FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

July – September, 2005

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

Driving Under the Influence

Department of Highway Safety and Motor Vehicles v. Brass, 906 So. 2d 1224 (Fla. 1st DCA 2005).

The defendant's drivers license was administratively suspended as a result of the decision of a hearing officer. The circuit court reversed, focusing solely upon the admissibility of certain statements made by the defendant to the investigating officer.

The district court quashed the order of the circuit court, holding that the court should have focused upon all the factors and circumstances known to the investigating officer in making a probable cause determination as to whether the defendant was the driver. The district court noted that the record contained ample evidence that, when viewed in its entirety, supported the officer's probable cause determination.

Lovelace v. State, 30 Fla. L. Weekly D1379 (Fla. 4th DCA June 1, 2005).

The defendant was issued a citation for misdemeanor driving under the influence on August 11, 2004. On November 15, 2004, the defendant filed a notice of expiration of speedy trial time under rule 3.191(a), Florida Rules of Criminal Procedure. The state then filed a "no information" on November 19, 2004, and the defendant moved for discharge on November 30, 2005. On December 1, 2004, the state filed a felony DUI charge in circuit court based on the same incident and prior DUI convictions. The county court subsequently failed to rule on the motion for discharge, claiming a lack of jurisdiction. The defendant petitioned for a writ of prohibition against the circuit court proceeding with the felony case.

The district court granted the writ of prohibition, holding that the county court should have granted the defendant's motion for discharge of the misdemeanor DUI based on the expiration of the speedy trial period, thereby leaving the state unable to prosecute the defendant for felony DUI, which requires a conviction of the misdemeanor charge and two prior DUI convictions. The court observed that when the state filed the no information the speedy trial period continued to run and the state could not refile charges based on the same conduct after the applicable period (90 days) has expired, which did not include the fifteen day window (after the demand).

[Note: On July 27, 2005, the district court replaced its previous opinion with an opinion deleting its statement that "[N]either informations nor indictments, however, are used for prosecuting misdemeanors." 906 So. 2d 1258.]

State v. Jacoby, 907 So. 2d 676 (Fla. 2d DCA 2005).

The defendant was the driver of a vehicle involved in a single-vehicle accident in which the vehicle's passenger was killed. At or previous to the time of the crash, the defendant had been followed by an unmarked patrol car, with whom he engaged in a high-speed race resulting in the crash. The officer in the unmarked car never activated his emergency lights or sirens or attempted to stop the vehicle. It was unclear whether the defendant knew he was being pursued by a law enforcement vehicle and whether the pursuit was discontinued prior to the crash, which resulted in the defendant's car being broken into two pieces. A second officer investigated the scene of the crash.

The defendant was charged with vehicular homicide and DUI manslaughter. The defendant moved to suppress all the evidence gathered at the scene of the accident, arguing that the crash was the result of police misconduct and that the evidence collected was therefore inadmissible "fruit of the poisonous tree." The trial court determined that while items that were found in open view on the ground were admissible, other evidence, including the two halves of the car, rear taillights from the car, and one empty twelve-pack beer carton found in the truck, were inadmissible.

Upon appeal, the district court reversed the suppression of the items, citing three reasons. First, the court distinguished the situation from that where suppression was used to deter "ill-advised acts of violence" caused by the officers themselves, observing that a high-speed chase during the early morning hours in a rural area did not rise to the level required. Second, the purpose of discouraging certain types of police misconduct was not invoked in the situation where the officer never attempted to exercise any police authority (no sirens or emergency lights). Third, the officer committing the alleged misconduct was not the officer who seized the items, and thus any determination of whether the seizure was proper must be based on the second officer's behavior (who had probable cause at the scene to associate the items with criminal activity).

Department of Highway Safety and Motor Vehicles v. Gonzalez-Zaila, 30 Fla. L. Weekly D1914 (Fla. 3d DCA Aug. 10, 2005), opinion withdrawn and superseded by, 920 So. 2d 1220 (Fla. 3d DCA 2006).

After the defendant's fifth conviction for driving under the influence in 1997, his license was permanently revoked. In 2003 he applied to the department for 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.]

