testified he directed the passenger to remain for "general safety

purposes" not associated with any suspected criminal conduct or threat, the passenger, Faulkner, was illegally detained, therefore nullifying his consent of the pat down that later revealed contraband.

In McClendon, the officer had noticed a car parked in the middle of the road without any lights on after midnight. McClendon, who was standing at the rear of the vehicle, got into the passenger seat as the officer approached to investigate. The driver was asked to step to the rear of the car and as he did so, McClendon, the passenger, got out of the car, leaned on the hood, and asked what was going on.

The officer testified that he could not see one of the passenger's hands. Afraid he could be shot, he feared for his safety and directed that McClendon get back into the car. Upon further investigation, it was determined that the driver was not licensed, the car was a rental and McClendon was listed on the rental agreement as an authorized driver. The officer determined that McClendon's license was suspended. During this time, a K-9 unit arrived and McClendon was asked to exit the car so that the K-9 could walk around the car. Narcotics and a loaded gun were found and McClendon was arrested.

McClendon sought to have the evidence suppressed based on the argument that the officer's instruction to him to get back into the car constituted an impermissible stop. The Fourth DCA held that the stop was permissible.

The Court held that the officer's interest in "protecting himself or a fellow officer against an unsuspected assault by a driver or passenger and against accidental injury from passing traffic is both legitimate and weighty and the intrusion into the driver's or passenger's personal liberty is de minimis." "The officer should be able to identify objective circumstances that support the reasonableness of his order... for the passenger

to return to a vehicle.”

Therefore it appears that the difference in the Faulkner case and this McClendon case is that this officer was able to articulate that he felt threatened by his inability to see one of McClendon’s hands that could be holding a weapon.

JUVENILES AND PROMISES OF LENIENCY

Detective Cecala of the Port St. Lucie Police Department was investigating a criminal mischief charge wherein juvenile E.C. and five other juveniles were suspected of entering a house under construction and damaging floors and walls by riding their bikes throughout the house.

Upon interviewing E.C., Detective Cecala testified that when he explained that his intention was to handle the matter “administratively” and not take E.C. into custody upon the Defendant’s agreement to make restitution, E.C. confessed. Cecala said that “administratively” meant that the juvenile would not be taken into custody, booked and fingerprinted etc but that a court date would be set. E.C. and his mother testified that Cecala promised that E.C. would not be charged in the matter nor would it ever become a court matter if E.C. admitted his involvement. She further testified that at most, according to Cecala, E.C. would have to see a probation counselor, pay restitution and probably write a letter of apology.

The trial court found that clearly the detective had made a promise that if E.C. was truthful, the matter probably would not go any further and that that induced the confession. The trial court, however, ruled that because E.C. and his mother had not complied with “diversion”, that the State had the right to then file formal

charges and use E.C.’s statements against him.

The Fourth DCA in **E.C. v St** suppressed the confession holding that the detective’s statements went beyond informing E.C of realistic penalties and encouraging him to tell the truth, but in fact amounted to a promise of leniency or a promise not to prosecute which illegally induced E.C. to confess. The fact that E.C. did not follow up on his promises to make restitution etc does not change the fact that the confession was induced by promises of leniency.

CONSENSUAL SEARCH & SEIZURE AND SEALED CONTAINERS

Officers saw Aponte standing behind a pickup truck along with two other persons. As the officer approached, the others walked away leaving Aponte behind. Noticing that a TV was in the bed of the truck in this high crime drug area, the officer suspected Aponte may have been planning to use the TV in an exchange for drugs.

The officer testified that he engaged Aponte in “small talk” and then asked his name and what he was doing. Aponte responded by handing the officer his drivers license. The officer then asked if he could search Aponte and Aponte replied “Okay.” During the search, the officer discovered a cigarette pack in a pocket, opened it and discovered crack. Aponte was arrested.

The Fifth DCA in **Aponte v St** held that the officer exceeded the scope of the consensual search by opening the cigarette box (even though Aponte did not object either orally or manually to the opening of the pack) because a “...reasonable person in Aponte’s position would not understand that the officer’s request to search him included a search of sealed

containers on his person in which he had a heightened expectation of privacy.” The Court further cited the US Supreme Court case of Katz v United States wherein that Court said “By placing his possessions inside a container, an individual manifests an intent that his possessions be ‘preserved as private.’”

Contrast the above case with Miami-Dade Police Department v Martinez, a Third DCA case decided in March where that Court held that the scope of the search did **not** exceed the consent when, without the occupant’s objection, officers opened a duct taped cereal box which contained money.

Here, officers received consent to search for weapons in a house. The Court noted that the consentor was present during the search and had the opportunity to limit the scope or discontinue it, but did not do so. “We are unwilling to ...hold... that enforcement officials must conduct all searches in plain view of the suspect, and in a manner slowly enough that he may withdraw or delimit his consent at any time during the search.” That Court also cited the Federal case of U.S. v Mendoza-Gonzalez which held that the scope of a defendant’s consent to look in back of a truck was not exceeded by the officers’ slicing through tape on a cardboard box and looking in, where the slicing was accomplished with minimal force, did not impair the box’s functionality, and did not affect the contents.

While difficult to explain, one distinction between these two apparently conflicting cases may be the nature of the container. A cigarette pack not otherwise apparently used for any illegal or suspicious purpose might be viewed differently from a cereal box sealed with duct tape. Otherwise, these cases point out the continuing dilemma law enforcement has with conflicting interpretations of law by different judges. The moral of the story, as has often been pointed out, is to include as many facts as possible in reports and testimony so that

meaningful differences and subtle changes can be argued to the Court.

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 352-374-3672.

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