

FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

July – September, 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

Rehm v. State, 931 So. 2d 1071 (Fla. 4th DCA 2006).

The defendant was observed at night weaving on a bicycle with no headlight. After being stopped, the defendant was administered sobriety field tests, which he passed. The detaining officer, upon observing indicators of drug use and being refused consent to search the defendant, requested a K-9 officer and dog. The drug dog alerted to the left handlebar and bicycle seat, but a search of the bicycle turned up no drugs. The officer then searched the defendant, resulting in the discovery of a bag of marijuana and the defendant's subsequent conviction of possession thereof.

The district court reversed, holding that there was no probable cause for the search. Observing that there was no argument that the officer was engaged in a search for weapons, the court opined that it was well-established that a dog alert to a vehicle (or a seat thereof) does not, in and of itself, provide sufficient probable cause to search a driver or passenger. The district court also noted that there was no scientific support in the record for the proposition that a dog alert on a bicycle seat or handlebar is more indicative of the occupant's present possession of drugs than a similar alert on a recently-occupied automobile seat.

Murphy v. Southern Mutual Management, 936 So. 2d 786 (Fla. 4th DCA 2006).

The plaintiff was injured when a drunk driver (blood alcohol levels of .31 and .30) drove onto a sidewalk and struck her. The plaintiff sued the defendant drinking establishment for having served the driver alcohol 2.4 hours before the accident. The trial court granted the defendant's motion for summary judgment.

The district court reversed, observing that section 768.125, Florida Statutes, establishes a

cause of action against a person selling or furnishing alcoholic beverages to a person habitually addicted to the use of alcohol for injury or damage caused by or resulting from such intoxication. The court pointed to deposition testimony that the driver had consumed alcoholic beverages at the defendant's bar at least three times a week for nine years as evidence from which a jury could determine that the vendor had sufficient knowledge that the statute was violated. The district court noted that there was also evidence that that the driver had been refused service at a second bar within minutes after leaving the defendant's bar, which could give rise to the conclusion that the defendant bar knew the driver was intoxicated.

[Note: On September 6, 2006, the district court withdrew its previous opinion and replaced it with an opinion changing the reference to the frequency at which the driver drank at the defendant's bar from "at least three times a week" to "once or twice a week." The holding remained the same. 936 So. 2d 786]

Williamson v. Department of Highway Safety and Motor Vehicles, 933 So. 2d 665 (Fla. 1st DCA 2006).

The defendant driver was stopped for failure to remain in one lane in violation of section 316.089 (1), Florida Statutes, when his vehicle crossed over the left hand lane and then the right lane, nearly colliding with another vehicle. The officer, upon observing the defendant's slurred speech and the emission of the smell of alcohol, arrested the defendant for driving under the influence. The defendant refused the officer's request for a breath test, resulting in the suspension of the defendant's drivers license after an administrative hearing. The circuit court denied the defendant's petition for writ of certiorari, rejecting the argument that the initial stop was unlawful because the violation for which the defendant was stopped required proof that other traffic was affected by his lane changes (there was no evidence below that the driver in the adjoining lane took evasive action or was even aware that the defendant had almost struck his or her vehicle).

The district court denied the defendant's subsequent petition for writ of certiorari, finding unpersuasive the defendant's argument that the evidence must disclose that the imperiled operator took evasive action or was aware of danger as having no basis in either statutory or case law. The fact that the record clearly established that the defendant put another vehicle in danger, whether or not the other operator knew of the danger, was sufficient.

Sobota v. State, 933 So. 2d 1277 (Fla. 2d DCA 2006).

The defendant was charged with driving under the influence with serious bodily injury. At trial, the court allowed the state to admit test results from a legal blood draw through a toxicologist who was as not involved with the actual testing. The toxicologist testified that the chief toxicologist who had conducted the test had recently retired. The court concluded that admission of the test results did not violate the federal Confrontation Clause because such test results were nontestimonial and qualified as business records. The defendant was subsequently convicted.

The district court reversed and remanded, holding that the test results were testimonial

hearsay, citing Johnson v. State, 929 So. 2d 4 (Fla. 2d DCA 2005), and certifying the following question to the Supreme Court:

Does admission of a test result from a legal blood draw violate the Confrontation Clause and Crawford v. Washington, 541 U.S. 36 (2004), when the toxicologist who performed the blood test does not testify?

Williams v. State, 933 So. 2d 1283 (Fla. 2d DCA 2006).