Department of Highway Safety and Motor Vehicles v. Kurdziel, 908 So. 2d 607 (Fla. 2d DCA 2005).

The defendant's drivers license was ordered suspended for a second refusal (eighteen months) by an administrative hearing officer who concluded, based on officer testimony, that the defendant had been observed "swerving in and out of his lane of travel" and that a traffic stop had been conducted based on a concern that the defendant was impaired or was having a problem (possibly medical). Upon certiorari review, the circuit court quashed the order, rejecting the factual findings underlying the hearing officer's conclusion and stating that there was no evidence as to why the officer pulled the defendant's vehicle over.

The district court, on "second-tier" certiorari review, quashed the circuit court's order, holding that the court had improperly reweighed the evidence, thereby going beyond the scope of the circuit court's certiorari review.

Kincaid v. State, 910 So. 2d 411 (Fla. 5th DCA 2005).

The defendant was convicted of felony driving under the influence, fleeing and eluding, and driving with a suspended license. Upon appeal, he claimed the trial court erred by instructing the jury that he had no right to consult an attorney prior to submitting to field sobriety and breath tests. The district court affirmed, holding that the issue was procedurally barred because the defendant had failed to specifically object below that the jury instruction constituted an improper comment on the evidence.

Frank v. State, 912 So. 2d 329 (Fla. 5th DCA 2005).

The defendant was charged with DUI manslaughter as a result of his involvement in a two-car crash in which the driver of the other vehicle died. While being hospitalized with injuries, the defendant had blood drawn. Subsequently, the investigating police officer obtained the results of a blood alcohol test from the hospital without complying with the subpoena and notice requirements of section 395.3025(4), Florida Statutes. The defendant was convicted after the test result of .108 was admitted at trial.

The district court reversed and remanded for a new trial, stating that such a holding is mandated even if the state subsequently notifies the person whose records are sought and thereafter subpoenas such records in compliance with the statute. The district court rejected the state's argument that the failure of the trial court to make a finding of bad faith was tantamount to finding that the officer acted in good faith, observing that an officer's lack of knowledge of the law or misapprehension thereof does not equate with good faith. The district court also rejected the state's claim of harmless error, noting that the applicable jury instruction stated that a necessary element of the crime could be satisfied by the finding of a blood alcohol level of .08 or higher.

Tynan v. Department of Highway Safety and Motor Vehicles, 909 So. 2d 991 (Fla. 5th DCA 2005).

The defendant was stopped for driving erratically, whereupon she was transported to a DUI testing facility and recorded blood test results of .140 and .139. At a formal administrative hearing, the defendant challenged the admissibility of the intoxilyzer results in relation to the

testing solutions, testing machine approval, annual inspections, modification of components, and simulator solutions. The defendant requested that three FDLE employees be issued subpoenas, a request denied by the hearing officer. The hearing officer, finding that the defendant was properly stopped and had an unlawful blood alcohol level, upheld the drivers license suspension and denied the defendant's attacks on the validity of the test results. A circuit court panel granted the defendant's petition for writ of certiorari and remanded, finding that the department's failure to issue subpoenas violated the defendant's due process rights, in that it denied her the opportunity to demonstrate the department's non-compliance with administrative rules.

At a second formal review hearing before a replacement hearing officer, one of three subpoenaed FDLE employees appeared, resulting in the hearing officer continuing the hearing for 30 days to allow for enforcement of the subpoenas. Prior to the rescheduled hearing, the department filed a motion for clarification of the circuit court's order granting certiorari, seeking to ascertain whether the court intended the holding of a subsequent formal hearing. The defendant moved to abate the rescheduled hearing until the circuit court ruled on a motion for clarification, a motion denied by the hearing officer. At the rescheduled administrative hearing, the defendant also objected to the holding of the hearing because she had not sought enforcement of the subpoenas, relying on an understanding that the hearing would not be held until the motion for clarification was disposed. During the hearing, the defendant nevertheless introduced evidence regarding intoxilyzer machines in the state, in addition to introducing testimonial evidence from another case, and made various legal arguments. The hearing officer subsequently upheld the suspension. The circuit court denied the defendant's petition for writ of certiorari.

