

FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

April – June, 2005

[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

Ayres v. State, 898 So. 2d 1154 (Fla. 5th DCA 2005).

The defendant was issued a citation for driving under the influence, which indicated that an appearance was required, but that the date and time of the appearance were “TBA,” that is, to be announced. Prior to the filing of an information and issuance of a summons to appear, the defendant moved for discharge on speedy trial grounds, contending that the speedy trial period commenced on the day the citation was issued. The county court granted the defendant’s motion, but the circuit court reversed.

The district court denied the defendant’s petition for writ of certiorari, referencing both the speedy trial rule, rule 3.191, Florida Rules of Criminal Procedure, and the definition of “taken into custody” in rule 6.160, Florida Rules of Traffic Court. The court concluded as follows:

The key aspect of both rules is that the paper, whether it is called a citation, notice to appear, or otherwise, only triggers the running of the speedy trial period when it is served “in lieu of arrest.” This determination turns not on what the document is called, but on whether it requires a defendant to “respond in any way,” the document is not utilized as a substitute for arrest, and is, therefore, not served “in lieu of arrest.” [Citation omitted] Here, although [the defendant] responded to the citation by hiring counsel, her response, although perhaps prudent, was not required by the citation for the purpose of responding to the criminal charge. Thus, because [the defendant] was not served “in lieu of arrest,” [the defendant] was not “taken into custody” under Florida Rule of Traffic Court 6.160.

Sawyer v. State, 30 Fla. L. Weekly D939 (Fla. 2d DCA April 8, 2005).

In response to two 911 calls from citizen informants, an officer arrived on the scene of an alleged driving under the influence offense to observe the defendant leaning against the side of a building near his vehicle. The officer spoke to both citizen informants and then conducted field sobriety tests on the defendant, which the defendant failed, resulting in his eventual conviction for driving under the influence.

The district court reversed, observing that there were three circumstances under which a person could be arrested for driving under the influence, to wit: 1) the officer witnesses each element of the prima facie case, 2) the officer is investigating an accident and develops probable cause for DUI, and 3) one officer calls upon another for assistance and their combined observations are united to establish probable cause for an arrest (fellow officer rule). After dismissing the first two theories as not supported by the facts, the court discussed the fellow officer rule and its incorrect application by the trial court. Specifically, the district court held that the rule does not impute the knowledge of citizen informants to officers, noting that to hold otherwise would render unnecessary the statutory requirement that a misdemeanor be committed in an officer's presence.

State v. Boatman, 30 Fla. L. Weekly D313 (Fla. 2d DCA Feb. 2, 2005).

The defendant was observed by an off-duty auxiliary deputy passed out behind the wheel of a vehicle with the keys in the ignition (passenger outside the car vomiting in the grass). The deputy awoke the defendant and obtained his drivers license, a computer check of which indicated that it was suspended. Two on-duty deputies then arrived and, after being informed of the suspended license, arrested the defendant. A search incident to the arrest resulted in the discovery of contraband drugs. At trial, the defendant argued that only the deputy witnessing the misdemeanor had statutory authority to arrest him. The trial court agreed that the arrest was unlawful because it was performed by a fellow officer who had not personally witnessed the misdemeanor offense.

The district court reversed, holding that the arrest was made in accordance with section 901.15(1), Florida Statutes, which states that an officer is permitted to make a warrantless arrest when a person has committed a misdemeanor "in the presence of the officer" if the arrest is made "immediately or in fresh pursuit." The court observed that the "fellow officer" rule, which operates to impute the knowledge of one officer in the chain of an investigation to another, applies in relation to a misdemeanor (citing cases in which it had held as much in dicta). The district court then specifically rejected the defendant's contention that the "fellow officer" rule should not apply to misdemeanors since there was an explicit statutory reference in relation to chapter 316 violations in section 901.15(5), but not to misdemeanors. The court concluded that this 1996 addition to the law was irrelevant since it was added for the purpose of accommodating non-criminal speeding violations in situations where the officer performing the stop was not the officer operating the speed-measuring device.

[Upon petition for rehearing, the district court, on April 13, 2005, at 902 So. 2d 222,

added the following footnote to the opinion:

In a motion for rehearing before this court, [the defendant] argued that the off-duty auxiliary deputy did not have powers of arrest pursuant to statute. This issue was not raised before the trial court or in the initial briefing in this court. Our record is not clear as to the statutory authority under which this deputy was acting. We therefore do not address this issue. On remand, [the defendant] is free to raise this issue if the circumstances merit it.]

Doyon v. Department of Highway Safety and Motor Vehicles, 902 So. 2d 842 (Fla. 4th DCA 2005).

When the defendant was sentenced for his second driving under the influence offense, the court failed to impose the requirement of an ignition interlock device. After the defendant had completed his sentence, he received written notice from the Department of Highway Safety and Motor Vehicles stating that he was required to have an ignition interlock device installed on his motor vehicle(s). He filed for a temporary injunction in circuit court, but was denied. An appeal to the district court followed.

The district court reversed and remanded to the trial court for the entry of a declaratory judgment and an injunction canceling the suspension and reinstating his license. The court observed that the remedy available to the state was in the courts, in the form of a post sentencing motion. Since the defendant had already completed his sentence before the department sent him the order requiring the installation of the device, upholding such order would subject the defendant to double jeopardy.

