

# FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

July - September, 2003

*[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

Department of Highway Safety and Motor Vehicles v. Marshall, 848 So. 2d 482 (Fla. 5th DCA 2003).

The defendant was arrested for driving under the influence after being observed by one officer and then stopped by a second officer at the direction of the first. She refused to take a chemical test after informing the second officer that she wanted to talk to an attorney before taking the test. At her administrative hearing, the hearing officer found there was probable cause for the stop, there was a lawful arrest, and that the defendant had been informed that her license would be suspended if she refused to take the test. In upholding the suspension, the hearing officer rejected various factual and legal issues raised by the defendant.

The circuit court (upon remand from the district court to consider a response from the department) granted the defendant's petition for writ of certiorari, holding that the order was not supported by competent substantial evidence. Specifically, the circuit court found that 1) the observations of the first officer (weaving within her lane and across the center lane divider) did not provide a valid objective basis for the second officer to conduct a traffic stop, 2) the defendant did not knowingly refuse to submit to the breath test in light of conflicting police statements regarding her right to consult an attorney, and 3) the defendant was not properly advised of the consequences of refusal (there was conflicting evidence on the issue of whether she was informed that refusal "will" or "may" result in suspension).

The district court quashed the writ of certiorari, holding that the decision of the hearing officer was supported by competent substantial evidence. Specifically, the district court held that 1) the stop was valid under the fellow officer rule and, in any case, the issue of whether the driving pattern raised a reasonable suspicion was waived; 2) in relation to defendant's confusion

regarding the right to an attorney, the circuit court had improperly reweighed the conflicting evidence regarding whether the defendant was told she could consult an attorney (there was documentary evidence to the contrary); and 3) there was competent substantial evidence to support the hearing officer's determination that the defendant was properly informed of the consequences of the refusal (including the refusal affidavit).

Daigle v. State, 848 So. 2d 1233 (Fla. 2d DCA 2003).

The defendant was charged with DUI manslaughter as a result of an accident in which he swerved to avoid a vehicle pulling in front of him, colliding with and killing the driver of a vehicle pulling into the road from the opposite direction. The defendant's expert witness testified that the crash was "unavoidable" and "inevitable" and not caused in any way by the manner in which the defendant operated his vehicle. The trial court denied the defendant's motion for acquittal based on the causation element. The defendant was subsequently convicted after the jury was instructed on the presumption of intoxication.

The district affirmed the conviction, but remanded for the technical correction of a sentencing error. In relation to the defendant's substantive arguments, the court held as follows: 1) the defendant failed to object to the jury instruction on intoxication, which was not fundamental error since the jury was free to accept or reject it; 2) in relation to the causation issue the evidence introduced by the state, albeit not of the expert variety, was sufficient to undermine the expert's conclusion (and in any case the jury could accept or reject the expert's opinion); 3) the defendant failed to preserve objections to the admissibility of the blood alcohol test results; and 4) the defendant failed to preserve objections to alleged irrelevant and prejudicial testimony given by the emergency room doctor.

In relation to the second conclusion, the district court certified the following question to the Supreme Court:

Is it fundamental error to give a jury instruction on the presumption of impairment in violation of the precepts of State v. Miles, 775 So. 2d 950 (Fla. 2000).

Vedner v. State, 28 Fla. L. Weekly D1401 (Fla. 5th DCA June 13, 2003).

As a result of a crash in which the defendant rear-ended another vehicle, a passenger in the defendant's vehicle was killed. The defendant was subsequently convicted of DUI manslaughter, vehicular homicide, DUI causing damage or injury, and possession of drug paraphernalia. Prior to being charged, the defendant was interviewed three times by law enforcement. Testimony regarding all three interviews was admitted at trial, despite the fact that the defendant only received a Miranda warning in relation to the first interview.

