

# FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

January – March, 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

Leveritt v. State, 896 So. 2d 704 (Fla. 2005).

The Supreme Court was confronted with the following question of great public importance:

In a DUI [Driving Under the Influence] manslaughter trial, is it fundamental error to give a jury instruction that is erroneous based upon the presumption of impairment declared invalid under Miles v. State [State v. Miles], 775 So. 2d 950 (Fla. 2000), when the opinion in Miles was issued during pendency of the appeal in the instant case, and when Miles changed the law applicable to the jury instruction presumptions of impairment, and when the issue of impairment was disputed at trial and is an essential element of the crime.

The Court, observing that it was unable to ascertain from the district court's opinion whether the giving of the presumption of impairment instruction was fundamental error, answered the certified question in the negative, vacated the decision below, and remanded for reconsideration in light of Cardenas v. State, 867 So. 2d 384 (Fla. 2004). Cardenas held that an improper instruction on the statutory presumption of impairment given contrary to the holding in Miles was not fundamental error if the state charges DUBAL (driving with an unlawful blood alcohol level) and the jury is correctly instructed thereon, or if the jury is correctly instructed on actual impairment.

Department of Highway Safety and Motor Vehicles v. Gaskins, 891 So. 2d 643 (Fla. 2d DCA 2005).

The defendant was convicted of DUI manslaughter in 1991, after having been previously convicted of driving under the influence in 1982 and 1987, and received a permanent license revocation. In 1996, he petitioned the department for and received a restricted license. In 2002 he filed a complaint in circuit court seeking a declaratory judgment that he is able to seek full reinstatement of his driving privilege and that the department must consider him for reinstatement. The court granted summary judgment in favor of the defendant.

The district court reversed, holding that the current version of the reinstatement provision, section 322.271(f), Florida Statutes, prohibits reinstating the license of any person convicted of DUI manslaughter if there are any previous DUI convictions, whether such reinstatement is restricted or unqualified. The district court then observed that the statute in effect at the time of the application for reinstatement and the time of the department's decision were controlling, rather than the time of the license revocation. The court concluded:

Thus, if [the defendant] were to file a petition for reinstatement, the Department would be precluded from considering a reinstatement based on section 322.271(4), Florida Statutes (2004), because [the defendant] has a DUI manslaughter conviction and two DUI convictions. The fact that he applied for and was granted a business purpose only license under the 1995 version of the statute does not control his current request to seek full reinstatement of his driving privilege.

Percival v. State, 891 So. 2d 629 (Fla. 5th DCA 2005).

The defendant entered into a plea agreement with the state in relation to the second degree felony of DUI manslaughter. The agreement was essentially to a bottom of the guidelines incarcerative term, with the defendant reserving the right to seek a downward departure. During the sentencing hearing, the trial judge inquired into the prior driving record of the defendant and instructed the state to provide the court with any information on prior alcohol related driving incidents. The defendant objected and the trial court denied the motion, observing that, in order to consider a downward departure based on the factors that the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant had shown remorse, the court needed to review the defendant's prior record. The defendant then received the agreed upon incarcerative term with no downward departure.

The district court affirmed, holding that the trial court had acted properly by ascertaining facts which could impact the sentencing decision. The information sought by the trial judge was clearly related to the statutory issue of whether the underlying offense was an isolated incident. The defendant's post-sentencing motion seeking to reopen the sentencing hearing or to withdraw his plea was thus correctly denied.

Edge v. State, 893 So. 2d 610 (Fla. 4th DCA 2005).

After the defendant was charged with driving under the influence, he moved to suppress evidence on the ground that the police stopped him without reasonable suspicion. The motion was denied and the defendant pled guilty, reserving his right to appeal the order denying the motion to suppress. The defendant's attorney failed to provide a transcript upon appeal and the appeal was denied, as was a subsequent petition to the district court.

