Office of the
State Attorney
Eighth Judicial Circuit

LAW ENFORCEMENT NEWSLETTER

February 2010

A MESSAGE FROM BILL CERVONE STATE ATTORNEY

As I write this we are well into the new year. We are also on the edge of the legislative session, and as with the past few years the financial challenges facing our state are enormous. Although it is far too early to be certain of anything, talk in Tallahassee continues to focus on a slow economic recovery and every possibility of more budget cuts. As the current President of the Florida Prosecuting Attorneys Association I will be spending a great deal of time in Tallahassee during the session, and in fact have already been there quite a bit for various hearings in anticipation of the session's official start in March.

Although criminal justice agencies may be held harmless from the worst of whatever may yet come, there is no guarantee of that. Florida's prosecutors have taken the position that all of our partners in the criminal justice system should be held harmless from further cuts (my office is already operating at 12+% less than we were allocated a couple of years ago). We also believe that no new laws having a workload impact on us should be passed until we are adequately funded to handle what we are already called upon to do. The sole exception to that is legislation addressing public corruption offenses,

Continued Page 2

INSIDE THIS ISSUE:

SAO PERSONNEL CHANGES

Gainesville Misdemeanor Division Chief, **TERESA DRAKE**, has resigned from the SAO to accept a position at the Law School. **HEATHER JONES**, formerly Juvenile Division Chief, will assume Teresa's position. **REBECCA MICKHOLTZICK** will become the Juvenile Division Chief.

Continued Page 2

Any changes in agency email addresses should be reported to our office at treadwayr@sao8.org.

For a copy of the complete text of any of the cases mentioned in this or an earlier issue of the LegalBulletin, please call ASA Rose Mary Treadway at the SAO at 352-374-3672.

Office of the State Attorney Eighth Judicial Circuit

120 West University Avenue
Gainesville, Florida 32601

Phone: 352-374-3670

We're on the web:
Www.sao8.org

Message From Bill Cervone
Continued

of which there are several in the hopper.

We continue to look for new ways to do more with less, as the legislature constantly asks. Our new sex crimes unit, for example, is now almost fully functional, and will allow for greater attention to those cases on a circuit wide basis. Regional counties will likely see Gainesville lawyers assisting with sex crime prosecutions on an increasing basis. Our conversion to a paperless file system also continues to move ahead. Starting in January, felony cases in Alachua County are being maintained electronically rather than on paper. The next step for this process will be to transition the regional county offices to paperless files. This and more is intended to increase efficiency. The anticipated glitches with these and all changes will hopefully be few, and in the long run will be ironed out to allow us to work better with each of you.

Congratulations!!!

GPD officer **TIM MURPHY** will retire after serving the City of Gainesville since 1991.

Gainesville ASA **BILL EZZELL** has been awarded the Child Advocacy Center Excellence in Service Award for exemplary assistance to children.

SAO Personnel Changes

MARCUS CATHEY has been hired as a new ASA in the Gainesville Misdemeanor division. Marcus previously worked in private practice in Gainesville.

DEBBIE HUNT is now working as a new ASA in the Gainesville Felony division after several years with the Marion County State Attorney's Office.

BRIAN KRAMER, formerly a felony ASA in Gainesville who had left to go into private practice, has returned as an ASA in Gainesville and will be the lead attorney in Felony Division Three, replacing **PHIL PENA**, who is leaving for private practice in Southwest Florida.

""Routine Police Practice My Not Be Legal"

TRUANT AND THE PAT DOWN

Miami-Dade Police Officer Quintas came into contact with juvenile L.C. at 1:30 pm outside of a housing project behind Southridge High School in Miami. Believing L.C. to be truant, the officer stopped her because she was wearing a Southridge polo shirt and appeared to be of school age. After confirming that she should be in school, the officer told L.C. that she would be transported back to school. Before placing her in the patrol car, the officer searched her pockets, finding a bag of marijuana.

The trial court denied L.C.'s motion to suppress the marijuana where L.C. argued that the search was unlawful as the police had no probable cause or other particularized suspicion to suspect the presence of a weapon. The officer testified that he always searches people he transports for weapons because he believed anyone could have a weapon.

L.C. appealed her conviction to the Third DCA who ruled in L.C. v State that the search was unlawful.