Department of Highway Safety and Motor Vehicles v. Rigau, 901 So. 2d 339 (Fla. 2d DCA 2005).

The defendant was stopped for driving under the influence and refused the breathalyzer test. The DUI charge was dismissed, but the defendant's drivers license was administratively suspended for failure to take the test. Upon petition for writ of certiorari the circuit court denied relief on the suspension, but granted the defendant's motion to seal the record of the suspension.

The district court reversed, holding that the suspension of a drivers license in an administrative proceeding is a civil, not a criminal, sanction. Therefore, it was not a proper subject for the trial court's invocation of sections 943.0585 and 943.059, Florida Statutes, which relate to the sealing of "criminal history information." The only available method to challenge the issuance of the suspension would have been by obtaining certiorari relief from the circuit court, which the defendant had failed to obtain (or to seek further review in the district court).

Green v. Department of Highway Safety and Motor Vehicles, 905 So. 2d 922 (Fla. 1st DCA 2005).

The defendant's drivers license was suspended as a result of breath test results of .100 and .102. The suspension was upheld after an administrative hearing and the defendant sought

certiorari review in the circuit court, arguing that the hearing officer failed to determine whether he had an unlawful blood alcohol level (the only evidence was his breath alcohol test results, which did not constitute proof of an unlawful blood alcohol level) and that he was denied adequate notice of the charge against him because the charging citation was for unlawful blood despite the fact he was not administered a blood alcohol test. The circuit court rejected the defendant's arguments, concluding that the legislature intended to use blood and breath interchangeably or, in the alternative, that proof of the defendant's breath constituted evidence of his blood alcohol.

The district court denied the defendant's petition for writ of certiorari, rejecting both of his arguments. The court dismissed the first argument as arguably leading to an absurd or ridiculous result as well as conflicting with relevant scientific principles. The district court then observed, on the notice issue, that the defendant's application for formal review indicated he received notice of the license suspension and the reason for it (because he received a citation for DUI), that he knew no blood test had been given, and that he had an unlawful breath alcohol level. Consequently, he had actual notice of the reason his license was suspended.

Gurry v. Department of Highway Safety and Motor Vehicles, 902 So. 2d 881 (Fla. 5th DCA 2005).

After being detained for failing to stop at a stop sign and observed to be impaired by alcohol (smell of alcohol, slurred speech, bloodshot eyes), the defendant was arrested and administered breath tests, resulting in .197 and .184 readings. At an administrative hearing, the defendant's license was suspended. The defendant sought certiorari review in the circuit court, which denied the petition, specifically finding that 1) the inspection reports constituted competent, substantial evidence because they were self-authenticating and required no handwritten signature, 2) the defendant had actual notice of the basis for the license suspension, and 3) the defendant's due process rights were not violated because the hearing officer was not an attorney.

The district court denied the defendant's petition for writ of certiorari, upholding the circuit court's finding. On the inspection report issue, the court noted the Florida Administrative Code Rule 11D - 8.006 does not require an actual handwritten signature and that the defendant failed to introduce any evidence that the officer did not approve the reports or intend the special italic print on the form to be his mark or signature. The district court then noted that the defendant had actual notice of the basis for the license suspension, since the citation issued indicated that the suspension was for a violation of section 322.2615, Florida Statutes, which deals with refusals and unlawful blood alcohol levels. While the citation did not indicate with what the defendant was charged, the trial court's examination of the transcript made it clear the defendant knew she was charged with the latter. Finally, the district court agreed that the defendant's argument that the fact that the hearing officer was not an attorney was without merit, since there is no statutory or constitutional requirement that hearing officers for the Department of Highway Safety and Motor Vehicles be attorneys. The court observed that while training in the law may be a prudent requirement for hearing officers, the statute only requires that hearing officers remain impartial and base their decisions on the preponderance of the evidence. The

court concluded that the determination of what kinds of training or degrees hearing officers must have is a matter best left to the department's discretion or the mandate of the legislature.

Lovelace v. State, 30 Fla. L. Weekly D1379 (Fla. 4th DCA June 1, 2005), opinion withdrawn and superseded by, 906 So. 2d 1258 (Fla. 4th DCA 2005).

The defendant was issued a citation for misdemeanor driving under the influence on August 11, 2004. On November 15, 2004, the defendant filed a notice of expiration of speedy trial time under rule 3.191(a), Florida Rules of Criminal Procedure. The state then filed a "no information" on November 19, 2004, and the defendant moved for discharge on November 30, 2005. On December 1, 2004, the state filed a felony DUI charge in circuit court based on the same incident and prior DUI convictions. The county court subsequently failed to rule on the motion for discharge, claiming a lack of jurisdiction. The defendant petitioned for a writ of prohibition against the circuit court proceeding with the felony case.

The district court granted the writ of prohibition, holding that the county court should have granted the defendant's motion for discharge of the misdemeanor DUI based on the expiration of the speedy trial period, thereby leaving the state unable to prosecute the defendant for felony DUI, which requires a conviction of the misdemeanor charge and two prior DUI convictions. The court observed that when the state filed the no information the speedy trial period continued to run and the state could not refile charges based on the same conduct after the applicable period (90 days) has expired, which did not include the fifteen day window (after the demand).