A second series of appeals based on the theory of ineffective assistance of counsel found its way to the district court. The court held that while there was no question that counsel's performance was deficient because he failed to include a transcript of the plea hearing, it did not constitute the type of ineffective assistance of counsel necessary to overturn the conviction. Addressing the facts of the case, the district court observed that the defendant's argument was that the stop was the result of information from an anonymous tipster, while the state had urged that the tipster was of the more reliable "citizen informant" variety. The district court concluded that the stop was based upon both the citizen's tip and the officer's independent observation of the defendant's driving. Since the circuit court could have concluded the defendant's motion was without sufficient merit such as to justify reversal, the district court held that any deficiency of appellate counsel did not undermine the ultimate result.

Hill v. Department of Highway Safety and Motor Vehicles, 891 So. 2d 1202 (Fla. 4th DCA 2005).

The defendant petitioned the department for reinstatement of his driver's license, which was under permanent revocation as a result of a DUI manslaughter conviction. The department denied the reinstatement and the circuit court denied his petition for review.

The district court also denied the defendant's petition, observing that his 1987 DUI conviction made him ineligible for reinstatement under section 322.271(4), as it existed when he made application for reinstatement in 2004. The law in effect at that time precluded reinstatement for persons with a DUI manslaughter conviction if they had a previous DUI conviction. The district court distinguished a case cited by the defendant, observing that the law in effect at the time of that decision did not specifically preclude the reinstatement of the license of a person with prior DUI convictions.

Department of Highway Safety and Motor Vehicles v. Patrick, 895 So. 2d 1131 (Fla. 5th DCA 2005).

As a result of various collisions and violations of traffic laws, the defendant was arrested for driving under the influence. After consenting to a breath test, she recorded blood alcohol results of .233 and .235. At a formal hearing, the hearing officer concluded that the driving privilege had been properly suspended for an unlawful blood alcohol level. Upon petition for writ of certiorari, the circuit court accepted the hearing officer's factual findings, but rejected the central legal conclusion. The circuit court found that the plain language of subsections 322.2615(7)(a)1.-3., Florida Statutes, contained no provision for the formal review of suspensions based on breath-alcohol (as opposed to blood-alcohol) level and thus the hearing

officer's conclusion violated due process. The case was remanded to the hearing officer to consider evidence of the defendant's blood-alcohol level.

The district court quashed the order of the circuit, holding that while the applicable subsection of the administrative suspension law does not reference breath tests, it would read the missing language into the statute. After reviewing various related provisions in section 322.2615, the court concluded as follows:

Moreover, although strict construction of penal statutes is generally proper, no statute should be construed so as to defeat the intention of the legislature. [Citation omitted]. Given the obvious inadvertent failure to include suspensions based on breath-alcohol results in the formal review proceedings, we have little hesitancy in reading the statute to include the omitted language, as we believe the legislature clearly intended. Thus, we read paragraph 322.2615(7)(a) to include formal review for suspensions based on breath-alcohol, as well as blood-alcohol level violations of section 316.193. As we have concluded that the trial court did not apply the correct law, certiorari relief is appropriate.

Shiver v. State, 900 So. 2d 615 (Fla. 1st DCA 2005).

After failing four sobriety tests and declining to take a fifth because of health problems, the defendant was administered two breath tests, which determined his blood alcohol level to be .151 and .132. At trial, the state introduced a "breath test affidavit" prepared by the arresting trooper, which included hearsay information attesting to the fact that the statutorily-required maintenance had been performed, as is referenced in section 316.1934(5)(e), Florida Statutes. Despite the fact that the officer performing the required maintenance did not testify, the defendant was convicted of felony driving under the influence.

The district court reversed, holding that the state had not shown that the instrument had the required maintenance and thus the test results were inadmissible. Such testimony had to be provided at trial to allow the defendant his constitutional right to confrontation, and thus could not have been provided as hearsay in the affidavit of another officer. The district court then determined that admission of the affidavit was not harmless because 1) the state made the accuracy of the instrument and test results the feature of its closing argument; 2) the state had argued that, due to breath results, the issue of impairment was irrelevant; and 3) the jury had been instructed that proof of a .08 blood alcohol level was alone sufficient to prove driving under the influence. The district court also reversed the defendant's adjudication on the first degree misdemeanor of driving while license suspended, holding that the defendant had only been charged with and convicted of the second degree misdemeanor of driving while licensed suspended.

