FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

January – March, 2006

[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

Suber v. State, 921 So. 2d 13 (Fla. 5th DCA 2006).

The defendant was convicted, after a jury trial, of manslaughter, vehicular homicide, DUI manslaughter, fleeing or attempting to elude an officer at high speed or with wanton disregard, possession of cocaine with the intent to sell or deliver, and throwing a deadly missile at a building. A single homicide that formed the basis of the case gave rise to three separate charges and three separate convictions. Although the defendant was convicted of manslaughter and vehicular homicide, the court neither adjudged him guilty of those offenses nor sentenced him for them. Instead the court adjudicated the defendant guilty of DUI manslaughter and imposed a sentence for the homicide only with respect to that offense.

The state conceded and the district court agreed that the convictions for manslaughter and vehicular manslaughter should be vacated. In response, the district court affirmed the judgments and sentences in all respects but vacated the convictions for manslaughter and vehicular homicide.

Goldman v. State, 918 So. 2d 442 (Fla. 4th DCA 2006).

As a result of a crash in which she killed one person and seriously injured another, the defendant was convicted of unlawful blood alcohol/manslaughter, DUI with serious bodily injury, and leaving the scene of an accident. Upon appeal, the defendant argued that the trial

court erred in convicting and sentencing her on both DUI manslaughter/leaving the scene of an accident with death and leaving the scene of an accident with injury.

The district court reversed the conviction for leaving the scene of the accident, holding that a conviction on both that count and DUI manslaughter/leaving the scene violates the prohibition against double jeopardy. The district court reasoned that where one person was injured and one person was killed, there could not be two convictions since the intent of the relevant statute was to prohibit a driver from leaving the scene of an accident that involves either injury or death. Since there was but one scene of the accident and one failure to stop, there could only be one offense.

State v. Issel, 919 So. 2d 719 (Fla. 2d DCA 2006).

The defendant entered an open plea to driving under the influence, a third or subsequent violation (it was his fourth DUI conviction). His Criminal Punishment Code scoresheet reflected a lowest permissible prison sentence of 19.8 months. At sentencing, the state argued that there was no legal reason for imposing a downward departure and specifically stated that a suspended sentence was not a legal sentence. The defendant argued that a suspended sentence should be considered a downward departure. The trial court sentenced the defendant to 365 days in county jail, suspended upon completion of a substance abuse program, and thirty months imprisonment suspended in favor of thirty months probation. The court cited that the reason for departing downward was "extreme duress."

The district court reversed and remanded, holding that, although acting under extreme duress is a mitigating factor enumerated in section 921.0026(2), Florida Statutes, duress usually involves some sort of coercion or threat. Since the record did not in any way support the contention that the defendant was driving while under the influence as a result of coercion or threat, the downward departure sentence was inappropriate, that is, not supported by competent substantial evidence.

Leveritt v. State, 924 So. 2d 42 (Fla. 1st DCA 2006).

The defendant was charged with DUI manslaughter and vehicular homicide as a result of a one-car accident in which his passenger was killed. A blood test drawn at a hospital tested to a .21 percent blood alcohol level. At trial, the court instructed the jury on the statutory presumptions of impairment. The jury found the defendant guilty of both charges.

On appeal, the defendant challenged the validity of the blood test and the jury instructions relating to presumptions of impairment. The district court rejected all challenges to the blood test (tampering and medical record issues). The court, however, found error in relation to the jury instruction issue, holding that since the regulation implementing the implied consent statutes, rule 11D-8012, Florida Administrative Code, had been held invalid, the trial court had used an erroneous jury instruction regarding the statutory presumptions of impairment. In addition, there was no determination made by the trial court as to whether the three-prong common law predicate for admissibility of test results (reliable test/performed properly/expert

testimony) had been satisfied.

The district court, however, observed that such error (given the lack of an objection) must be of a fundamental nature to provide the defendant any relief. The court then held the error was not fundamental since it had not deprived the defendant of a fair trial. Specifically, the district court justified this conclusion as follows:

> The instruction in the instant case neither omitted from the definition of an offense one of the essential elements, nor misdefined one of the essential elements of an offense. The challenged instruction merely advised the jury of an evidentiary presumption or permissible inference that they were free to accept or reject.

The district court then certified the following question of great public importance to the Supreme Court of Florida:

> In a DUI 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, 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 Supreme 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.

Upon remand, the district court observed that the state had not satisfied the three-prong common law test established in State v. Bender, 382 So. 2d 697 (Fla. 1980), specifically that 1) the chemical test was reliable, 2) the test was performed by a qualified operator with proper equipment, and 3) expert testimony was presented concerning the meaning of the test. Since the blood evidence could not have been introduced under Miles, the district court held that the jury instruction on the presumption of impairment was fundamental error. The court found unpersuasive the state's argument that there was sufficient evidence of actual impairment introduced at trial, observing that the issue of impairment was "hotly contested" and that it could not be said that the verdict was not the result of the improper consideration of the blood alcohol evidence and the jury instruction on the presumption of impairment.