"The issue in this appeal is whether it is 'unreasonable,' ...for a police officer to perform a weapons search without having performed a pat-down on a fifteen year old truant before putting her in the back of his police car to execute his statutory obligation to transport her to school, when the officer has no basis to suspect her of possessing any weapons." The court stated that the uniqueness in this case lay in the fact that the officer did not pat down L.C. prior to directly searching her pockets. "In the absence of reasonable suspicion, Officer Quintas was not justified in proceeding to a direct search of L.C. merely because he felt uneasy about his safety, nor could he do so based upon blanket department policy. At a minimum, he was required to perform a pat down."

ILLEGAL ROUTINE PROTECTIVE SWEEP

A neighbor of Defendant Mestral called the police during the daytime to report a possible burglary in progress at the Defendant's home. The neighbor said there were two white males who appeared to be carrying objects out of the house, possibly drugs, and placing them in a vehicle in front of the house.

When the police arrived, the defendant, his wife, their four year old child, and a man named Nelson Hernandez were in the front yard. The police saw that there were two white males in the front yard and one was holding an object in his hands. There was a vehicle in the front yard which was backed up to the house. The police saw what appeared to be pry marks on the front door of the home. The officers concluded that what they saw corresponded to the tip. The police separated the defendant and Hernandez and placed each in the back seat of a different police car.

The officers ascertained that the defendant's wife, who spoke little English, lived in the home. They told her to remain on the porch with the child and, without asking consent, entered the house to conduct a protective sweep. The officers indicated that it is their normal procedure in a burglary case to enter the house to see if any more perpetrators or victims are inside. During the protective sweep an officer opened a closet, which provided an entryway to an adjacent apartment containing a marijuana grow operation. The officers contacted narcotics officers, who then obtained a

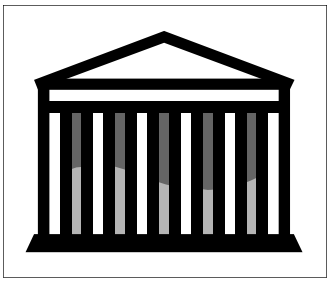
Continued Page 4

ILLEGAL ROUTINE PROTECTIVE SWEEP
CONTINUED

written consent to search from the defendant and seized 91 plants plus growing equipment.

The defendant moved to suppress the evidence, arguing that the protective sweep constituted an illegal entry. The State defended entirely on the theory that the protective sweep was a legal entry, and did not rely on the post sweep written consent. The trial court denied the defendant's motion and the defendant was convicted at trial.

The Third DCA in **Mestral v State** *reversed* the conviction holding that the protective sweep was illegal because the police entered the house without consent, exigent circumstances, or a search warrant. The protective sweep was not justified by exigent circumstances where the officers entered the residence as part of a routine practice and not on the basis of any articulable facts which would warrant a reasonable belief that there was any dangerous individual inside who posed a threat to those on the scene.



NO TRESPASSING AND THE APARTMENT COMPLEX

In the early morning hours, Ocala police officers were on foot patrol in a multi-building Ocala Place Apartments complex when they saw Ward walk through a fence opening onto the complex's common grounds. The Ocala Police Department had a written agreement with the apartment complex owner authorizing officers to patrol the property grounds and enforce trespass laws. The complex had large, "no trespassing" signs posted on multiple sides of every building at eye level, in well lit areas.

The officers approached Ward and asked him if he was a resident of the complex. He said "no" and stated that he was just "cutting through". When asked his name, Ward identified himself as "Jimball Covington." However, when asked to spell the name, Ward gave at least two different spellings. After a computer check indicated the name was "invalid", Ward was placed under arrest for Giving a False Name. A search incident to arrest resulted in finding a pistol and crack cocaine on Ward's person.

It is a misdemeanor for a person who has been arrested or lawfully detained to falsely identify himself to law enforcement. (Ch 901.36(1).). Ward argued that he had been unlawfully detained.

The Fifth DCA in **Ward v State** *affirmed* Ward's conviction. The court held that the officers had a reasonable suspicion justifying detention of Ward after Ward admitted that he was not a resident of the complex. When the officers approached Ward and asked him if he lived at Ocala Place, their actions constituted a consensual encounter, not a detention. After Ward told the officer that he was not a resident, but was "cutting through", the consensual encounter was elevated to a detention and Ward was no longer free to leave. The officers had reasonable suspicion to believe that Ward had just committed the crime of trespass. By his own admission, Ward had no lawful reason to be on the apartment property.

