STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT
WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2005-01 **January 2005**
Editor: Rose Mary Treadway

A MESSAGE FROM

BILL CERVONE

As I write this, we are in the last few days of 2004 and fast approaching another new year. By the time this issue of our Legal Bulletin has been delivered, 2005 will be well underway. I hope each of you and your families had a wonderful holiday season and that 2005 brings only good things to you, both professionally and personally, including a safe and sane tour each time you go on duty.

January also marks the beginning of a new term in office for me. Elsewhere in this issue, you will see news about attorney changes and re-assignments that I have made to start that new term. We continue to be a dynamic office, meaning that staff changes happen all the time. Especially with the number of young attorneys we employ, moving people from position to position and sometimes from county to county is a way of life. The time when the same Assistant handled the same caseload for years on end is largely over, both here and across the State. Our transferring attorneys from one position to another serves to enhance the work we do by accommodating the skills and preferences of the lawyers to the needs of the office, at least insofar as is practical. Especially at a time like the beginning of a new term, it can also serve to re-energize all of us in what we do.

Of course, it is also necessary from time to time to adjust to the loss of staff, as now, when two of our lawyers, Mark Moseley and Walter Green, have moved on to judgeships. I am personally delighted for and proud of both Mark and Walter for their elective success. While we will certainly miss them here, we also wish them well as they start their new jobs.

Hopefully, the changes we've made will work to better serve our communities. They involve increased lawyer staffing in some of our regional counties and re-assignments of both people and responsibilities in Gainesville. Your input is always welcome in reacting to what we do or suggesting things that we can do to help you do a better job.

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SAO PERSONNEL CHANGES

ASA **MARK MOSELEY** was elected as the new Circuit Judge effective January. His caseload in Alachua County will be assumed by ASA **PHIL PENA**. Phil's previous caseload will now belong to ASA **MICHAEL BECKER**, whose narcotics caseload will be assumed by ASA **JAY WELCH**.

ASA **WALTER GREEN** was elected as the new Alachua County Judge. Walter's position as Alachua County Misdemeanor Division Chief will be taken over by ASA **TERESA DRAKE**. ASA **PAM BROCKWAY** will handle Walter's BAKER ACT proceedings.

ASA **MARGARET STACK** is now the new Division III Lead Attorney. ASA **DAVID KREIDER** will inherit Margaret's Division IV caseload.

ASA **ANDREA MUIRHEAD** is now designated the SA's liaison to GPD's Internet Crimes Against Children Task Force.

ASA **RASHEL JOHNSON** has resigned to take a position in private practice in Palm Beach County. Her position in the Traffic Division has been filled by **ADAM VORHIS**, who interned in the SA office and had been in private practice in Jacksonville.

ASA **RICH CHANG** has been reassigned to Levy County where he handles felony cases.
ASA **FRANCINE TURNEY** has assumed Rich's traffic caseload in Gainesville.
ASA **STACEY STEINBERG** will take Francine's caseload in Domestic Violence.

JENNA BIEWEND has joined the SA Office as the new Assistant in Gainesville Misdemeanor. She and ASA **ZACH JAMES** will switch caseloads.

ASA **CHRIS ADEMAC** has resigned his position in the Bradford County Office in order to transfer to the SAO in Palatka. ASA **MICKEY BEVILLE-LAMBERT** will assume his caseload.

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CONGRATULATIONS!

ASAs **SEAN THOMPSON** and **ANGIE CHESSER** are the proud parents of new baby boy, Benjamin, born in December.

Congratulations to the newly elected 2005 officers for the Law Enforcement Executive Council: Chairman, Chief **LINDA STUMP**, UPD and Vice-Chairman, Captain **ED VAN WINKLE**, GPD.

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NOTICE OF ENHANCEMENT

BY TED BOORAS, Chief Assistant SA, Palm Beach

Effective July 1, 2004, section 316.1935, FLEEING OR ATTEMPTING TO ELUDE A POLICE OFFICER, was amended by the Florida Legislature.

