

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT

WILLIAM P. CERVONE, STATE ATTORNEY

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Editor: Rose Mary Treadway

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A MESSAGE FROM

BILL CERVONE
State Attorney

As we usually do in the Fall, much of this edition of the Legal Bulletin will be devoted to new legislation. The summaries you'll find here are intended only to alert you as to areas where there have been changes. If anything is of particular interest to you, please be sure to read the entire new or amended statute in question. New legislation is available in a variety of places on line. We can also send you a copy of anything that you might need.

There was relatively little done during last spring's session as far as criminal law is concerned. The buzz words in Tallahassee were "fiscal impact." Almost anything that had a price tag associated with it simply got put aside. Most of the time and energy spent in the Capitol went to trying to figure out how to cope with Florida's budget crisis.

In that regard, I'm sure each of your own agencies has experienced more than its share of problems. The more Tallahassee cuts and the more the Legislature shifts the burden of providing services to the State's counties and municipalities, the more those local bodies are pushed into the corner with their own funding problems.

The SAO receives the vast majority of its funding, including almost all of its salary money, from the State. At this point, our budget is about 12% less than it was in June of 2007. That amounts to roughly a million dollars, over 90% of which must come from salaries. We have been fortunate so far in that we have been able to make that shortage up through normal attrition and not replacing people who leave for one reason or another. The result, however, has been an inevitable loss of many specializations. We no longer have attorneys devoted to managing jail cases, which is especially important in Alachua County where the jail population remains high. We also no longer have lawyers tasked specifically with handling firearms cases, narcotics cases, and traffic

homicide cases in Gainesville. All of those units have, by necessity, been eliminated and the cases spread out among the regular divisions.

I write this not to be pessimistic about where we are but only to say this: despite how budget realities force us to adapt, we will do exactly that. Those of you who have been around a while know that this kind of problem is cyclical in nature. It will resolve itself. Until it does, we will continue doing what we do, albeit not without problems.

SAO PERSONNEL CHANGES

ANGELA PRITCHETT has joined the SAO as an ASA assigned to Alachua County Court. Angela is a graduate of the UF Law School and was an intern at the SAO previously.

GEORGE WRIGHT and **DAVID MARGULIES** also have joined the SAO as ASAs assigned to Alachua County Court. George was a judicial clerk at the Federal Courthouse after graduating from UF Law School. David is also a graduate of the UF Law School.

MEL BESSINGER, Baker County

ASA, has resigned to take a position as staff attorney at the NE Florida State Hospital in Macclenny. His replacement has not been named.

ROBERT WILLIS, ASA in Gilchrist County, resigned in June to run for public office. **ANDREA MUIRHEAD** is currently serving in Gilchrist County as Robert's replacement.

JIM FISHER, ASA in Gainesville, has resigned to take a position as counsel for DHSMV in Orlando.

DUANE TRIPPLETT, Levy County ASA, resigned in May to take a position in private practice. Gainesville ASA **FRANK SLAVICHAK** moved to Levy County to assume a felony position.

ASA **ANDY MOREY** resigned in April also to enter private practice.

CONGRATULATIONS!

The Baker County Sheriff's Office made the following award presentations at May's Law Enforcement Memorial:

Morris Fish Award to Deputy **JOHN HARDIN**.

Joseph Burtner Award to Investigator **DAVID MORGAN** and Deputy **MICHAEL HAUGE**.

Detention Deputy of the Year
to **THOMAS (BUBBA) DYAL**.

Communications Deputy of the
Year to **JENNIFER WILLIAMS**.

Explorer of the Year to Sgt
ISSAC SIMMONS.

Volunteer of the Year to **PETER**
QUINLEY.

FLORIDA CASE LAW

TWO IS TOO MANY

Officer Tabares was providing security at a high school football game when he entered the men's restroom and saw that two individuals were standing in a single restroom stall with the door open.

The officer could not see what the two were doing. The first occupant left the stall and walked quickly by the officer. As he approached the officer, the first one turned toward the direction of the stall, put his hand over his mouth, made a noise like he was clearing his throat, then ran out of the restroom.

