

# STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT  
WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2005-03  
Editor: Rose Mary Treadway

July 2005

## A MESSAGE FROM

FROM BILL CERVONE  
State Attorney

As we always do, the October issue of the Legal Bulletin will highlight new criminal legislation from this year's session, most of which will go into effect on October 1<sup>st</sup>. One enactment that has received considerable attention merits mention now, however, since it radically changes Florida law. I am referring to changes in self-defense that many of you are already aware of.

As of October 1<sup>st</sup>, the duty to retreat that has been a part of Florida's law on self-defense for as long as I know will be eliminated. In other words, an individual will no longer be required to attempt to avoid the use of deadly force by retreating but instead may stand his ground and meet force with force when confronted by an aggressor.

The law will presume that a person, lawfully in a home or vehicle, now has a reasonable fear of harm when someone else is unlawfully and forcibly entering either this residence or vehicle.

This presumption will not apply if the person making entry is a law enforcement officer acting in the course of his duties but that distinction is not one that I am comfortable with. Candidly, I suspect that this serves only to increase the danger to officers who must make entry into a home under any number of circumstances.

The new law also grants immunity from both civil suit and criminal prosecution to someone who acts under its parameters. In addition, while law enforcement may still conduct a standard investigation when these issues exist, no arrest may be made for the use of force unless there is probable cause that the force used was unlawful. In my view, the codification of this provision into law serves no purpose other than to discourage an arrest.

All of these changes may or may not significantly impact the reality of what we do in the law enforcement community in cases of this sort. They are important, however, and I would encourage all officers to carefully read all of these

new provisions. To facilitate that, the enactment is printed elsewhere in this issue in its entirety. In addition, my office will provide training on the specifics of the new law of self-defense to any agency that requests that.

For a least a while and until there is some appellate clarification, no one can be sure what these provisions will ultimately mean. One can only hope that they do not lead to more violence on our streets than already exists.

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### SAO PERSONNEL CHANGES

SAO Investigator **BETH TORRES** resigned effective June 16<sup>th</sup> to take a position with FDLE as a Special Agent. Beth will be assigned to the Gainesville Field Office. Beth's position will be taken by **BOBBY SCHULZ** of the Levy County Sheriff's Office. Bobby will be assigned to the Levy/Gilchrist Offices, and Investigator **JESSIE BLITCH** will return to the Gainesville Office. Jesse will continue to be available for polygraph and other assistance circuit wide.

ASA **JAMES KNIGHT** has resigned effective August 15<sup>th</sup>. James will be moving to Texas. His position in the

Levy County Office will be taken by **ANGELA BOUNDS**, a May graduate of the University of Florida Law School who has spent several terms with the Office as an intern.

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### CONGRATULATIONS!

GPD Captain **RICK HANNA** recently completed the 220<sup>th</sup> Session of the FBI National Academy in Quantico, Virginia. Captain Hanna completed courses covering forensic science, police management and constitutional law.

GPD Captain **RAY WEAVER** recently completed the Southern Police Institute's Command Officers Course, held in Orlando. The course, which spanned 10 weeks, covers leadership, supervision and other topics relevant to managing a police department.

In May, the Baker County Sheriff's Office bestowed awards on the following personnel: **JIMMY MARKER**, the Morris Fish Award for Excellence and Dedication to Duty; Investigators **RANDY CREWS** and **BRAD DOUGHERTY**, the Joseph Burtner Scholarship through the Institute of Police Technology and Management at the University of North Florida; **LAUREN CREWS**, Communications Officer of the Year; **JODY DYAL**, Detention Deputy of the

Year; and **BRANDON COLBERT**, Explorer of the Year.

The Gainesville Police Department has announced new Assignments and Promotions:

New Assignments:

Captain **LYNNE BENCK**, Division Commander of the Criminal Investigation Bureau; Captain **ED VANWINKLE**, District 1 Commander; Lieutenant **LARRY SEALE**, Executive Lieutenant, District 1; and Captain **WILLIE WASHINGTON**, District 2 Commander.

Promotions:

**ART ATKINS**, Sergeant; **STEVE HAYES**, Corporal; **DUANE DIEHL**, Corporal; and **DANA THOMPSON**, Corporal.

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**CASE LAW UPDATE**

**Florida Cases**

**OBSTRUCTING/RESISTING WITHOUT VIOLENCE**

Danny St. James was seen entering into a storage facility at an employment agency and leaving with a bike belonging to another worker. Later, when a uniformed officer was investigating the theft, he approached a group of 10-15 people and asked if anyone had seen Danny St. James. The officer did not say why he was looking for St. James and did not state that he was conducting an

investigation.