The defendant was convicted by a jury of trafficking in cocaine, possession of cannabis, and driving under the influence. In relation to the DUI charge, the trial court had allowed the introduction into evidence of a breath test affidavit from a person other than the person who actually administered the test and prepared the affidavit.

The district court reversed the driving under the influence conviction, reiterating its holding in Johnson v. State, 929 So. 2d 4 (Fla. 2d DCA 2005), that a Florida Department of Law Enforcement lab report prepared pursuant to a police investigation and offered to establish an element of a crime was testimonial hearsay and inadmissible in the absence of the conditions established in Crawford v. Washington, 541 U.S. 36 (2004), wherein the United States Supreme Court conditioned the admissibility of testimonial hearsay on the unavailability of the declarant and the defendant's prior opportunity to cross-examine. The district court rejected the state's argument that the report should be admitted under the business record hearsay exception (citing Johnson) and certified the following question to the Supreme Court:

Does admission of a breath test affidavit violate the Confrontation Clause and Crawford v. Washington, 541 U.S. 36 (2004), when the technician who performed the breath test does not testify?

Brady v. State, 934 So. 2d 659 (Fla. 2d DCA 2006).

The defendant was arrested for driving under the influence and possession of a controlled substance, the former charge filed in county court and the latter in circuit court. Six days after the expiration of the misdemeanor speedy trial period, the state filed a two-count information on both charges. The defendant moved to dismiss the DUI offense and the circuit court denied the motion.

The district court reversed and granted the defendant's petition for writ of prohibition against the circuit court having jurisdiction of the DUI charge. The district court noted that the speedy trial period had already run on the DUI in county court and thus the circuit court lacked jurisdiction over the misdemeanor charge. The court added that the misdemeanor could not be revived by consolidating or joining it with a felony charge after the ninety-day time had expired, observing that the county court was never divested of jurisdiction over the DUI charge and the circuit court never properly obtained jurisdiction over that charge.

Bush v. State, 937 So. 2d 1148 (Fla. 5th DCA 2006).

On December 19, 2003, the defendant was arrested and issued a citation for misdemeanor driving under the influence. On March 18, 2004, she filed a Notice of Expiration of Speedy Trial Time, asserting that she had not been brought to trial within 90 days as required for a misdemeanor under the speedy trial rule. The county court heard argument on the motion on March 25, 2004, at which time the prosecutor stated that he was filing a felony DUI charge that day. The county court entered an order stating as follows: “Per Assistant State Attorney Case Upgraded to Felony.” However, despite the representation of the prosecutor, the felony information was not filed until April 7, 2004. The defendant then filed a motion for discharge in county court, subsequent to which the state nol prossed the misdemeanor DUI, but stated that the pending felony DUI was not nol prossed. The defendant’s motion to discharge the felony DUI was denied by the circuit court.

The district court reversed, citing as authority Lovelace v. State, 906 So. 2d 1258 (Fla. 4th DCA 2005). [Note: the Lovelace opinion summary is contained in the DUI section of the April-June 2005 edition of these summaries.]

Department of Highway Safety and Motor Vehicles v. Trauth, 937 So. 2d 758 (Fla. 3d DCA 2006).

The defendants (two consolidated cases) had their drivers licenses suspended pursuant to a formal administrative hearing held pursuant to section 322.2615, Florida Statutes. Upon writs of certiorari, the circuit court quashed the order without explanation and remanded to the county court for adjudication of appellate attorney fees. A subsequent motion for rehearing on clarification in the circuit court was denied.

The district court reversed, holding that the circuit court order departed from the essential requirements of law by issuing what was tantamount to a “Per Curiam Reversal.” Citing extensively from Kates v. Millheiser, 569 So. 2d 1357 (Fla. 3d DCA 1990), the district court held that the circuit court order had failed in the following ways: 1) it is the responsibility of the appellate courts to guide the trial courts as to questionable procedures or rulings (a per curiam reversal opinion does not give the trial judge any guidance as to how to correct the supposed error which was the basis of the reversal), 2) to the extent that the reversal relates to evidentiary matters, it fails to place the trial lawyers on notice as to what issues are open for retrial, and 3) the need for an appellate court to announce the reason for a reversal is essential to the integrity of the judicial process, given the importance for litigants and the public to recognize that determinations develop as the result of a fair and just reasoning process rather than an arbitrary decision.

Department of Highway Safety and Motor Vehicles v. Williams, 937 So. 2d 815 (Fla. 1st DCA 2006).