Department of Highway Safety and Motor Vehicles v. Gonzalez-Zaila, 30 Fla. L. Weekly D1914 (Fla. 3d DCA Aug. 10, 2005).

In 1997, after the defendant's fifth conviction for driving under the influence, his license was permanently revoked. In 2003, he applied to the department for a drivers license reinstatement and received a hardship license for employment purposes. In 2004, the department ordered the defendant to install an ignition interlock device or risk cancellation of his license. Upon petition for writ of certiorari, the circuit court granted the defendant relief, quashing the department's order requiring installation of the ignition interlock device in the absence of a court order.

The district court denied the department's petition for writ of certiorari, rejecting the department's claim of statutory authority to require use of the device. In addition, the district court noted as follows:

> Second, even if the court required the installation of the ignition interlock device, the statute provides that the DMV could only implement this requirement when reviewing the licensee's application for reinstatement. § 322.271(2)(d), Fla. Stat. (2004). The DMV cannot reinstate [defendant's] license without requiring the interlock device and then months later require him to install the device under the threat of canceling his hardship license. Such a requirement, first imposed via a court order upon initial revocation of driving privileges, would have to be redetermined by the DMV upon a person's application for reinstatement of those privileges. Once the restricted license is reinstated, the DMV cannot later impose additional requirements or restrictions.

The district court concluded by advising the department that the appropriate procedure would have been for the state to seek judicial modification of the sentence.

[Note: For the record, it should be noted that the 2005 Legislature, in chapter 2005-138, Laws of Florida, created section 322.2715, Florida Statutes, granting the department the following statutory authority:

> (1) Before issuing a permanent or restricted driver's license under this chapter, the department shall require the placement of a department-approved ignition interlock device for any person convicted of committing an offense of driving under the influence as specified in subsection (3), except that consideration may be given to those individuals having a documented medical condition that would prohibit the device from functioning normally. An interlock device shall be placed on all vehicles that are individually or jointly leased or owned and routinely operated by the convicted person.]

[Note: On February 22, 2006, the district court, at 920 So. 2d 1220 (Fla. 3d DCA 2006), withdrew its previous opinion and substituted a new opinion. The court deleted language stating that the department could only have required installation of the ignition interlock device upon a court order, observing that section 322.271(2)(d), Florida Statutes, clearly allows the department to order the device. However, the district court went on to hold that the department had not followed the statutory requirements, reasoning as follows:

> According to the statute, then, the [department] cannot reinstate [the defendant's] license without a requirement for an interlock device, then later require him to install the device under the threat of canceling his hardship license. Such a requirement should be determined at the hearing and stated by the [department] upon grant of a person's application for reinstatement of those privileges. Once the restricted license is reinstated, the [department] cannot later impose additional requirements or restrictions that were not set forth at the hearing.]

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.

[Upon Motion for Rehearing, the district court sitting en banc issued an opinion on March 8, 2006, at 922 So. 2d 1046. While reaching the same conclusion, that is, quashing the decision below, the court rewrote various portions of the original opinion and concluded as follows:

> In sum, we conclude that those portions of the breath test affidavit pertaining to the breath test technician's procedures and observations in administering the breath test constitute testimonial evidence. Their admission at petitioner's criminal DUI trial violated his right of confrontation under *Crawford.* Because petitioner was prevented from confronting this critical evidence of his blood alcohol level at trial, its admission was serious enough to constitute a violation of a clearly established principle of law resulting in a miscarriage of justice. Accordingly, we grant the petition for writ of certiorari. However in view of the importance of the issues involved, we certify the following question to be of great public importance:
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> > *Does admission of those portions of the breath test affidavit pertaining to the breath test operator's procedures and observations in administering the breath test constitute testimonial evidence and violate the Sixth Amendment's Confrontation Clause in light of the United States Supreme Court's holding in Crawford v. Washington, 541 U.S. 36 (2004)?]*

State v. Walker, 923 So. 2d 1262 (Fla. 1st DCA 2006).

The defendant entered "straight-up" pleas of no contest to charges for felony driving under the influence and driving while license permanently revoked. The factual basis provided by the state included a blood alcohol reading of .24, five previous DUI convictions, and the failure to have a valid drivers license. At sentencing, the defendant's attorney argued, without documentation, that the defendant was the only source of income for his family because his wife was "disabled with a heart condition" and requested a suspended prison sentence conditioned on such terms as the court might direct. The state argued for five years imprisonment, citing the five previous DUI convictions and seven driving while license suspended convictions. The sentencing guidelines scoresheet called for a minimum of 21 months imprisonment. The court sentenced the defendant to concurrent five year sentences, suspended upon completion of five

years probation. The trial court's only reason for this downward departure was "family situation."