Belvin v. State, 30 Fla. L. Weekly D1421 (Fla. 4th DCA June 8, 2005).

The defendant was arrested for driving under the influence and was transported to a breath testing facility, where he registered breath test results of .165, .144, and .150. At a non-jury trial, the arresting officer testified that he made the traffic stop and requested the breath samples. The officer also testified that he signed a breath test affidavit, which was also signed by a breath test technician. The technician administered the test and prepared the breath test affidavit, but did not testify at trial. The trial court overruled the defendant's objection that admission of the affidavit violated his right of confrontation and the defendant was convicted. The circuit court affirmed, holding that the breath test affidavits were not testimonial in nature.

The district court granted the petition for writ of certiorari. The court held that, despite the provisions of section 316.1934(5) and section 90.803(8), Florida Statutes, which collectively declare that the affidavit is admissible in evidence as an exception to the hearsay rule, the circuit court violated a clearly established principle of law. Specifically, the district court relied on the United States Supreme Court opinion in Crawford v. Washington, 541 U.S. 36 (2004), wherein the Court held that an out-of-court statement that is "testimonial" in nature is inadmissible in criminal prosecutions, under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether such statement is deemed reliable by the court.

After discussing the meaning of testimonial, the district court held that the observations of the breath test technician were based on that individual's personal recording of observations while testing the subject, with the affidavit supplying the questions and answers involved. Thus the affidavit met the Crawford definition of formalized "pretrial statements that declarants would reasonably expect to be used prosecutorially," and thus were testimonial. The district court then rejected the state's argument that since breath test affidavits are statutorily referred to as public records and reports, they are not testimonial, holding that such a determination was irrelevant to whether they were pretrial statements expected to be admitted as evidence at trial.

The district court also rejected the argument that the defendant's motion should have been denied because the defendant could have deposed the technician prior to trial, observing that a discovery deposition does not qualify as a prior opportunity for cross-examination and, in any case, the defendant would not have been entitled to be present for the deposition. The court then summarized its holding as follows:

In sum, the breath test affidavit in this case constituted testimonial evidence and its admission at petitioner's criminal DUI trial violated petitioner's right of confrontation, under Crawford, as there was no showing of unavailability and prior opportunity for cross-examination of the technician/affiant. Because petitioner was prevented from confronting the only evidence of his blood alcohol level presented at trial, admission of the breath test affidavit was serious enough to constitute a violation of a clearly established principle of law resulting in a miscarriage of justice. Accordingly, we grant the writ of certiorari, quash the circuit court's decision below, and remand this case for further proceedings consistent with this opinion.

Embrey v. Dickenson, 906 So. 2d 316 (Fla. 1st DCA 2005).

After the defendant's second driving under the influence conviction, the trial court erred by failing to require the installation of an ignition interlock device as part of the sentence. After completing all the terms of the sentence, the defendant was informed by the Department of Highway Safety and Motor Vehicles that he would either have to install the device on his vehicle or face revocation of his drivers license. The circuit court upheld the department's order.

The district court quashed the circuit court's order, observing that neither section 316.193 nor section 322.16, Florida Statutes, grants the department the authority to require the imposition of the device in the absence of a court order [Note: This situation will presumably be changed by chapter 2005-138, Laws of Florida, which grants, effective July 1, 2005, the department the authority to order the device in the absence of a court order.] The district court reasoned as follows:

While section 322.16 provides general authority for the Department to impose time and purpose restrictions on drivers licenses and to effect other administrative measures necessary to ensure the safety of Florida's highways, section 322.16 does not grant the Department the independent authority to impose a criminal punishment. When a trial court fails to impose a mandatory sentencing condition,

the remedy is for the state to appeal that error – not for the Department to impose the condition.

McBride v. State, 26 Fla. L. Weekly D2424 (Fla. 2d DCA Oct. 10, 2001).

The defendant was convicted of DUI manslaughter as a result of an accident in which he drove his car into oncoming traffic and collided head on with the victim's car. During the trial, the court instructed the jury on the statutory presumptions of impairment. The district court affirmed the conviction, but the Supreme Court remanded the case to the district court for consideration in light of its opinion in Townsend v. State, 774 So. 2d 693 (Fla. 2000).

The district court again affirmed the conviction, holding that while it was clear error for the trial court to instruct the jury on the statutory presumptions of impairment, the error was harmless since it could be said beyond a reasonable doubt that the verdict could not have been affected by the error. Specifically, the court observed that the state had laid the appropriate predicate for admission of blood alcohol results of .306, the effects of which had been testified to by the medical examiner's chief toxicologist. The district court also observed that further evidence was provided by evidence that the defendant had driven at approximately seventy miles per hour, swerved in and out of lanes, nearly collided with another vehicle, barely missed a bicyclist, and hit the metal grating of a bridge before swerving into the victim.

[The district court granted a motion for rehearing and substituted an opinion. That opinion again affirmed the defendant's conviction, but eliminated reference to the bridge and added references to the other facts, including screeching tires. See 816 So. 2d 656, opinion filed February 20, 2002.]