The defendant drove her vehicle through a stop sign, across a two-lane road, over the opposite shoulder, and through the driveway of a restaurant, coming to rest in a nearby drainage ditch. She was apprehended by a law enforcement officer while being taken home by a friend.

After performing poorly on field sobriety exercises and registering .121 and .130 on breath alcohol tests, the defendant was arrested for driving under the influence. Subsequently, her license was suspended after a formal administrative hearing. Upon petition for writ of certiorari, the circuit court quashed the suspension order, finding that since no crash had occurred (defendant's vehicle sustained \$100 damage but had caused no other damage), as required in section 316.645, Florida Statutes, there was no authority for a warrantless arrest under section 901.15, Florida Statutes.

The district court reversed, holding that the term "traffic crash" reasonably contemplates some degree of damage, but does not require damage to the property of another, nor does it set a minimum amount necessary in order for such an incident to occur legally.

Criminal Traffic Offenses

Garcia v. State, 939 So. 2d 1082 (Fla. 3d DCA 2006).

As a result of the illegal issuance of an identification card to an undercover operative who did not have the required documentation, the defendant was convicted of (among other offenses) the unlawful issuance of an identification card in violation of section 322.212(3), Florida Statutes, and the unlawful supplying of an identification card in violation of section 322.212(4), Florida Statutes. The defendant challenged the two violations on double jeopardy grounds.

The district court rejected the argument, noting that each offense contained an element lacking in the other. Specifically, subsection (3) can only be committed by an employee of the Department of Highway Safety and Motor Vehicles, and requires a showing that the defendant allowed or permitted the issuance of a card when the defendant knew the applicant had not satisfied the legal requirements. On the other hand, subsection (4) applies to any person and requires a showing that the defendant entered into an agreement to supply someone with a card by any means not in accordance with applicable statutory requirements. The district court summarized as follows:

Thus in subsection (3) it need only be shown that a Department employee allowed or permitted the issuance of a license or identification card to one who is not qualified, whereas under subsection (4) there is a requirement for either a showing of an agreement or a showing that the defendant affirmatively aided in supplying an unqualified person with a license or identification card. Under the first alternative – the showing of an agreement – the agreement must only be shown to exist and does not have to be carried out. As each subsection contains an element that the other does not, there is no double jeopardy violation.

Weathers v. State, 937 So. 2d 1132 (Fla. 4th DCA 2006).

The defendant was charged with felony driving while license revoked as a habitual traffic

offender in violation of section 322.34(5), Florida Statutes. At trial, the state introduced a redacted copy of the defendant's driver history record, which contained the defendant's name, address, birth date, height, race, sex, and drivers license number. The record did not list the offenses which resulted in the defendant's status, but contained entries showing a five year revocation as a habitual traffic offender and evidencing that notice had been provided to the defendant as statutorily required. The record had been redacted in response to an earlier order in limine requiring omission of the prerequisite convictions. After having his motion for acquittal rejected, the defendant was convicted.

The district court affirmed, holding that the elements of the offense included habitual traffic offender status and notice thereof to the defendant, not proof of the convictions underlying that status. The court then concluded that the record sufficiently linked the defendant to the charge and recited that the requisite notice was given.

Hardin v. State, 938 So. 2d 578 (Fla. 1st DCA 2006).

The district court issued a per curiam affirmance, citing Card v. State, 927 So. 2d 200 (Fla. 5th DCA 2006), for its holding that in a prosecution for driving while license revoked as a habitual traffic offender, a certified copy of the defendant's driving record is not testimonial hearsay and thus the record's admission did not implicate the defendant's Sixth Amendment right to confrontation under Crawford v. Washington, 541 U.S. 36 (2004).

Traffic Court Rules

In re: Amendments to the Florida Rules of Traffic Court (Three Year Cycle), 938 So. 2d 983 (Fla. 2006).

Effective January 1, 2006, the Supreme Court adopted the following amendments to the traffic rules:

Rule 6.040 – adds to the definitional section of the rules the term “counsel” to mean “any attorney who represents a defendant.”

Rule 6.455 – changes the civil infraction rule on amendments to allow a charging document to be amended “by the issuing officer in open court at the time of a scheduled hearing before it commences . . .”

Rule 6.630 – deletes the provision prohibiting civil traffic infraction hearing officers from being paid no more than \$50 per hour.

Vehicle Forfeiture

City of Hollywood v. Mulligan, 934 So. 2d 1238 (Fla. 2006).

