

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT
WILLIAM P. CERVONE, STATE ATTORNEY

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October

A MESSAGE FROM

BILL CERVONE

As I write this, October 1st is just around the corner. It can't come quick enough as it will bring us closer to the end of an all too busy hurricane season. I hope that all of you and your families have come through the storms our area has experienced with no lasting harm. Perhaps out of all of this we will have a greater appreciation for things we take for granted, knowing that as much of a mess as we've had, things could have been much worse and, indeed, are in other parts of the state.

In this issue, as we do each year in October, new legislation affecting those of us who work in the criminal justice system is highlighted. Like last year, there was comparatively little of substance passed in 2004. For the second year in a row, most of the legislature's work on criminal justice issues focused on implementation of the many changes required by Article V and its shift of financial responsibility between the state and the

sorting out the problems caused by that process and will likely continue doing so through next year's session, when I anticipate that a series of so-called glitch bills will be introduced to deal with various concerns.

In any event, please be aware of the topics covered in the synopsis that follows and please call the SAO if you have questions or need a copy of the complete language of any of the new laws that have gone into effect.

SAO PERSONNEL CHANGES

JAMES KNIGHT is the new ASA in Levy County having interned previously in the Gainesville Office.

Gainesville ASA **KIM KINSELL** has resigned to take a staff attorney position with Life South Blood Center. ASA **SEAN BREWER** will assume her felony caseload.

CONGRATULATIONS !

UPD honored its finest in an awards ceremony in August at the University of Florida. Those honored include Officer of the Year, JAMES RAVEN; Support Person of the Year, TRACY MASSIMILLO; Parking Patroller of the Year, KATRINA SPAN; Communications Operator of the Year, EVELYN WILSON; Police Service Technician of the Year, JEROME BLANCHARD; and Medal of Valor Winner, LT. DOCK LUCKIE.

In July, GPD bestowed honors in its Promotions and Awards Ceremony.

Officers JORGE CAMPOS, TSCHARNA SENN and WENDY LORD were promoted to the rank of Corporal. Field Training Officer of the Year for 2002 is Officer BRADFORD LITCHFIELD and for 2003 is Officer NICHOLAS FERRARA.

A Police Service Award was bestowed upon Officer RICHARD LALONDE. Unit Citations went to Corporal ORLANDO ALVAREZ and Officer MARTIN HONEYCUTT. Honored with the Award of Excellence were Officers BRETT ROBISON, RONNIE HARTLEY, ROBERT KENNEDY,

RYAN CULBERTSON, KENNETH BEERBOWER, MIKE MARESCA, ROB CONCANNON, Sergeant RICK ROBERTS, Officers RANDY ROBERTS, DEBRA PAGE, JAMIE HOPE, BRAD LITCHFIELD, Detective ROBERT HOEHN, and Officer JAY SAUNDERS.

The Police Star was awarded to Officers MICHAEL T. MITCHELL, ROBERT KENNEDY, CHARLES OWENS, TODD GRANTHAM, GLEN BAKER, MARC WOODMANSEE, and JOHN KEMP.

The Distinctive Service Award was presented to Officer ELGIN SAXON.

ASAs ZACK JAMES, ANGIE CHESSER, and JAMES KNIGHT have been notified that they have successfully passed the Florida Bar Exam.

CASE LAW UPDATE:

DRIVING AWAY VS RUNNING AWAY

A police officer saw what he believed to be a drug deal between the drivers of two cars. As the officer approached, the Defendant drove away without violating any traffic law. The officer stopped him and found drugs. The Second DCA

in Paff v State reversed the conviction.

The Court held that the U.S. Supreme Court's decision in Illinois v Wardlow, holding that officers have reasonable suspicion to stop a person based upon his "unprovoked flight" in "high crime areas" did not apply in this case because Paff was **driving** a car, rather than running.