[The Florida Supreme Court remanded the case for the district court to reconsider whether the giving of the jury instruction on the statutory presumption of impairment was harmless error in light of its opinion in Cardenas v. State, 867 So. 2d 384 (Fla. 2004). The district court, on June 15, 2005, at 903 So. 2d 373, concluded that:

Based on this evidence and the record as a whole, we conclude that the error in the jury instructions concerning the presumption of impairment was harmless. As noted above, the jury was instructed to find [the defendant] guilty if the evidence showed beyond a reasonable doubt that he was under the influence of alcoholic beverages to the extent that his normal faculties were impaired or that his BAL was in excess of .08 g/dl at the time of the accident. The evidence met this standard, and specifically as to the BAL, the unrefuted expert testimony was that [the defendant's] BAL could not have been below .20 g/dl at the time of the accident. Accordingly, based on the harmless error standard reiterated in Cardenas, we conclude that there is no reasonable possibility that the error affected the verdict, or stated differently, we conclude beyond a reasonable doubt that the error did not affect the verdict. Because the error was harmless, we affirm [the defendant's] conviction.

Department of Highway Safety and Motor Vehicles v. Griffin, 30 Fla. L. Weekly D1496 (Fla.

4th DCA June 15, 2005).

The district court was confronted, within the context of four consolidated cases, with the question of whether the use of non-lawyers as implied consent administrative hearing officers in formal hearings violates the due-process rights of drivers arrested for driving under the influence. The circuit courts reached opposing conclusions on the issue.

The district court held that there was no due process violation in the implied consent procedure described in section 322.2615, Florida Statutes, which does not require hearing officers to be attorneys. After noting that there was a strong presumption that a statute is constitutional, the district court observed that the Florida Constitution allows for non-attorney judges in Article V, section 20(d)(8), and that due process consisted of notice and an opportunity to be heard that is full and fair (both present in the statute). The court reasoned as follows:

In the absence of any record showing that the use of these hearing officers creates an adjudication of rights that is not fair, nor full, we conclude the procedures of chapter 322 are not in violation of due process. Additionally, a review of the State and Federal Constitutions shows no direct conflict with the rights therein contained and the strong presumption of validity has not been overcome by the motorists herein. Therefore, we declare that the procedural scheme employed by the Department of using non-lawyer hearing officers does not run afoul of the state or federal constitutions nor the due process rights of the motorists.

The district court did, however, find objectionable the specific act of a hearing officer who located a document in her office which had not been provided to her at the hearing by the law enforcement officer. The court observed that the hearing officer had departed from her neutral role as magistrate when she stopped the hearing, located the registration certificate based upon her questions to the officer regarding its submission, and entered it as evidence during the hearing. The court observed that the hearing officer was affording the Department an opportunity to correct a defect in the record evidence of her own accord, by locating the missing evidence herself, rather than allowing the officer to do so. Thus, she acted impermissibly as an advocate for the Department.

Smallridge v. State, 904 So. 2d 601 (Fla. 1st DCA 2005).

The defendant was convicted of two counts of DUI manslaughter. On appeal, the defendant raised eight issues, all of which were rejected by the district court, which specifically addressed five of the issues.

First, the district court rejected the defendant's challenge to the jury instruction which allowed the jury to consider whether the defendant "caused or contributed to the cause of the deaths" of the victims. While conceding that the relevant statutory provision only criminalized conduct that "caused" a death, the court noted that the Supreme Court of Florida had construed the statute in Magaw v. State, 537 So. 2d 564 (Fla. 1989), as not requiring sole causation on the part of a defendant. It was this interpretation which was subsequently embodied in the jury

instruction. Second, the court upheld the decision that the defendant's motion to suppress breath test results was error since the defendant was not allowed to contact this attorney/father, who allegedly would have advised him of the right to an independent test. The district court observed that the defendant, while entitled to law enforcement assistance in obtaining an independent blood test, had never requested such a test, despite the fact that he actually had achieved contact with his father. The court then rejected the defendant's challenge to blown-up photographs of the decedents, holding that while their relevance may have been only marginal, any error was harmless in light of evidence presented relating to blood alcohol level and excessive speed. The court declined to reach the issue of restitution and costs imposed on the indigent defendant, observing that the time to consider the matter was at the time of enforcement of the order. Finally, the court rejected the defendant's challenge to the facial constitutionality of the Florida Criminal Punishment Code (sections 921.002 – 921.0027, Florida Statutes), in light of the United States Supreme Court's opinion in Blakely v. Washington, 124 S.Ct. 2531 (2004), dealing with sentencing guidelines. Declining to reach the merits of the challenge, the court concluded that the defendant lacked standing. The court observed that the:

facial constitutional challenge to the Criminal Punishment Code is not directed to a finding of fact the sentencing court made that had not been established by the jury In fact, in entering the sentences, the lower court made no findings of enhancement, otherwise, and sentenced [the defendant] within the range established by the Code based solely on the jury's verdicts. The rule is well established that a person to whom a statute is lawfully applied cannot mount a facial challenge to it simply because its terms might be unconstitutional as applied to another person.

State v. Iaco, 906 So. 2d 1151 (Fla. 4th DCA 2005).

The defendants both consented to take a breath test after not being advised of either the administrative or criminal consequences of the refusal to take the test. At their respective trials, the defendants moved to exclude the results of the tests, which motions were granted and the results of the breath tests were excluded. The county court submitted a question of great public interest to the district court, which was rephrased as follows:

Whether suppression of evidence is warranted when law enforcement intentionally fails to read the full implied consent warnings based upon a department policy?