The district court reversed, holding that the only reason set forth by the trial court in support of its decision to downwardly depart was not a valid legal ground to support such action. Specifically, the district court observed that family support concerns have been consistently rejected as valid reasons for downward departures.

Criminal Traffic Offenses

Fernandez v. State, 917 So. 2d 1022 (Fla. 1st DCA 2006).

A motor vehicle driven by the male defendant was stopped by an officer who had called in the license registration plate of the vehicle and was informed that the female owner's drivers license was suspended. The officer asked for the defendant's license and was informed that it was suspended, at which time he issued the defendant a criminal summons. The defendant was subsequently charged with felony driving while license revoked as an habitual traffic offender. After the court denied the defendant's motion to suppress, he pled no contest and reserved the right to appeal.

The district court reversed, holding that it was constitutionally impermissible for the arresting officer to approach the defendant and ask to see a drivers license after the officer had satisfied the purpose for the stop. The court, using as authority the opinion in State v. Diaz, 850 So. 2d 435 (Fla. 2003), wherein the Supreme Court held that an officer who had stopped a vehicle because he could not read the expiration date on the temporary tag in the rear window was precluded from questioning the driver after determining the tag was valid, outlined its reasoning as follows:

> Here, the sole basis for the officer's stop of the vehicle [defendant] was driving was to determine whether the registered owner, a female, was driving. As in Diaz, it became apparent to the officer almost immediately that the purpose of the stop (i.e., to ascertain whether the female registered owner was driving) had been satisfied. Nevertheless, the officer engaged [defendant] in conversation, and requested his driver's license. These facts are substantially indistinguishable from those in Diaz. Accordingly, as in Diaz, the officer's questions violated [defendant's] constitutional rights, and we are constrained to reverse.

Maddox v. State, 923 So. 2d 442 (Fla. 2006).

The defendant was stopped for an improper lane change, at which time he failed to provide a drivers license and proof of insurance. When questioned as to his name and date of

birth, he gave the officer his brother's name and date of birth. The officer then issued the defendant citations in his brother's name for improper lane change and failure to provide proof of insurance. A subsequent search of the car provided information leading to the defendant's real identity and the fact that his drivers license was suspended. The defendant was then charged with, and convicted of, forgery (among other offenses).

The district court affirmed all convictions but chose to discuss only the issue of the admissibility of the traffic citations in the forgery case in light of the statutory prohibition in section 316.650(9), Florida Statutes, against the admissibility of a citation in evidence in any trial. The court certified conflict with Dixon v. State, 812 So. 2d 595 (Fla. 1st DCA 2002), and held that the citations were admissible, reasoning as follows:

> . . . we do not believe the trial court erred in admitting the citations as evidence of the forgeries. Although section 316.650(9) does provide that traffic citations "shall not be admissible evidence in any trial" that statutory proscription does not apply to the facts of this case. Based on our reading of the statute, we conclude that the purpose of the statute is to protect the person to whom the citation is issued. Here, the citation was issued to a person the deputy believed to be [defendant's brother]; the deputy charged [the defendant's brother] with two civil infractions. When the deputy learned that [the defendant] was, in fact, not [his brother] but rather [himself] he withdrew the charges against [the brother] and retained the documents as evidence of the criminal offenses of forgery. [The defendant] misrepresented himself to be [his brother] and signed the ticket to carry out the misrepresentation. [The defendant] was not on trial for either of the civil infractions, nor was [his brother]. In fact, after the withdrawal of the citations, the charges of improper lane change and failure to show proof of insurance were no longer pending against anyone. Thus, the documents were not "citations" as contemplated by the statute, but rather were documentary evidence of [the defendant's] criminal conduct. Thus, the statute does not apply.

The Supreme Court approved the district court's decision, holding as follows:

> When section 316.650 is read in the context in which it is found and in conjunction with related statutory provisions, the reasonable construction of this statutory provision is that the Legislature intended only to exclude traffic citations in a more limited fashion in matters with issues related to the operation, maintenance or use of the motor vehicle. To hold otherwise would expand the scope of this statute unreasonably and lead to absurd results.

The Supreme Court also observed that to reach a contrary conclusion would "essentially [eradicate] all prosecutions for forgery of a traffic citation." The Court observed that such prosecutions need proof that the allegedly forged document is in fact a "public document" and therefore actionable. The majority countered the dissent's argument that the introduction of the traffic citation into evidence could be unduly prejudicial to the defendant (in that it alleged the defendant committed an offense) by observing that such concerns could be alleviated by merely redacting the portions of the citation that do not relate to the forgery charge and could potentially

prejudice the defendant.