A man, later identified as St. James, told the officer: "I don't know no St. James." This remark became the basis for the charge of resisting or obstructing an officer without violence.

The Second DCA in **St. James v State** reversed St. James's conviction for Resisting, holding that the evidence was insufficient to support the charge. "... A suspect can commit the offense of obstructing by providing false information to a police officer during a valid arrest or Terry stop, but ... this rule... does not obligate a person to give his or her correct identity to an officer unless that person is legally detained."

Here, the Court stated that St. James was not legally detained when he denied his identity. Although the officer had probable cause to arrest St. James at the time, the officer did not convey that fact to the group, and there was no showing that St. James knew that the officer intended to detain him.

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**SEARCH & SEIZURE: TRAFFIC STOP and XMAS TREE AIR FRESHENERS**

Collier County Deputies, while engaged in drug interdiction on Alligator Alley, saw Defendant Gordon drive by and decided to stop him because he was driving

with two air fresheners (miniature evergreen trees) hanging from the car's rearview mirror. Believing that Gordon appeared nervous and exhibited other suspicious behavior when answering questions about controlled substances, the deputy asked for and obtained consent to search the vehicle.

Upon opening the trunk, the deputies found a box of laundry detergent but no laundry. Drago, the K-9, then alerted on the trunk. Upon opening the box of laundry detergent, the deputy found 250 grams of cocaine. Gordon was arrested for trafficking.

At the suppression hearing, the deputies testified that the air fresheners drew their attention because the trees were hanging from a string looped over the post supporting the car's rearview mirror. The deputies believed that this was a violation of 316.2952 (2) which, among other provisions, prohibits a person from operating a car where an object covers or is located in or upon the windshield. They also testified that they believed Gordon had violated 316.2004(2)(b) prohibiting a person from driving with any nontransparent material upon the front windshield, side or rearview windows such that it materially obstructs, obscures, or impairs the driver's clear view of the roadway.

The trial court denied the suppression motion. The Second DCA then reversed the conviction in Gordon v State holding that the officers good faith belief that driving with an object hanging from the rearview mirror was a traffic violation did not establish the existence of probable cause to stop the car.

The Court ruled that neither statute applied in this case as both statutes require that the objects be "upon" the windshield and as such, was not in direct contact with the windshield or windows. "The air fresheners were not attached by tape, glue or otherwise affixed to the windshield, and they were not in direct contact with it. Instead, they were suspended loosely in the vehicle by a string that looped over the post supporting the rearview mirror that was in turn attached to the windshield." "This kind of indirect contact does not satisfy the requirement of the statute that the offending item be 'attached to' the windshield. The air fresheners were certainly not 'in' the windshield." Thus neither statute provided a basis for the stop.

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#### FRUITS OF ILLEGAL ARREST

Fort Myers Police Officer Cela stopped a car for turning left directly in

front of him without signaling. The woman driver had a suspended license. The officer then noticed that front seat passenger Cooks was not wearing a seat belt. The back up officer questioned Cooks with the intent to ticket him for seat belt violation. Because the officer believed Cooks was giving a false name, he ordered Cooks to get out of the vehicle and place his hands on top of the hood in order to arrest and search him for giving a false name. Cooks broke free and fled, throwing a gun down as he ran. He was apprehended.

After Cooks' motion to suppress was denied by the trial court, Cooks was convicted of Possession of Firearm by a Convicted Felon and appealed. The Second DCA reversed the conviction in Cooks v State.

Although the Appellate Court held that the initial stop for failure to use turn signal was valid because the officer was affected by the failure to signal, there was no reasonable suspicion to conduct an investigatory detention of passenger Cooks for failure to wear a seatbelt where the officer did not know whether Cooks had been wearing a seat belt while the vehicle was moving. Therefore, the Court held that the subsequent arrest for giving a false name was illegal. "By putting Cook's hands on top of the vehicle and

attempting to search him, the officer effected an illegal arrest." "When he (Cooks) threw the gun, his action was a result of the illegal arrest, and therefore, the motion to suppress should have been granted."

The State argued that even if the stop and detention were illegal, the motion was properly denied because Cooks abandoned the gun. The Court rejected that argument, saying Cooks had been seized when he was physically taken out of the car and his hands were put on top of the car. His subsequent fleeing and abandonment of the gun was a product of the illegal seizure.

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Consider the following decision with facts similar to the COOKS decision above:

**SEARCH & SEIZURE:**  
**PASSENGER'S FELONY PROBABLE**  
**CAUSE FOR SEARCH AS**  
**INEVITABLE DISCOVERY**

Two Tallahassee Police Officers were parked on the side of the road, pulling cars over for speeding and equipment violations. One officer saw Kennard's car, with its high-beam headlights on, approaching over the hill. The car's tag light was out, also. The car was pulled over.

