

# FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

April – June, 2004

*[Editor's Note: In order to reduce possible confusion the defendant in a criminal case will be referred to as such even though his/her technical designation may be appellant, appellee, petitioner, or respondent. In civil cases, parties will be referred to as they were in the trial court, that is, plaintiff or defendant. In administrative suspension cases, the driver will be referred to as the defendant throughout the summary, even though such proceedings are not criminal in nature. Also, a court will occasionally issue a change to a previous opinion on motion for rehearing or clarification. In such cases, the original summary of the opinion will appear followed by a note. The date of the latter opinion will determine the placement order in these summaries.]*

## Driving Under the Influence

Littman v. Department of Highway Safety and Motor Vehicles, 869 So. 2d 711 (Fla. 1st DCA 2004).

The department revoked the defendant's driving license because of two Florida driving under the influence convictions and four Virginia DUI convictions. In revoking his license pursuant to section 322.28(2)(e), Florida Statutes, the department relied on a computer printout of the defendant's driving record from Virginia. Upon petition for writ of certiorari, the circuit court upheld the revocation, finding that the computer record was sufficient evidence.

The district court denied the defendant's petition for writ of certiorari on the merits, holding that since a certified copy of a computer printout of a driving record has been held to be sufficient evidence to establish that a defendant was driving on a suspended license, such a printout was sufficient to prove by a preponderance of the evidence that the defendant had four Virginia DUI convictions for the purpose of revoking his license.

State v. Bodden, 877 So. 2d 680 (Fla. 2004).

The defendant was issued a citation for driving under the influence and submitted to a test to determine his blood alcohol content, the results of which were .060 and .065. He also submitted to a urine test, which resulted in a positive for marijuana. He was subsequently charged with the possession of cannabis and drug paraphernalia, in addition to driving under the influence. The trial court barred the state from using the results of the urine test in the defendant's driving under the influence case and then certified the following question to the district court as being of great public importance:

In administering Florida's implied consent law, is the Florida Department of Law Enforcement required to adopt rules in accordance with the Florida Administrative Procedures Act governing the collection, preservation, and analysis of urine samples obtained by law enforcement pursuant to section 316.1932(1)(a), Florida Statutes?

The district court affirmed, holding that the requirement in the implied consent law that the defendant is deemed to have given consent to an "approved" test requires the development of a standard rule promulgated under the Administrative Procedure Act. The court rejected the state's argument that under the applicable statutory provision only a test to determine the alcohol content of a person's blood or breath had to be an approved test. The court resolved the ambiguity in the statute in favor of the defendant and held that the reference to an approved test included a urine test. The court concluded that:

. . . an 'approved' urine test is one in which the method of administrative and the analysis of the test are 'performed substantially according to methods approved by' the FDLE. We acknowledge, however, that the methodology for administering a urine test should be somewhat less complex than the methodology necessary for administering a breath or blood test.

The court also held that a non-approved urine test taken pursuant to the implied consent law is not admissible as a scientific test pursuant to the traditional rules regarding the admissibility of evidence since consent was not given voluntarily (that is, consent based on misinformation is not voluntary). Upon Motion for Certification the district court granted the state's motion for certification of the following question to the Supreme Court.

In administering Florida's implied consent law, is the Florida Department of Law Enforcement required to adopt rules in accordance with the Florida Administrative Procedures [sic] Act governing the collection, preservation, and analysis of urine samples obtained by law enforcement pursuant to Section 316.1932(1)(a), Florida Statutes.

The Supreme Court answered the question in the negative, concluding that the section 316.1932(1)(a)1. does not require that urine testing procedures be promulgated in accordance with the Administrative Procedure Act. After a detailed analysis of the relevant provision and other provisions of the implied consent law, the Court observed that a logical and harmonious statutory construction is that the term "approved" does not modify "urine test" and accepted the district court's conclusion that the statutory guidelines were sufficient for the rather simple urine test, while more comprehensive procedures should be developed for both blood testing (which is more intrusive) and breath testing (which is more complex).