Carrada v. State, 919 So. 2d 592 (Fla. 3d DCA 2006).

The defendant was convicted of leaving the scene of a crash resulting in personal injury. At trial, the court permitted a passenger in the defendant's vehicle to be called by the state, with knowledge that he was to testify adversely for the sole purpose of "impeaching" the defendant with a devastating prior statement (which he denied making) to the effect that the defendant had deliberately left the scene for the purpose of evading responsibility. The trial court also admitted the written (impeaching) statement as substantive evidence.

The district court reversed, holding that the passenger's testimony constituted improper impeachment, which was not harmless, since its effect was to "sabotage entirely the defendant's only defense to the case, which was that he left the scene only to find the nearest telephone from which he could call the authorities." The district court then rejected the defendant's contention that he was entitled to a judgment of acquittal, reasoning as follows:

> This is so because we disagree with his underlying contention that the statute, because it requires that a defendant "willfully" violate its provisions, creates a "specific intent" crime; that is, that it involves, as an element of the offense, a showing that the defendant left the scene with the "specific intent" to abandon the victim or to escape responsibility for the accident. (The defendant goes on to say that there is no such evidence absent the inadmissible "prior inconsistent statement.") In our judgment, however, the mere use of the word "willfully" does not create such a crime or create such an element. . . . The state need only prove the actual existence of the accident and the victim's injury, the defendant's admitted knowledge that both occurred . . . and the admitted fact that he did not remain at the scene. . . . That he did so, he contends, only to appropriately summon help is properly considered a matter of defense. The obviously adverse effect of the errors on the defense, however, requires a new trial.

Duckworth v. State, 923 So. 2d 530 (Fla. 4th DCA 2006).

The defendant was involved in a motor vehicle accident in which he lost consciousness due to a seizure, striking and killing a pedestrian. Blood samples taken after the accident revealed the presence of neither alcohol nor illegal drugs and only the correct dosage of medication taken for a medical condition. The state attorney proceeded with a criminal investigation, issuing a subpoena for the defendant's medical records to the defendant's treating physician. The state thereafter sought to obtain a release of medical records from the Department of Highway Safety and Motor Vehicles. The trial court granted the state's motion for release of the department records over the objection of the defendant, who argued that pursuant to section 322.125(4), Florida Statutes, reports received or made by the department's Medical Advisory Board may not be divulged to anyone but the driver and are exempt from Chapter 119 (Public Records) except under limited, not herein applicable, circumstances.

The district court reversed, holding that the unambiguous language of section 322.125(4),

as well as section 322.124(4), which provides that reports of driver disability to the department are confidential and inadmissible in any civil or criminal trial, as well as administrative rules adopted to implement these provisions, precludes the release of the records sought. The court observed that no exception exists that would allow the court to balance the driver's privacy rights against legitimate state needs or compelling state interests in a criminal investigation, such as exists in other statutory provisions precluding disclosure of a patient's medical records. The district court also rejected the state's argument that the relevant statutes only preclude the use of the records as evidence, noting that the statutory prohibition is against divulging the matter "to any person except the licensed driver or applicant," rather than merely prescribing the use of such information.

Pass v. State, 31 Fla. L. Weekly D502 (Fla. 2d DCA Feb. 10, 2006).

As a result of events occurring on November 7, 2001, and January 3, 2002, the defendant was convicted of two counts of driving while license permanently revoked. He subsequently filed for postconviction relief, alleging ineffective assistance of counsel, based on an argument that the offense charged had been declared unconstitutional in Florida Department of Highway Safety and Motor Vehicles v. Critchfield, 842 So. 2d 782 (Fla. 2003). The trial court denied the motion, finding that trial counsel had not been ineffective because the decision not to make a Critchfield claim had been strategic in nature.

The district court reversed, holding that the defendant had been convicted of a nonexistent crime. The court also observed that the trial court should not have reached the issue of trial strategy, since such an issue is irrelevant to a nonexistent crime.

State v. Cappalo, 31 Fla. L. Weekly D453 (Fla. 2d DCA Feb. 10, 2006).

The defendant was charged with aggravated fleeing and eluding, aggravated assault with a deadly weapon without intent to kill, burglary, and grand theft. He was found guilty of the aggravated fleeing and eluding and attempted aggravated assault but found not guilty by reason of insanity of the burglary and grand theft charges. The defendant filed a motion for judgment of acquittal/new trial, alleging the crimes were all part of one criminal episode and that, because the jury acquitted him by reason of insanity on the grand theft charge, he did not have the requisite intent or frame of mind to commit the crimes of aggravated fleeing and eluding and attempted aggravated assault. The trial court, agreeing there was one continuing transaction and that there was no evidence that the defendant's sanity or insanity was episodic, granted the motion for acquittal, finding as follows:

> To find him not guilty by reason of insanity on the initial two counts which started this whole transaction, which was very short in duration, and a finding of guilty on the second two counts that followed closely thereafter is totally inconsistent and boggles the reasoning as far as I'm concerned. He's either in or he's out on the whole thing, either sane from the beginning to the end or insane from beginning to end.