"Flight on foot is distinctly different than flight in a car. When 'headlong flight' occurs on foot, the defendant's intent to elude an officer may be clear, even though no law is broken. When 'flight' occurs in a vehicle, the vehicle often conceals the emotions of its occupants and it is more difficult to determine that such a defendant is demonstrating 'nervous, evasive behavior,' or is intending to engage in 'headlong' flight." "A car that obeys all traffic regulations when leaving a location when a police car arrives would seem to be the motor vehicle equivalent of a person who simply walks away from an officer on foot."

The Court stated that this behavior cannot be *headlong flight*, even if it was triggered by the sight of the patrol car. "Mr. Paff's behavior was fully consistent with 'going about one's business' when approached by an officer." "The deputy had only a mere

hunch, and not a reasonable suspicion that Mr. Paff had committed, was committing, or was about to commit a criminal offense."

In a vigorous dissent, the minority opinion pointed out that the *cumulative information* available to the detaining officer here supported the officer's conclusion that criminal activity was afoot. In addition to the hasty departure, it was a high crime area where it was common for drug transactions to occur. The positions of the two vehicles, parked in close proximity, with the driver's windows lined up, was also a factor relevant to the reasonable suspicion determination.

The dissent said all of this was more than a "hunch" and indicated a reasonable suspicion of criminal activity.

**SEARCH & SEIZURE: INCIDENT
TO ARREST**

Abdullah was stopped by an Orange County deputy for riding his bike without a light at night. A radio check revealed that Abdullah had an outstanding 1993 warrant for petit theft. He was arrested and a search incident to arrest revealed

cocaine in his pocket.

Abdullah filed a motion to suppress, arguing that his arrest was illegal because the prosecution on the petit theft offense had not commenced within the statute of limitations.

The Fifth DCA in Abdullah v State held that although the prosecution for the 1993 theft offense is barred by the statute of limitations, the arrest for that offense was not illegal. The officer was not required to address whether prosecution was barred by the statute of limitations before arresting the Defendant on the outstanding warrant.

**PARTIAL IMPLIED CONSENT
WARNING**

The failure to inform a DUI suspect that the refusal to take a breath test constitutes a crime if she had a prior refusal will not prevent the admission of the refusal at trial, the Fifth DCA ruled in Grzelka v State.

When asked to submit a breath test, Grzelka was warned that her refusal would result in the suspension of her driver's license, but she was not informed that, if her license previously had been suspended for a prior refusal, her refusal would

constitute a misdemeanor, as required in 316.1932(1(a)1.a.

The court held that the fact that the defendant was informed of some adverse consequence, although not all adverse consequences, will allow the refusal to be admitted. "...nothing in the statute requires exclusion when the statutory warning is not complete."

**SEARCH AND SEIZURE:
AUTOMOBILE CONSENT**

During the stop of Santiago's vehicle, Santiago gave officers consent to search his vehicle.

The officer, having learned in training that drugs were often concealed behind car radios, pulled on the defendant's car radio and it moved free and clear, in that it was not connected by any wires or screws. The officer then found heroin hidden behind the radio.

Santiago argued that a "reasonable person" would not understand the officer's request to search the car to include "dismantling his radio and searching behind it."

The Fifth DCA in Santiago v State held that the defendant's general consent to search, that included no limit on the scope of his consent, was sufficient to

allow the officers to search behind the radio in the dashboard. The Court noted that the radio was not attached to the dashboard but was simply poised there in order to hide the drugs.

The Court also cited to **State V Ramirez**, a 1993 case from the Fifth DCA, that held that an officer's observation that a panel in the dashboard above the glove compartment was ajar, was sufficient to give probable cause, (in light of his expertise in the use of secret compartments in cars for drug transport) to use a screwdriver to pry open the panel to determine whether there was a secret compartment concealing drugs where he suspected them to be.

**US SUPREME COURT'S NEW
MIRANDA RULING**

In a case involving a police protocol for custodial interrogation that called for giving no *Miranda* warnings of rights to silence and counsel until an interrogation has produced a confession, following the confession with *Miranda* warnings, and then leading the suspect to cover the same ground a second time; the U.S. Supreme Court has ruled that such post warned

statements should be suppressed as a violation of *Miranda's* warning requirement.