The district court affirmed, holding that while testimony regarding one of the interviews should not have been admitted, any error was harmless. In all the interviews the accident investigator and criminal investigator were involved. In relation to the first interview, conducted

the day after the crash, the defendant properly received Miranda warnings. At the second interview, five days later, the defendant did not receive any warning but was advised that he was free to leave at any time. The third interview occurred six months later, at which time the defendant was told he was free to leave but not given a Miranda warning. At this interview, the defendant admitted to drug usage (his blood alcohol level was under .08). In ruling that evidence from the third interview should not have been admitted (but was harmless error), the district court stated as follows:

The third interview, however, is problematic. [The defendant] specifically inquired about the reasons for the additional questions, and he was told that it was for the accident investigation, not a criminal investigation. Here, there was an “indication” that he was required to answer the questions, and he should have been advised under Miranda. We conclude that the failure to warn [the defendant] under Miranda prior to eliciting the statements that were used against him in a criminal trial violated his right against self-incrimination. It was error, therefore, to allow the jury to hear and consider those statements.

[Note: Upon Motion for Rehearing filed July 25, 2003, the district court clarified the “Legal Analysis” section of the opinion in relation to the situation where during the course of a vehicular accident investigation a law enforcement officer seeks to elicit statements from a person who has been given “any indication” that he or she is required to provide accident information. The district court repeated its requirement that a Miranda warning must be given in such situations and then stated that only such statements given after such advisement may subsequently be used in *civil or criminal trials, or administrative proceedings*. The emphasized language replaced a general reference in the original opinion to *legal proceedings*. at 849 So. 2d 1207.]

State v. Pierre, 854 So. 2d 231 (Fla. 5th DCA 2003).

The defendant was arrested for driving under the influence and informed that he must submit to testing of his breath and urine or have his drivers license suspended. His breath test revealed a blood alcohol level below the legal limit, but his urine test indicated the presence of cocaine, marijuana metabolites, and other controlled substances. The county court granted the defendant’s pretrial motion in limine suppressing the urine results and certified the following question as one involving great public importance:

Can the state introduce a defendant’s urine test results of a urine sample obtained by law enforcement pursuant to Florida statute section 316.1932(1)(a), Florida’s implied consent law, by establishing the traditional *Bender and Robertson* predicates, where the Florida Department of Law Enforcement has not promulgated rules governing the urine testing?

The district court rephrased the question as follows and proceeded to answer it in the negative:

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

The district court, certifying conflict with the decision in State v. Bodden, 872 So. 2d 916 (Fla. 2d DCA 2002), specifically held that there was no ambiguity in section 316.1932(1)(a)1., Florida Statutes, which requires, in relevant part, that persons operating motor vehicles in this state have given their consent to submit to an “approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath, and to a urine test for the purpose of detecting the presence of chemical substances . . .” The court noted that, given that other testing provisions independently relate to breath and urine, urine tests could not be considered merely subsets of chemical tests and thus subject to the approval requirement. The district court also observed that from a grammatical standpoint, the reference to an approved chemical test does not apply to urine tests, given the fact that over thirty words and three commas separate the word “approved” from the words “urine test.”

The court then pointed out that there was a specific grant of authority given to the Department of Law Enforcement in section 316.1932(1)(a)2 to implement rules for blood and breath testing, but not urine testing. This lack of rule delegation regarding urine testing was perhaps made unnecessary by the existence of specific statutory directions concerning urine testing, that is, that the test be so administered as to ensure its accuracy and that the privacy of the individual involved be maintained.

## **Criminal Traffic Offenses**

State v. Meister, 849 So. 2d 1127 (Fla. 4th DCA 2003).

The defendant was charged with driving on a suspended license pursuant to section 322.34(2), Florida Statutes. The trial court granted her motion to dismiss, finding that statutory provision unconstitutionally vague as applied to the defendant, who was riding a moped when stopped.

