

# FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

July - September, 2004

*[Editor's Note: In order to reduce possible confusion the defendant in a criminal case will be referred to as such even though his/her technical designation may be appellant, appellee, petitioner, or respondent. In civil cases, parties will be referred to as they were in the trial court, that is, plaintiff or defendant. In administrative suspension cases, the driver will be referred to as the defendant throughout the summary, even though such proceedings are not criminal in nature. Also, a court will occasionally issue a change to a previous opinion on motion for rehearing or clarification. In such cases, the original summary of the opinion will appear followed by a note. The date of the latter opinion will determine the placement order in these summaries.]*

## Driving Under the Influence

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

The defendant was involved in an accident in which her vehicle went airborne and collided head-on with another vehicle, resulting in the ejection of and fatal injuries to the occupant of that vehicle and in the serious bodily injuries to four persons in two vehicles forced to take emergency evasive measures in an attempt to avoid the crash. Subsequent investigation resulted in the discovery of persons who witnessed the defendant driving erratically at speeds approximating 85 miles per hour, weaving in and out of traffic and into the interstate median, and driving through the shrubbery barrier into oncoming traffic. The defendant was transported to a hospital, where an investigating officer ordered a blood test of the defendant based on various indications, including the detection of the odor of alcohol emanating from the driver's side of the defendant's vehicle. When the blood alcohol level registered .009, a subsequent blood and urine test was ordered, which revealed the presence of illegal drugs, primarily cocaine.

The defendant moved to suppress the test results. The trial court suppressed the blood test result, finding that although the officer had probable cause to order a blood draw, the requirements for such a draw had not been met, since a urine test had not been impractical or impossible, as required by section 316.1932(1)(c), Florida Statutes. The trial court did, however, allow results of the urine test to be admitted.

The district court reversed, holding that the applicable law was a provision found inapplicable by the trial court, to wit, section 316.1933(1), Florida Statutes, which authorizes a law enforcement officer who has probable cause to believe a person operating a motor vehicle has caused the death or serious bodily injury of a human being to use reasonable force to require such a person to submit to a blood test. The district court found language in section

316.1932(1)(c) relating to persons appearing at a hospital for medical treatment, while arguably applicable, not the appropriate section to apply given the additional factor of death and serious bodily injury. The district court rejected the trial court's reasoning against the applicability of section 316.1933, that is, that the officer lacked probable cause (noting the defendant's erratic driving and the odor of alcohol) and that the officer had not requested the unconscious defendant to submit to the test (observing that the statutory reference to a request was not to a request for the consent of the person to be tested but to a request that the test be performed).

The district court then reversed the trial court's holding that the urine tests be admitted, holding that section 316.1932(1)(c), unlike section 316.1932(1)(a), does not specifically or impliedly authorize breath or urine tests. Specifically, the court stated:

Given our interpretation of section 316.1932, which clearly places breath and urine tests in a category that is separate from blood tests, we conclude that the trial court erred when it applied the blood test requirements portion of section 316.1932(1)(c) to [defendant's] urine test in order to find that it was admissible. Because section 316.1932(1)(a) clearly requires that urine tests must be conducted pursuant to a lawful arrest, and because [the defendant] was not under arrest at the time that the urine test was taken, the urine test here was not admissible.

Grzelka v. State, 881 So. 2d 633 (Fla. 5th DCA 2004).

When asked to submit a breath test, the defendant was warned that her refusal would result in the suspension of her drivers license, but she was not informed that, if her license previously had been suspended for a prior refusal, her refusal would constitute a misdemeanor, as is required by section 316.1932(1)(a)1.a., Florida Statutes. At trial on the driving under the influence charge, the trial court admitted evidence of the refusal and the defendant was convicted.

The district court affirmed, holding that section 316.1932(1)(a)1.a. specifically authorizes the introduction of a refusal into evidence, but does not require exclusion when the statutory warning is not complete. The court also observed that evidence of refusal was admissible relevant evidence under general rules of evidence, since it tends to prove a consciousness of guilt, provided that the defendant was informed that adverse consequences would flow from the refusal. The district court concluded that since the defendant was advised of at least one adverse consequence of refusal, her decision to refuse was relevant and should have been admitted.