The officer heard the toilet flush. J.C. then exited the stall and walked toward the officer. The officer moved in front of J.C. and told him to stop. J.C. stopped, stepped

back, then put his head down and hit the officer with his chest and shoulder.

Officer Tabares tried to take J.C. into custody and called for backup. Two other officers arrived. During the struggle, a backup officer was struck by J.C.

J.C. was convicted of Resisting with Violence and BLEO and subsequently appealed, arguing that Officer Tabares was not engaged in the lawful performance of his duties because the investigatory stop was illegal as there was no founded suspicion which would justify an investigatory stop.

The Third DCA in J.C. v State affirmed the conviction, citing several decisions affirming such a stop where police find two people using the same restroom stall and apparently not using the stall for its intended purpose. "These observations may permit the police officer to take further reasonable steps to investigate." Thus the officer was engaged in the lawful performance of a legal duty.

Note: The crime date in J.C. was September 2006. Under Florida law at that time, there was a prohibition on the use of force to resist an arrest, even if the arrest was illegal. As written, the statute did not prohibit the use of force in non-arrest situations. The 2008 Florida Legislature has broadened subsection 776.051(1) to also prohibit the use of force in a

non-arrest situation.

**INVOCATION OF RIGHT TO
ATTORNEY**

Thompson's car was stopped by the Monroe County Sheriff's Office after it and Thompson matched the description from a robbery BOLO.

During the investigation at the scene, nothing incriminating was discovered, but the deputy smelled alcohol on Thompson's breath, conducted field sobriety tests and arrested Thompson for DUI. Thompson was taken to the station and refused to submit to the breathalyzer test.

Immediately after refusing, Thompson invoked his right to **counsel** under *Miranda* and continued to do so numerous times. The deputy did not question Thompson again; however, other officers were not informed that Thompson had invoked his right to counsel. Thompson spent the night in the Plantation Key Jail.

Approximately twelve hours later, two robbery detectives arrived at the jail and escorted Thompson across the street back to the Sheriff's office. Thompson signed a waiver of his *Miranda* rights and confessed to the previous night's robbery and other crimes.

The trial court suppressed this confession and the State appealed.

The Third DCA in *State v Thompson* found that the trial court was correct in suppressing the confession. "Miranda rights are not investigation-specific; once invoked, they apply to subsequent custodial interrogations even if those interrogations are unrelated to the offense for which the suspect is in custody." The court further noted that prolonged police custody after that suspect requests an attorney creates a presumption that any subsequent waiver of rights is the result of police coercion.

"Thompson's numerous invocations of his right to consult an attorney came after he refused a breath test... thus we find that Thompson was not invoking his right to counsel in order to obtain advice on whether to breathe into the machine." "We can only assume that Thompson's unwillingness to answer police questions continued during his twelve-hour stay in jail. The fact that police reinitiated contact, and not Thompson, creates a presumption of coercion in Thompson's subsequent waiver, and this presumption does not dissipate with a later reading of *Miranda*."

**RESISTING WITHOUT AND THE
LEGAL DUTY**

While driving his patrol car, Hillsborough County Deputy Cole heard a call go out for a disturbance in the area. Although he was not dispatched to it, he responded as a backup.

When Cole arrived on the scene, he saw his corporal walking down a flight of stairs, surrounded by a large group of people. He asked the corporal, "What do you want me to do?" Deputy Cole was directed to detain C.H.C.

Cole then saw C.H.C., who was "walking in a circle clinching his fists and yelling profanities ... at the deputies on the scene." Deputy Cole directed C.H.C. to walk over to him. C.H.C. then ran with Cole yelling "Police, stop!" Other deputies located C.H.C. and detained him.

C.H.C. was charged with Opposing an Officer without Violence.