The district court reversed, stating that, as a general rule, inconsistent verdicts are permitted, given that jury verdicts can be the result of lenity rather than guilt or innocence. The district court observed that the one exception to this rule, not applicable in this instant case, is when the inconsistent verdicts are those in which an acquittal on one count negates a necessary element for conviction on another court (that is, involving an offense that as a matter of law cannot be committed unless another underlying offense has also been committed, for example, felony murder but not the underlying felony).

Marrero v. State, 921 So. 2d 7481 (Fla. 5th DCA 2006).

The defendant pled no contest to felony driving while license suspended as a habitual offender under section 322.34(5), Florida Statutes. He reserved the right to appeal the issue of whether he was required to have a drivers license to operate a front-end loader upon a highway.

The district court affirmed, observing initially that a front-end loader is within the chapter 322 (Drivers' Licenses) definition of motor vehicle, to wit, "any self-propelled vehicle, including a motor vehicle combination, not operated upon rails or guideway, excluding wheelchairs, and motorized bicycles . . ." The district court then confronted the defendant's claim that he was excluded from the license requirement by section 322.04(1)(b), which exempts "any person while driving or operating any road machine . . . temporarily operated or moved on a highway." In rejecting this claim, the court held as follows:

> To fall within this limited exception, [the defendant] would have had to allege in his motion to dismiss that the front-end loader was a 'road machine' and was being operated 'temporarily' on a highway. The State would have then had the opportunity to admit or deny those critical facts. Neither of these allegations was made in the motion to dismiss, nor can we say as a matter of law, that all front-end loaders are road machines. As a matter of common sense, we know that front-end loaders are sometimes used in road construction but we also know that they are used in other types of construction as well. Further, we know nothing about whether [the defendant's] operation of a front-end loader on the roadway was temporary or not. To us, it is likely that the question of whether this front-end loader was a road machine being temporarily operated on a highway is inherently one of fact, and not the law.

Sproule v. State, 927 So. 2d 46 (Fla. 4th DCA 2006).

The defendant was charged with habitual driving while license revoked. At trial, the court allowed the introduction of the defendant's driver history record as evidence that his license had been revoked as a habitual traffic offender. The defendant had objected that the record was hearsay and a violation of his Sixth Amendment right of confrontation. The defendant was subsequently convicted and sentenced to a year in county jail.

The district court affirmed, holding that a driving record is not testimonial in nature and therefore the defendant did not have the right to cross-examine a witness concerning the compilation of the record. Citing the recent United States Supreme Court opinion in Crawford v.

Washington, 541 U.S. 36 (2004), the district court held that while there was no dispute that a driving record containing habitualization entries maintained by the department and provided to the court does constitute hearsay, it falls under an established exception to the hearsay rule as a certified copy of a public record. The court also referenced section 322.201, Florida Statutes, which provides that driver history records are self-authenticating, as evidence of legislative faith in the trustworthiness of such records.

Arrests, Search and Seizure

Frierson v. State, 926 So. 2d 1139 (Fla. 2006).

The defendant was stopped for the failure to signal, in violation of section 316.155(1), Florida Statutes, and driving with a cracked tail light, in violation of section 316.610, Florida Statutes. The trial court found that the stop was invalid, given that no drivers were affected by the defendant's failure to use a turn signal and that the tail light in question was in fact operating. However, the trial court denied the defendant's motion to suppress evidence of the illegal firearm found in the defendant's vehicle after he was subsequently arrested on an outstanding warrant, even though the warrant turned out to be invalid (another person had given law enforcement the defendant's name and date of birth). The trial court based its denial on the fact that the existence of the arrest warrant constituted an intervening circumstance that dissipated the taint of the illegal traffic stop.

The district court agreed that the traffic stop was improper, observing that the failure to use a turn signal charge was unsupported in the absence of evidence suggesting the turn created a safety concern and that the existence of a cracked reflector rather than a cracked light was insufficient to support that charge. The district court then reversed the denial of the motion to suppress, holding that it should have been granted because the initial traffic stop was not supported by reasonable cause and that subsequently discovered evidence was the fruit of the poisonous tree. The court discussed, but did not find dispositive, the fact that the error that led to the defendant's arrest may not have been attributable to law enforcement and thus may have been subject to a good faith exception if the stop had occurred for that reason alone.