Savage v. State, 880 So. 2d 809 (Fla. 5th DCA 2004).

As a result of an accident in which the defendant swerved off the interstate and collided with a signpost, instantly killing his passenger, the defendant was charged with vehicular manslaughter and DUI manslaughter. Prior to trial the defendant substituted counsel, who moved for a continuance to prepare the case. The trial court denied the motion for continuance, as well as a motion for acquittal. The defendant was convicted by jury of vehicular

manslaughter.

The district court affirmed. On the continuance issue, the court observed that the trial court had previously announced that it had already granted the last continuance in the case, and that, in any case, the denial was not an abuse of discretion in light of the fact that the victim's mother and two out-of-town prosecution witnesses (a toxicologist and an eyewitness from Louisiana) had already arranged their schedules to be present at the trial. In relation to the motion of acquittal, the district court cited the eyewitness testimony of erratic driving (including a sharp turn to avoid a collision) and observed as follows:

Toxicology testing done by the State showed that [the defendant] had both ecstasy and Valium in his blood two hours after the accident. One expert testified that the amount of ecstasy found in [the defendant's] system was a relatively high value typical of a recreational use of the drug. The State's experts also testified that ecstasy impairs cognition and thinking and can cause deficits in attention. It can also produce visual disturbances, such as trailers and a halo effect, as well as hallucinations. One effect of the drug is increased energy; another is dilated pupils. There was also evidence that mixing other drugs with ecstasy (such as Valium) can produce unpredictable results. While the level of the drug in the blood alone cannot indicate impairment, the State's experts indicated that impairment can be inferred from the driving pattern exhibited by [the defendant] prior to the crash and his inability to stop when he drove up too quickly behind another vehicle. [The defendant's] impairment would also explain some of his behavior following the incident.

Department of Highway Safety and Motor Vehicles v. Fountain, 883 So. 2d 300 (Fla. 1st DCA 2004).

The Department of Highway Safety and Motor Vehicles permanently revoked the defendant's drivers license in 1991 based on four driving under the influence convictions. At that time through 1997, the defendant would have been eligible to apply for a restricted license. The legislature attempted to foreclose that option in 1998, but the relevant act was declared unconstitutional as being part of a law that violated the constitutional single subject requirement. The defendant applied in 2003 for a restricted license. The department denied the application, relying on the 1998 statutory prohibition. The defendant was subsequently granted certiorari review by the circuit court, which rejected the department's request for a remand to consider the application and ordered the reinstatement of the defendant's license for one year under enumerated circumstances.

The district court granted certiorari and quashed the order, holding that under either version of the statute the circuit court was without authority to order the department to issue the license. The district court observed that based on the 1997 version of the statute, it is within the department's discretion to decide whether to reinstate the defendant's license if the statutorily specified requirements are met. Under the 1998 version, neither the circuit court nor the department could have issued a hardship license.

Sloan v. State, 884 So. 2d 378 (Fla. 2d DCA 2004).

The defendant was adjudicated guilty of DUI manslaughter after the trial court had stated that it believed the youthful offender statute could not be used to circumvent the mandatory adjudication requirement in section 316.656(1), Florida Statutes.

The district court reversed, holding that if the trial court classifies a defendant as a youthful offender, the mandatory adjudication provision is inapplicable and section 958.04(2), Florida Statutes, which generally allows for withheld adjudications for youthful offenders, is applicable.

Gill v. State, 886 So. 2d 988 (Fla. 5th DCA 2004).

The defendant was convicted of the first degree felony of DUI manslaughter with failure to give information and render aid. The trial court upwardly departed from the sentencing guidelines, citing the factors that the volume of alcohol in the defendant's system was nearly three times the legal limit and that the crime occurred on one of the busiest roadways in the area during the evening hours. The defendant argued, and the state conceded, that the reasons for the departure were invalid, given the lack of evidence presented on the traffic factor and the fact that the level of intoxication standing alone was not a valid reason to depart since it is an element of the crime. The trial court scored the offense as a level 8 offense, a finding disputed by both the state (arguing for level 9) and the defendant (contending for level 7). This disagreement centered around the fact that the offense occurred during the period between when the first degree felony DUI manslaughter offense was created (with the sentencing guidelines classification of that offense as level 9) and the legislative re-adoption of the guidelines in 1997 after the Heggs opinion.