Dickenson v. Aultman, 905 So. 2d 169 (Fla. 3d DCA 2005).

The defendant was convicted of a second driving under the influence offense. Despite a statutory requirement that the defendant's sentence include the installation of an ignition interlock device, the trial court did not order such installation. When the defendant subsequently

sought to have his drivers license reinstated, the Department of Highway Safety and Motor Vehicles informed the defendant that he was required to install the device. In response to a petition filed by the defendant and after a hearing, the trial court ordered the department to remove the ignition interlock device designation from the defendant's record and immediately reinstate his drivers license.

The district court affirmed. In response to the department's argument that it was using section 322.16(1)(a), Florida Statutes, as authority for its action, the court observed as follows:

The Department asserts that pursuant to this statute, it is granted the authority to 'impose restrictions . . . to assure the safe operation of a motor vehicle by licensee.' We disagree with the Department that this statute, which does not even mention an ignition interlock device, is broad enough to grant the Department authority to require the installation of the device. The 'restrictions' contemplated by this section are 'special mechanical control devices' that are necessary for the 'safe operation of a motor vehicle.' An ignition interlock device does not assist the vehicle's operator to safely operate the vehicle. Rather, the purpose of this device is to monitor the operator's blood alcohol level and to prohibit him/her from operating the vehicle if his/her blood alcohol level is in excess of 0.05 percent.

The district court went on to state that allowing the department to require the use of the device would improperly allow the department to impose a criminal penalty that the legislature had not authorized it to do, in violation of the specific constitutional prohibition in Article I, section 18. The court then disposed of the department's procedural argument that the defendant had inappropriately failed to seek relief through a petition for writ of certiorari, as required by section 322.31, Florida Statutes. The district court noted that this argument had not been raised at the trial level and thus was unavailable on appeal.

Mooney v. State, 898 So. 2d 1030 (Fla. 1st DCA 2005).

The defendant was convicted of felony fourth or subsequent driving under the influence. At trial, the court admitted evidence of the defendant's three previous DUI convictions after finding that the defendant had "opened the door" to their admission.

The district court reversed and remanded, holding that the defendant had not "opened the door" to otherwise inadmissible collateral evidence (presumptively harmful and highly inflammatory) since she had offered neither a trait of her good character nor misleading or inaccurate testimony. Since the introduction of the defendant's prior convictions did not contradict or correct the defendant's testimony, the trial court abused its discretion in admitting it.

Andres v. State, 898 So. 2d 256 (Fla. 4th DCA 2005).

The defendant was convicted of fourth offense felony driving under the influence. Within the context of a rule 3.850 post-conviction motion, the defendant alleged under oath that

1) two of the prior misdemeanor convictions used to enhance the felony charge were punishable by more than six months of imprisonment, 2) he was indigent at the relevant times, 3) he was not appointed counsel, and 4) he did not waive the appointment of counsel. The trial court summarily denied the motion.

The district court reversed the trial court's order and remanded for attachment of portions of the record refuting the defendant's claim or, in the alternative, an evidentiary hearing. The court observed that the defendant had met his initial burden under State v. Beach, 592 So. 2d 237 (Fla. 1992), and has successfully shifted the burden to the state to demonstrate that he was not entitled to counsel, that counsel was provided, or that counsel was waived.

Ehrlick v. State, 898 So. 2d 237 (Fla. 4th DCA 2005).

The defendant was involved in a traffic accident on April 13, 1998, in which both he and an occupant of the other vehicle sustained serious bodily injury. On September 29, 1998, the state charged the defendant with driving under the influence, reckless driving, and DUI with serious bodily injury, and a capias was issued. On February 8, 2003, the defendant was served. The trial court denied the defendant's motion to dismiss the charges, which argued that the applicable statute of limitations (three years - felony) had expired. The trial court relied on an affidavit (later recanted) from the passenger in the defendant's vehicle to the effect that the defendant had left the country immediately after he was released from the hospital, together with the fact that the defendant's drivers license had expired in 2001.