The Supreme Court accepted jurisdiction based on a certification of conflict, framing the conflict issue as follows:

> Whether evidence seized in a search incident to an arrest based upon an outstanding arrest warrant should be suppressed because of the illegality of the stop which led to the discovery of the outstanding arrest warrant.

The Court held that the rule to be applied was not a "but for" or "per se" test, but "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471

(1963). The Court noted that an analysis under Wong Sun required consideration of the following three factors: 1) the time elapsed between the illegality and the acquisition of the evidence; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the official misconduct. Brown v. Illinois, 422 U.S. 590 (1975).

The Supreme Court then applied the Brown factors to the instant case as follows:

> The brief amount of time that elapsed between the illegal stop and the arrest of [defendant] weighs against finding the search attenuated, but this factor is not dispositive. In turning to the next factor, the outstanding arrest warrant was an intervening circumstance that weighs in favor of the firearm found in a search incident to the outstanding arrest warrant being sufficiently distinguishable from the illegal stop to be purged of the "primary taint" of the illegal stop. Crucially, the search was incident to the outstanding warrant and not incident to the illegal stop. The outstanding arrest warrant was a judicial order directing the arrest of [defendant] whenever the [defendant] was located. As [the concurring judge] noted, 'A warrant indicates the existence of criminal conduct separate from the conduct that occurred at the time of the illegal traffic stop. The illegality of the stop does not affect the continuing required enforcement of the court's order that [defendant] be arrested.'
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> We believe to be very significant the third factor in the Brown analysis, which is whether the purpose and flagrancy of the official misconduct in making the illegal stop outweighs the intervening cause of the outstanding arrest warrant so that the taint of the illegal stop is so onerous that any evidence discovered following the stop must be suppressed. In this case, we do not find that the purpose and flagrancy of misconduct in illegally stopping [defendant] was such that the taint of the illegal stop required that the evidence seized incident to the outstanding arrest warrant should be suppressed. The law enforcement officer made a mistake in respect to the enforcement of the traffic law, but there was no evidence that the stop was pretextual or in bad faith.

The Supreme Court then resolved the conflict among the district courts by holding that application of the Brown test should decide the issue of whether evidence seized in a search incident to an arrest based upon an outstanding warrant discovered following an illegal stop must be suppressed.

F. J. R. v. State, 922 So. 2d 308 (Fla. 5th DCA 2006).

The defendant was a passenger in a vehicle stopped for a traffic offense. After the vehicle stopped, the driver and the defendant exited the vehicle and started to walk away. The stopping officer advised them to stop, but they continued walking, resulting in the arrest of the defendant for resisting an officer without violence. This led to the defendant subsequently being charged with possession of cocaine. The trial court denied the defendant's motion to suppress.

The district court reversed, holding that the defendant, an innocent passenger, had the

right to choose whether to continue with his business or to return to the vehicle. The court distinguished the instant situation from one in which the officer was permitted to detain a passenger for the officer's safety, observing that the stop in this case was at 3:00 in the afternoon, that there was no testimony that there was anything about the defendant's appearance suggesting that he might have been armed or dangerous, and that there were no objective circumstances to support the reasonableness of the officer's order to return to the vehicle.

Hewitt v. State, 920 So. 2d 802 (Fla. 5th DCA 2006).

After stopping the defendant for a traffic violation, the officer asked to see her drivers license. The defendant replied that she had never been issued a license. The officer then asked the defendant to exit her vehicle and inquired, without Miranda warnings, if she had weapons or drugs on her person, to which the defendant conceded she had marijuana. The defendant was subsequently charged with drug possession. The trial court denied the defendant's motion to suppress, reasoning that asking a driver, for purposes of officer safety, to exit a vehicle during a traffic stop did not turn the encounter into a custodial situation requiring Miranda warnings.

The district court affirmed, after analyzing the four factors relevant to whether a suspect is in custody, to wit, the manner in which police have summoned the suspect for questioning; the purpose, place, and manner of the interrogation; the extent to which the suspect was confronted with evidence of guilt; and whether the suspect was informed of a right to leave the place of questioning. The court concluded that a reasonable person in the defendant's shoes would not have believed she was going to be arrested merely because a police officer asked her to step out of her vehicle and then asked a standard question for officer safety purposes. Specifically, a reasonable person, not in possession of illicit drugs, would not have believed he or she would be arrested merely for driving without a valid drivers license.

Zeigler v. State, 922 So. 2d 384 (Fla. 1st DCA 2006).

The defendant was stopped for the failure to have a motor vehicle license tag. Upon approaching the vehicle, the officer observed that a temporary tag was properly displayed. He then continued to approach the vehicle and ask for the defendant's identification. When the defendant rolled down the window, the officer smelled the odor of burnt marijuana. A subsequent search of the vehicle resulted in the discovery of contraband drugs. The trial court denied the defendant's motion to suppress.