The Supreme Court then rejected the defendant's equal protection challenge, observing that persons charged with driving under the influence are not a protected or suspect class, and thus only a rational relationship between the disparate treatment of urine testing and other testing

need be established. The Court went on the state:

In this regard, we note that the goals of the breath and blood tests are different from the goals of urine testing. Breath and blood tests detect alcohol content, whereas urine tests detect controlled substances. See §316.1932(1)(a)(1). If an individual has a certain level of alcohol in his or her system, the State benefits from the presumption of impairment. See §316.1934. However, because there is no “legal limit” for controlled substances, there is no similar presumption associated with urine test results. A person is guilty of DUI only if the State proves that the controlled substance impaired the person’s normal faculties.

We note that the testimony of the FDLE expert in this case further demonstrates the specific purpose and distinct nature of the urine test. According to the expert, unlike a breath or blood test which determines alcohol content, a level of impairment cannot be extrapolated from a drug concentration detected in a urine sample. In other words, it would be very difficult to conclude that a person was under the influence of a particular drug to the point that his or her normal faculties were impaired at the time of his or her arrest based solely on the presence of the drug in the person’s urine.

[Note: In State v. Korth, 875 So. 2d 790 (Fla. 3d DCA 2004), the district court, in deference to Bodden, answered the following question in the negative: “Is the Florida Department of Law Enforcement required to adopt rules in accordance with the Florida Administrative Procedures Act governing the collection, preservation, and analysis of urine samples obtained by law enforcement pursuant to section 316.1932(1)(a), Florida Statutes?”]

Stoletz v. State, 875 So. 2d 572 (Fla. 2004).

The defendant was involved in an accident in which she collided with persons aiding the victim of a previous accident, killing one person and injuring two. Based on a blood alcohol result of .241 percent, she was charged with one count of DUI manslaughter, two counts of DUI causing serious bodily injury, and one count of felony driving while license suspended (habitual offender). She was sentenced to five years’ imprisonment for driving while license suspended, followed by one year of probation for DUI, a special condition of which was nine months’ incarceration in county jail. In addition her license was permanently revoked under section 316.655(2), Florida Statutes, the general grant of statutory authority over license revocation and suspension given to judges.

On appeal the defendant challenged only the permanent revocation, arguing that the trial court should have determined any license action under the DUI-related provision, section 322.28(2)(a)(2), Florida Statutes, which required a minimum five year revocation for a second DUI offense. The district court affirmed the permanent revocation, finding it was a permissible sanction under either provision, and certified conflict with Whipple v. State, 789 So. 2d 1132 (Fla. 4th DCA 2001), to the Supreme Court.

The Supreme Court affirmed, noting that there was no conflict between section

316.655(2) and section 322.28(2)(a)(2) and that both statutes would permit a trial court to permanently revoke under the circumstances of this case. The Court explained as follows:

Although we find that when a defendant is convicted of a DUI, a trial court should utilize the statute which specially applies to DUI convictions to determine the permissible license revocation period for the DUI conviction, in this case, section 316.655(2) is also applicable because the defendant was convicted of another driving offense. [The defendant] pled no contest to and was convicted of felony driving while license suspended (habitual), a violation of section 322.34(5). When a defendant is convicted of another offense in chapter 316 or any other law of this state regulating motor vehicles, and the totality of the circumstances merits a suspension or revocation, a trial court may utilize section 316.655(2) to suspend or revoke the defendant's license. Because [the defendant] was convicted of an additional offense which was a violation of a 'law of this state regulating motor vehicles,' the trial judge did not err in considering the totality of the circumstances when permanently revoking [the defendant's] license under section 316.655(2). . . . Thus, in this case, both the specific statute applicable to DUI, section 322.28(2)(a)(2), and the general statute, section 316.655(2), authorized the trial court's permanent revocation of [the defendant's] driver's license.

Neiner v. State, 875 So. 2d 699 (Fla. 4th DCA 2004).

After an arrest for driving under the influence, valium was discovered in the defendant's purse during an inventory search at the breath testing facility. At trial the defendant's defense was that she obtained the valium through a prescription at a drug store. The judge refused to allow a former employee of the store to testify that the store's lack of a record of the defendant's prescription may have been because company policy required the destruction of prescription records after five years. The defendant was subsequently convicted.