The district court granted the defendant's petition for writ of certiorari. The court held that the defendant should have been granted a de novo hearing before the replacement hearing officer, which would have allowed both parties the right to introduce all the evidence (including any from the first hearing) they wanted to present to the new hearing officer. The district court then found that the department's motion for clarification, although not filed within the required 15 day time limit, effectively lodged jurisdiction in the circuit court until its disposition. Thus, the hearing officer was without jurisdiction to enter a final order in the second hearing. Rejecting the circuit court's finding of harmless error the district court stated:

> Further, it appears this error was not harmless in the sense that it was not prejudicial. [The defendant] relied on the correct rule of appellate law at this second hearing in assuming it would be continued. That was the reason she did not enforce the subpoenas regarding persons she thought were essential witnesses [names]. Thus this second hearing contained the same deprivation of due process issues she suffered in the first. This is the primary basis for our issuing the writ and quashing the circuit court's denial of the second petition filed below.

The district court observed that the defendant's attempted defense had been upheld by a different three-judge circuit panel and noted that she may have a substantial challenge to the validity of the chemical test meriting a full due process hearing.

Criminal Traffic Offenses

McKnight v. State, 906 So. 2d 368 (Fla. 5th DCA 2005).

The defendant was pulled over for a cracked windshield and consented to the officer's request to search him and his vehicle. At some point, the defendant became uncooperative and left the scene in his vehicle. A subsequent pursuit led to the defendant running a red light, and causing a collision with another vehicle resulting in the death of two and serious injury of another. The defendant was charged with and found guilty of two counts of vehicular homicide, among other offenses. Both counts were charged as first degree felonies because the defendant failed to render aid.

The district court affirmed, rejecting the defendant's double jeopardy arguments. Initially, the court rejected the state's argument that the defendant waived the claim, observing that a violation of double jeopardy is fundamental error, which cannot be waived absent a knowing and voluntary waiver, which was not present. The court then observed that the appropriate test for a claim of multiple punishments for the same offense was to ascertain legislative intent concerning the "allowable unit of prosecution," that is, the aspect of criminal activity the legislature intended to punish. The court then held that in relation to the vehicular homicide element of the offense the legislature clearly intended that the death of each victim constitute an allowable unit of prosecution, as with any other offense falling with the category of homicide crimes. The court next confronted the issue of whether the enhancement of vehicular homicide from a second to a first degree felony for failing to give information and render aid violated double jeopardy. Distinguishing the enhancement situation from separate convictions for vehicular homicide and leaving the scene offenses (where the intended unit of prosecution was each accident rather than victim) the court held that the legislature intended to "clarify that the aspect of criminal conduct to be punished . . . is the failure to render aid to each victim of the accident . . . rather than the defendant's act of fleeing from a single accident scene." The court noted that the elevation of vehicular homicide to a first degree felony is a result-driven sanction that implicitly recognizes the possibility that the victims may not have died had the defendant complied with the statutory duty.

Hobson v. State, 908 So. 2d 1162 (Fla. 1st DCA 2005).

The defendant was convicted of aggravated fleeing or eluding as a result of serving as the "get-away driver" in the robbery of a convenience store. After leaving the scene of the robbery, the defendant began to drive erratically and at a high rate of speed as a law enforcement officer pursued him with lights and sirens activated. During the course of the pursuit, the defendant struck a car, after which he continued to flee the officer, eventually being apprehended when the van he was driving stalled in a field.

The district court reversed the felony conviction, noting there were three elements of the offense, to wit, 1) leaving the scene of a crash involving injury, death, or property; 2) in the course of unlawfully leaving the crash scene, willfully fleeing or attempting to elude an officer

after being ordered to stop; and 3) as a result of the fleeing or eluding causing further bodily injury or property damage. Section 316.1935(4), Florida Statutes. The court, after observing that it was undisputed that law enforcement began its pursuit in response to the robbery, held that the first element was absent. The court then noted that the third element of further property damage or injury after striking the car and continuing flight was also absent. Rejecting the state's contention that the defendant had not preserved error, the court held that a conviction for an offense that did not take place constituted fundamental reversible error. The case was remanded for the entry of judgment and sentence on the lesser included offense of misdemeanor fleeing and eluding.

