

FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

January – March, 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

Schofield v. State, 867 So. 2d 446 (Fla. 3d DCA 2004).

The defendant was charged with driving under the influence. Prior to trial she contested the reliability of the breath test results, arguing that the test did not comply with the applicable administrative rules because the arresting officer failed to ask her whether she had a dental plate and to request that she remove any such device. After a 20 minute observation period, the first test administered to the defendant resulted in an "Invalid Sample-Mouth Alcohol." Subsequently the defendant rinsed her mouth and took two additional breath tests, with results of .114 and .111. The county court suppressed the test results as not being sufficiently reliable. The circuit court reversed the suppression order.

The district court denied the defendant's petition for writ of certiorari, holding that the circuit court had not departed from the essential requirements of the law. The district court observed that the breath test affidavit was proper in both form and content, that the officer who performed the test was certified by the Florida Department of Law Enforcement to conduct such tests, and that the test was performed in compliance with governing statutory law and administrative rules. The court, noting that there was no rule requirement that dental devices be removed or that an officer inquire about their existence, concluded that "evidence of the use of dentures during a breath alcohol test go the weight accorded the test result, not the admissibility of the test result, the latter of which lies fully within the discretion of the court."

Department of Highway Safety and Motor Vehicles v. Possati, 866 So. 2d 737 (Fla. 3d DCA 2004).

The defendant collided with a parked, marked decoy police vehicle and was apprehended

by a police officer, who detected the strong smell of alcohol from the defendant and observed that the defendant's eyes were watery and bloodshot. A second officer, part of a DUI unit called to the scene, administered sobriety tests to the defendant, which the defendant allegedly failed. After being read an implied consent warning, the defendant refused to take a breathalyzer test and was arrested.

At the defendant's formal review hearing, both officers appeared, but the second (DUI unit) officer could not recall the defendant's performance on the sobriety tests, and none of the written incident reports were able to refresh his memory. The hearing officer found there was competent substantial evidence for sustaining the defendant's suspension. The circuit court granted the defendant's petition for writ of certiorari and reinstated the defendant's license, finding that there had been a departure from the essential requirements of law and a procedural due process violation in that the defendant's right to confrontation was abridged due to the officer's inability to recall the field sobriety tests and because the officer's report was admitted without a proper predicate being laid for a past recollection recorded.

The district court denied the department's petition for writ of certiorari. However, upon Motion for Rehearing and Clarification, the district court granted the petition and ordered the suspension reinstated. The district court held that the circuit court departed from the essential requirements of the law by exempting the defendant from the requirements of the implied consent law. The court stated that the hearing officer had correctly determined that the defendant satisfied the four requirements of section 322.2615(7)(b), Florida Statutes. Specifically, the district court observed that there was probable cause to believe the defendant was driving under the influence (first requirement) and was lawfully arrested (second requirement). In addition, there was no dispute in relation to whether there was a refusal (third requirement) and whether the defendant was warned of the consequences of refusal (fourth requirement). In relation to the first and second requirements, the district court held that the smell of alcohol on the defendant's breath and his observably bloodshot eyes, when coupled with the fact that he had just crashed into a parked police vehicle, satisfied the probable cause standard and provided a basis for an arrest. The district court then stated that the testimony of the second officer was unnecessary for the probable cause determination.

Davis v. State, 866 So. 2d 1251 (Fla. 4th DCA 2004).

The defendant admitted, during her trial for DUI manslaughter, to having alcohol in her system at the time of the accident in which she was involved and giving a false name. During closing arguments the defendant's attorney conceded that the defendant was guilty of giving a false name and driving under the influence, but not that she was at fault in the accident. The jury found the defendant guilty of DUI manslaughter. The trial court summarily denied the defendant's motion for post-conviction relief, which alleged ineffective assistance of counsel.

The district court affirmed, observing that the defendant's attorney had not conceded commission of DUI manslaughter in the closing argument, but had simply acknowledged various undisputed acts of the defendant. The district court analogized the argument to one where

defense counsel concedes guilt on a lesser-included offense. The court then held that in light of the evidence it was not reasonably likely that the result of the trial would have been any different if that argument had not been made.

Dobrin v. Department of Highway Safety and Motor Vehicles, 874 So. 2d 1171 (Fla. 2004).