Defendant Seibert feared charges of neglect when her son, afflicted with cerebral palsy, died in his sleep. She was present when two of her sons and their friends discussed burning her family's mobile home to conceal the circumstances of her son's death. Donald, an unrelated mentally ill 18 year-old living with the family, was left to die in the fire, in order to avoid the appearance that Seibert's son had been unattended.

Five days later, the police arrested Seibert, but did not read her *Miranda*. At the police station, Officer Hanrahan questioned her for 30 to 40 minutes, obtaining a confession that the plan was for Donald to die in the fire. He then gave her a 20 minute break, returned to give her *Miranda* warnings, and obtained a signed waiver.

He resumed questioning, confronting Seibert with her pre-warning statements and getting her to repeat the information. Hanrahan testified that he made a conscious decision to withhold *Miranda* warnings, question first, then give the warnings, and then repeat the question until he got the answer previously given.

In Missouri v Seibert, the U.S. Supreme Court held in a 5-4 decision, that the fully warned inculpatory statement must be suppressed. "Because this midstream recitation of warnings after interrogation and unwarned confession does not effectively comply with *Miranda's* constitutional requirement, we hold that a statement repeated after warning in these circumstances is inadmissible."

The Court distinguished its earlier ruling in Oregon v Elstad, that held that a suspect's unwarned inculpatory statement made during a brief exchange at his house did not make a later, fully warned inculpatory statement inadmissible.

In Seibert, the Court said "...it is likely that warnings withheld until after interrogation and confession will be ineffective in preparing a suspect for successive interrogation, close in time and similar in content. The manifest purpose of question-first is to get a confession the suspect would not make if he understood his rights at the outset. When the warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'"

SEARCH AND SEIZURE:
AUTOMOBILE TRUNK

Leary was arrested for trespass after he entered his vehicle and was about to drive off. Officers subsequently searched his car incident to arrest, found a firearm in his trunk and arrested him for possession of a firearm by a convicted felon.

The Fifth DCA in Leary v State reversed the conviction holding that the officers had unlawfully seized the firearm.

The court held that the search of a car incident to arrest is limited to the passenger compartment. The authority to search incident to arrest does not extend to the trunk of a car, unless contraband is found in the passenger compartment. In this case, no contraband was discovered on Leary's person or in his car.

The State argued that the trunk search was then an inventory search since the car was going to be towed from the property. The court again disagreed, ruling that there had been no showing of the agency's standardized procedures for when to tow upon an arrest

for minor charges, nor any evidence that the officers followed such standardized procedure.

**K-9 SNIFF AT EXTERIOR OF
HOUSE NOT PC FOR SEARCH
WARRANT**

Broward deputies received an anonymous tip that Rabb was growing cannabis inside of his home.

Deputies started surveillance of the home and watched as Rabb left his home and drove away. Following the vehicle, the detectives saw Rabb make an improper lane change and initiated a traffic stop.

A nervous and trembling Rabb exited the vehicle, which allowed the officers to see books and a videotape concerning the cultivation of marijuana located on the driver's seat. Rabb agreed to answer questions and was Mirandized.

When Rabb was asked whether he had a grow operation in his home, Rabb didn't answer directly, but stated that he was replacing drywall in the house. When asked about the books and video, he replied that "he was just interested in cannabis cultivation."

During this questioning, K-9 Chevy walked around the car and alerted to the presence of drugs inside the vehicle.

A cannabis cigarette was found in the ashtray and Rabb was arrested.

Less than an hour after the stop, the detectives then went to Rabb's residence. Chevy walked by the front of the home, up to the front door and alerted. Based on an affidavit, a search warrant was issued and a search was conducted at the home. A grow operation was discovered inside.

The Fourth DCA in State v Rabb held that the evidence seized pursuant to the search warrant must be suppressed, as the dog sniff at the exterior of the house was an illegal search.