The district court reversed, agreeing with the state that the offense should have been scored as a level 9 offense. The court reasoned as follows:

The State's analysis of this point is correct. The unconstitutionality of the legislation adopting the 1995 version of the guidelines offense severity ranking chart did not prevent the legislature from amending the offense severity ranking chart in 1996. The fact that the legislature had made an unconstitutional attempt to amend the guidelines did not divest the legislature of its power to make subsequent constitutionally valid amendments to the guidelines. In view of the decision in Heggs, the 1996 amendment to the offense severity ranking chart operated, as the State argues, as an amendment to the 1994 guidelines. The 1996 legislation establishing a level 9 severity ranking for the offense of DUI manslaughter with failure to provide information and to render aid therefore was a valid legislative enactment. Accordingly, [the defendant] should have been sentenced with a score sheet on which his offense was scored as a level 9 offense.

The district court remanded the case for resentencing, even though the sentence imposed was within the guidelines for a level 9 offense. The court noted that it had no basis for concluding the trial court would have imposed the same sentence if it had employed a correct scoresheet.

## **Criminal Traffic**

State v. Brannum, 876 So. 2d 724 (Fla. 5th DCA 2004).

After submitting an open plea to the court on the offenses of aggravated fleeing and eluding and felony driving while license revoked, the defendant was given a suspended prison sentence and probation. The trial court stated that it did consider the sentence a downward departure, but nevertheless indicated that the sentence was justified because the offenses were committed in an unsophisticated manner and the defendant had entered a voluntary and uncoerced plea to the charges.

The district court, after finding that the sentence constituted a downward departure sentence (since the incarcerative portion of the sentence was suspended), reversed for the imposition of a guidelines sentence. The district court observed that the ground given for a departure sentence, that is, that the offense was committed in an unsophisticated manner and was an isolated incident--for which the defendant showed remorse--was not supported by the evidence. Specifically, the court noted that the defendant's offenses were not isolated incidents, but rather a part of a lengthy criminal record, including convictions for battery on a law enforcement officer, armed robbery, and misdemeanor batteries. In addition, the district court observed that the felony driving while license revoked could only have been charged if the defendant had previously been found guilty of driving with a revoked license. Finally, the court rejected as a reason for departure the fact that the defendant entered a voluntary and uncoerced plea, noting that the state was not a party to any plea agreement (a prerequisite to a valid justification for a downward departure.)

Logan v. State, 877 So. 2d 952 (Fla. 4th DCA 2004).

The defendant was convicted of the offenses of felony driving while license suspended, section 322.34(2), Florida Statutes, and habitual offender driving while license suspended, based on separate offenses occurring in 2001 and 2002. The convictions occurred at the same time as a result of a plea bargain.

The district court affirmed, stating that previous case law, Franklin v. State, 816 So. 2d 1203 (Fla. 4th DCA 2002), holding that such offenses are mutually exclusive as applied to a single incident, was inapplicable to offenses occurring at different times. The court stated that since it was not apparent from the record upon which prior convictions the offenses in 2001 (felony driving while license suspended) and in 2002 (driving while under habitual traffic offender status) were based, and the defendant had agreed to a plea bargain, it would affirm without prejudice to the defendant to seek postconviction relief, if appropriate, as to whether

either of the offenses were supported by adequate predicates.

James v. State, 881 So. 2d 85 (Fla. 5th DCA 2004).

The defendant was convicted of the second degree felony of fleeing or attempting to elude a law enforcement officer with lights and sirens and with wanton disregard. The jury had been instructed on such offense, as well as a misdemeanor offense, but not on the third degree felony offense (no wanton disregard). The trial court denied the defendant's motion for post-conviction relief based on ineffective assistance of counsel, to wit, the failure to request the third degree felony instruction.