The most significant change deals with the reclassification of misdemeanor Fleeing to a third degree felony. Thus, ***there is no longer a misdemeanor*** Fleeing or Attempting to Elude, they are all felonies.

The elements of the offense did not change, just the degree classification.
The Legislature also created a first degree felony for Fleeing where there is high speed, reckless operation, **and** serious bodily injury **or** death. This section applies even where the law enforcement officer involved in the chase is the one injured or killed. Additionally, this section carries a minimum mandatory sentence of three years.

Further, the Legislature now requires the court to revoke for one year the driver's license of any operator convicted under any section of this statute. Courts are also prohibited from withholding adjudication of any operator convicted under any section of this statute.

Finally, motor vehicles involved in a violation of the Fleeing statute are now considered contraband, which may be seized by law enforcement and subjected to forfeiture.

In that all Fleeing cases are now felonies, officers cannot simply issue a citation and release, but rather, these drivers must be booked with a felony filing packet.

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CASE LAW UPDATE:

SEARCH & SEIZURE: CONSENT

A second search of a suspect, conducted by a deputy minutes after another officer completed an initial search, constituted a separate action that required separate consent where there was no probable cause, the Second DCA held in November in **Alamo v State**.

The Court threw out the cocaine possession conviction of Randolph Alamo, who was arrested during a routine traffic stop. Following the stop, Alamo consented to a deputy's request to conduct a search, which found no contraband. When that officer, Deputy Petruccelli,

turned his attention to another passenger in the vehicle, Alamo began chatting with a second deputy who arrived to provide backup. The second deputy, Corporal Maseda, became suspicious of Alamo and, without asking for another consent to search, had Alamo step over to the side of the car and began searching him. Alamo complied by putting his hands on the car without being asked, and Corporal Maseda found cocaine that had eluded Deputy Petruccelli.

The trial court denied Alamo's motion to suppress, concluding that the two searches formed one continuous event and that Alamo's initial consent to Deputy Petruccelli carried over to the second search. The DCA disagreed and said Corporal Maseda should have obtained Alamo's consent separately.

The Court also rejected the State's suggestion that Alamo gave implied consent by placing his hands on the car. "When Deputy Petruccelli finished searching Mr. Alamo, the authority to search pursuant to the consent expired," the DCA said. "The record reveals no fact indicating that Corporal Maseda's search was a mere continuation of Deputy Petruccelli's or that Corporal Maseda possessed an independent founded suspicion or probable cause to search Mr. Alamo. The second search of Mr. Alamo was performed by a different officer, at a different time, in a different location. These circumstances do not support the trial court's conclusion that this was 'a continuous event.'"

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SEARCH & SEIZURE:REASONABLE SUSPICION

Broward EMTs and police were made aware of a vehicle parked at night in a normally abandoned warehouse area in Broward County. The officer, upon arriving at the dimly lit warehouse area between 8:30 and 9 p.m., used his flashlight to look inside the vehicle to see Baez, who was slumped over the wheel of a parked van. The officer then knocked on the passenger-side window with his flashlight. He was concerned about Baez, who appeared asleep or in need of medical attention. Baez immediately awoke, and the officer asked him through the car window if he was all right.

Baez, not able to hear the officer's question, opened the door and got out of his car. The officer did not request or demand that Baez step out of the car. Once Baez was outside, the officer repeated his inquiry into Baez's condition. Baez responded that he was all right and had just fallen asleep.

The officer then requested to see some identification. Baez produced his driver's license, which the officer looked at and went to his police car to run a computer warrants check, which then revealed an outstanding warrant for Baez's arrest from New Jersey. Baez was arrested and placed in another police car. The arresting officer then found cocaine in the officer's car where Baez had been seated.