The district court affirmed, holding that while it was improper for the officer to ask for the defendant's identification, he was allowed to make personal contact to explain to the defendant the reason for the stop. Since the officer had lawful authority to be in the position to smell the marijuana, he had the right to detain the defendant. The court applied the inevitable discovery rule, which states that when evidence is obtained through the result of unconstitutional police procedures, the evidence will still be admissible if it would have been discovered through legal means. The court observed that if the officer had immediately explained the reason for the stop rather than asking for identification, he would still have smelled the marijuana.

Jarrett v. State, 926 So. 2d 429 (Fla. 2d DCA 2006).

The defendant was stopped for speeding in the Town of Reddington Shores by a police officer employed by the Town of Indian Shores. The two towns had entered into an agreement pursuant to which the latter was providing the former with law enforcement services. The defendant, charged with several felonies that grew out of the stop, challenged the validity of the agreement. The trial court denied the motion to suppress, finding that the traffic stop was authorized by section 166.0495, Florida Statutes, which allows a municipality to enter into an interlocal agreement with an adjoining municipality to provide law enforcement services. On a motion for rehearing the defendant challenged the technical compliance of the agreement with statutory requirements in relation to the filing of the agreement with the clerk of court. The trial judge denied the motion based on a determination that the defendant lacked standing to challenge "any ostensible infirmity of the agreement" since he was neither a signatory to it nor a third-party beneficiary.

The district court affirmed, holding that while his legal allegation was sufficient to confer standing, his motion failed on the merits. The court observed that the primary purpose of the exclusionary rule is to deter unlawful police conduct. The rule does not apply to evidence obtained by police acting in objectively reasonable reliance upon a statute subsequently determined to be invalid. Since the defendant's challenge was not aimed at a Fourth Amendment violation by the police officer but rather at the actions of municipal governments in allegedly failing to follow statutory procedures applicable to the execution of interlocal agreements, it must fail. The district court also noted that the agreement conferred at least de facto status on the police officer and that de facto acts of an officer are as valid as de jure acts.

Department of Highway Safety and Motor Vehicles v. Roberts, 31 Fla. L. Weekly D868 (Fla. 5th DCA March 24, 2006).

The defendant's drivers license was administratively suspended as a result of a stop for speeding. The department relied solely on the trooper's charging affidavit, which stated, in relevant part, that the officer observed the defendant traveling 71 mph in a 45 mph speed zone, after which the officer attempted to pull the defendant over for a tenth of a mile. Upon petition for writ of certiorari, the circuit court invalidated the suspension upon determining that the facts alleged were insufficient to establish an objective basis upon which to conclude the officer had a reasonable suspicion that a violation of the law occurred.

The district court agreed with the trial court on the merits, observing that the officer's report provided few if any specifics about the officer's vantage point when he reached the conclusion the defendant was speeding, nor did the officer assert the defendant was still speeding when he was attempting to pull him over (the duration of the pursuit not being probative of speed). The district court held that this factual analysis was essentially irrelevant, however, since its scope of review was only to determine whether the circuit court afforded procedural due process and did not depart from any clearly established legal principles. The court noted that in the absence of contrary precedent involving closely analogous facts, it could not conclude that the circuit court departed from a clearly established principle of law. [Note: There was a 16-page dissent.]

State v. Lopez, 923 So. 2d 584 (Fla. 5th DCA 2006).

As the result of convictions of felony driving while license revoked (habitual offender) and giving a false name or identification, the defendant was sentenced to two years community control and one year probation. Subsequently, the state filed an affidavit for violation of community control, alleging probation violations for driving while license revoked. The trial court granted the defendant's motion to suppress based on an invalid stop for the following reasons: 1) the vehicle driven was registered to a woman (defendant was a male); 2) the officer did not see who was driving the vehicle; and 3) the defendant did not violate any traffic laws.

The district court, while accepting the facts determined by the trial court, concluded that the court did not consider the totality of the circumstances in light of the officer's knowledge. Specifically, the district court justified its reversal based on the additional facts that the officer had been informed by the defendant's probation officer that the defendant was illegally driving and that he was scheduled to leave his residence early in the morning to go to work. In addition, the officer had verified by computer records that the defendant's license was suspended and had obtained a photograph of the defendant which aided in his pre-detention identification. In light of the foregoing and other facts, the district court determined that the officer had a well-founded, articulable suspicion that the defendant was the driver of the vehicle stopped, and thus the stop was valid.

Civil Traffic Infractions

State v. Burger, 921 So. 2d 847 (Fla. 2d DCA 2006).