After being observed by a law enforcement officer driving very fast (approximately 50 miles per hour) and drifting and correcting himself in a quick manner, the defendant was stopped for failure to maintain a single lane. During the stop the officer observed bloodshot eyes and detected the odor of alcohol on the defendant's breath, after which he conducted a field sobriety test which the defendant failed. The department suspended the defendant's license. The circuit court granted certiorari, finding that the arrest affidavit did not specifically allege that the defendant crossed either line of the traffic lane and further failed to allege the posted speed limit where the "fast speed" was observed.

The district court quashed the circuit court's decision, holding that the court applied the wrong law. Specifically, the district court stated:

The issue is not why this particular officer conducted the traffic stop; the question should be whether the established facts would have caused a reasonable officer under the same circumstances to make the stop. See *State v. Pollard*, 625 So. 2d 968 (Fla. 2d DCA 1993); see also *State v. McNeal*, 666 So. 2d 229 (Fla. 2d DCA 1995). In other words, would it be unreasonable for an officer who observed one driving a truck at a high rate of speed and unable to maintain a straight course to pull the driver over to check the safety of the vehicle, the health of the driver or the capacity of the driver?

Upon petition for writ of certiorari, the Supreme Court, observing that the correct test to be applied under the circumstances of the case is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop, quashed the district court's decision and reinstated the circuit court's order. The Supreme Court noted that upon certiorari review, the circuit court was charged with the duty of determining whether competent substantial evidence existed to support the stop. The Court then stated:

The only record evidence from which to make this determination was the paperwork that the officer filed as a result of this traffic stop. From this limited evidence, the circuit court concluded that (1) the record did not competently or substantially support the officer's stop of [the defendant's] vehicle on the basis of the failure to maintain a single lane because the facts contained in the arrest report did not provide probable cause that this traffic infraction actually occurred; (2) the record did not competently or substantially support the officer's stop of [the defendant's] vehicle on the basis of speeding because there was no indication in the record that [the defendant] was in fact speeding; and (3) the record did not

competently or substantially support the officer's stop of [the defendant's] vehicle

to determine whether [the defendant] was ill, tired, or driving under the influence because the record did not indicate that [the defendant] was impaired. The court recognized that it could not speculate from the record facts that were not contained in it, and the documentary evidence did not provide probable cause for the stop.

Rodriguez v. State, 875 So. 2d 642 (Fla. 2d DCA 2004).

The defendant, while driving a stolen car, crashed into a motorcycle, causing the death of the motorcycle driver and serious bodily injury to the passenger. The defendant was charged with the following nine counts: (1) vehicular homicide, (2) third-degree murder, (3) DUI manslaughter, (4) leaving the scene of an accident resulting in death, (5) leaving the scene of an accident resulting in serious bodily injury, (6) DUI with serious bodily injury, (7) driving while license suspended with death resulting, (8) driving while license suspended with serious bodily injury resulting, and (9) grand theft auto. The jury found him guilty of all counts. At the sentencing hearing, the state removed the following two convictions from the scoresheet because of double jeopardy concerns: count one - vehicular homicide (because there was only one death), and count eight - driving while license suspended with serious bodily injury (because there was only one accident). Written sentences were, however, entered on all nine counts imposing the statutory maximum for each.

The district court directed the trial court, upon remand, to strike the sentences on count one (vehicular homicide) and count eight (DWLS with serious bodily injury) since the state had removed these convictions from the scoresheet because of double jeopardy concerns. Count 2, third-degree murder, was vacated based on the holding of the Florida Supreme Court that the legislature did not intend to punish the same homicide under two statutes (in this case third degree murder and DUI manslaughter). The district court ordered that both the sentence and the adjudication for third-degree murder be vacated. The adjudication was vacated to avoid scoring “unsentenced” convictions.

Cardenas v. State, 867 So. 2d 384 (Fla. 2004).

[Note: The Cardenas case was consolidated with State v. Bonine, the former involving boating under the influence, the latter driving under the influence. The following factual summary is of the Bonine case.]

The defendant was convicted of DUI manslaughter as a result of an accident in which he struck and killed a motorcyclist with his vehicle. At trial, the jury had been instructed that the defendant could be found guilty on one of two theories, to wit, that he was driving while under the influence of alcoholic beverages to the extent his faculties were impaired or that he drove with a blood alcohol level of 0.08 or higher. The jury was also instructed on the statutory presumptions of impairment under section 316.1934, Florida Statutes. This latter instruction was erroneous since the state did not comply with the applicable testing procedures. See State v. Miles, 775 So. 2d 950 (Fla. 2000).