Having been lawfully detained, Ward's act of providing a false name to the officers constituted a violation of section 901.36(1). An officer can lawfully detain an individual who the officer reasonably suspects has committed a crime regardless of whether the officer intends to make an arrest.

The court also opined that Ward's argument that the trespassing signs did not strictly comply with the requirements of section 810.011(5) was irrelevant. The issue is whether the officers had reasonable suspicion to believe that Ward had committed the offense of trespassing, not whether the defendant had actually committed a crime.

"FLASHING" GUN IN RESTAURANT NOT PROBABLE CAUSE FOR STOP

While on an off duty detail in Fort Lauderdale, uniformed Officer Castro was approached by a man who reported that "some guy was over there flashing his gun to a couple of friends." The informant explained that a man in a restaurant had raised his shirt, exposing the gun in his waistband to his friends at the table. The man did not take the gun out of the waistband.

As Officer Castro was receiving a description of the man from the informant, the man, Defendant Regalado, walked by and the informant identified Regalado as the man with the gun. The informant refused to give his name to the Officer, saying he was scared to do so. The informant took off.

Officer Castro called for backup and followed Regalado. As Castro got within a few feet, Regalado turned and looked around. Officer Castro observed a bulge in Regalado's waistband that he believed was the butt of a gun, based on his training and experience. Because Regalado began to blend into the crowd on the street, Officer Castro drew his service revolver and ordered Regalado to the ground. Regalado complied. The officer patted down the Defendant and retrieved a firearm.

Regalado sought to suppress the firearm, arguing that the officer had no probable cause to stop him because neither the anonymous tip nor the officer's observations revealed any suspicion of past, present or future criminal activity. The trial court denied the Motion to Suppress and the Defendant plead nolo contendere, reserving his right to appeal.

The Fourth DCA in **Regalado v State** *agreed* with Regalado holding that because it is legal to carry a concealed weapon in Florida if one has a permit to do, and no evidence of suspicious criminal activity was provided to the officer other than the Defendant's possession of a gun, a Terry stop was not justified and the trial court erred in denying the Motion to Suppress.

"The only information received by the officer was that the individual had a gun. Possession of a gun is not illegal in Florida. Even if it is concealed, it is not illegal if the carrier has obtained a concealed weapons permit. Although the officer observed a bulge in Regalado's waistband,... no facts and circumstances were presented to show that Regalado's carrying of a concealed weapon was without a permit and thus illegal."

The Court futher opined that stopping a person solely on the ground that the individual possesses a gun violates the Fourth Amendment. " In this case, neither the anonymous tip nor the officer's observations revealed any suspicion of past, present, or future criminal activity. Therefore, there was no authority for the officer to pull his gun and order the defendant to the ground."

The Dissent argued that Regalado's pizza restaurant handgun exhibition as reported by the tipster, coupled with the observations made by Officer Castro, did constitute, under the totality of the circumstances analysis, a reasonable suspicion justifying a Terry stop.

Further, the Dissent argued, the open display of a weapon, regardless of whether an individual holds a concealed weapons permit, is an illegal activity which might justify a stop. "To suggest that an officer must engage in an analysis as to whether a gun wielding suspect might possess a concealed weapons permit, which cannot be readily observed, is a dangerous premise." "So while I obviously disagree with the majority's contention that only a tip of *illegal* conduct can lead to a constitution-

Continued Page 6

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> and click on the "Legal Bulletin" box.

We're on the web: Www.sao8.org

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 352-374-3670.

"FLASHING" GUN IN RESTAURANT NOT PROBABLE CAUSE FOR STOP Continued

ally permitted Terry stop, Regalado's alleged and potentially dangerous gun exhibition was just that. And whether Regalado may have been issued and continued to possess a valid concealed weapons permit is, on many different levels, of little import...(T)his was a good stop."

HIGH CRIME AREA AND FLIGHT

Florida Statutes Chapter 843.02 makes it an offense for any person to resist, without violence, a law enforcement officer when the officer is engaged in a lawfully executed legal duty. The Florida Supreme Court held in C.E.L. v State that a juvenile could be convicted of Resisting Without Violence when he took flight in a high crime area in defiance of an officer's verbal order to stop.