The court, noting that this was a case of first impression in Florida, ruled that a dog sniff at the exterior of a house is a Fourth Amendment search and that a "shroud of protection" wraps around a house. The court noted that this case is controlled by the U.S. Supreme Court's opinion in Kyllo v United States where that Court ruled that the use of a thermal imager by law enforcement to scan the exterior of a house to discern the relative warmth inside Kyllo's home (to establish a grow operation) was a search. It was a Fourth Amendment violation for law enforcement to

employ a thermal imager to discern the warmth inside the house.

The DCA stated the dog's sense of smell crossed the "firm line" of Fourth Amendment protection at the door of Rabb's house. "Because the smell of marijuana had its source in Rabb's house, it was an 'intimate detail' of that house, no less so than the relative warmth of Kyllo's house." The court even compared this sniff to the "disturbing use of robot-spiders to detect fugitives in the Tom Cruise movie *Minority Report*. "Therefore, until the United States Supreme Court indicates otherwise, we are bound to conclude that the use of a dog sniff to detect contraband at a house does not pass constitutional muster and is ...an illegal search." The court examined the other independent lawful evidence and determined that was not enough for probable cause for the search.

The dissent in Rabb argued that this was no different than a dog sniff of luggage in an airport or a sniff in a hall outside of a motel room, both of which had been determined not to be Fourth Amendment searches, and as such, passed constitutional muster. "The Fourth Amendment did not preclude the officers in either case from being where they were when the canine sniff took place."

Further, the dissent argued that the canine sense of smell is not the type of rapidly advancing technology that concerned the Supreme Court in Kyllo.

"'Bloodhounds have been chasing escaping prisoners and other fugitives through the swamps for hundreds of years, with posses following dutifully and trusting implicitly in the canine expertise, even at the closed doors of cabins and houses. The canine reactions, moreover, have traditionally been admissible as evidence even at a trial on the merits, let alone in an *ex parte* application for a warrant.'"

Hopefully, the Florida or United States Supreme Court will resolve this issue.

**CRACKED WINDSHIELD NOT PC
FOR STOP**

Officers stopped Hilton's car after they noticed his windshield had a seven inch crack in the upper corner on the passenger side.

The officers intended to issue a traffic citation for equipment violation but instead, found a gun in plain view, resulting in a search that produced more than forty bags of cannabis.

The Second DCA in Hilton v State held that the officers had no authority to stop the car.

The court said that the Florida Statutes do not specifically prohibit driving with a cracked windshield. Section 316.2952 requires that cars be equipped with a windshield.

While that section mandates that windshield wipers be in working order, it says nothing about cracks. Another statute, section 316.610, makes it a traffic violation to drive a car that either "is in such unsafe condition as to endanger any person or property", or "does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this chapter."

Because Ch 316.2952 merely requires a car to have a windshield, but does not contain requirements for the "proper condition" of the windshield, driving with a cracked windshield would be a traffic violation only if this violated the "unsafe condition" portion of section 316.610.

The court further opined that a cracked windshield would be an unsafe condition if it impeded a driver's ability to see the road or if it was so large that the windshield was likely to break or that the condition could present a hazard to

other cars on the road. The court did not find any of those conditions to apply.

The dissent argued that the traffic stop was lawful, citing other Florida cases where courts have specifically held that a cracked windshield is a violation. This minority opinion stated that "...The location of the crack on a windshield does not alter the law or its import." "The officers had reasonable cause to believe that the vehicle's equipment, its windshield, was not in proper repair."

Again, perhaps the Florida Supreme Court can clarify this situation.

FREE! FREE! TAILGATE

All law enforcement officers are invited to drop by for lunch at the Gainesville State Attorney's Office on October 1st and October 8th.

State attorney employees will serve either hotdogs, chili or burgers to all law enforcement officers on these days to show our appreciation for all you do!

**REMINDER: LEGAL BULLETIN NOW
ON-LINE**

As announced in our last issue, the Legal Bulletin is now available on-line, including old issues beginning with calendar year 2000. To access the Legal Bulletin go to the SAO website at <www.co.alachua.fl.us> and click on the "Legal Bulletin" box.

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.