The court answered the question in the negative, citing its previous opinion in State v. Gunn, 408 So. 2d 647 (Fla. 4th DCA 1981), in which it held that the exclusion of evidence was an inappropriate sanction on the state when law enforcement failed to fully advise a defendant of the consequences for failing to submit to a breathalyzer test. The district court then reasoned as follows:

Our earlier opinion in Gunn is controlling. Contrary to the trial court's conclusion that Gunn could be distinguished because it involved an inadvertent failure to advise of the criminal and administrative consequences of a refusal to

take a breath test, Gunn did not indicate that the failure to advise in that case was in fact inadvertent. As we noted in Gunn, the administrative and criminal consequences apply only if the defendant refuses the breathalyzer test. When the defendant consents to the test, those consequences do not apply. Thus, failing to be advised of them does not warrant suppression of the test results.

Mollenberg v. State, 907 So. 2d 554 (Fla. 5th DCA 2005).

The defendant was convicted of driving under the influence. The county court certified the following question as a matter of great public interest:

Is a defendant in a DUI trial entitled to a jury instruction on the category 2 lesser included offense of attempt where the evidence adduced at trial shows:

1. The defendant was driving a motor vehicle.
2. Breath tests indicate breath alcohol level of .043 and .051 g/210L.
3. The defendant performed poorly on field sobriety exercises.
4. Urine tests indicate the presence of controlled substances but not the amounts.

At the charge conference, the defense counsel requested an instruction on attempt. The trial court denied the request on the grounds that the evidence showed a completed crime. The jury found the defendant guilty.

The district court rephrased the question as follows:

Is a defendant entitled to an instruction on attempted DUI where it is undisputed that the defendant was driving but conflicts as to whether he was impaired?

The court noted that there were no Florida opinions at the Supreme Court or district court level discussing attempted DUI. The court, however, observed that the defendant's argument was that an attempt applies to the impairment element of DUI, and that where there is some, but not conclusive, evidence of impairment, a jury is entitled to consider that evidence as an "act in furtherance" and be allowed to find the defendant guilty of attempted DUI. The defendant conceded that if his argument was accepted, it followed that a person who drinks and drives can be convicted of an attempt even if he is not impaired, or if impairment is not conclusively proven. The court rejected this argument, noting that its adoption would punish innocent conduct and violate the principle of overbreadth. The court rejected the defendant's other arguments and concluded as follows:

More importantly, the concepts of lenity, jury pardons and being instructed on one's theory of defense all have the same prerequisite in Florida. They all require that there be some evidence of a lesser offense before the jury

can be instructed on it. . . . In the instant case, the trial court found that there was no evidence of attempt because it was undisputed that [the defendant] was driving. The evidence of impairment, or partial impairment, is irrelevant because we conclude that the attempt does not apply to the impairment element.

Therefore, the district court held that there can be no attempted DUI where the driving element is conceded because attempt does not apply to the impairment element. The court declined to decide the broader question of whether the crime of attempted DUI exists.

Criminal Traffic Offenses

Sexton v. State, 898 So. 2d 1187 (Fla. 1st DCA 2005).

While driving to work in the early morning, the defendant was involved in a crash, killing the occupant of the other vehicle when his truck veered across a double-yellow line and collided with an oncoming vehicle. An examination conducted two hours after the crash revealed that the defendant had a blood-alcohol level of .034. The defendant was charged with manslaughter, which requires culpable negligence, defined in case law as involving a “state of mind so wanton or reckless that the behavior it produces may be regarded as intentional” and which “evinces a reckless disregard for human life.” The trial court denied the defendant’s motion, which had contended that the evidence was insufficient to establish a prima facie case of culpable negligence.

The district court reversed, holding that the undisputed facts were insufficient to constitute culpable negligence. The court specifically observed:

Here, [the defendant] was not shown to be intoxicated; his speed did not greatly exceed the posted limit; and while his crossing of the center line into oncoming traffic was evidence of negligence or recklessness, which resulted in the death of another person, this combination of facts does not establish willful or wanton misconduct, or describe behavior that was so gross and flagrant as to render it likely that his driving would cause the death of another.

State v. Franklin, 901 So. 2d 394 (Fla. 5th DCA 2005).

The defendant was charged with driving while his license was cancelled, suspended, or revoked as an habitual offender, a third degree felony, and one count of DWLC together with an additional count of possession of cannabis, twenty grams or less, a first degree misdemeanor. The defendant pled nolo contendere to DWLC in a third case and the trial court dismissed the other two cases, apparently influenced by the defendant having made efforts to obtain a license, the cost to taxpayers to prosecute, and “the best interest of judicial economy.”

The district court reversed, holding that notwithstanding the trial court’s good intentions, the dismissal of the two cases over the state’s objection was an abuse of discretion. The district

court cited to opinions holding that such sua sponte dismissals constituted an improper infringement upon the state's discretion to prosecute, notwithstanding consideration of the interests of the public and the parties. The district court characterized the trial court's actions as tantamount to entering a nol pros on behalf of the state, in which sole discretion to make such a decision is vested.

Arroyo v. State, 901 So. 2d 1014 (Fla. 4th DCA 2005).