Kirschner v. State, 915 So. 2d 624 (Fla. 2d DCA 2005).

The defendant was placed on probation for driving while her drivers license was revoked under the habitual traffic offender law, section 322.34(5), Florida Statutes, pursuant to an order which withheld adjudication and placed her on probation.

The district court reversed, holding that the state's evidence was insufficient to prove that the defendant's license was revoked pursuant to the habitual traffic offender statute. Specifically, the district court noted the state never introduced a copy of the defendant's driving record into evidence, as is authorized by the relevant statute. The trial court, while asked to take judicial notice of the record, had never done so. Thus, the district court held that the state had failed to establish two elements of the offense, to wit, that the defendant's license was revoked and that the revocation was based on the habitual traffic offender statute.

Kallelis v. State, 30 Fla. L. Weekly D1496 (Fla. 4th DCA June 15, 2005).

The defendant was convicted of driving while license revoked as a habitual traffic offender based on the introduction of a certified copy of his driver history record obtained from the Department of Highway Safety and Motor Vehicles.

The district court reversed, holding that the certified copy of the record contained no traffic offenses that would qualify for habitual traffic offender designation. The court distinguished a case in which a record was admitted into evidence, noting that such record contained the requisite convictions to qualify for habitual traffic offender status.

[Note: Upon Motion for Clarification, the court substituted an opinion on August 31, 2005, which specifically required reversal for the entry of a judgment of conviction for driving with a suspended license, the lesser included offense. 909 So. 2d 544. In its previous opinion, the court had reversed and vacated the conviction and sentence for driving with a suspended license.]

Drivers Licenses

Freeman v. Department of Highway Safety and Motor Vehicles, 30 Fla. L. Weekly D2103 (Fla. 5th DCA Sept. 2, 2005), opinion withdrawn and superseded by, 924 So. 2d 48 (Fla. 5th DCA 2006).

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 fullface 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 fullface 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 not 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 not 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 fullface photographs for permanent licenses nor was there evidence that the department had ever photographed anyone with a mask or other covering over the face.

Department of Highway Safety and Motor Vehicles v. Rosenthal, 908 So. 2d 602 (Fla. 2d DCA 2005).

The defendant's drivers license was revoked by the department for five years as a habitual traffic offender based on one driving under the influence offense and two driving while license suspended (DWLS) offenses. Upon certiorari review, the circuit court ruled that the department's determination was erroneous since one of the qualifying offenses, the second DWLS, was based on a nolo contendere plea with adjudication withheld, and thus could not be considered a conviction for purposes of determining habitual traffic offender status.

The district court quashed the circuit court order, upholding the department's order finding that the second DWLS qualified as a "conviction," as defined under section 322.01(10), Florida Statutes, and as held Raulerson v. State, 763 So. 2d 285 (Fla. 2000). The district court noted that the second DWLS involved a disposition based on a nolo contendere plea with adjudication withheld, but was not entered pursuant to section 318.14(10), Florida Statutes, which authorizes the clerk to withhold adjudication in specified driving while license suspended cases. After observing that such withheld adjudication is statutorily excluded from the definition of "conviction," the court concluded:

> [Defendant's] second DWLS offense was not subject to disposition under section 318.14(10) and thus must be considered a conviction under the reasoning of Raulerson. In failing to follow Raulerson, the circuit court failed to apply the correct law and violated a clearly established principle of law. The resulting miscarriage of justice – the restoration of [the defendant's] drivers license when the law clearly required that the license be revoked for his habitual violations of the law – justifies the granting of the Department's petition. We quash the circuit court's order and remand for the reinstatement of the Department's revocation order.

Arrests, Search and Seizure

State v. Howard, 909 So. 2d 390 (Fla. 1st DCA 2005).

The defendant was a passenger in her own vehicle when it was stopped for a cracked or broken windshield, to wit, a 14 inch crack. After smelling marijuana as the driver stepped out of the car, the officer conducted a consensual search which resulted in the discovery of contraband. The trial court granted the defendant's motion to suppress, finding that the initial traffic stop was illegal since the "hairline crack" had not created a safety issue. The court reasoned that since there was no specific prohibition against cracks in the provision dealing with windshields, section 316.2952(1), Florida Statutes, and since section 316.610 generally prohibited driving a vehicle in an unsafe condition, the stop was illegal absent proof (not forthcoming) that the crack presented a safety concern. Hilton v. State, 29 Fla. L. Weekly D1475 (Fla. 2d DCA June 18, 2004).