The defendant was stopped and given a citation for a violation of the provision requiring a vehicle to be equipped with two or more stop lamps, section 316.222(1), Florida Statutes. Pursuant to section 316.234(1), Florida Statutes, such stop lamps were required to display light visible from 300 feet to the rear. The trial court entered an order suppressing information obtained from the defendant, finding that it was obtained as a result of an unauthorized traffic stop since the defendant's vehicle had three stop lamps, one on each side and another in the center, two of which were operative.

The district court affirmed, holding that the clear language of section 316.222(1) states that a motor vehicle must be equipped with two or more stop lamps. When read in conjunction with section 316.234(1), the apposite language required that two or more stop lamps, when activated, must emit light capable of being seen from a certain distance. Since the defendant's vehicle had two operable rear brake lights, it complied with the statutes. The district court observed that there is no requirement that the operable lights be parallel to one another but only that they be located in the rear of the vehicle. The court added that if the Legislature chooses to require that all lights be operable, it can do so with a statutory revision.

Nelson v. State, 922 So. 2d 447 (Fla. 2d DCA 2006).

The defendant was charged with improper backing in violation of section 316.1985(1), Florida Statutes, which prohibits a vehicle from backing unless such movement can be made with safety and without interfering with other traffic. The charge arose from the defendant backing out of a parking space to within two feet of a police vehicle, which, at that point, activated its emergency lights. The officer subsequently became aware that the defendant was driving on a suspended license, resulting in a search incident to arrest and the discovery of cocaine. At the suppression hearing, the office testified that he stopped the defendant because he nearly backed into the officer's car. The trial court denied the defendant's motion to suppress.

The district court reversed, holding that merely backing to within two feet of another vehicle does not constitute improper backing. The court observed that the officer was neither forced out of his path nor required to swerve to avoid the defendant's vehicle. In addition, there was no interference with other traffic. Given that the traffic stop was invalid, the motion to suppress should have been granted.

Drivers Licenses

<u>Freeman v. Department of Highway Safety and Motor Vehicles</u>, 30 Fla. L. Weekly D2103 (Fla. 5th DCA Sept. 2, 2005).

The Department of Highway Safety and Motor Vehicles, after having issued the defendant a drivers license with a picture of her face covered by a veil, canceled the drivers license as not complying with the statutory requirement in sections 322.14(1)(a) and 322.142, Florida Statutes, that a drivers license have a full-face photograph of the licensee. The trial court upheld the department's action, after considering conflicting testimony on the issue of whether the Islamic doctrine of "necessity" would allow for the removing of the veil for a drivers license photo.

The district court affirmed, rejecting all of the defendant's claims, while addressing specifically arguments under the Florida Religious Freedom Restoration Act and the concept of equal protection. In relation to the former, while the district court conceded that the defendant had a sincere religious belief as required by section 761.03, Florida Statutes, it held that the requirement of a full-face photograph was not a substantial burden on the defendant's exercise of religion, that is, it neither compels the religious adherent to engage in conduct that her religion forbids, or forbids her to engage in conduct that her religion requires. The district court applied the relevant case law to the instant case and concluded:

> In this case, the trial court concluded that [the defendant] had <u>not</u> shown that the photo requirement substantially burdened her free exercise of religion. This conclusion is supported by [the defendant's] deposition testimony that she must be veiled only in the presence of men unrelated to her. Importantly, she agreed that her veiling belief did <u>not</u> mean that she could never be photographed without her veil. The Department's existing procedure would accommodate [the

> defendant's] veiling beliefs by using a female photographer with no other person present. Thus, the burden to accommodate [the defendant's] religious beliefs would be placed upon the Department. [Consistent with precedent], the trial court here concluded that [the defendant] had failed to demonstrate a substantial burden and, thus it did not reach the compelling interest/least restrictive means test.

In relation to the equal protection, the district court rejected the defendant's argument that the department had issued photoless permits and allowed persons to wear beards, wigs, cosmetics, and glasses for their photographs. The court noted that there were no exceptions to the requirement of a full-face photograph for permanent licenses nor was there evidence that the department had ever photographed anyone with a mask or other covering over the face.

[Note: On motion for rehearing, opinion filed February 13, 2006, 924 So. 2d 48, the district court added the following language (on page 13 of the slip opinion) in relation to its holding that the defendant had not shown that the photo requirement substantially burdened her free exercise of religion:

> This conclusion is supported by expert testimony of Dr. Kahaled Abou El Fadl. Dr. El Fadl testified that in Islamic countries there are exceptions to the practice of veiling. Consistent with Islamic law, women are required to unveil for medical needs and for certain photo ID cards. Examples include photo ID cards to be displayed to police, to enter and take professional exams, and for passports. The only qualification is that the taking of the photograph accommodate [Freeman's] beliefs.]