The defendant, after being stopped by law enforcement, fled the scene, ran two red lights, passed a vehicle using the right-hand lane, pulled into his driveway, and was tackled by law enforcement while running into his house. He was charged with the second degree felony of aggravated fleeing and eluding, pursuant to which the trial court instructed the jury on the five elements of the crime, one of which was "knowing he had been directed to stop by a duly authorized law enforcement officer, willfully [refusing or failing] to stop the vehicle in compliance with the order, or having stopped the vehicle willfully [fleeing] in an attempt to elude the officer." The defendant was convicted, after failing in his argument that the jury was misled by the inclusion of the words "after having stopped" in the instruction, which he argued had allowed the jury to convict the defendant of fleeing after he stopped the car in his driveway.

The district court affirmed, holding that there was no error in the instructions. The court reasoned as follows:

First, [the defendant] knew the police were following him. Second, he actually stopped his vehicle and then fled in the car. And third, the defense specifically asked the court to read the misdemeanor fleeing and eluding instruction, which includes the same language as an alternative lesser included offense instruction We therefore find no error in the court's jury instruction on aggravated fleeing and eluding.

Olguin v. State, 903 So. 2d 270 (Fla. 3d DCA 2005).

The defendant's van struck a bicyclist, who died as a result of the collision. He left the scene, but crashed into a utility pole after traveling 420 feet. He was charged and convicted of leaving the scene of an accident involving a death.

The district court affirmed, rejecting the defendant's claims of insufficient evidence and the commission of a fundamental error regarding a jury instruction on voluntary intoxication. The district court rejected the defendant's arguments that there was no evidence that he knew that he had hit anyone and that because he was too drunk to realize what he had done, the jury could not infer that he should have known he had hit someone. The district court pointed to post-accident behavior testimony from observers indicating that the defendant was not that drunk (emptying beer cans out of vehicle, appearance of alertness). These observations, coupled with the severity of the collision (blood and tissue imbedded in the glass of his vehicle) convinced the court that the instruction, which merely informed the jury that even though the evidence showed that [the defendant] was drunk, he was not absolved and that he could still be found guilty, even if drunk, if the evidence showed that he either knew or reasonably should have known of the

resulting injury or death from the nature of the accident, did not constitute fundamental error.

State v. Jones, 30 Fla. L. Weekly D678 (Fla. 4th DCA March 9, 2005).

The defendants, who were minors at the time of the alleged offenses, were each charged with driving without a valid license in violation of section 322.03(1), Florida Statutes. The charges were filed in the traffic division of the county court. The county court granted the defendant's motion to transfer the cases to the juvenile division of the circuit court to be handled as delinquency cases. The state filed petitions for writs of prohibition seeking to prevent the circuit court from proceeding with the cases.

The district court granted the writs, citing to section 316.635(1), Florida Statutes, which states that a "court which has jurisdiction over traffic violations shall have original jurisdiction in the case of any minor who is alleged to have committed a violation of law . . . pertaining to the operation of a motor vehicle." This provision goes on to state that traffic felonies shall be tried in circuit court. The district court also noted that section 26.012, in describing the jurisdiction of circuit courts, includes cases relating to juveniles "except traffic offenses as provided in chapters 316 and 985." Observing that the juvenile defendants in the instant case were charged with misdemeanors, the district court held that the county court had original jurisdiction.

[On motion for rehearing, the court withdrew its March 9, 2005, opinion for the purpose of reflecting a change in appearance of counsel, at 899 So. 2d 1280, opinion filed April 27, 2005.]

D. E. v. State, 904 So. 2d 558 (Fla. 5th DCA 2005).

The juvenile defendant was convicted of vehicular homicide as a result of a head-on collision with another vehicle when his vehicle went out of control. The trial court denied the defendant's motion for judgment of acquittal, which had argued that proof of mere speed alone cannot supply the recklessness necessary as an element of the offense.

The district court affirmed. After declining to reconsider the postulate that speed alone will not support a charge of vehicular homicide, the court found that there was well more than speed upon which to base the conviction. The court reasoned as follows:

Here, the evidence showed that the collision occurred before the sun had risen, near a school in a residential neighborhood familiar to [the defendant] at a time when traffic was likely to be congested. [The defendant] was operating his vehicle without adult supervision in violation of the state licensing law. While some of the evidence regarding speed is conflicting, it appears that [the defendant] was traveling far in excess of the speed limit, and was unable to maintain his vehicle in a single lane. According to the testimony, his taking the curve at a perilously high rate of speed probably caused [the defendant] to jerk the wheel to the left, resulting in his loss of control of the vehicle. An expert opined that [the defendant] came out of the curve straddling the two northbound lanes because his speed would not allow him to maintain a single lane. Thus, it appears that [the defendant] knowingly drove the car without adult supervision in

violation of state law, and knowingly traveled at a dangerously high speed around a dangerous curve in the road near a school in the dark through an area that was familiar to him, and that was likely to become congested. These facts amount to far more than just speeding.

The court concluded that such actions would make it reasonably foreseeable that a traffic fatality would occur and thus constituted the willful or wanton disregard for safety necessary for reckless driving.

Kallelis v. State, 30 Fla. L. Weekly D1496 (Fla. 4th DCA June 15, 2005).

The defendant was convicted of driving while license revoked as a habitual traffic offender based on the introduction of a certified copy of his driver history record obtained from the Department of Highway Safety and Motor Vehicles.