The district court reversed, observing initially that the Hilton opinion was overturned by the en banc opinion in Hilton v. State, 901 So. 2d 155 (Fla. 2d DCA 2005), review granted, 919 So. 2d 435 (Fla. 2006). Contra, State v. Burke, 902 So. 2d 955 (Fla. 4th DCA 2005). The district court held that although the two previously referenced statutes do not specify under what circumstances an officer may stop a car to perform a safety inspection on a broken windshield, an officer is allowed to stop a vehicle with a visibly cracked windshield regardless of whether the crack creates an immediate hazard. The court certified conflict with Burke.

State v. Casey, 908 So. 2d 600 (Fla. 2d DCA 2005).

The defendant was a passenger in a vehicle stopped for an inoperative tag light. The officer subsequently observed an expired out-of-state temporary tag and, upon performing a license check, discovered that the driver had a suspended drivers license and that the vehicle had no registration. The officer arrested the driver and advised the defendant to exit the vehicle. A subsequent search included the defendant's purse (on the front passenger seat) and resulted in the discovery of non-prescribed controlled substances in her purse. The trial court granted the defendant's motion to suppress, accepting the defendant's argument that the search should have been limited to a search incident to an arrest in the area within the defendant's immediate control.

The district court reversed and remanded, holding that the bright line rule adopted in New York v. Belton, 453 U.S. 454 (1981), controlled, to wit, that when an officer arrests an occupant of a vehicle, the interior of the vehicle is within the scope of a search incident to the arrest. This includes any container in the vehicle, whether open or closed.

State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005).

Based on drug-related information from an informant and observation of reckless driving by a law enforcement officer, the defendant was stopped. While the officer was still writing the citation, a narcotics dog alerted on the vehicle. A subsequent search resulted in the discovery of drugs. At trial, the court granted the defendant's motion to suppress the drugs found in the vehicle, reasoning that there was insufficient proof that the dog was qualified so as to establish probable cause under Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003). Matheson held that additional factors, such as the "track record" of the dog prior to the search at issue, were relevant to whether probable cause existed. In the absence of any record thereof the court held that the alert itself did not establish probable cause.

The district court reversed and remanded, opting for a middle ground between the Matheson holding and case law to the effect that training and certification alone is a sufficient proof of reliability to make a prima facie showing of probable cause. The district court summarized its position as follows:

> We therefore conclude that the state can make a prima facie showing of probable cause based on a narcotic dog's alert by demonstrating that the dog has been properly trained and certified. If the defendant wishes to challenge the reliability of the dog, he can do so by using the performance records of the dog, or other evidence, such as expert testimony [citations omitted]. Whether probable cause has been established will then be resolved by the trial court.

Origi v. State, 912 So. 2d 69 (Fla. 4th DCA 2005).

The defendant was pulled over for driving 90 miles per hour in a 65 mile per hour zone. While writing a speeding citation, the officer noticed that the defendant smelled like an alcoholic beverage, leading the officer to contact a member of the DUI taskforce. The officer of the taskforce arrived on the scene and observed numerous signs of alcohol usage in relation to the

defendant (odor of alcohol, bloodshot eyes, staggering, slurred speech). After the defendant refused to perform sobriety tests and refused to submit to a chemical test, he was arrested and given a Miranda warning. Subsequently, when approaching the DUI testing facility the defendant responded to the officer's comment that there were a lot of drugs in a cooler retrieved from the vehicle with a statement that "I have to make money and make a living."

The defendant was charged with driving under the influence and five drug offenses. The trial court denied the defendant's motion to suppress the aforementioned statement and the cooler containing drugs. At his first trial, the defendant was convicted of DUI, but the jury hung on the drug charges. At his second trial, both officers testified about the statement and the defendant was convicted.