Kennard's passenger was not wearing a seat belt. After

providing false information to the officer, the passenger was asked to step out of the car. The passenger violently shoved the officer and ran away. The officer took Kennard's keys, forcing Kennard to remain at the car while the officer followed the fleeing passenger. Kennard was then cuffed due to officer safety concerns by the detaining officer, who performed a pat-down.

The pat-down did not reveal any weapons, but did reveal a sandwich bag with 10 small baggies inside containing cocaine. Kennard filed a motion to suppress both the statements made to the police and the drugs seized as a result of the search. The trial judge denied the motion and Kennard was convicted of Possession of Cocaine.

The First DCA in Kennard v State affirmed the conviction ruling that the felony committed by the passenger would have given the officer probable cause to search the car, and consequently, Kennard's person. "If an officer has probable cause to believe a felony is being committed in his presence, he can search the car without a warrant." "The passenger committed a felony on the officer performing the vehicle stop, then fled the scene. Another officer at the scene testified that after witnessing the passenger's assault on the first officer

and subsequent flight, he felt additional criminal activity had taken place." The Court held that since a search of the car revealed nine bags of cannabis in the passenger compartment and since Kennard was the car's owner/driver, he could have been arrested based on this cannabis, which would have revealed the cocaine in his pocket.

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ANTIQUE FIREARMS AND CONVICTED FELONS

Bostic, a convicted felon, was arrested for Possession of Firearm by Convicted Felon for possessing a muzzle-loading rifle, which used black powder (instead of fixed ammunition) and percussion caps as an ignition system.

No dispute existed as to Bostic's status as a convicted felon or that he was in possession of the described firearm. Bostic argued that the firearm he possessed was an "antique firearm" and thus exempted under Ch 790.001(1) and (6). He argued that because his rifle uses black powder instead of fixed ammunition and its ignition system is a form of percussion cap, the weapon was an antique firearm and as such was exempt from the definition of "firearm" under section 790.23 that a felon was not permitted to possess.

The Fifth DCA in Bostic v

State upheld his conviction holding that merely having an ignition system similar to that found on an antique firearm is not sufficient to render the firearm a "replica" of a firearm manufactured in or before 1918. The weapon possessed by Bostic included visible differences from an antique firearm such as a fiber optic sight.

"A plain reading of the statute requires that, in order to be exempt, a firearm must be either manufactured in or before 1918 or be a 'replica' thereof. A replica is defined by Florida case law as meaning a reasonably exact reproduction of the object involved that, when viewed, causes the person to see substantially the same object as the original."

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#### FELLOW OFFICER RULE AND INFORMANTS

The "fellow officer rule", through which one officer calls another for assistance and their combined observations establish probable cause, does not apply when the information was supplied by citizen informants, the Second DCA ruled in Sawyer v State.

David Sawyer was arrested on a misdemeanor charge of driving under the influence, and was subsequently charged

with possession of marijuana following a search incident to the DUI arrest. The initial arrest came after two citizens observed Sawyer driving erratically and called 911 to report it. An officer responded to the calls and spoke with both citizen informants. The officer spotted Sawyer resting against a building. After conducting a field sobriety test on Sawyer, the officer placed him under arrest and found marijuana while searching his pockets.

Sawyer filed a motion to suppress, arguing that the statements from the citizens did not establish probable cause for the officer to make an arrest for a misdemeanor he had not personally witnessed. The DCA agreed, concluding that a report by citizens to an officer does not contain the same credibility as when one officer relays information to another officer.

"An officer can arrest a person for misdemeanor DUI in three circumstances: 1. 'the officer witnesses each element of a prima facie case,' 2. 'the officer is investigating an 'accident' (and) develops probable cause to charge DUI,' or 3. 'one officer calls upon another for assistance (and) unite to establish the probable cause to the arrest.'"

"The circuit court incorrectly applied the fellow officer rule to the information supplied by the

two citizen informants," the DCA said, noting that the "fellow officer rule" operates to impute the knowledge of one officer in the chain of investigation to another. "The rule does not impute the knowledge of citizen informants to officers."

**\*\*Note:** Ordinarily a known citizen-informant (as opposed to an anonymous informant) is deemed an inherently reliable source, and may form the basis for a search or search warrant. This case simply holds that a misdemeanor not committed in the officer's presence cannot be cured with citizen observations.