The district court reversed, observing that where evidence tends in any way, even indirectly, to establish a reasonable doubt of the defendant's guilt, denial of its admission is error. The court concluded:

Defendant's entire defense in this case was that she obtained the Valium through a prescription from Walgreens. If she had been able to produce the prescription she would not have been charged, let alone found guilty. The fact that Walgreens would have destroyed any record of this prescription was relevant to her defense in that it explained why she could not produce a copy of the prescription. The state's argument that Walgreen's policy was not relevant is undermined by the fact that the state, in closing argument, pointed out that the appellant did not produce a prescription.

## **Criminal Traffic Offenses**

Foster v. State, 869 So. 2d 743 (Fla. 2d DCA 2004).

The defendant was charged with leaving the scene of a crash with injury resulting from his car running through a stop sign. The defendant was subsequently interviewed by a law enforcement officer, claiming that the reason he was unable to stop at the intersection was that his brakes had failed. The officer asked a second officer, who had experience as an automobile mechanic, to examine the defendant's vehicle at the wrecking yard. After the trial court denied the defendant's motion in limine to prevent the second officer from testifying, the second officer testified that the defendant's brakes were functional. The state argued that this testimony went to the credibility of the defendant, who was subsequently convicted.

The district court reversed, holding that the testimony on the condition of the brakes resulted in impeachment on a collateral issue, that is, a matter neither relevant to a particular issue nor discrediting a witness by pointing out bias, corruption, or lack of competency. The court stated that:

The effect of the collateral impeachment testimony was to give the impression that [the defendant's] poor driving rather than defective brakes caused the accident. However, the cause of the accident was not relevant to the crime charged, and the testimony impeaching [the defendant] as to the cause of the accident could have swayed the jury to find [the defendant] guilty for an improper reason.

State v. Burris, 875 So. 2d 408 (Fla. 2004).

The defendant grabbed the purse of the victim while reaching out of the window of his vehicle, resulting in the victim being knocked off her feet and dragged along the pavement before releasing her purse. The defendant was charged with, and convicted of, robbery with a deadly weapon in violation of section 812.13(2)(a), Florida Statutes. This provision enhances the punishment for robbery from a second-degree felony to a first-degree felony if the offender "carried a firearm or other deadly weapon."

Upon appeal, the Fifth District (disagreeing with another district) held that, giving the word "carry" its common or "plain or ordinary" meaning, an offender driving an automobile is not "carrying" the automobile, rather the automobile is carrying the offender. In reaching a contrary conclusion, the First District had given the term "carry" a broader reading, making it synonymous with "possess."

The Supreme Court agreed with the Fifth District, concluding that an automobile may not be "carried" as a deadly weapon under section 812.13(2)(a) so as to allow an enhanced conviction. The Court based its conclusion on the plain and ordinary meaning of "carry," further bolstered by the statutory rule of lenity, that is, the statement in section 775.021(1), Florida Statutes, that criminal statutes should be construed in favor of the accused.

[Note: In Dominguez v. State, (en banc), 876 So. 2d 675 (Fla. 3d DCA 2004), the court reversed the defendant's conviction for armed robbery with a weapon (automobile) based on Burris.]

Sanford v. State, 872 So. 2d 406 (Fla. 4th DCA 2004).

The defendant was charged with attempted second-degree murder, shooting into an occupied vehicle, and aggravated fleeing and eluding, as a result of being pursued by an officer answering a BOLO describing his car. The pursuit lasted 14 minutes and ended with the defendant exiting his vehicle and exchanging gunfire with the officer as he ran toward his residence. At trial, the jury was instructed that as an element of the felony aggravated fleeing and eluding charge that the defendant must “[know that] he had been directed to stop by a duly authorized law enforcement officer, willfully refused or failed to stop the vehicle in compliance with the order, or *having stopped the vehicle, willfully fled in an attempt to elude the officer.*” [Emphasis supplied] The defendant was convicted on all three counts.

The district court rejected the defendant's contention that reference to the italicized portion of the instruction was erroneous and constituted fundamental error (defendant had not objected at trial) since that language was an element of the misdemeanor offense of fleeing and eluding, but not the felony offense. Specifically, the court stated that a defendant who flees a marked vehicle with lights and sirens engaged and subsequently stops and runs away is not excused by the latter act from the offense of aggravated fleeing and eluding and that the act of fleeing the scene can be a factor in committing the charged offense. The district court also noted that it saw no risk that the jury would believe that the fleeing and eluding felony was committed solely by the defendant's act of leaving the car and attempting to go into his residence.