The Second DCA in C.H.C. v State reversed the conviction, holding that the evidence was insufficient to show that the deputy was engaged in the lawful execution of a legal duty when he ordered C.H.C. to stop. "In cases involving an investigatory detention, it is necessary for the State to prove that the officer had a reasonable suspicion of criminal activity that would support the detention." Thus, the State was required to establish that Deputy Cole would have been justified in

detaining C.H.C based on a founded suspicion that C.H.C was engaged in criminal activity, which it could not do. "First, the conduct attributed to C.H.C. before he fled does not constitute 'disorderly conduct' because the deputy did not indicate that C.H.C was inciting an immediate breach of the peace. Further, the State cannot rely on the 'fellow officer rule' as justification for the detention because there is no record evidence that another officer on the scene had the reasonable suspicion necessary to justify the detention."

"C.H.C.'s flight from the scene cannot alone support the charge of obstructing or opposing an officer without violence because the State did not show that Deputy Cole was engaged in the lawful execution of a legal duty when he ordered C.H.C. to stop."

CUSTODIAL INTERROGATION AND THE JUVENILE

Seventeen year old Anthony Lee was suspected of having sexual relations with an under-aged girl. A Levy County deputy came to Lee's home and spoke to Lee's mother, who indicated Lee was at school. The deputy indicated he needed to get Lee's "side of the story." Since Lee was at school, the Deputy set an appointment to question Lee two days later.

Lee was kept out of school to keep the appointment and undergo questioning.

Initially, Lee was questioned with his parents present, where he continuously denied the allegations. However, when Lee continued to deny, the deputy had Lee's parents step outside. While taking the parents outside, the deputy told Lee to "hang on, I'll be right back." When outside, the deputy told the parents to remain outside so he could question Lee outside their presence.

Upon returning inside, the deputy continued questioning Lee and Lee continued to deny the allegations. Then the deputy told Lee that the victim had at first lied, then admitted to having sex with Lee. The deputy also said he had evidence of a sexual encounter from bed sheets and underwear. These assertions with continued, repetitive questioning led to Lee admitting to having sex with the underage female.

The trial court found that there were no Miranda rights given, nor were the parents told that Lee could refuse to speak to the deputy or that they could stop the interview. The court also found that Lee and his parents felt they had no choice but to speak with the deputy. The trial court denied Lee's motion to suppress the statements, holding that there was no coercion or force used.

The First DCA in Lee v State

reversed, holding that a custodial interrogation occurred without Miranda warning.

The Appellate Court opined that..."Just because an interrogation occurs in a suspect's home does not mean the interrogation could never be regarded as 'custodial.'" "Clearly an individual can be in custody in his home. Second, the trial court's conclusion that force was not used is not supported by its findings. Appellant was kept out of school, had to continuously answer repetitive questions, and had to stay in the house and wait for the deputy's return. If Appellant was in custody the environment was coercive. A coercive environment created by being 'in custody' can only be dispelled by giving Miranda warnings."

The DCA found that Lee was the subject of the investigation and was kept out of school to submit to questioning. Lee felt he had no option but to attend and could not terminate his encounter with the deputy.

The purpose of this interrogation was to obtain incriminating responses. This factor supports an "in custody" conclusion. Normally, questioning in a suspect's home would mitigate against a conclusion that the questioning was "custodial". However, although Lee's parents were initially present during questioning, after Lee continued to deny the allegations, the deputy had them step outside. He never

told them they did not have to go outside, and their testimony, which the court accepted, was that they believed they had no choice but to comply, leaving the deputy free to question Lee alone. Removing the parents and isolating the juvenile suggests a custodial environment. The manner of the interrogation was insistent, authoritative and repetitive, which created a more coercive or "custodial" environment. The deputy had Lee kept out of school, had the parents leave, and when taking the parents outside, told Lee to "hang-on." Lee's denial led only to repeated questioning.

The DCA also pointed out that in confronting Lee with the evidence, the deputy, in essence, told Lee his denials were futile, because the evidence against him was total and overwhelming.

Finally, the court stated that the failure to Mirandize removes any question of admissibility. And the deputy failed to take any measure to mitigate the coercive aspects of the questioning, such as informing Lee he was free to leave, or that he could terminate questioning.

Lee was in custody for Miranda purposes. Since none were given, the confession was suppressed.