Baez moved to suppress the cocaine arguing that once the officer retained his license, after identifying him, he was unlawfully detained while the officer ran the warrants check. The trial court held that there was a consensual encounter and search. The Fourth DCA reversed the conviction holding that after the officer had inspected the license, the consensual encounter ended and Baez was detained in violation of his Fourth Amendment rights while the officer was holding his ID.

The Florida Supreme Court in **State v Baez** now has *reversed* the DCA and upheld the original conviction.

The totality of the circumstances controls in cases involving the Fourth Amendment. Here, the issue was not whether the reason for the stop had been eliminated by facts which developed after the stop had been made. Rather, the officer was given the license in a consensual encounter. The question was whether the officer could then retain what he was consensually given long enough to do the computer check. The officer did have reasonable basis and reasonable suspicion to investigate Baez further. Baez was found in a suspicious condition—slumped over the wheel of his van—in a location in which he should not normally have been—a dimly lit warehouse area at night. Baez voluntarily exited his vehicle, and when asked for identification, gave his driver's license to the officer. The officer had sufficient cause to further investigate by doing a computer check based on Baez's suspicious behavior.

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MORE
SEARCH & SEIZURE: REASONABLE SUSPICION

A deputy lacked justification to stop a vehicle that was moving slowly at night on a bumpy road in the driver's neighborhood merely because there had been burglaries a few miles away on previous nights and the vehicle's slow speed could have involved alcohol or mechanical problems, the First DCA stated in **Faunce v State**.

Jeffery Faunce pled no contest after a search of his truck turned up cocaine, but appealed the validity of the stop and subsequent search that found the drugs. The DCA said the fact that Faunce was driving slowly is not, by itself, sufficient to give rise to reasonable suspicion. As a result, the DCA granted Faunce's motion to suppress the evidence.

"When the speculation is eliminated, all that remains is that a police officer saw a man driving a pickup truck rather slowly on a dirt road at 11 p.m. We are unwilling to say that this observation is sufficient in itself to justify an investigative detention. The standard is not high, but it does require something more specific than the good hunch the officer had in this case," the DCA said.

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FELONY CHILD ABUSE

Paul King, an administrator at Charlotte Regional Christian Academy, was convicted of Felony Child Abuse contrary to Ch 827.03(1) which resulted from the paddling of one of his students.

One of the disciplinary policies at the Academy is the use of corporal punishment, and the parent of each child signs a form consenting to the administration of the punishment. King testified that he spanked the eight year old student twice on her clothed buttocks with a wooden paddle as a punishment for cheating. The paddling took place away from other students and was witnessed by appropriate school personnel.

The student suffered significant welts and bruises on her buttocks as a result of the paddling, but did not require any medical treatment. Although her mother testified that the student had become withdrawn after the paddling, there was no evidence that she suffered any discernible impairment in her ability to function within her normal range of performance and behavior.

The Second DCA in **King v State** *reversed* the conviction, holding that the trial court should have granted a judgment of acquittal as a matter of law.

The DCA held that Felony Child Abuse under 827.03(1) makes it a third degree felony to "knowingly or willfully abuse a child without causing great bodily harm, permanent disability or permanent disfigurement to the child." However, spankings that result in "significant bruises or welts" do not rise to the level of felony child abuse, which requires "more serious

beatings that do not result in permanent disability or permanent disfigurement." The Court said that this type of corporal punishment may constitute Contributing to the Dependency of a Child, a first degree misdemeanor under Ch 827.04.

The Court held that the extent of the student's injuries in this case was nothing more than "significant bruises or welts", and there was no corresponding mental injury under section 39.01(43). The definition of * "mental injury" under 39.01(43) applies to Ch 827.03.

* Under Ch 39.01(43) "mental injury" means an injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in the ability to function within the normal range of performance and behavior.

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SEARCH & SEIZURE: HEADLONG FLIGHT

At 4:45 a.m., a deputy was patrolling a residential area in Safety Harbor and noticed a small group of people standing outside a parked car with illuminated brake lights. Seldom were people out at this hour and there had been a number of burglaries recently in the area.