The district court reversed, holding that the trial court should have at least conducted an evidentiary hearing in light of the issue involved. The court observed that it was error on the part of the trial court to merely assume the decision not to request the lesser included instruction was a strategic choice or that there was no prejudice given the lack of any reasonable probability that the jury would have declined to follow the law and exercised its jury pardon power.

Grizzard v. State, 881 So. 2d 673 (Fla. 5th DCA 2004).

While on probation, the defendant pled nolo contendere to the offense of knowingly driving on a suspended license, despite the fact that the defendant may have had a valid restricted (business purposes only) license. At the probation violation hearing, the court revoked the defendant's probation on the sole basis that this charge constituted a violation of the requirement that the defendant "live and remain at liberty without violating any law." The court considered the previous nolo contendere plea as res judicata.

The district court remanded the case to the trial court for further consideration as to whether the nolo contendere plea constituted a ruling "on the merits." The court summarized its reasoning as follows:

In summary, a conviction obtained pursuant to a plea of nolo contendere can support a revocation of probation. However, in this case, the trial court erred in announcing that the defendant's nolo plea in the Hillsborough County driving while license suspended/knowingly prosecution was binding and conclusive on the issue of whether the defendant was in fact guilty of that charge. The defendant denied the charge at the revocation hearing and the court was not precluded from determining that the defendant was not, in fact, guilty of the offense. The cause is remanded for reconsideration upon application of the correct rule of law.

### **Arrest/ Search and Seizure**

Paff v. State, 884 So. 2d 271 (Fla. 2d DCA 2004).

The defendant was the driver of one of two vehicles parked with the driver's side windows facing each other in a shadowy area of a gas station's driveway, creating an obstruction. A law enforcement officer pulled into the station, at which time the two vehicles left "real quick," but did not violate any traffic laws. The officer, based on personal knowledge that drug deals commonly occur in this area, stopped the defendant's vehicle and detained it until a police dog arrived and alerted on drugs. A subsequent search of the vehicle resulted in the discovery of cocaine and the defendant's conviction for possession thereof.

The district court reversed the trial court's denial of the defendant's motion to suppress, distinguishing the defendant's flight from flight on foot in the following manner:

Flight on foot is distinctly different than flight in a car. When 'headlong flight' occurs on foot, the defendant's intent to elude an officer may be clear, even though no law is broken. When 'flight' occurs in a vehicle, the vehicle often conceals the emotions of its occupants and it is more difficult to determine that such a defendant is demonstrating 'nervous, evasive behavior,' or is intending to engage in 'headlong' flight. [Citation omitted]. A car that obeys all traffic regulations when leaving a location when a police car arrives would seem to be the motor vehicle equivalent of a person who simply walks away from an officer on foot. Such a pedestrian does not [provide a basis for detention].

### **Torts/ Accident Cases**

Duhaime v. Boggs, 877 So. 2d 860 (Fla. 5th DCA 2004).

The defendant in a civil action was the driver of the last (fourth) vehicle in a chain-collision crash; the plaintiff drove the third vehicle in the chain. The accident occurred when the defendant crested an overpass, observed the plaintiff skidding on a slippery pavement (of unknown origin), in turn skidded and collided with the plaintiff's vehicle shortly after it had collided with the second vehicle in the chain. The trial court denied the plaintiff's motion for a directed verdict and the jury returned a defense verdict.

The district court affirmed, referencing the trial court's analysis of the presumption of negligence attaching to the fact that the defendant had rear-ended the plaintiff as follows:

... [we] agree with the trial judge that the evidence was sufficient to overcome the presumption. Three drivers, all apparently operating at safe speeds, encountered an unforeseen, slippery substance on the road, hidden from view, located just at the point where, because of the circumstances, braking became critical. By the time [the defendant] crested the overpass, he was confronted with the added hazard of one collision having just occurred and one collision about to occur. He essentially had no way to stop or otherwise avoid the accident. Under these unique circumstances, we think the jury was properly permitted to decide whether [the defendant's] actions constituted a breach of the applicable duty of care.