The district court reversed the dismissal, holding that the applicable definition of motor vehicle was in the chapter from which the charge emanated, that is, chapter 322 (Drivers’ Licenses), rather than chapter 316 (State Uniform Traffic Control). While the definition in section 316.003(21), Florida Statutes, specifically excludes mopeds from the definition of motor vehicles, the definition in section 322.01(26), Florida Statutes, includes any self-propelled vehicle and contains no specific exclusion of mopeds. Thus, the district court concluded that there was no vagueness or ambiguity in section 322.34 with respect to its applicability to mopeds.

State v. Del Rio, 854 So. 2d 692 (Fla. 2d DCA 2003).

The defendant was charged with vehicular homicide as a result of an accident in which he collided with and killed a woman pushing her baby in a stroller after he made a left turn onto the road where the collision occurred. The jury returned a guilty verdict, but the trial court entered a judgment of acquittal, concluding that the accident was the result of negligence and careless driving rather than the recklessness required for a vehicular homicide conviction.

The district court affirmed, holding the facts of the case (state expert testified that the defendant was speeding at most one mile over the limit, the woman was in the street six feet from the curb, and the defendant may have cut through a T-intersection without stopping) was insufficient to establish the requisite recklessness, which has been defined by the Florida Supreme Court as culpability that falls short of culpable negligence but more than the mere failure to use ordinary care. The district court observed that the reported cases of vehicular homicide involved such behavior as alcohol consumption before driving through a heavily congested intersection, driving twice the speed limit through a SLOW-CHILDREN PLAYING area, and speeding 81 miles per hour through a construction zone.

State v. Veilleux, 28 Fla. L. Weekly D1804 (Fla. 2d DCA July 30, 2003), opinion withdrawn and superseded by, 859 So. 2d 1224 (Fla. 2d DCA 2003).

The defendant was charged with forgery as a result of allegedly signing a name not his own to traffic citations for reckless driving and driving without a valid drivers license. The trial court excluded the citation from evidence pursuant to the requirement in section 316.650(9), Florida Statutes, that traffic citations “shall not be admissible evidence in any trial.”

The district court denied the state’s petition for writ of certiorari, holding that there was no basis to discern a legislative intent to make an exception to the unambiguous language of section 316.650(9). The court held that the trial court had not departed from the essential requirements of the law, given that it had followed precedent from the district court opinion on the issue. Dixon v. State, 812 So. 2d 595 (Fla. 1st DCA 2002). The district court then disagreed with the dissenting opinion on the issue that the applicable statute was procedural in nature and thus need have been approved by the Supreme Court, citing to Supreme Court precedent:

Even if we were to agree with the dissent that section 316.650(9) is purely procedural, the constitutional limitation on the legislature’s enactment of procedural law is not absolute. Rather, such violation occurs when the “legislatively imposed ‘procedure’ is interfering with and intruding upon the procedures and processes of this Court and conflicts with this Court’s own rule regulating the procedure.” Jackson v. Department of Corrections, 790 So. 2d 381 (Fla. 2000).

Lipovsky v. State, 854 So. 2d 707 (Fla. 2d DCA 2003).

The defendant was convicted of driving while license suspended and causing serious bodily injury pursuant to section 322.34(6)(b), Florida Statutes. The trial court had rejected the defendant's motion for judgment of acquittal arguing that the state had failed to prove the elements of the offense.

The district court reversed, holding that the state had not proved that the defendant's license was suspended for one of the reasons listed in section 322.34(6)(b). Specifically, the court noted that it appeared that the defendant's license was automatically suspended for failure to comply with the requirements of a civil infraction as required by section 318.15, Florida Statutes. The district court observed that this section was not listed as one of the qualifying suspensions under section 322.34(6)(b). The court then held that the defendant had adequately preserved the issue, but even if it had not been preserved, the defendant was entitled to a reversal since the state committed fundamental error by failing to make a prima facie showing of an essential element of the crime.

State v. Martinez, 870 So. 2d 18 (Fla. 2d DCA 2003).

The defendant was charged with forgery as a result of allegedly signing a uniform traffic citation with an incorrect name. The trial court granted the defendant's motion in limine and held that the citation could not be introduced into evidence and no reference could be made to it absent an asserted basis for independent relevance.