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**AGGRAVATED ASSAULT ON A LEO:**  
**Defendant's intent, not LEO's**  
**reaction.**

A deputy conducted a traffic stop on a vehicle that was being operated with no tail lights at night. The deputy, using his public address system, directed the defendant Benitez to stop the vehicle and turn off the ignition. The defendant stopped and kept his foot on the brake. He did not turn off the ignition.

Upon approaching the car, the deputy could smell a strong odor of alcohol and other signs of intoxication coming from the defendant. The deputy reached in, turned off the ignition and removed the keys.

The deputy asked Benitez questions about his registration, but Benitez advised that a friend owned the vehicle and the friend did not know Benitez had taken it. Upon asking

Benitez to open the glove compartment to see if he could locate the registration, the deputy noticed that the defendant's demeanor changed. Benitez ignored the instruction, looked straight ahead, and then leaned slightly forward, moving his hand off the gear shift and placing it behind the small of his back.

The deputy testified that such gestures are considered "a danger cue" that police are trained to watch for. He ordered the defendant to keep his hands where he could see them, and asked him what he was trying to retrieve. The defendant did not answer and did not remove his hands from the small of his back.

The defendant continued to ignore the deputy, which concerned the deputy for his safety. The deputy saw that Benitez had something behind his back and concluded that Benitez was arming himself with a weapon. The deputy ordered him to drop what was in his hand, but Benitez looked at the deputy with a blank stare and then looked behind his back. The deputy testified that at this point he feared something bad was about to happen.

The deputy opened the defendant's door, took control of Benitez's left arm, and pushed him into the steering wheel. Looking behind Benitez's back, he saw Benitez holding a dark colored pistol. The deputy



testified that Benitez was holding the gun "in what would be considered a firing or shooting grip and his hand was rotating down behind his back to where the-hand and the grip and the handgun itself were all inverted, they were all upside down." It was subsequently learned the gun was unloaded and no bullets were found in the vehicle.

The State charged the defendant with Aggravated Assault on a Law Enforcement Officer with a Firearm and the jury convicted him of same.

The Fourth DCA in Benitez v State reversed the conviction. The Court held that there was substantial, competent evidence to support a well-founded fear on the part of the deputy based upon the defendant's lack of responsiveness to the deputy's commands, coupled with his movements, and the existence of an object in the defendant's hand. However, the real question, according to the Court, was whether the defendant intentionally and unlawfully threatened the deputy. Although the Court expressed an awareness of the dangers facing law enforcement during what appear to be routine traffic stops, it held that the defendant's act of placing his hand behind his back, while alarming to the deputy, was not substantial, competent evidence the defendant intentionally and

unlawfully threatened the deputy.

"Assault is a crime which requires intent. The 'threat' element addresses the defendant's intent, not the reaction of the person perceiving the word or act. It is the defendant's word or act that must be reviewed to determine whether it constitutes a 'threat,' not the reaction of the person perceiving the word or act."

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#### SEARCH AND SEIZURE: ODOR AND CONSENT

Nassau County deputies received an anonymous tip that Smith was growing and selling marijuana from his home. After an investigation revealed nothing to corroborate the tip, the deputies went to Smith's home, sought and gained entry, but were refused consent to search the home. The deputies obtained no incriminating statements from Smith nor did they notice anything unusual in the home.

However, when Smith's girlfriend walked by, deputies detected the smell of marijuana on her person. Deputies then asked for her consent to search, which she refused; then she was asked to persuade Smith to consent. This request was also refused. The deputies left to watch the property. Smith and his girlfriend

then left the property.

One deputy then left to secure a search warrant while another arrived with a thermal-imaging device to look for unnatural heat sources used to grow marijuana, (now an illegal search under the U.S. Supreme Court ruling in Kyllo v. U.S.). Nothing incriminating was found. Then Smith returned and was prevented entry into the house. He was told that a search warrant was being obtained because the deputies believed probable cause existed to search the house. Smith negotiated to allow his home to be searched, provided the deputies agreed not to involve his girlfriend. Ultimately, contraband was found.

The First DCA in Smith v State reversed the conviction. Although the Court agreed that law enforcement can secure the dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is sought, the probable cause must be based not on mere suspicion, but on facts known to exist.

Here, the deputies must have had probable cause to secure the home to prevent Smith from re-entering. The Court stated that since the anonymous tip was not confirmed, nothing incriminating was seen inside the home or revealed by a thermal-imaging scan, nor were incriminating

statements uttered by Smith or his girlfriend, all that was left was the smell of marijuana on the girlfriend, who was allowed to leave. "However, like 'plain view', whatever probable cause this would have provided is limited to the location of the 'plain smell', here, the girlfriend." "The deputies took no action when the girlfriend was present in the home, but waited to seek a warrant until after her departure, which took the only incriminating fact they had with her."