The district court reversed and remanded for dismissal of the charges, reasoning as follows:

The problem in this case lies with the State's total reliance on the passenger's affidavit. Even if the attestations had not been recanted, five years elapsed before the State made any effort to serve the defendant. The defendant was not restricted from leaving the country. The fact that he may have done so for a short period of time does not excuse the State from exercising diligence to effect service of the capias within the limitations period. There simply was NO evidence the defendant had been continuously out of the country since 1998. In fact, there was proof to the contrary that the defendant resided in Broward County for four of the five years. While the trial court discounted the defendant's witnesses, a finding of fact we will not disturb, the State simply failed to prove it executed the capias without unreasonable delay.

Department of Highway Safety and Motor Vehicles v. Marks, 898 So. 2d 1063 (Fla. 5th DCA 2005).

At an administrative hearing on a driving under the influence arrest, an FDLE employee failed to appear pursuant to a subpoena duces tecum from the defendant. The subpoena sought evidence to establish that the breathalyzer machine used on the defendant was not approved by FDLE. The administrative hearing officer subsequently suspended the defendant's license.

Upon petition for writ of certiorari, the circuit court quashed the order suspending the defendant's license.

The defendant then became the plaintiff in a federal civil rights action (42 U.S.C. section 1983) and sought to depose the hearing officer. The trial court granted the deposition to allow the defendant (plaintiff) to obtain an explanation of the hearing officer's action in denying the motion to set aside the suspension and the extent of the hearing officer's legal training and training on Department of Highway Safety and Motor Vehicles rules and regulations, including its policies and procedures used in suspending drivers licenses.

The district court quashed the order granting the deposition, rejecting the trial court's conclusion that a deposition was necessary because there was an inadequate record of the administrative hearing. The district court observed that, since the trial court had already quashed the suspension based on its review of the record, there could be no demonstrable concern that an inadequate record existed in relation to the hearing. In light of this conclusion, the district court held that it was unnecessary to reach the issue of whether the deposition was barred by "absolute immunity," rather than "quasi-judicial immunity."

## **Criminal Traffic Offenses**

Anderson v. State, 892 So. 2d 1202 (Fla. 4th DCA 2005).

After observing the defendant, who was the subject of an active arrest warrant, two officers activated a blue light in their unmarked vehicle and began pursuing the defendant. The defendant sped away and, while eluding the officers, struck and injured a person and continued to flee. The defendant was charged with leaving the scene of an accident with personal injury and fleeing or eluding. At trial, the court admitted evidence that the defendant had committed an uncharged crime, driving without a drivers license. The defendant was convicted of both offenses charged.

The district court affirmed, holding that the lack of a valid drivers license was properly admitted because it refuted the defendant's theory that his motive for fleeing was his fear of those following him.

State v. Boatman, 30 Fla. L. Weekly D313 (Fla. 2d DCA February 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.

Innis v. State, 893 So. 2d 696 (Fla. 5th DCA 2005).

The defendant, as a result of fleeing from the scene of a robbery, was charged with robbery with a deadly weapon, possession of heroin, and two counts of fleeing to elude law enforcement officers. The defendant argued that his two convictions for fleeing, both charged as third degree felonies under section 316.1935(2), Florida Statutes, violated his constitutional right against double jeopardy.

The district court reversed, holding that while trial testimony revealed that multiple police vehicles from multiple agencies were involved in the pursuit, the same two officers riding in the same vehicle were referenced in the two counts of fleeing. The court concluded that the applicable statute did not evince a legislative intent that separate charges may be levied merely because more than one officer occupies a single chasing “authorized vehicle.” The court also rejected the state’s contention that the defendant actually committed two distinct offenses, to wit, the third degree felony, section 316.1935(2), fleeing authorized vehicle with sirens and lights activated, and the second degree felony, section 316.1935(3)(a), containing the additional element of driving at a high speed. The district court observed that the defendant was actually convicted of two third degree felonies (not a second and a third), and, in any case, since every element of the third degree felony is included in the second degree felony, conviction of both could not be based on one episode of fleeing from the same officers.