COERCION AND THE FIB

The Florida Supreme Court has held in Wyche v State that the sole fact that a defendant was told that saliva swabs were to be used in investigation of a fictitious burglary did not make his consent to swabs coerced.

While Wyche was detained in Columbia County for probation violations, Lake City Investigator VanBennekom asked Wyche for a saliva sample, stating that he was suspected of committing a burglary at a Winn Dixie. In fact, VanBennekom had manufactured the fictitious Winn Dixie burglary in order to obtain Wyche's consent to take swabs for a sexual assault investigation. No DNA match was obtained in the sex case; as a consequence Wyche was exonerated as to it.

During VanBennekom's investigation, Lake City Investigator Moody was also investigating a burglary of the Pink Magnolia, a gift shop in Lake City, and asked VanBennekom to send the saliva swab that he had obtained to the FDLE lab for comparison with blood drops taken from the crime scene. FDLE acquired a match. Based on the result, Wyche was accused of the Burglary.

Wyche filed a motion to suppress the saliva swabs and DNA test results, arguing that VanBennekom gained his consent through trickery and that suppression was appropriate.

The Florida Supreme Court

stated that the focal issue is whether the fact that Wyche consented to the saliva swabs upon being told that the DNA sample was for use in a fictitious burglary investigation requires that the saliva swabs containing Wyche's DNA not be used in the prosecution of an actual burglary. Was the consent to the saliva swabs under these circumstances voluntary or coerced?

The Court found no coercion. When a defendant validly consents to giving of bodily substances, whether saliva, hair, or blood, for use in a criminal investigation, the characteristics of the substance can be used in investigations unrelated to the one for which the defendant was told the sample was collected. This holding is logical because the DNA profile derived from a bodily substance like saliva, hair or blood is a constant identifying fact that does not change or disappear.

Wyche's consent was requested for the purpose of investigating one alleged crime and the results of the search were used in the investigation and prosecution of another crime. The defendant consented to the collection of bodily fluids after being told that the samples were to be used in a criminal investigation.

The Court found that the custodial setting of Wyche's consent and the investigator's failure to inform Wyche of the

actual purpose of the search were not factors so controlling as to overpower Wyche's will. Wyche was not deluded as to the import of his consent to the saliva swabs.

The Court found Wyche's case materially different from other cases where a consent to search or a confession was found to be involuntary because the defendant was promised some benefit or lack of repercussion for giving his or her consent or confession. Also, the Court distinguished the Fourth DCA case of St v McCord, where the DCA found McCord's consent to a saliva sample coercive. McCord was suspected of a substantial number of robberies. While he was in custody on unrelated charges, an investigator told him he was a suspect in a rape, which was fictitious, and that saliva could exclude him from the rape. At no time did the investigator tell McCord that he was a suspect in the robberies. McCord was thereafter charged in the robberies and the saliva sample was used in the prosecution. The investigator testified that he believed McCord consented to the saliva sample only because he wanted to clear his name in the fictitious rape case. The investigator's deception caused McCord to feel coerced into consenting.

The Supreme Court stated that "...while we do not believe that a defendant's consent to a search should be interpreted as being conditioned on the

resulting evidence being used only in investigations of crimes that the defendant knows that he or she did not commit, we recognize that a defendant's understandable desire to clear his or her name of the stigma of a rape accusation is a circumstance to consider. McCord's being told that he was a suspect in a serious sex crime for which DNA could clear him is a circumstance relevant to the analysis of whether McCord's consent was voluntary or coerced that distinguished McCord from the instant case. The trial court in Wyche could have reasonably concluded that being accused of burglary does not entail the same pressure as being accused of rape."

Finally, although Justice Bell concurred in the opinion, he wrote to point out that he was disturbed by the level of intentional police misconduct in Wyche. "Such tactics, if they were to become commonplace, would destroy the integrity of the criminal justice system. This type of intentional deception by law enforcement risks the criminal law being used as an instrument of unfairness... My hope is that law enforcement will resist the temptation to interpret this decision as an endorsement of intentional deception as acceptable, routine police practice. Indeed, the indiscriminate use of such tactics poses a real and serious threat to civilized notions of justice."