Suarez v. State, 879 So. 2d 1251 (Fla. 3d DCA 2004).

The defendant was convicted of vehicular homicide after a jury trial as a result of an intersection collision in which the two occupants of the other vehicle were killed. At trial the defendant had attempted to introduce testimony from a person who had talked to the occupants of the other vehicle minutes prior to the collision, which testimony was to the effect that the passenger had told the driver that the passenger needed to make it home before curfew, to which the driver allegedly replied “alright, let's go home then.” The trial court refused to admit this hearsay testimony.

The district court affirmed, holding that the above statement by the driver should not have been admitted, reasoning as follows:

When we look at the passenger's statement about the 3:00 a.m. curfew, the statement does not prove or explain any subsequent act of conduct of the passenger nor is the passenger's state of mind at all an issue in this case. Even if the passenger's state of mind were at issue, the statement cannot serve to describe the state of mind of the driver at the time of the collision. When we look at the driver's statement “alright, let's go home then,” the statement is not at all indicative of the driver's state of mind when the collision occurred because the statement does not necessarily show any commitment of the driver to satisfy the

passenger's curfew. The driver's statement also does not prove or explain any subsequent act of conduct of the driver or that the driver ran the red light on the night of the collision to satisfy the passenger's curfew. The driver's state of mind, like the passenger's state of mind, is not an issue in the case.

Blake v. State, 873 So. 2d 1259 (Fla. 1st DCA 2004).

The defendant pled nolo cotendere to the misdemeanor offense of driving with a suspended or revoked license and was found guilty at trial of the felony offense of leaving the scene of an accident involving personal injury. He was sentenced to incarceration on the felony and ordered to pay restitution on the misdemeanor.

The district court, after observing that various technical errors in the judgment and the charging instrument did not warrant reversal, did reverse the order of restitution, noting that the state had not sufficiently demonstrated a connection between the defendant's driving without a license and the accident which caused the damages.

## **Arrests, Search and Seizure**

Williams v. State, 869 So. 2d 750 (Fla. 5th DCA 2004).

As described by the district court the underlying facts were as follows:

While on routine patrol, the arresting officer stopped [the defendant] at 7:38 p.m. for a window tint violation and an obscured tag. A minute-and-a-half later, the officer requested back-up. Four minutes after the stop, the officer requested a drug dog, which arrived at 8:13 p.m. Ten minutes after the stop, the officer ran [the defendant's] date of birth through the teletype and immediately received a response that no warrants were outstanding for [the defendant]. Thirty-five minutes after the stop, the officer issued [the defendant] a citation for the window tint violation. The record reveals that the citation the officer issued to [the defendant] had been partially filled out before the stop even took place. After [the defendant] was handed the citation and his driver's license, he was asked to step to the median so the drug dog could sweep the car. The dog alerted and [the defendant] was arrested.

Upon the discovery of cocaine, a concealed firearm, and drug paraphernalia, the defendant was charged with various felony offenses. The trial court denied the defendant's motions to suppress and the defendant was convicted.

On appeal, the defendant argued that the initial stop exceeded the time necessary to write the citation and that he was illegally detained after being issued the citation. After observing that it was irrelevant that the officer became aware that the vehicle had a valid temporary tag upon approaching the vehicle since there was another suspected offense (window tint) for the stop, the

district court reversed, finding that the thirty-five minutes the officer took to obtain the necessary information and write the citation far exceeded what was necessary, particularly in light the fact that the officer had filled out portions of the citation before the stop. Therefore, since the defendant was illegally detained at the time the canine search began, the search was improper and any evidence seized inadmissible. The district court also observed that, even if the thirty-five minute period was reasonable, the citation had already been issued to the defendant before the drug dog search began, thereby making any continued detention illegal.

Hoover v. State, 880 So. 2d 710 (Fla. 5th DCA 2004).