The district court reversed, holding that the certified copy of the record contained no traffic offenses that would qualify for habitual traffic offender designation. The court distinguished a case in which a record was admitted into evidence, noting that such record contained the requisite convictions to qualify for habitual traffic offender status.

Baker v. State, 905 So. 2d 961 (Fla. 1st DCA 2005).

The defendant was convicted of fleeing and attempting to elude, driving while license suspended, and possession of a controlled substance. In a post-conviction motion asserting ineffective assistance of counsel the defendant alleged that his trial attorney should have argued for his acquittal on the driving while license suspended charge since the state failed to prove the element of knowledge required for the criminal offense (without knowledge the offense becomes a moving civil infraction).

The district reversed on this issue, noting that the defendant's license was suspended because he failed to pay a ticket. Under such circumstance, the state cannot benefit from the statutory presumption and was required to prove actual knowledge (which it did not).

Drivers Licenses

State v. N.P., 913 So. 2d 1 (Fla. 2d DCA 2005).

The defendant juvenile was found delinquent for having committed criminal mischief, in violation of section 806.13, Florida Statutes, by placing graffiti on the bathroom walls of a middle school. The trial court withheld adjudication and imposed a number of sanctions, but neither a fine or drivers license suspension or revocation.

The district court upheld the failure to impose a fine, since the defendant had not been convicted (adjudication of delinquency not considered a conviction). The district court,

however, held that the trial court erred in not imposing drivers license sanctions, since such sanctions do apply to acts of delinquency.

Arrests, Search and Seizure

Gordon v. State, 901 So. 2d 399 (Fla. 2d DCA 2005).

The defendant's vehicle was stopped for driving with two air fresheners hanging from the vehicle's rearview mirror, an alleged violation of section 316.2004, Florida Statutes, which prohibits obstruction of the driver's view or driving mechanism, or section 316.2952(2), Florida Statutes, which prohibits any sign, sunscreening material product, or covering attached to, or located in or upon a windshield. A subsequent search resulted in the discovery of cocaine and the defendant's conviction for trafficking in cocaine.

The district court reversed, holding that the initial stop was illegal. After observing that a number of states, not including Florida, had enacted statutes prohibiting the placement or hanging of objects inside or upon the vehicle, including the rearview mirror, the court examined the issue of whether the air fresheners obstructed the driver's view or the windshield. The court noted that a violation of section 316.2004(2)(b) could apply only if the air fresheners were upon the windshield. The court, noted that being "upon" a thing required direct contact and thus a hanging object could not constitute a violation. In relation to section 316.2952(2), the issue was similar, that is, whether the air fresheners were attached to or located in or upon the windshield. The court found that they met neither requirement and thus the stop was unlawful (irrespective of the officer's misapprehension of the law) and evidence obtained as a result thereof should be suppressed.

State v. Burke, 902 So. 2d 955 (Fla. 4th DCA 2005).

The defendant was stopped for a cracked windshield and a cracked taillamp. Upon discovering that he did not have a valid drivers license, the officers arrested him and, during a search incident to an arrest, found drugs in his pocket. The trial court suppressed the drugs, holding that the state had not met its burden of demonstrating that the crack in the windshield was a safety problem under section 316.610(1), Florida Statutes, and that the crack in the red lens of the taillight which was emitting white light, still partially covered the taillight and thus could not provide a proper basis for a stop.

The district court affirmed, holding that the taillight issue was controlled by Frierson v. State, 851 So. 2d 293 (Fla. 4th DCA 2003), and the windshield crack had not been demonstrated to be a safety problem, and therefore, could not provide a basis for a stop. On the latter issue the court certified direct conflict with Hilton v. State, 901 So. 2d 155 (Fla. 2d DCA 2005).

State v. Rodriguez, 904 So. 2d 594 (Fla. 5th DCA 2005).

The defendant was pulled over after being observed exiting, without stopping, from

either a business or side street at a high rate of speed. The vehicle subsequently drove in the wrong lane before entering an apartment complex. At this point, the observing officer, believing that the defendant might be impaired, activated his overhead lights and asked the defendant to exit his vehicle, after which he was arrested and placed in a patrol car. Upon his exiting the patrol car, cocaine was found in the back seat and the defendant was charged with possession thereof. The defendant filed a motion to suppress, contending that he did not commit a traffic violation. The trial court granted the motion, ruling that the defendant had violated neither section 316.125(2), Florida Statutes, which requires a driver of a vehicle emerging from an alley, building, private road, or driveway within a business or residential district to stop prior to entering a roadway, nor section 316.081, which prohibits driving on the wrong side of the roadway.

The district court reversed, holding that the proper inquiry was not a deconstruction of the defendant's driving pattern but rather whether there was probable cause to stop him based on his driving pattern. The court summarized the basis for its conclusion that such cause existed as follows:

At 2:00 a.m. [the officer] saw [the defendant] bl[o]w out of a driveway or past a stop sign near a bar at an excessive rate of speed, continue to drive down the wrong side of the road across a double yellow center line, and then take a wide swing into the driveway of an apartment complex. Based on these facts, the court erred in ruling that the stop was not justified. Based upon these facts, [the officer] would have been derelict in his duties if he did not stop [the defendant] because there was probable cause based upon objective evidence to believe [the defendant] violated several Florida traffic statutes. The trial court erred in ruling otherwise.