The district court reversed and remanded for a new trial. While the court held that the first officer was justified in detaining the defendant for the brief period before the second officer's arrival (given the testimony regarding the defendant's appearance), the district court observed that introduction of the defendant's post-Miranda statement was improper since the defendant was subject to an accusatory statement reasonably likely to elicit an incriminating response and was in a custodial situation. The court concluded such error was not harmless since it could not conclude that there was no reasonable possibility that the statement contributed to the conviction.

State v. Schuck, 913 So. 2d 69 (Fla. 4th DCA 2005).

The defendant was the owner of and backseat passenger in a vehicle stopped for a broken taillight (with red tape covering a fist-size hole still emitting a white light). As the officer approached the vehicle he detected the odor of marijuana and subsequently issued a citation to the driver (the defendant's spouse) for improper and unsafe equipment pursuant to section 316.610, Florida Statutes. He then asked the passengers to exit the vehicle. Pursuant to a consensual search the officer recovered enough marijuana to charge the defendant with felony possession. At trial, the court granted the defendant's motion to suppress evidence since the officer had engaged in a tainted unlawful stop and thus was required to have a warrant.

The district court reversed, holding section 316.610(1), Florida Statutes, expressly gives a police officer the authority to require the driver to submit to an inspection. Since the vehicle reasonably appeared to have an equipment violation, the stop was authorized (section 316.221 specifically prohibits material being placed over a tail lamp). The district court distinguished its holding from a contrary result in relation to a cracked taillight, observing that the latter was not a traffic violation.

State v. Coleman, 911 So. 2d 259 (Fla. 5th DCA 2005).

In three consolidated cases, the State challenged the trial court's orders granting motions to suppress drugs found in vehicles after a police dog gave indications that drugs were present. Conceding that the state had established that the dog had been trained and certified, the trial court based its ruling on the failure to establish the dog's "track record." In addition, the state

had challenged the lower court's orders excluding testimony from the dog's handler about the dog's track record, because records prepared by the handler had been lost.

The district court, after reviewing conflicting opinions from another district court, reversed and agreed with the Fourth District in State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005), which held that the state can make a prima facie showing of probable cause based on a narcotic dog's alert by demonstrating that the dog had been properly trained and certified, and that if a defendant wished to challenge the reliability of the dog, he can do so by using the performance records of the dog or other evidence, such as expert testimony. The decision of whether probable cause has been established would then be resolved by the trial court. In the instant case, the district court noted that since such certification and training had been demonstrated, the state and defense should be allowed to reopen the evidence on remand to present additional evidence regarding the dog's reliability. In relation to the issue that evidence of the dog's "track record" had been inadvertently lost, the district court observed it would be inappropriate to sanction the state in the absence of a showing of bad faith. The district court then certified conflict with Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003).

Torts/Accident Cases

Roos v. Morrison, 913 So. 2d 59 (Fla. 1st DCA 2005).

The plaintiff in a civil action was a passenger on a motorcycle which was struck by a sport utility vehicle (SUV) in which the defendant was a passenger. The plaintiff alleged that the defendant was in a superior position to the driver of the SUV to observe a potential hazard and gave affirmative advice to the driver which resulted in the collision, to wit, the defendant, as a back seat occupant of the SUV, informed the driver it was safe to back up, resulting in a serious injury to the plaintiff. The trial court dismissed the plaintiff's complaint with prejudice.

The district court reversed and remanded for the case to proceed. Recognizing that Florida law states that "an action undertaken for the benefit of another, even gratuitously, must be performed with an obligation to exercise reasonable care," the court found potential liability if it was established that the defendant undertook the duty of determining whether the SUV driver's intended path of travel was clear, was in a better position to so ascertain that the intended path was clear, told the driver so, and the driver relied on such statement.

The district court, indicating that it was mindful that its decision could result in some cases in a partial or total transfer of liability from an insured driver to a possibly uninsured passenger certified the following question to the Florida Supreme Court:

> May a vehicular passenger be held liable to another vehicular passenger in circumstances where the potentially liable passenger was in a superior position to the driver of that passenger's vehicle to observe a potential hazard and gave affirmative advice to the driver which resulted in a collision with the other passenger's vehicle?