C.E.L., a fifteen year old African-American male, was convicted of Resisting Without Violence after he ran from two approaching officers in a high crime area and then failed to obey their verbal command to stop. Officers were patrolling the apartment complex in response to a previous complaint regarding drugs and trespassing and noticed C.E.L. standing with other teens. Upon seeing the officers, each wearing vests emblazoned with "sheriff" over their plain clothes, the juvenile "immediately turned around and took flight." The officers ordered C.E.L. to stop, but he disregarded the order and continued to run. Although the juvenile resisted the verbal command, he was ultimately apprehended and arrested for obstruction pursuant to Ch 843.02.

At his adjudicatory hearing, C.E.L. moved for a dismissal, arguing that running by itself was not enough to support a charge of opposing an officer. He was found guilty and subsequently appealed.

Ultimately, the Florida Supreme Court upheld the conviction, relying on the U.S. Supreme Court's 2000 opinion in Illinois v Wardlow which held that "unprovoked flight" from officers in a high crime area provided reasonable suspicion to detain persons; and thus in the instant case, the subsequent continued flight in defiance of the police order to stop was sufficient to sustain a conviction for Resisting Without. The Court rejected the Juvenile's argument that the sole act of flight cannot be used as the basis for a reasonable suspicion necessary

to support a conviction for Resisting.

"The plain language of section 843.02 makes it an offense for any person to resist, without violence, a law enforcement officer when the officer is engaged in a lawfully executed legal duty. Under Wardlow, the moment C.E.L. took flight in a high crime area, the officers were provided with rea-

sonable suspicion to warrant an investigatory stop. Therefore, the officers were engaged in the lawful execution of a legal duty. Thus, C.E.L.'s continued flight in defiance of the officer' lawful command constituted the offence of Resisting an Officer without Violence under 843.02."

COURTROOM FULL OF UNIFORMED OFFICERS INHERENTLY PREJUDICIAL

Jacksonville Sheriff's Office narcotics officers were preparing to execute a search warrant at a particular home where the Defendant Shootes was exiting. Two unmarked units with heavily tinted windows hemmed Shootes in as officers jumped out of the unit wearing tactical gear shouting "Police!" as they exited.

In reaction, which the Defendant later testifying that he assumed was an attack by robbers, he drew a gun and fired at the officers. The officers returned fire and Shootes was shot, subdued and arrested.

The Defendant testified that he did not realize until after the shooting stopped that the men were not criminals attacking him but were in fact police officers, in essence advancing a theory of self defense. There was conflicting evidence about the officers' clothing and whether their clothing and appearance should have alerted Shootes to their identities as police officers. The visual presentation of the officers was thus a feature of the trial and was pivotal to the Defendant's theory of defense.

On the last day of trial, one side of the gallery began filling up with officers of the JSO. According to affidavits, the officers sat in the front rows closest to the jury. There were estimates of between 35 and 70 officers in the gallery. They were all identifiable as JSO personnel as some wore the formal blue JSO uniforms and some wore undercover uniform shirts with bright yellow letters reading "Narcotic Officer, Police, Jacksonville Sheriff's Office." None of the officers made gestures, chattered or otherwise distracted the jury or the Court.

Shootes was convicted of two counts of Aggravated Assault. He appealed, asserting that his Sixth Amendment right to a fair trial was denied by the presence of the large number of JSO officers in the courtroom on the last day of trial. The First DCA in **Shootes v State** *agreed* and reversed the conviction.

The court stated that a defendant claiming that he was denied a fair trial must show either actual or inherent prejudice. Here, the court found inherent prejudice as there was an unacceptable risk of impermissible factors coming into play. The court found the number of identifiable officers in the courtroom was "substantial" and their sitting together in seats closest to the jury made the jury susceptible to the impression that the officers were there "to communicate a message to the jury."

"Unlike cases where clothing or accessories worn by spectators might merely have shown support for the victim or another party in general, in this case the officers' apparel was actually a feature of the trial, directly related to Appellant's theory of self defense." "Under these circumstances, the courtroom scene presented to the jurors of dozens of officers literally clothed with the authority of the JSO could not only have sent the jury a message of official interest and desire for a conviction, but the display of various formal and informal JSO uniforms could easily have been seen by the jury as a live demonstration of the appearance of the officers involved in the altercation with Appellant." The court ruled that the totality of the circumstances on the final day of the trial resulted in an unacceptable risk of impermissible factors influencing the jury's decision and this constituted inherent prejudice to Appellant's right to a fair trial.