Torts/Accident Cases

Goldberg v. Florida Power & Light Company, 899 So. 2d 1105 (Fla. 2005).

The district court reversed a judgment entered against the defendant utility company in connection with a wrongful death action arising from the death of the plaintiff's decedent. The defendant had terminated power to a traffic light, which resulted in a motor vehicle collision and the resulting death. Initially, the district court had affirmed the trial court's order denying the defendant's alternate motions for directed verdict and a new trial, but determined that the \$37 million in damages awarded by the jury was excessive and remanded the case for remittitur to \$10 million. Thereafter, sitting en banc, the district court reversed the initial panel's decision and remanded the case with instructions to direct a verdict and enter judgment in favor of the defendant utility company.

The Supreme Court quashed the district court's decision and reinstated the decision of the original panel. The Court noted that the legal duty on the part of the defendant arose from the general facts of the case (rather than having a legislative, administrative, or judicial basis).

The facts were that a power line had fallen in the rear of a private residence, ultimately resulting in the arrival of the defendant's repair trucks. During the repair process, an adjacent traffic light at a major intersection was rendered inoperable (issue as to whether this was done knowingly). The fatal accident at issue then arguably occurred as a result of the inoperable traffic light.

The Supreme Court held that the foregoing actions created a foreseeable zone of risk encompassing the motorists utilizing the intersection and gave rise to legal duty to warn motorists of the hazardous condition, in relation to which the defendant had ample opportunity to take necessary safety measures (such as notifying local authorities). The Court also noted that the weather conditions and the fact that the accident occurred during rush hour should have been factored into the defendant's plan on how to proceed. The Court rejected the proposition that a plaintiff's negligence in entering an uncontrolled intersection always constitutes an intervening and superseding cause as a matter of law, since such a rule would contravene the well-settled principle that the issue of proximate cause is primarily a question of fact.

[An application of Goldberg can be found in Pascual v. Florida Power & Light Company, 911 So. 2d 152 (Fla. 3d DCA 2005), in which the district court reversed a dismissal of the plaintiff's case (inoperable traffic signal) and remanded for a trial.]

Festival Fun Parks v. Gooch, 904 So. 2d 542 (Fla. 4th DCA 2005).

The plaintiff was injured in a go-kart crash at the defendant's track. The trial court applied the dangerous instrumentality doctrine, making the defendant vicariously liable, and the jury found the defendants (track owner and unknown driver) 65% negligent and the plaintiff 35% negligent.

The district court determined that the main issue was whether the trial court properly applied the dangerous instrumentality doctrine and considered it de novo. The district court rejected the trial court's analysis based on the definitions of motor vehicle found in sections 316.003(21) and 322.01(26), Florida Statutes. Observing that the definition of "motor vehicle" found in chapter 320 (Motor Vehicle Licenses), does not include go-karts, and that the only statutory reference to go-karts refers to them as "amusement rides," see section 616.242 (3)(d), Florida Statutes, the court concluded that the doctrine should not apply. The court reasoned that the salient consideration for the Supreme Court when it classified golf carts as dangerous instrumentalities in Meister v. Fisher, 462 So. 2d 1071 (Fla. 1984), was that golf carts were extensively regulated by statute. Go-karts, on the other hand, are not extensively regulated, nor do they pose the relative danger posed by golf-carts, which, according to the Meister, when operated negligently on a golf course, have the "same ability to cause serious injury as does any motor vehicle operated on a public highway" and were "identical to those involving other motor vehicle accidents." The district court pointed out that go-kart accidents were pretty rare, according to the only expert testimony presented. Based on the foregoing, the case was remanded for a new trial.

Barkett v. Gomez, 908 So. 2d 1084 (Fla. 3d DCA 2005).

The plaintiff in a civil action was hit by the defendant's commercial vehicle while

delivering pizza flyers to vehicles in an intersection. At trial, the court denied the admission of a photograph of the defendant's vehicle with a dent on its right side. At the conclusion of testimony the trial court denied this defendant's request for a jury instruction on section 316.130(3), Florida Statutes, which provides that where sidewalks are provided, no pedestrian shall, unless required by other circumstances, walk along and upon the portion of a roadway paved for vehicular traffic. In addition, the plaintiff was permitted to comment on the defendant's failure to call as a witness the passenger in the defendant's vehicle. The jury returned a verdict of defendant 80% negligent and plaintiff 20% negligent.

The district court reversed, holding that the failure to give the requested jury instruction constituted prejudicial error, reasoning as follows:

The undisputed evidence at trial was the [the defendant] was driving within the speed limit, not talking on a cell phone, paying attention to the road, in the correct lane of travel, and traveling with the green light when he hit the plaintiff who, pursuant to section 316.130.(3), was illegally in the street handing out flyers. Failure to give the requested instruction therefore, constitutes prejudicial error as it denied the defendant of his right to a fair trial and due process of the law.

Although noting that this holding was dispositive, the district court went on to address the other two issues. On the photograph issue, the court agreed with the trial court that the testimony presented did not establish that it fairly and accurately depicted the condition of the vehicle after the accident. In relation to the comment on the passenger failing to testify, the court upheld the trial court, noting that the defendant had not properly preserved the objection.