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 chapter 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.

Ivory v. State, 898 So. 2d 184 (Fla. 5th DCA 2005).

The defendant was stopped after an officer observed that his vehicle had a cracked windshield. After examining the windshield the officer determined that it was unsafe, that is, it had a substantial, rather than a hairline, crack. Upon being informed that the defendant did not have a drivers license, the officer wrote a citation for driving with a suspended license, which he later amended to driving while license suspended or revoked upon learning that the defendant was a habitual traffic offender. At trial, the court found that the deputy had reasonable suspicion for the stop and the defendant was convicted.

The district court affirmed, holding that there was record support for the trial court’s factual finding after it heard the testimony of witnesses and reviewed photographs of the windshield. The district court noted that there was a statutory requirement that a vehicle must have a windshield (section 316.2952, Florida Statutes), and a prohibition against driving a vehicle in an unsafe condition because of faulty or defective equipment if such condition endangers the driver or other members of the public (section 316.610, Florida Statutes). The latter authorizes an officer with reasonable cause to believe a vehicle is unsafe to require the driver to subject it to an inspection.

Matos v. State, 899 So. 2d 403 (Fla. 4th DCA 2005).

The defendant was charged with two counts of manslaughter as a result of crashing into a vehicle containing two persons backing out of a driveway onto a road with a 30 miles per hour speed limit. The central question in the case was the defendant’s speed, estimated by the defense’s expert at 56.91 miles per hour and the state’s expert as a minimum of 80-98 miles per hour. The trial court, after a Frye hearing, allowed introduction of the “black box” computer which operated the defendant’s airbag and recorded speeds of 114 miles per hour and 103 miles per hour seconds before the crash. The defendant was convicted.

The district court affirmed, limiting its discussion to two “black box” issues, to wit, the Frye issue and the applicability of section 316.1905(1), Florida Statutes. The court affirmed on both issues. In relation to Frye, the court observed that it was considering the issue de novo and applying the scientific acceptance test as of the time of the appeal, rather than the time of the trial.

On the issue of scientific acceptance the court observed as follows (SDM refers to the Sensing & Diagnostic Module, also known as the “black box”):

The process of recording and downloading SDM data is not a novel technique or

method. In any event, the state demonstrated that when used as a tool of automotive accident reconstruction, the SDM data is generally accepted in the relevant scientific field, warranting its introduction.

In relation to the statutory challenge, the district court observed that the requirement in section 316.1905(1), mandating that devices used to determine the speed of a motor vehicle must be tested and approved by the appropriate state agency, was never intended to apply to a device internal to a vehicle and installed by a manufacturer. The court noted that the SDM had recorded the defendant's speed at the time of the accident without any intervention by a law enforcement officer.

## **Arrests, Search and Seizure**

State v. Gilbert, 894 So. 2d 1055 (Fla. 1st DCA 2005).

The defendant was the driver of a vehicle stopped for an inoperable tag light. One of the officers approached the passenger to write a citation for not wearing a safety belt, but soon discovered the passenger had outstanding warrants in the form of writs of attachment for failure to pay child support, resulting in the subsequent arrest of the passenger. Meanwhile, the other officer approached the defendant and took his drivers license in order to write a citation for the inoperable tag light. The officer asked the defendant if there was anything illegal in the car, to which the defendant replied he had a gun under the seat. A search of the vehicle ensued, resulting in the charge of possession of a concealed weapon against the defendant. The trial court concluded that the search was illegal, finding that the arrest of the passenger on a civil writ did not give the officers a reasonable suspicion to search the car and that the defendant's admission had been made during a custodial interrogation prior to being advised of his rights.