The Court held that the odor on the girlfriend, by itself, does not give the officers probable cause to believe marijuana was present in the home.\* "We decline the State's invitation to stretch the 'plain smell' doctrine into a *de facto*, roving proxy for probable cause. Since there was no probable cause to obtain a warrant, deputies had no authority to secure Smith's home and prevent him from re-entering." Smith's consent was reached by coercion, in that there was a submission to law enforcement show of authority, thus rendering the consent involuntary.

\* Note: The Court acknowledged that the Fifth DCA has reached a contrary conclusion in State v Wells, a 1987 opinion that held that the odor of marijuana on a person, by itself, justifies searching the area from which the person had recently come. Perhaps the Florida Supreme Court will resolve this issue.

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**SEARCH & SEIZURE: PASSENGER**

Bautista sought to suppress the fraudulent identification card and statements that he made to police following a traffic stop.

Haines City PD officers conducted a traffic stop of a van in which Bautista was a passenger. The driver did not have a driver's license and was arrested. The officers asked Bautista for a driver's license or other identification, anticipating that they could release the van to him rather than having it towed. After Bautista responded that he did not have any identification with him, the officers asked him to exit the van.

There appeared to be a wallet in Bautista's pocket and Bautista "was asked to remove it." He complied and provided the officers with a valid Mexican driver's license. While the wallet was open, one officer saw a resident alien card. He asked Bautista if that was his card, and Bautista stated yes, pulled it out and handed to the officer. The officer recognized the card to be fraudulent and arrested Bautista. The officer testified that Bautista had been free to leave until he saw the resident alien card.

Although Bautista did not challenge the stop or the request for ID, he did argue that once he denied having

identification, the officers should not have asked him to remove the wallet from his pocket, which ultimately led to the discovery of the fraudulent identification.

The Second DCA in Bautista v State agreed and reversed his conviction. The Court held that when the officers asked Bautista to remove his wallet, the statement was a demand that changed the nature of the encounter from a consensual one to a detention. The officers had no basis to ask for Bautista's wallet and detain him because, at the time, they did not have reasonable suspicion that Bautista had committed, was committing or was about to commit a crime. "...Bautista's producing the documents in response to the officers' request is presumptively involuntary based on the officer's improper detention of him and their asking him to remove his wallet from his pants."

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**FAKE CRIMES PROMISES COERCES  
CONFESSION**

Samuel was a suspect in several robberies. During a custodial interrogation, the officer told Samuel that he was suspected of committing 15 robberies, a ploy to get Samuel to believe that he was facing a more serious

situation than Samuel actually was involved with, specifically, five or six robberies. The officer testified that he asked Samuel how many robberies Samuel committed and Samuel responded five or six. The officer told Samuel that if he discussed the five or six, he would not be charged with the others.

The Fourth DCA reversed the convictions in Samuel v State holding that the officer's tactic was coercive. "Although Samuel admitted before the promise that he committed five or six crimes, it was not until (the officer's) promise not to prosecute the other fictional crimes that the officer learned the specifics of the robberies. This was coercive, and makes anything said about the crime charged in the instant case involuntary."

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#### GUILT BY ASSOCIATION

Being present in a van that contained stolen property is not enough to prove that a defendant intended to participate in the burglary, the Fourth DCA held in Garcia v State.

Jorge Garcia was found guilty of Burglary of a Dwelling, Grand Theft and Trespass of a Conveyance. Garcia moved for acquittal and argued that there was no evidence that he entered the

dwelling or participated in the burglary or theft. The DCA agreed and reversed.

"Here, the only evidence of appellant's possession of the victim's recently stolen property was his presence, along with three other people, in the van containing the stolen items.

Testimony as to location of the items in the van was conflicting. Yet, even assuming that the property was in the back of the van where appellant was seated, we note that no evidence was presented that appellant had exclusive possession of the stolen property or the ability to exercise any dominion and control over it. Thus, proof that appellant was in the van with the recently stolen property, under these circumstances, is insufficient evidence to support the inference that he committed the burglary and theft," the DCA said.

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#### IN MEMORIAM

Gainesville Police Sergeant **JAMES JENDZIO** passed away in June after a two year illness. Sergeant Jendzio served GPD for 16 years in many roles including patrol shift supervisor and as a long time member of the SWAT team.

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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.

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

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 [sawww.co.alachua.fl.us](http://sawww.co.alachua.fl.us) and click on the "legal bulletin" box. **An incorrect website was listed in January's newsletter.**

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**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.