The district court reversed, holding that the latter instruction was erroneous and was not harmless error since it constituted “legal error,” a mistake of law, rather than “insufficiency of proof,” a mistake about the weight or factual import of the evidence. The court explained that “[A] general guilty verdict must be set aside where the conviction may have rested on an unconstitutional ground or a legally inadequate theory and there is no way to determine which ground the jury relied upon. However, reversal is not warranted where the general verdict could have rested on a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient.” The district court then observed that reversals are required where the jury may have convicted the defendant on a legally improper theory.

Turning to the instant case, the district court opined that it involved a legal error rather than insufficiency of proof given the following circumstances:

Here the jury was instructed that it could *presume* [the defendant] was impaired based on his test results. This instruction was erroneous as a matter of law and not because of any deficiency in the proof at trial. It is unknown whether the jurors followed their instructions and presumed [the defendant] to be impaired or whether they determined that from the evidence. Since one of the ways to prove the offense was legally inadequate, [the defendant’s] conviction must be reversed and the cause remanded for a new trial.

The district court concluded that the error could not be harmless, because even if there were overwhelming evidence on one valid alternative ground one could not conclude which ground was relied on (the valid or invalid ground) and thus the error was per se harmful.

In the Cardenas (BUI) case, the Supreme Court was called upon to determine whether improperly instructing the jury on the presumption of impairment was fundamental error which could be raised for the first time on appeal. The certified conflict in Bonine (DUI) required the Supreme Court to determine whether an erroneous instruction on the presumption of impairment can be subjected to a harmless error analysis or is harmful per se.

In relation to the Cardenas issue, the Supreme Court held that an improper instruction (under Miles) does not constitute fundamental error when the jury is instructed on either impairment or DUBAL (unlawful blood or breath alcohol level), or both. The Court observed that the improper instruction on the presumption of impairment neither omitted nor misdefined an essential element of the crime.

On the Bonine issue, the Court reversed the district court, holding that the “general verdict” precedent relied upon by that court to hold that the erroneous instruction constitutes per se harmful error does not apply to the DUI statutory scheme since legally sufficient evidence on one of two theories supporting a general verdict does not warrant

reversal, even with proper objection at trial. Specifically, the Supreme Court noted that while a general guilty verdict must be set aside if it may have rested on an unconstitutional ground or legally inadequate theory, reversal is not required where the verdict could have rested upon a theory of liability without adequate evidentiary support if there is an alternate theory or guilt for which there is sufficient evidence. The Court explained as follows:

The distinction between legally inadequate and factually insufficient theories of guilt recognized in these cases turns on the discrete nature of each theory. The reasoning is that where the theories are independent, a reviewing court cannot determine whether a jury relied on the evidence supporting a theory on which it was erroneously instructed through a mistake in the law, rather than the evidence supporting the valid theory. This distinction does not apply in the case under review because when the jury is instructed on both DUBAL and the presumption of impairment, the alternative methods for proving DUI through blood test results rely on the same evidentiary fact – the existence of a .08 blood-alcohol level. A blood-alcohol level of .08 or higher both establishes DUBAL and assists the State in proving impairment. To either conclude that a defendant is guilty under the DUBAL alternative or apply the presumption of impairment, the jurors must first find beyond a reasonable doubt that the defendant operated a motor vehicle with a .08 blood-alcohol level. This fact independently establishes DUI via DUBAL under section 316.193(1)(b) without regard to the alternative of impairment under section 316.193(1)(a). Thus, jurors instructed on both DUBAL and the presumption of impairment are capable of determining that when the State has established a .08 percent blood-alcohol level beyond a reasonable doubt, the presumption of impairment is, as the Court stated in Robertson, a “moot concern.”

The Court, however, then observed that overwhelming evidence of impairment alone cannot render the error in instructing on the presumption of impairment harmless. The question is whether there is a reasonable possibility that the error affected the verdict. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, the error is by definition harmful.

Applying the foregoing analysis to the instant cases, the Supreme Court approved Cardenas and quashed Bonine.

Sawyer v. State, 842 So. 2d 850 (Fla. 4th DCA 2004).