The district court granted certiorari on this interlocutory pretrial order, holding that it was a departure from the essential requirements of the law. The court held that the trial court was correct in excluding introduction of the citation in light of the specific prohibition against its admissibility in section 316.650(9), Florida Statutes, and the holding in Dixon v. State, 812 So. 2d 595 (Fla. 2002). However, the district court found error in the exclusion of any reference to the citation, a result dictated by neither case law nor statutory provision, observing that such a ruling would result in a miscarriage of justice since it would be all but impossible for the state to prosecute the offense without making reference to the forged document.

State v. Phillips, 852 So. 2d 922 (Fla. 1st DCA 2003).

The defendant was charged with (among other offenses) the third degree felony of driving with a license revoked pursuant to the habitual traffic offender law in violation of section 322.34(5), Florida Statutes. The trial court dismissed this count, finding that section 322.34(5) was constitutionally deficient because it did not change a crime. The trial court reasoned that section 322.34(5) was deficient because it referred to section 322.264 as authority for the revocation even though that provision only defined the criteria for finding a person to be an habitual traffic offender. The court observed that this constitutional infirmity could be cured by a statutory amendment to section 322.34(5) substituting section 322.27(5) for 322.264. Section 322.27(5) is the authority for the actual revocation of habitual traffic offenders.

The district court reversed, rejecting the trial court's conclusion that the reference in section 322.27(5) to a revocation "pursuant to" section 322.264 should be read as "in accordance with" that provision. The district court noted that the term "pursuant to" has been variously interpreted to mean (1) in accordance with, (2) under, (3) as authorized by, or (4) in carrying out. The court also cited a dictionary usage comment to the effect that since the phrase "pursuant to" means so many things, it is rarely, if ever, useful, and often used imprecisely by lawyers. The district court concluded:

It has long been recognized that the rule that penal statutes must be strictly construed is subordinate to the rule that the intention of the legislature must be given effect. [citations omitted] That maxim is honored by construing the phrase, "pursuant to," as meaning "as defined by," thereby making it an offense for a person to drive when his or her license has been revoked because he or she is a habitual offender under or as defined by section 322.264.

Sorrell v. State, 28 Fla. L. Weekly D1998 (Fla. 4th DCA Aug. 27, 2003), opinion withdrawn and superseded by, 855 So. 2d 1253 (Fla. 4th DCA 2003).

The defendant was convicted of driving while his license was permanently revoked in violation of section 322. 341, Florida Statutes.

The district court, after rejecting the defendant's various attacks on the evidence, reversed the conviction based on the Department of Highway Safety and Motor Vehicles v. Critchfield, 842 So. 2d 782 (Fla. 2003). In Critchfield, the Supreme Court declared unconstitutional under the single subject rule a provision making fourth DUI offenders subject to a permanent revocation.

In relation to the evidentiary issues, the court held that the state established that the defendant's license had been revoked through the admission of a copy of the defendant's driving record (it being unnecessary to prove the underlying DUI convictions forming the basis for the revocation) and that an indication in the record that the defendant had been given notice of the revocation was sufficient to establish the notice requirement.

Allen v. State, 852 So. 2d 394 (Fla. 4th DCA 2003).

The defendant was charged with vehicular homicide. He moved to dismiss the information, claiming that there were no material disputed issues of fact and that such facts as a matter of law failed to establish the reckless driving necessary to support a vehicular homicide charge. The trial court denied the motion.

The district court affirmed, holding that, contrary to the defendant's claim that the state could only prove he was driving approximately 95-105 miles per hour on the interstate, there was evidence of recklessness. The court observed that the state had submitted evidence that the defendant was exceeding 110 miles per hour and weaving in traffic, thereby creating a material

issue of fact on the issue of recklessness.

## **Arrests, Search and Seizure**

Blackwelder v. State, 853 So. 2d 479 (Fla. 2d DCA 2003).