The district court reversed, reasoning as follows:

A person who is taken into custody on a civil writ of attachment is deprived of his physical freedom of movement in exactly the same way as a suspect taken into custody on a criminal warrant. From the officer's point of view, the procedure for serving a writ of attachment is no different from any other kind of arrest, and, from the arrestee's point of view, the consequences are also the same. The arrestee is deprived of his liberty, and, just as in a criminal case, the contempt charge leading to the issuance of a writ could result in a continued deprivation of liberty. [Citation omitted]. It follows that the justification for searching a vehicle incident to an arrest for a criminal offense applies with the same force to an arrest on a civil writ.

Hilton v. State, 29 Fla. L. Weekly D1475 (Fla. 2d DCA June 18, 2004).

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

convicted of possession of marijuana.

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

Upon rehearing en banc, the district court, on February 16, 2005, at 901 So. 2d 155, reversed its original opinion and affirmed the trial court. The court reasoned:

We conclude that the officers lawfully stopped [the defendant's] car based on the cracked windshield, because the equipment violation was a noncriminal traffic infraction. Section 316.2952, Florida Statutes (2001), provides that a windshield is required on every motor vehicle and that a violation of this statute is a noncriminal traffic infraction. Section 316.610(1) expressly give a police officer the authority to require the driver of a vehicle to stop and submit the vehicle to an inspection if the officer has reasonable cause to believe that the vehicle is "unsafe or not equipped as required by law or that its equipment is not in proper adjustment or repair."

The district court went on to add that an officer may stop a car to perform a safety inspection of a broken windshield if it is visibly cracked regardless of whether the crack creates any immediate hazard. The court then certified the following question to the Supreme Court as a matter of great public importance:

May a police officer constitutionally conduct a safety inspection stop under Section 316.610 after the officer has observed a cracked windshield, but before the officer has determined the full extent of the crack?

Tubbs v. State, 897 So. 2d 520 (Fla. 3d DCA 2005).

An officer in an unmarked vehicle was following a vehicle owned by the defendant (driven by a friend with the defendant as a passenger), who was known to the officer to have a suspended drivers license and be involved in narcotics activity. After stopping for a red light, the driver pointed to a marked police vehicle on the side of the road, whereupon the driver and passenger switched seats (during which the driver seemed to attempt to hide from the policeman in the marked car). The officer following the vehicle requested a stop of the vehicle, which was effectuated by the marked police car. Cocaine was subsequently discovered, resulting in the conviction of the defendant on a trafficking charge. The defendant had entered a nolo

contendere plea, reserving the right to challenge the validity of the stop.

The district court affirmed, holding as follows:

We hold the stop was permissible because the furtive movements of the driver and passenger, the apparent concern with the presence of a police officer, and the ensuing switch in drivers gave rise to an objectively founded suspicion that [the driver] had been knowingly and illegally driving the car with, for example, no or a suspended or revoked license. Because the facts known to the detective thus objectively provided a reasonable basis for suspecting wrongdoing, the stop was constitutionally permissible as a matter of law.

Poliar v. State, 898 So. 2d 1013 (Fla. 4th DCA 2005).

The defendant, upon being observed by an officer, slowed his speed to 30 miles per hour, below the 40 mile per hour minimum speed of the Florida Turnpike. The officer subsequently stopped him for excessively tinted windows. The defendant exhibited extreme nervousness, which, coupled with other factors, resulted in the defendant's detention until the arrival of a drug dog, which alerted on the defendant's vehicle. A subsequent search resulted in the discovery of contraband drugs and the defendant's plea to drug trafficking, reserving the right to challenge the search and seizure.

The district court affirmed, holding as follows:

[The defendant's] excessive nervousness, his inability to answer simple questions about his birth date and home address, his deceit in failing to disclose his previous drug arrest, his travel from Miami, and questions about his immigration status justified [the defendant's] detention for further questioning and investigation for a period of time beyond that necessary to write a citation and do a computer check of his background. This was not a case where the driver should have been "free to go" after the citation issued. See State v. Brown, 691 So. 2d 637, 638 (Fla. 5th DCA 1997) (noting that while the general rule is that a detention must end at the time a traffic citation is completed, this presupposes that once the citation is issued, the traffic stop is completed and the driver is free to go).