The defendant was convicted of felony (fourth offense) driving under the influence. The judge allowed the presentation of fingerprint comparison testimony at the enhancement phase of the trial even though the state did not disclose the witness until the guilt phase was reaching completion.

The district court affirmed, holding that although he claimed prejudice, the defendant

neither sought a continuance of the enhancement stage nor did he argue that he was not the person reflected in the judgments of conviction at issue. The district court then affirmed the defendant's conviction of felony driving while license revoked, but withheld the issuance of a mandate pending the Florida Supreme Court's ruling on the validity of section 322.341, Florida Statutes, which deals with the offense of driving while license permanently revoked.

[Note: In Sawyer v. State, 867 So. 2d 402 (Fla. 2004), the Supreme Court quashed the decision of the district court and remanded for reconsideration in light of Florida Department of Highway Safety and Motor Vehicles v. Critchfield, 842 So. 2d 782 (Fla. 2003). Upon remand, the district court reversed the conviction and stated that if the jury was instructed on lesser offenses, the defendant may be retried on such offenses. See Sawyer v. State, 867 So. 2d 642 (Fla. 4th DCA 2004).

State v. Muldowny, 871 So. 2d 911 (Fla. 5th DCA 2004).

In two driving under the influence cases, the county court suppressed the results of intoxilyzer tests and certified the following questions to the district court:

Is a defendant entitled to inspect and copy and potentially use at trial or hearing the operator's manuals, maintenance manuals and schematics of the intoxilyzer?
Assuming the answer to the above question is yes, is the appropriate remedy exclusion of the breath test for the state's failure to provide such documentation?

The district court accepted jurisdiction and decided to also consider the suppression issue. The court then reasoned as follows:

Section 316.1932(1)(f)(4), Florida Statutes (2002), requires that when a person tested with a machine requests it, full information concerning the test is to be made available. It must necessarily follow that when a person risks the loss of driving privileges or perhaps freedom based upon the use and operation of a particular machine, full information includes operating manuals, maintenance manuals and schematics in order to determine whether the machine actually used to determine the extent of a defendant's intoxication is the same unmodified model that was approved pursuant to statutory procedures. It seems to us that one should not have privileges and freedom jeopardized by the results of a mystical machine that is immune from discovery, that inhales breath samples and that produces a report specifying a degree of intoxication.

In light of the foregoing, the district court then modified the first certified question as follows:

Is a defendant entitled to inspect and copy and potentially use at trial or hearing the operator's manuals, maintenance manuals and schematics of the intoxilyzer

used to test the defendant when the results of the test are intended for use to affect the driving privileges of or assess penalties against that defendant?

After answering the rephrased question in the affirmative, the court considered the issue of whether exclusion of the breath test results was an appropriate remedy. Citing the Richardson case, the court upheld the trial court's decision to suppress, observing that the state's failure to comply with the order to produce "frustrated the defendants' quest to determine if the specific intoxilyzer used to test them had been substantially modified by the inclusion of parts that were not on the schematic of a machine approved by FDLE." The court noted that the state's discovery violation prejudiced the defendants and prevented them from preparing defenses and thus was properly subject to suppression.

State v. Montello, 867 So. 2d 613 (Fla. 4th DCA 2004).

The district court was confronted with the following certified question (as rephrased by the district court):

Does section 316.1932, Florida Statutes (2002), require that urine testing procedures first be "approved" by the Florida Department of Law Enforcement before they may be administered to persons who are suspected of DUI?

The applicable language in section 316.1932(1)(a)1., Florida Statutes, reads as follows (emphasis supplied by district court):

Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but no limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath, and to a urine test for the purpose of detecting the presence of chemical substances as set forth in s. 877.111 or controlled substances . . .

In answering the question in the negative, the district court referenced the plain meaning of this provision in distinguishing between chemical or physical breath tests (which must be approved by FDLE) and urine tests (which are not subject to FDLE approval). The district court observed that there is explicit authority granted to FDLE in relation to breath and blood tests in section 316.1932(1)(f)1., which authority does not exist in relation to urine testing. Specific reference is also made to FDLE rule-making in relation to breath and blood testing in sections 316.1932(1)(a)2., 316.1932(1)(b)2., 316.1933(2)(b), and 316.1934(3), Florida Statutes. The court held that in the absence of a grant of statutory rule-making authority, the department was without the power to promulgate rules relating to urine testing.