The defendant was stopped because the officer, during a random check of license tags for suspended licenses or warrants, had determined that the vehicle was owned by a person with a suspended drivers license. After the defendant explained that he was not the owner, the officer observed that the defendant was nervous, sweating, and exhibiting stumbling speech. After verifying that the defendant had a valid drivers license, the officer asked the defendant to exit the vehicle, at which time a piece of white chalky substance, later identified as cocaine, fell to the ground. The defendant was subsequently convicted of the possession of cocaine.

The district court reversed, conceding that while the initial stop was valid, any detention subsequent to ascertaining that the defendant had a valid drivers license was illegal. The court observed that the defendant's behavior did not rise to the level of a well-founded suspicion of criminal activity.

Moore v. State, 874 So. 2d 42 (Fla. 2d DCA 2004).

The defendant was a passenger in a motor vehicle stopped for an inoperative taillight. After the driver pulled away as the officer approached the vehicle, a low-speed chase ensued, resulting in the car being stopped and the defendant lying on the ground in handcuffs. The officer then removed the defendant's wallet and discovered an altered drivers license, resulting in the defendant's conviction for possession of an altered or counterfeit drivers license.

The district court reversed, holding that the officer lacked a reasonable suspicion that the defendant was armed with a weapon. The court noted that, while the officer stated that he believed all of the passengers in the car were armed, he was unable to provide any factual basis for such belief. The court further observed that the defendant had no bulge in his pockets and had made no furtive movements.

Yanes v. State, 877 So. 2d 25 (Fla. 5th DCA 2004).

After being observed crossing the white line on the right-hand side of the road on three occasions (one-half of the car's width), the defendant was stopped by an officer believing the defendant might be impaired, sick, or tired. Thereafter, the officer observed that the defendant evinced the odor of alcohol and appeared nervous, resulting in the summoning of a drug-sniffing dog and subsequent discovery of cocaine. The defendant was convicted of trafficking in cocaine.

The district court rejected the argument that the search of the vehicle was tainted because the stop and detention were improper. The court observed that section 316.089(1), Florida Statutes, requires that a “vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.” The district court held that deviation from a lane by more than was practicable was a violation of the statute, irrespective of whether anyone is endangered. In addition, there was evidence that the defendant’s abnormal driving caused the officer to have a well-founded suspicion of impairment.

Cook v. State, 873 So. 2d 624 (Fla. 2d DCA 2004).

The defendant was the passenger in a vehicle allegedly stopped for violation of a municipal noise ordinance, after which stop he was discovered to possess cocaine and marijuana. After the trial court denied the defendant’s motion to suppress, the defendant was found guilty on both possession charges. During the trial the officer who witnessed the violation did not testify.

The district court reversed, holding that the motion should have been granted since a municipal ordinance violation must by statute (section 91.15, Florida Statutes) have been committed in the presence of an officer. At the hearing on the motion to suppress, the state presented the testimony of two officers who arrived as backup but not the officer (Reynolds) who witnessed the violation. The court summarized its analysis as follows:

The testimony presented by the State fails to provide evidence that Officer Reynolds observed a violation of the noise ordinance. The backup officers’ testimony provides only conclusory statements that the vehicle was pulled over for a loud car stereo, and this testimony was admissible only to show how the backup officers reacted, not as evidence that the vehicle was observed operating with a loud car stereo prior to the stop. Accordingly, the State failed to meet its burden to show that the stop was lawful.

Koppelman v. State, 876 So. 2d 618 (Fla. 4th DCA 2004).

The defendant was in a black pick-up truck sitting stationary in an unpaved roadway (dirt road with no curbs on either side of the road) with the truck’s lights on, no other cars in the vicinity, and in the presence of no “no parking signs.” A law enforcement officer approached the vehicle, which was half on the grass, half on the road, and eventually arrested the defendant for possession of various items of contraband. The trial court denied the defendant’s motion to suppress and the defendant was convicted of the possession offenses.

The district court reversed, holding that the officers did not have grounds for an investigatory stop and thus the motion to suppress should have been granted. The district court disagreed with the trial court’s conclusion that section 316.2045, Florida Statutes, provided a basis for the stop since that provision, entitled “Obstruction of the public streets, highways and roads,” required a willful obstruction of traffic, a conclusion not supported by the facts of the case. The court also observed that section 316.195, Florida Statutes, entitled “Additional

parking violations,” establishes distance requirements for parking on a two-way roadway, thereby implicitly establishing the proposition that parking along a two-way roadway is not illegal per se. When this was combined with the lack of testimony regarding the exact placement of the vehicle and the lack of factual findings on the matter, there was no well-founded and articulable suspicion of criminal activity.