The deputy turned down the street and, from a distance of 75 to 100 yards, saw a person jump into the car and accelerate quickly. The car rocked to the left as it made what the deputy described as an aggressive turn. Significantly, the deputy did not know whether the driver or passenger had seen him approach in his marked car. His suspicions aroused, the deputy activated his blue lights and stopped the car. After the stop, passenger Cunningham was searched and arrested for possession of cocaine.

The Second DCA in **Cunningham v State** reversed the conviction, holding that there was no "headlong flight" as enunciated in the U.S. Supreme Court's opinion in **Illinois v Wardlow** to justify an investigatory stop.

The DCA noted that in **Wardlow**, a four car caravan of officers converged on an area known for narcotics trafficking with the expectation that they would find a crowd of people, including dealer lookouts. An officer in the last car observed Wardlow standing on the street, holding an opaque bag. When Wardlow noticed the officers, he immediately ran.

They pursued Wardlow through a gangway and alley and finally stopped him on the street. During a pat down, an officer felt what turned out to be a loaded gun in his bag and arrested him.

The DCA said the hallmarks

of **Wardlow** are the high-crime locale and the suspect's subsequent "unprovoked flight upon noticing the police". Thus, those two factors, if present, add to the totality of circumstances that might arouse an officer's suspicion that a crime had been or was about to be committed, justifying a stop.
Here, the DCA said, although it could be established that this was a high crime area, it could not be established that Cunningham or the driver actually *saw* the police before the car left the area, which was a critical factor in the Court's decision. Although the deputy was driving a marked vehicle, the DCA was unconvinced that the people could have identified it as such at 4:45 a.m., particularly as there was no evidence concerning the lighting in the area. The deputy did not turn on his blue flashing lights until after the suspect car began moving. The brake lights were already illuminated when the deputy first spotted it, suggesting that the driver might have been preparing to leave even before the deputy drove toward the car. And, although the car made an "aggressive" turn, the driver did not commit any traffic infractions that would justify the stop. Thus, there was no factual basis for the legal conclusion that the defendant intentionally evaded law enforcement. There was no reasonable suspicion for the stop and thus the evidence was suppressed.

*Note: this was the same court that rendered the **Paff v State** opinion as cited in the October newsletter, holding that **Wardlow** did not apply to a driver leaving suddenly upon seeing an officer as opposed to a runner, because headlong flight occurring in a car is different than headlong flight involving a runner. A vehicle often "conceals the emotions" of its occupants and it is more difficult to determine what the defendant's intentions are in leaving a location in a car when the police arrive.*

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OPEN CONTAINER AND THE RIGHT TO BE LET ALONE

During a crowded special event in Daytona Beach, Lugo was walking with a group of men on the sidewalk along Highway A1A while Officer Cerce, a Daytona Beach police officer, directed traffic in the middle of the five-lane roadway.

The officer noticed the group of men and Lugo holding red plastic cups. Lugo held his cup down by his leg and the officer saw Lugo changing paths in the crowd, apparently in an effort to avoid him.

Officer Cerce crossed the

street, grabbed Lugo's arms, and asked Lugo what was in the cup. Lugo told the officer that he was drinking Hennessy, and the officer responded by arresting Lugo for an open container violation. During the search incident to arrest, Officer Cerce discovered a small bag of pills, later identified as MDMA, also known as Ecstasy.

In December, the Fifth DCA in **Lugo v State** held that the officer did not have reasonable suspicion to detain and subsequently arrest the defendant for open container. The DCA opined that "…the right to be let alone is the most comprehensive of rights and the right most valued by civilized men."