Force v. Ford Motor Company, 879 So. 2d 103 (Fla. 5th DCA 2004).

The plaintiff in a product-liability case based on an alleged design defect was the guardian of a person incapacitated in an accident in which a seatbelt shoulder restraint had purportedly failed during a violent collision. The defendant was the manufacturer of the vehicle. The case proceeded to trial on only a strict liability count. The court denied the plaintiff's request for a "consumer-expectation" jury instruction, to wit, that a product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer. The jury returned a verdict for the defendant.

The district court reversed, holding that the failure to give the "consumer expectation" instruction was error. The court, after concluding that under Florida law the consumer expectation standard was applicable for at least some products, reasoned as follows:

We conclude that there may indeed be products that are too complex for a logical application of the consumer-expectation standard. We leave the definition of those products to be sorted out by trial courts. With respect to seatbelts, however, we believe that the cases finding that they may be tested by the consumer-expectation standard are better reasoned and more persuasive. Accordingly, inasmuch as the jury instruction requested by [the plaintiff] accurately stated the applicable law, and the evidence supported the giving of the instruction, and the instruction was necessary to resolve the issues properly, we hold that [the plaintiff] was entitled to submit his case to the jury on both the risk-utility test and the consumer-expectation test, and, therefore, reverse and remand for a new trial.

Evans v. City of Miramar, 879 So. 2d 684 (Fla. 4th DCA 2004).

The plaintiff was involved in an intersection collision with an emergency vehicle, owned by the defendant who had proceeded through a red light. The trial court entered summary judgment in favor of the defendant, in light of the substantial deposition evidence favorable to the defendant, including testimony that the defendant's driver had used his lights and siren and was stopped or slowed down before proceeding through the intersection.

The district court reversed, indicating that there was some question whether the defendant's driver should have seen the plaintiff's vehicle and whether he had proceeded into her lane with due regard for safety of persons approaching in that lane. The court cited section 316.072, Florida Statutes, as establishing the applicable responsibilities for emergency vehicles.

Florio v. Eng, 879 So. 2d 678 (Fla. 4th DCA 2004).

The plaintiff and defendant were involved in a collision occurring when the plaintiff was making a right turn and the defendant was attempting to pass on the right (defendant alleged that

he believed the plaintiff had moved to the left in anticipation of making a left-hand turn; plaintiff testified that he had signaled a right-hand turn and did not cross into the left-hand lane). The plaintiff had requested a jury instruction on section 316.084, Florida Statutes, entitled "When overtaking on the right is permitted." Finding that there was no evidence to support the instruction, the trial court denied the request. The jury returned a verdict in favor of the defendant.

The district court reversed and remanded for a new trial, concluding that the failure to give the instruction was an abuse of discretion. The court observed that 1) the requested instruction accurately stated the law, 2) the facts (at least the plaintiff's allegations thereof) supported the giving of the instruction, and 3) the instruction was necessary to allow the jury to properly resolve the issues of the case.

Fisher v. State, 885 So. 2d 892 (Fla. 3d DCA 2004).

The plaintiff's decedent was a passenger in a vehicle driven at high speed, while allegedly being pursued by a marked police vehicle. The vehicle crashed, wrapping around a concrete support pole and killing the driver (blood alcohol content - .23) and the plaintiff's decedent (blood alcohol content - .09). The trial court granted summary judgment in favor of the defendant, determining that a police officer does not owe a duty to a passenger in a fleeing vehicle unless the officer knew of or should have known of the passenger's presence in the vehicle.

The district court affirmed, citing the countervailing obvious considerations of protecting the public from victimization by suspects fleeing the scene of a crime versus subjecting the public to accidents that may result from the chase. The court then concluded by stating:

[An additional] factor is the overwhelming burden placed on the police to perform the impractical, if not impossible task of determining, even if they knew a passenger was in a car, whether that passenger was a participant in a crime. By requiring police officers to first determine if there was a passenger and then determining if the passenger was involved in a crime would essentially halt any police pursuit. That result makes no sense considering that the police are our thin blue line protecting society.