Hilton v. State, 29 Fla. L. Weekly D1475 (Fla. 2d DCA June 18, 2004), opinion withdrawn and superseded on rehearing en banc, 901 So. 2d 155 (Fla. 2d DCA 2005), review granted, 919 So. 2d 435 (Fla. 2006).

The defendant’s vehicle was stopped for a cracked windshield, subsequent to which the officers discovered marijuana. After his motion to suppress was denied, the defendant was convicted of possession of marijuana.

The district court reversed, holding that the circumstances of the case did not justify the stop. Specifically, the court observed that there was no prohibition against driving with a cracked windshield (in this case a seven inch crack in the upper tinted portion on the passenger side). Section 316.2952, Florida Statutes, requires that cars be equipped with a windshield with a wiper in working order, but does not mention cracks. The court then rejected the argument that the crack could underpin a violation of section 316.610, Florida Statutes, which makes it a violation to drive a vehicle in such unsafe condition as to endanger any person or property or to drive a vehicle which does not contain parts or equipment required by law. While conceding that a windshield crack would be an unsafe condition if it impeded a driver’s ability to see the road or if it was so large that the windshield was likely to break, the court concluded that such was the case herein.

## **Torts/Accident Cases**

Pollock v. Florida Department of Highway Patrol, 882 So. 2d 928 (Fla. 2004).

The plaintiffs in consolidated cases were instantly killed when the automobile in which the two were occupants collided into the back of an unlit tractor-trailer which had stalled in the right hand lane of an expressway. A previous motorist had contacted the Florida Highway Patrol (FHP) about a near collision he had with the tractor trailer approximately an hour earlier (3:00 a.m.). Apparently, the patrol dispatcher had failed to enter the motorist’s call into the computer, resulting in no trooper arriving on the scene prior to the collision. At trial, jury verdicts led to the entry of judgments in favor of both plaintiffs in separate cases. The district court reversed and directed that final judgments be entered in favor of defendant FHP.

The Supreme Court approved the decisions of the district court and disapproved conflicting decisions from another district. The Court rejected the contention that the defendant owed a duty of care to the plaintiffs, either under the common law or emanating from internal policies and procedures. In relation to the common law, the Court observed that there was no duty on the FHP to maintain the roadway and keep it free of obstructions, noting that such a

theory was based on concepts of “premises liability,” and thus inapplicable since the FHP had no ownership or control over the state’s highways (a Department of Transportation function). Similarly, the FHP did not have a “duty” to remove stalled or abandoned vehicles from the highways, but rather “authorization” to do so in furtherance of its authority to enforce traffic laws. In any case, the Court observed that FHP’s duties were owed to the general public, as opposed to an individual person (distinguishing the situation where a special tort duty arises when law enforcement officers became directly involved in circumstances which place people in a “zone of risk” by creating or permitting dangers to exist). The Court then stated:

We further conclude that FHP’s internal operating procedures and policies did not impose a duty to dispatch officers to the scene of the stalled tractor-trailer. On this issue, we approve the reasoned analysis of the district court which concludes that, in the context of governmental tort litigation, written agency protocols, procedures, and manuals do not create an independent duty of care. . . . While a written policy or manual may be instructive in determining whether the alleged tortfeasor acted negligently in fulfilling an independently established duty of care, it does not itself establish such a legal duty vis-a-vis individual members of the public. . . . This principle applies, unless, of course, the sovereign adopts such protocols and procedures as standards of conduct, in which case there would exist an independent duty of care.

While unnecessary to its decision, the Supreme Court discussed the issue of sovereign immunity, opining that governmental tort liability does not attach as a matter of law in the absence of a statutory or common law duty if the activity in question is operational in nature. The Court declined to accept the plaintiff’s invitation to alter the law of sovereign immunity to provide that if a governmental act is operational in nature, there automatically exists a duty of care to all persons injured by the act or omission.