The court said that the defendant was walking down a crowded sidewalk, maneuvering around other pedestrians to distance himself from the officer, while holding an opaque plastic cup. Since the container was opaque, the appearance of alcohol was not visible to the officer. Further, Lugo did not exhibit any type of drunken behavior to suggest he was impaired or being disorderly. Yet, these circumstances alone provoked the officer to walk across the street and detain Lugo by grabbing his arm.

"Such a detention was only based on a hunch, and nothing more. A hunch does not rise to the level of suspicion needed to detain an individual. Absent the illegal detention, Officer Cerce would have had no basis to arrest Lugo for the open container violation and the search would not have occurred."

OBSTRUCTING OFFICER WITHOUT VIOLENCE---NOT!

Miami-Dade Police officer Robinson, an undercover narcotics team officer, testified that he first saw Defendant R.E.D. together with an unnamed male on a street corner located near a target house. Officer Robinson saw R.E.D. and the male walk over to the target house. He then heard R.E.D. tell two other males who also approached the target house "99 that's the police there." The male who was with R.E.D. thereafter told Officer Robinson "hey that's the police, you need to get out of here." R.E.D. and the others subsequently fled.

R.E.D. was arrested for obstructing an officer without violence and convicted in the trial court.

The Third DCA in **R.E.D v State** *reversed* the conviction holding that the Defendant's warning to others, who were approaching a sting operation target house, of the presence of police was insufficient to

support a charge of obstruction where the individuals warned had not yet committed any crime.

To support a conviction under Ch 843.02, the state must show: (1) the officer was engaged in the lawful execution of a legal duty; and (2) the action by the defendant constituted obstruction or resistance of that lawful duty.

The DCA cited **D.G. v State**, a 1995 Second DCA opinion that held that there are three legal duties, when coupled with words alone, which will result in obstruction of justice, (1) serving process; (2) legally detaining a person; or (3) asking for assistance. The State argued that the officer was legally detaining a person, the male running away upon being warned. The court held that was insufficient because the male was not committing any crime.

"We find that Officer Robinson, … was not involved in the process of detaining anyone when he encountered R.E.D., and he was thus not engaged in the lawful execution of any legal duty. When R.E.D. warned the two males of the police's presence, Officer Robinson was not yet prepared to arrest the two males and had no other basis upon which to prevent the escape of the males as suspects. The males had simply approached the target house, were not involved in any criminal activity and were never arrested. These facts are quite different from the facts in **Porter v State** , a 1991 case from the Fourth DCA, where the Defendant's words, "28 plain clothes," impeded the officers' attempt to arrest known drug dealers who effectively escaped apprehension.

In a stinging dissent, the minority judge stated that no one yells "99 police" to signal that the ice cream truck is coming. "Forecasting '99 police' is meant to alert all nearby hearers of police presence, so that any illegal acts can quickly come to a close, evidence can be flushed, and law enforcement can be frustrated."

"The majority's conclusion … that an officer must legally or physically detain a suspect before a lookout can be charged with obstruction, is illogical… a lookout through his words of warning can interfere with the execution of law enforcement during the pre-commission stage of the crime as well as during the post-commission arrest state with his actions." The dissenter further argued that he found it troublesome that the speech conduct here could merely be brushed off as an exercise of the First Amendment.

"There is a grave difference between the words uttered by an obstructionist to signal

police presence to balk an undercover operation, and uttering generalized sentiments against authority or questioning police."

"In sum, no one ever warns unless there is trouble! R.E.D.'s conviction should not totter on abstruse issues of whether he was a formal lookout, how much knowledge he may have had of ensuing criminal activity, whether the projected criminal act was embryonic or full-term, or misapplication of the First Amendment. R.E.D has cast his lot in siding with and assisting his criminal brethren; but for his statements, the official police operation would not have come to a halt."

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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.sa.co.alachua.fl.us> and click on the "Legal Bulletin" box.

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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.

PARKING ALERT

Law enforcement officers are reminded to seek parking spaces in those areas designated for "Law Enforcement Only" at the Gainesville SAO, in order to free up other spaces for visitors.