Reid v. State, 898 So. 2d 248 (Fla. 4th DCA 2005).

The defendant was stopped for obstructing traffic, to wit, parking his vehicle in a roadway near an intersection and causing another vehicle to drive around his vehicle. After the defendant was ordered out of his vehicle, the officer discovered cocaine in plain view, resulting in the eventual conviction of the defendant for the possession of cocaine.

The district court affirmed, holding that the officer had probable cause to believe that a traffic infraction had occurred and thus the stop was permissible, that it was appropriate to order the defendant out of his vehicle, and that the defendant was not detained beyond the time necessary to issue the citation. In relation to the obstructing traffic charge, the court

distinguished a case in which an obstructing charge was held to be invalid (therein the vehicle was only briefly stopped in the roadway and the officer approaching the vehicle did not have to stop or drive around the vehicle), noting that in the instant case there was an intent to impede or hinder the free flow of traffic.

## **Torts/Accident Cases**

Cleaveland v. Florida Power and Light, 895 So. 2d 1143 (Fla. 4th DCA 2005).

The plaintiff motorcyclist was the fifth vehicle in a five-vehicle chain collision. The trial court entered a summary judgment in favor of the defendants (which owned three of the other four vehicles in the crash), relying on the “rear end collision” rule. This rule recognizes a presumption that the rear driver is the sole proximate cause of injuries and damage when the collision is predicated on a sudden stop, with nothing more.

The district court reversed for a trial on the merits, holding that there was evidence of lead driver negligence (sudden and unexpected stop, failure to maintain control, speed, following distance, etc.), and thus the rule does not apply.

Sims v. Cristinzio, 898 So. 2d 1004 (Fla. 2d DCA 2005).

In a civil action one co-defendant was driving a pick-up truck with an attached trailer when he pulled onto the shoulder of the road, possibly without signaling or braking and possibly with part of his vehicle remaining on the highway. A vehicle following the pick-up truck stopped suddenly to avoid the portion of the trailer which may have remained in the road. A second co-defendant who was following the stopping vehicle, veered to the left to avoid a collision and crashed into the plaintiff’s oncoming vehicle. A fourth vehicle collided with the stopped vehicle and subsequently observed that he thought there was enough room for the second vehicle to have continued without stopping. The trial court found that the second co-defendant’s actions (in veering into oncoming traffic) were the sole cause of the accident.

The district court reversed, holding that even if the second co-defendant were presumed to be negligent, there was evidence which could be found to be negligence on the part of both the first co-defendant (pick-up driver) in allowing his vehicle to protrude into the road, and the second vehicle in not passing the pick-up without stopping.

## **Vehicle Forfeiture**

Allen v. City of St. Petersburg, 898 So. 2d 223 (Fla. 2d DCA 2005).

The defendant was stopped for an improper tag and, after a computer check revealed two

prior convictions for driving while license suspended, arrested for the felony offense of driving with a suspended license. The officer then seized the defendant's vehicle based on the vehicle's use during the commission of a felony, as authorized by the Florida Contraband Forfeiture Act. Subsequently, the city filed a complaint of forfeiture alleging the vehicle was used in the commission of a felony. After the defendant filed a motion for summary judgment alleging that one of the two predicate convictions did not qualify and thus she could not be charged with a felony, the city dismissed the forfeiture complaint. The trial court denied the defendant's motion for attorney fees.

The district court reversed, holding that the defendant was entitled to an award of attorney fees. After observing that section 57.105(1), Florida Statutes, allows the court to award attorney fees when the losing party knew or should have known that a claim is not supported by the material facts necessary to establish the claim, the district court stated:

Here, the City failed to verify that the predicate misdemeanor convictions existed to support the felony offense. If the City had simply reviewed Pinellas County traffic records before filing its complaint, it would have known that its claim against [the defendant] was unsupported by the material facts. Accordingly, because the City should have known that the material facts did not support its forfeiture action, we hold that [the defendant] is entitled to an award of attorney's fees under section 57.105(1).