The defendant's vehicle was stopped by an officer for failure to have a license tag. Upon approaching the vehicle the officer observed a temporary tag displayed in the rear windshield. The officer proceeded to make contact with the defendant, who initially provided an incorrect name. Subsequently, the officer determined that the defendant's license had expired, leading to the defendant's arrest and discovery of cocaine, methamphetamine, and drug paraphernalia. The defendant was subsequently convicted on these and other charges.

The district court reversed and remanded for discharge on all counts, holding that after an officer has totally satisfied the purpose for which he initially detained a motorist, there no longer exist reasonable grounds or legal basis for continuing the detention. The court observed that once the officer had determined the defendant's vehicle had a valid tag, he could no longer detain the defendant.

Morrow v. State, 848 So. 2d 1290 (Fla. 2d DCA 2003).

The defendant was a passenger in a vehicle stopped for speeding and failing to display a tag. After interacting with the driver, the officer, upon observing that the defendant was not wearing a safety belt, asked for identification, at which time the officer blocked the passenger's door and called for back-up. This resulted in the discovery of outstanding warrants against the defendant and, after a search incident to an arrest, the discovery of crack cocaine and marijuana and convictions for such offenses.

The district court reversed, holding that the defendant was not subject to detention since his actions did not give rise to a reasonable suspicion that he had committed, was committing, or was about to commit a crime. The court observed that the safety belt requirement, section 316.614(5), Florida Statutes, only requires passengers to wear a safety belt "when the vehicle is in motion." In light of testimony by the defendant that he was wearing the belt until the car stopped and the officer's testimony that he did not know whether the defendant was wearing a belt while the car was moving, the district court held that the officer did not have a reasonable suspicion of criminal activities justifying an investigatory stop.

Frierson v. State, 28 Fla. L. Weekly D1329 (Fla. 4th DCA June 4, 2003).

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 which 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 have not 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.

[Note: On Motion for Rehearing, the district court on August 6, 2003, added a reference in the opinion to the recent enactment of section 322.15(2), Florida Statutes, which requires the taking of a fingerprint from a person who does not produce a drivers license during a traffic stop. at 851 So. 2d 293.]

## **Torts/Accident Cases**

Ortlieb v. Butts, 849 So. 2d 1165 (Fla. 4th DCA 2003).

The defendant's vehicle collided with the plaintiff's vehicle, which had pulled away from a stop sign and then stopped without entering the roadway. The plaintiff apparently saw the defendant move forward, then looked left to see if the road was clear, accelerated, and ran into the defendant's vehicle, which was still waiting at the stop sign. The trial court denied the plaintiff's motion for a directed verdict, finding that the defendant had rebutted the presumption of negligence arising in a rear-end collision. The jury returned a verdict finding the plaintiff twenty-five percent negligent.

The district court reversed the denial of a directed verdict and directed entry of a judgment in favor of the plaintiff for the full amount of the verdict. The court reasoned as follows:

The evidence does not show that [plaintiff's] stop was sudden and

unexpected. [The defendant] never saw [the plaintiff] stop because, as she admits, she wasn't looking. That she accelerated her vehicle without looking to see where she was going does not fairly and reasonably show that she was not negligent. In fact, it shows the exact opposite. Because the presumption of negligence was not rebutted, the trial court erred in denying the motion for directed verdict.

Klarides v. Maher, 852 So. 2d 337 (Fla. 2d DCA 2003).

The defendant's vehicle rear-ended the plaintiff's vehicle when the defendant was hit from behind and propelled into the defendant. At the time of the collision the plaintiff was illegally waiting to move from a straight-through lane into a left turn lane to make a left turn. The trial court granted summary judgment against the defendant.

The district court reversed, observing that while there is a presumption that the rear vehicle in a rear-end collision is negligent, such presumption was negated by the defendant's substantial and reasonable explanation. The issue of negligence thus became a disputed issue of material fact, thereby making the entry of a summary judgment error.