In addition, the district court noted that section 316.1932(1)(a) was amended in 2003 to clarify the distinction between breath/blood tests and urine tests. The court observed that while

this amendment could not be retroactively applied to the instant case, courts do have the right and duty to consider subsequent legislation in relation to arriving at a correct interpretation of the predecessor law.

Galiana v. State, 868 So. 2d 1218 (Fla. 3d DCA 2004).

The defendant was convicted after a jury trial of two counts of DUI manslaughter, two counts of vehicular homicide, and one count each of leaving the scene involving property damage and unlawfully driving while an habitual traffic offender. The defendant's motion for a mistrial, alleging inappropriate prosecutorial comments in closing statements, was denied.

The district court held that the prosecutorial comments (references to the victims as being "two children no longer with us" who will "never spend the weekend playing with puppies" and to the defendant's driving as a "Russian roulette game") bordered on being inappropriate but were not of such a nature so as to deprive the defendant of a fair trial. The district court did, however, dismiss the vehicular homicide convictions, since a single death cannot support convictions for both DUI manslaughter and vehicular homicide.

State v. Eaton, 868 So. 2d 650 (Fla. 2d DCA 2004).

The defendant was charged with vehicular homicide, DUI manslaughter, driving under the influence with property damage and/or personal injury, and driving in violation of a restricted license. The accident in which the defendant was involved resulted in the death of the defendant's passenger and injury to the defendant. Blood was drawn from the defendant for medical purposes. At trial, the court granted the defendant's motion to suppress and excluded evidence of blood alcohol test results based on a determination that the state had willfully violated the rules of discovery by not providing the defendant with the hospital blood alcohol test results.

The district court granted the state's petition for writ of certiorari, stating as follows:

A motion to suppress hearing generally is not used in lieu of a Richardson hearing because prejudice to the aggrieved party, one of the factors the trial court must consider, is exceedingly difficult to prove on a pretrial motion such as a motion to suppress. Here, the trial court used the motion to suppress hearing to consider the Richardson factors [willfulness, substantialness, and prejudice] and determined that the discovery violation was willful. However, the order granting the motion to suppress does not indicate that the trial court found [the defendant] was prejudiced by the discovery violation. Although prejudice may have arisen had the evidence been introduced midtrial, any prejudice caused by the State's failure could have been easily remedied by simply furnishing [the defendant] with the results and continuing the trial, if necessary.

The district court concluded that the trial court had departed from the essential

requirements of law by not considering less severe sanctions than suppression, such as a continuance (which would not have prejudiced the defendant because he was out of custody, had waived speedy trial, and had already received a continuance). The district court quashed the suppression order without prejudice to the defendant to raise other issues, such as technical compliance with the statutory requirements for obtaining blood alcohol test results from the hospital.

State v. Coughlin, 871 So. 2d 935 (Fla. 5th DCA 2004)

After being involved in a traffic crash the defendant was administered field sobriety tests, resulting in a physical injury to the defendant. Before his departure with medical personnel, law enforcement obtained a blood sample from the defendant (which yielded a .271 blood alcohol reading). A month later the investigating officer issued and mailed the defendant a Florida Uniform Traffic Citation, detailing the date and nature of the violation (DUI), and indicating that he would be notified when he was required to appear in court (no date was provided). The defendant subsequently moved for discharge on speedy trial grounds. The motion was granted by the county court and the circuit court affirmed the decision.

The district court granted the state's petition for writ of certiorari, finding that the circuit court had failed to apply the correct law in affirming the county court's decision. The district court noted that the speedy trial time period begins to run when a person is taken into custody upon either being arrested or served with a notice to appear in lieu of physical arrest. Rule 3.191(d), Florida Rules of Criminal Procedure. Since the defendant was neither arrested nor issued a notice to appear when he received the citation, he was not taken into custody as required by the rule. The citation the defendant received merely indicated he was "to be notified" and placed on him no requirement that he respond in any way.

Criminal Traffic Offenses

Gensler v. State, 868 So. 2d 557 (Fla. 3d DCA 2004).

The defendant police officer was convicted of vehicular homicide as a result of colliding with a pedestrian who was standing in the right through traffic lane of the highway on which the defendant was driving.