The defendant was arrested by plaintiff's police officers for the misdemeanor offense of solicitation of prostitution. Since the defendant was in his vehicle at the time, the plaintiff city seized and impounded the defendant's vehicle. After the payment of an administrative fine pursuant to the applicable municipal ordinance, the defendant received his vehicle back. The trial judge subsequently rejected the defendant's suit for declaratory judgment on the issue of the constitutionality of the ordinance. The district court reversed, finding that the ordinance affects a criminal forfeiture and is thus preempted by the Florida Contraband Forfeiture Act. The district court certified the following question (as rephrased by the Supreme Court) as being of great public importance:

Does the Florida Contraband Forfeiture Act (FCFA) sections 932.701 – .707, Florida Statutes (2002), preempt a municipality from adopting an ordinance that authorizes the seizure and impoundment of vehicles used in the commission of certain misdemeanor offenses?

The Supreme Court answered the question in the negative, holding that the FCFA did not preempt a municipality from using its home rule powers to enact such an ordinance. The Court observed that the instant ordinance did, however, raise significant constitutional concerns, which the Court declined to address since such concerns were independent of whether the FCFA and the ordinance were in conflict with each other (which they were not) and these constitutional issues were not raised below.

As providing support for its holding, the Court distinguished between impoundment and forfeiture as follows:

Finally, we note that although impoundment and forfeiture are related concepts in the context of government seizure of personal property, they are not synonymous terms. Essentially, an impoundment is the temporary taking of tangible, personal property; forfeiture is the permanent taking of real or personal property (tangible or intangible). For example, forfeiture has been defined as a permanent governmental taking of title and all rights to and in property that has been condemned for its role in a criminal violation. . . . On the other hand, impoundment is defined as 'to place (something, such as a car or other personal property) in the custody of the police or the court, often with the understanding that it will be returned intact at the end of the proceeding.' . . . The Virginia Court of Appeals noted the essential difference in nature of the deprivation imposed by an impoundment as opposed to forfeiture [as follows]: 'A temporary impoundment of a vehicle is not a forfeiture, although it has characteristics of forfeiture.' Being temporarily deprived of one's vehicle until one pays a fee to release it also resembles a civil penalty.

Based on the foregoing definitions, contrary to the Fourth District's conclusion, the ordinance does 'not affect forfeiture.' It does not seek to permanently divest the owner of all right and title to the vehicle. Rather, the

ordinance authorizes the temporary deprivation of access to one's vehicle when it is used in the commission of a drug- or prostitution-related misdemeanor. Although the ordinance requires that the vehicle owner be temporarily deprived of the vehicle and requires that the owner pay a fee in exchange for the return of the vehicle, these requirements do not transform the impoundment ordinance into a 'forfeiture scheme.' The vehicle owner is never permanently deprived of the vehicle; rather, the vehicle's return is simply conditioned upon payment of an administrative fee and incidental costs. If a vehicle owner fails to pay administrative fee and other costs, the vehicle is not 'forfeited' as in the FCFA. Instead, the vehicle is disposed of as if it were lost or abandoned property under chapter 705, Florida Statutes (2005). . . . Under chapter 705, the vehicle is sold. The money due the City is taken from the sale proceeds, and the balance is held in an account for the owner for up to one year.

Department of Highway Safety and Motor Vehicles v. Churchill, 932 So. 2d 623 (Fla. 2d DCA 2006).

The department instituted a vehicle forfeiture proceeding against the defendant for the felony offense of leaving the scene of an accident involving serious injuries. After receiving a presuit Notice of Seizure and Rights to Adversarial Preliminary Hearing, the defendant sent a request for such hearing by regular mail, rather than certified mail as required by section 932.703(2)(a), Florida Statutes. After being notified by the department that the request had to be by certified mail, the defendant sent a certified mail request after the fifteen-day window for such request had expired. The department declined to set the case for a hearing. The court, after review of the department's petition, issued an order finding probable cause. The court then granted the defendant's motion to set aside the order, given that the department had received actual notice and ordered the return of the vehicle.

The district court upheld the trial court on the hearing issue but reversed on the return of the vehicle decision. In relation to the former, the court rejected the department's argument that the statutory requirements should be strictly construed to preclude the necessity of a hearing, holding that due process mandated that the provisions of the forfeiture act be strictly construed in favor of persons being deprived of their property, not the state. The district court then observed that actual notice by a mode other than that prescribed was sufficient. On the vehicle return issue, the district court noted that the trial court went a step too far and that the proper remedy was to set the case for an adversarial preliminary hearing with proper notice.