FLIGHT AFTER TRAFFIC STOP

While patrolling the streets of Orlando, Officer Nazarro pulled behind and checked the tag of a black Ford Ranger pickup. While awaiting the results, the driver, Livingston, pulled into a residential driveway and subsequently pulled back into the roadway after the Officer passed him.

The results of the tag check revealed that the registered owner had an outstanding warrant. The Officer initiated a traffic stop to determine whether the registered owner was in the truck. He knew that the registered owner was a white male. Using his public address speaker, he asked the driver to step out of the truck with his driver's license. The driver's side door opened, and the Officer saw that the arm pushing the door open was that of a black male. As a result, he knew that the driver, Livingston, was not the truck's registered owner.

As soon as he stepped out of the truck, Livingston fled. Officer Nazarro pursued on foot and repeatedly gave commands to stop; Livingston ignored these commands. While in pursuit, the Officer saw Livingston carrying a black bag. During the pursuit Livingston threw the bag onto the roof of a house. After catching up to Livingston, Nazarro ordered him to the ground. Livingston put his right hand into his right

front pants pocket. Afraid he might be reaching for a weapon, Nazarro shot Livingston with his Taser. Livingston continued to resist the Officer's attempts to cuff him and he was Tasered again.

Finally Nazarro cuffed and searched the defendant uncovering a revolver, \$1400, and narcotics in the black bag.

Livingston sought to suppress the evidence arguing that the items were obtained illegally because Nazarro lacked any basis to detain him after determining that he was not the owner of the truck.

The Fifth DCA in Livinston v State affirmed the conviction, holding that the officer's actions in pursuing the defendant, who fled in response to police presence, were reasonable given the defendant's abandonment of a vehicle he clearly did not own on a public roadway, the officer's knowledge that the defendant was not the owner of the vehicle, and the defendant's flight from the scene.

SEARCH AND SEIZURE:PLAIN VIEW

Officers responded to an anonymous tip that drugs were being sold from a backyard shed. Upon arriving, the officers walked toward a four foot high chain link fence surrounding the entire

property, including the shed. Standing outside the fence, an officer saw Oliver drop a baggie on the ground while sitting outside the shed. The officer also witnessed Oliver's co-Defendant, Mason, move his hands in a "furtive motion" while standing inside the shed. Because Oliver's and Mason's movements indicated to the officers that they were trying to destroy evidence, they entered the yard without a warrant. The officers seized the baggie and arrested Oliver because they determined the baggie contained cocaine.

At the suppression hearing, the officer testified that although she could not identify the contents of the baggie or the substance that Mason was brushing off of his hands, her training and experience suggested that the baggie contained either marijuana or cocaine.

The Second DCA in Oliver v State reversed the Defendant's conviction holding that because the officer was not able to identify the baggie's contents with certainty from her vantage point outside the fenced back yard, the illicit nature of the content was not immediately apparent and only discoverable upon closer inspection. The officer's training and experience was insufficient to support a warrantless entry into the yard. "When closer examination of an item observed in plain view is necessary to confirm its incriminating nature, its

nature is not considered 'immediately apparent'."

NOW ON-LINE

The concurring opinion stated that chain link fences, which create little sense of privacy, often make for close search and seizure cases. Further, in retrospect, it may have been better if the police department had sent an undercover officer to view the location before dispatching a patrol car. The officers' reasonable assumption that the men were destroying evidence was based on the reaction of the men when they saw the officers. The officers could not, however, enter the premises to avoid destruction of evidence when they lacked probable cause to make an arrest unless and until they had sufficient evidence that contraband existed in open view.

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 sao8.org and click on the "legal bulletin"

REMINDER

Law Enforcement Officers are reminded to check in with the receptionist at the Gainesville SAO before entering the locked glass doors to see an attorney. The receptionist will then telephone the attorney so that the officers can be met and escorted to their destinations.

Also, officers are reminded to either bring their subpoenas or know the name of the attorney they are there to see.

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.

REMINDER: LEGAL BULLETIN