The district court reversed and remanded for a new trial, holding that the trial court committed various evidentiary errors, to wit: 1) excluding evidence of the decedent's crack cocaine and alcohol intoxication on the night of the accident; 2) excluding testimony to the effect that in the area of the accident prostitutes commonly step into the path of oncoming vehicles (possibly relevant to the defense version of events); 3) allowing the medical examiner to testify as to the defendant's speed after the medical examiner admitted a lack of expertise on this

subject and in the absence of a predicate for the admission of such testimony; and 4) allowing admission of evidence in relation to the defendant's violation of various police department protocol, the case's notoriety, the defendant's use of her cellular telephone before the accident, and the fact that the defendant had been responding to a false alarm. In relation to evidence of the department's protocol, the district court stated that it created a false standard for the reckless driving component of vehicular homicide, since it permitted the jury to hold the defendant to a higher standard than that to which an ordinary citizen would be held.

Robinson v. City of Miami, 867 So. 2d 431 (Fla. 3d DCA 2004).

The plaintiff in a civil rights suit against the defendant city had been arrested after defendant's officer issued the plaintiff a citation for jaywalking and the plaintiff refused to sign the citation. The plaintiff suffered an adverse final judgment at the trial level.

The district court affirmed, holding that the officer, pursuant to section 318.14(3), Florida Statutes, which provides that the failure to sign and accept a citation is a misdemeanor, had the right to arrest the plaintiff. Therefore, the plaintiff did not have the right to lawfully resist his arrest without violence.

Sims v. State, 869 So. 2d 45 (Fla. 5th DCA 2004).

The defendant was driving a truck when he struck and killed the victim, then left the scene of the accident without stopping. The defendant, charged with neither vehicular homicide nor DUI manslaughter, was convicted of leaving the scene of an accident involving death. The trial judge concluded that the accident was nearly unavoidable since the victim, who had a .196 blood alcohol level, was lying on top of his bicycle while in the middle of the road. The medical examiner testified that the victim's injuries were consistent with being hit, dragged, and run over. At the defendant's sentencing hearing, the trial judge added 120 victim injury points, then downwardly departed after making the above-referenced finding that the accident was "nearly unavoidable." The defendant had argued that since the offense charged (leaving the scene) had occurred after the victim was already dead, the injuries and death were not the "direct result" of the offense.

The district court affirmed, holding that the imposition of victim injury points was within the discretion of the court. The district court noted that the applicable statutory and rule provisions allow for the assessment of victim injury points even if the injury is not an element of the crime, so long as there is physical trauma. The court further observed:

In the present case there is substantial competent evidence that the Victim was dragged after being hit by [the defendant's] vehicle. Using the reasoning set forth in [citation omitted] we conclude that there was a sufficient causal connection between the leaving of the accident scene and the death to justify the imposition of victim injury points, and that the trial judge did not abuse his discretion in doing so.

Arrests, Search and Seizure

Brown v. State, 863 So. 2d 459 (Fla. 5th DCA 2004).

The defendant driver was pulled over for failing to come to a complete stop before making a right turn at a red light. When the stopping officer saw a passenger in the vehicle moving as if to conceal something, he called for backup. When the backup arrived, the officer stopped writing the citation and frisked the passenger, who subsequently fled and was apprehended. The defendant was discovered to have an invalid tag, decal, and registration. A subsequent inventory search of the vehicle resulted in the discovery of contraband. The trial court denied the defendant's motion to suppress, which argued that he had been detained for an unreasonable amount of time for a traffic offense while the officers dealt with his passenger. The defendant was subsequently convicted of firearm and drug possession.

The district court affirmed, holding that while generally a traffic stop must last no longer than the time it takes to write the citation, the furtive movements by the passenger gave the officer reasonable grounds to frisk him for protection reasons, during which time it was reasonable to detain the defendant.

Ndow v. State, 864 So. 2d 1248 (Fla. 5th DCA 2004) .

The defendant was observed in a stopped vehicle on the off ramp of the Florida Turnpike while sitting through an entire cycle of a green light. The defendant then proceeded slowly through the next green light, subsequently drove slowly behind the officer's vehicle and, after the officer pulled off the road, passed the officer, pulled over, and traded places with a passenger. Based on this activity, the defendant was stopped. Upon approaching the vehicle, the officer smelled the odor of unburnt cannabis, arrested the defendant, and discovered cannabis. The trial court denied the defendant's motion to suppress.

The district court affirmed, reasoning as follows:

We agree that the motion to suppress was properly denied. If a police officer observes a motor vehicle operating in an unusual manner, there may be justification for a stop even when there is no violation of vehicular regulations and no citation is issued. [Citations omitted]. 'The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior.' [Citations omitted]. In determining whether such an investigatory stop was justified, courts must look to the totality of the circumstances. [Citations omitted]. Considering the totality of the circumstances

detailed above, [the officer's] suspicion that [the defendant] may be driving while impaired was reasonable and warranted the investigatory stop.

Torts/Accident Cases

Burch v. Sun State Ford, 864 So. 2d 466 (Fla. 5th DCA 2004).

The plaintiff's representative filed a wrongful death action against the owner of a vehicle involved in an accident resulting in the death of the decedent. The accident occurred at the end of a high-speed chase instituted by the driver of the defendant's vehicle, who was subsequently convicted of willful or wanton reckless driving. The trial court entered summary judgment in favor of the defendant, finding that the driver had engaged in intentional misconduct and thus relieved the defendant of vicarious liability under the dangerous instrumentality doctrine.

The district court reversed, holding that the dangerous instrumentality doctrine was not limited to the negligent operation of a vehicle and that reckless driving or other intentional misconduct by the operator does not terminate liability under the doctrine (certifying conflict with another district's opinion). The district court then excluded such liability when a vehicle is used in a weapon-like manner with the intent to inflict physical injury, since in such a situation the vehicle is being used for a purpose different than that for which it is designed. The court concluded as follows:

In sum, we hold the [dangerous instrumentality] doctrine applies even when an operator is involved in intentional misconduct, unless the operator makes weapon-like use of the vehicle with the intent to cause physical harm. However, if the weapon-like use of the vehicle is reasonably foreseeable to the owner, liability will be imputed nevertheless. Because this analysis involves the operator's state of mind, it will ordinarily be a question of fact for the jury. In this case, summary judgment was improper. [The driver's] intent in following and then chasing [the victim] is unclear. On this record, a jury could certainly conclude that [the driver] did not intend to use his vehicle to cause physical injury.

Howell v. Winkle, 866 So. 2d 192 (Fla. 1st DCA 2004).

In a civil action the defendant's car crashed into the plaintiff's car while attempting to make a left turn in front of three lanes of traffic, the last of which was the right curb lane in which the plaintiff was traveling. At the close of the defendant's case the plaintiff moved for and was granted a directed verdict in her favor as to comparative negligence. The court also rejected the defendant's request for a special jury instruction on the requirement of decreasing speed where there is a special hazard. The jury returned a verdict finding that there was no negligence on the part of the defendant which was a legal cause of the plaintiff's damage. The trial court

then entered an order directing a verdict on the defendant's liability (reasoning that she was the sole cause of the accident) and ordered a new trial on damages, or, in the alternative, ruled that

the plaintiff was entitled to a new trial on both liability and damages because the verdict was contrary to the manifest weight of the evidence.

The district court reversed the directed verdict and remanded for a new trial, stating that the plaintiff's own evidence was sufficient to support an inference of comparative fault, to wit, that the plaintiff was into the middle lane when the defendant stopped and looked for oncoming traffic, and only subsequently moved into the right curb lane. This could have raised an issue of whether the defendant exercised reasonable care prior to the accident, a factor in a determination of comparative fault.

While observing that the special hazard jury instruction issue was unnecessary to address, the district court decided to confront it to provide guidance to the trial court on remand. In determining that the trial court had not abused its discretion in denying the request, the district court stated:

. . . based upon the record before us, we believe that the trial court correctly found that the facts here did not support the instruction requested. "Special hazards" are generally limited to those situations in which weather, roadway or exceptional traffic conditions require a driver to decrease her driving speed . . . The instances where traffic conditions constitute a special hazard are generally limited to exceptional traffic conditions associated with events that create unusually crowded traffic conditions, such as parades, festivals, or sports events . . . Normal traffic conditions, encountered by drivers everyday, do not constitute a special hazard . . . Here, there is no evidence of the existence of weather or roadway conditions which might constitute a special hazard. Further, the record reflects that the traffic conditions around the mall were not unusually crowded. Thus, there was no record basis for the requested special hazard instruction.