FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

July-September 2011

[Editor's Note: In order to reduce possible confusion, the defendant in a criminal case will be referenced 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 referenced 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 control its placement order in these summaries.]

I. Driving Under the Influence
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I. Driving Under the Influence (DUI)

Massengale v. State, __ So. 3d __ (Fla. 1st DCA 2011), 2011 WL 4445981, 1D10-4849.

The district court affirmed defendant's convictions for manslaughter by DUI, driving with a license suspended or revoked, DUI causing damage to a person or property, and DUI causing serious bodily injury. The district court reversed the $100 fine at issue and remanded with directions to strike it from the judgment.

Defendant argued that the trial court erred by denying a motion for mistrial after the prosecutor improperly commented in opening statement about defendant's constitutional right not to testify. The district court concluded that the state met its burden to show there was no reasonable possibility that this error affected the verdict. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Defendant asserted error in the trial court's imposition of mandatory cost of prosecution ($100) under section 938.27(8), Florida Statutes (2008). The state conceded error because the offenses occurred before the authorizing statute became effective.
http://opinions.1dca.org/written/opinions2011/09-27-2011/10-4849.pdf

Higginbotham v. State, __ So. 3d __ (Fla. 1st DCA 2011), 2011 WL 4104993, 1D11-1829.

The district court reversed the trial court's order denying defendant's motion to correct an illegal sentence for DUI convictions.

Defendant was convicted of four counts of DUI manslaughter and one count of DUI causing serious bodily injury, and was sentenced to 50 years' imprisonment concurrent on each count. He filed a rule 3.800(a) motion alleging that the fifty-year sentences were illegal because they exceeded statutory maximums. The state asserted that the sentences were within the sentencing guidelines range.

The district court stated that the trial court failed to attach defendant's guidelines scoresheet or anything else indicating that the sentences were legal. The district court reversed and remanded for the trial court to attach the guidelines scoresheet conclusively refuting this claim or for resentencing within applicable statutory maximums. The district court noted that, in addition to a scoresheet indicating that 600 months was within the guidelines, the trial court must attach portions of the order refuting a claim.
http://opinions.1dca.org/written/opinions2011/09-16-2011/11-1829.pdf

State v. Geiss, __ So. 3d __ (Fla. 5th DCA May 27, 2011), 2011 WL 2097694, 36 Fla. L. Weekly D1132, 5D10-3292.

On July 22, 2011, the district court in State v. Geiss, --- So.3d ----, 2011 WL 2923702, 36 Fla. L. Weekly D1575 (Fla. 5th DCA 2011), denied the state's motion for rehearing in the case cited above, but granted the state's motion to certify to the Florida Supreme Court the following question of great public importance:

> *Does section 933.02(2)(a), Florida Statutes, preclude law enforcement officers from securing a warrant for a blood draw in misdemeanor cases involving an allegation that a suspect has driven with an unlawful blood alcohol level?*]

The district court reversed an order suppressing a test result in a felony DUI case. After defendant refused a breath test, police had obtained a search warrant to draw a sample of his blood for testing. The trial court suppressed the blood results, concluding that obtaining a blood sample by search warrant violated: (1) defendant's constitutional right to privacy, (2) the implied consent statute, and (3) the search warrant statute.

The district court disagreed with the first two conclusions but agreed that the warrant should not have been issued under Florida's search warrant statute. The district court found that test results should not have been suppressed given good faith reliance by police on a judge's determination that the search was legally authorized. U.S. v. Leon, 468 U.S. 897 (1984). Applying the Leon good faith exception, the district court reversed and remanded, finding that the blood test results should not have been suppressed.
http://www.5dca.org/Opinions/Opin2011/052311/5D10-3292.op.pdf

II. Criminal Traffic Offenses

Santisteban v. State, __ So. 3d __ (Fla. 4th DCA 2011), 2011 WL 4056179, 4D09-229.

The district court affirmed defendant's conviction for vehicular manslaughter, but vacated his sentence and remanded for resentencing before a different judge. Defendant was convicted of four counts of vehicular homicide arising out of a gasoline tanker accident that killed four people.

On appeal, defendant alleged that (1) the trial judge erred in failing to recuse himself from defendant's criminal case when he also was presiding over a civil case involving the same deaths; (2) evidence did not support a finding of criminal negligence; (3) the verdict was "inconsistent with the weight of the evidence"; and (4) the court erred in failing to grant a more significant downward departure.

The district court held: (1) defendant's motion was technically deficient but failed to state a legally sufficient ground for judicial disqualification; (2) the state presented sufficient evidence of defendant's reckless conduct to survive a motion for judgment of acquittal; (3) an appellate court has no authority to overturn a verdict because it believes it is inconsistent with evidence; and (4) while extent of downward departure generally is not appealable, the trial judge in the present case relied on constitutionally impermissible considerations in determining the extent of downward departure.

Defendant was driving a tanker from I-595 onto a ramp to the Florida Turnpike. The tanker contained 9,000 gallons of fuel. Defendant entered the curving turn onto the turnpike in excess of the 35 mph posted speed. The accident victims occupied a 2001 Mercury traveling ahead of the tanker.

Defendant argued that the trial judge improperly used religious considerations in determining the sentence. Under the unique facts of this case, the district court concluded that the judge relied upon constitutionally impermissible considerations in determining the departure. In pronouncing sentencing, the judge relied on a religious concept in determining the sentence. The trial court said:

> Now, no number of years will bring back four extraordinary people or the scars that have been created as a result of what happened to those four extraordinary people. In the Jewish tradition there is a concept [*of chai, it's 18*] that stands for life which is something I wish to be mindful of in imposing a sentence over the loss of life of four Jewish people. I accept that you are a good friend, are a loving husband, and will prove to be a good father to your child as you have another child I understand. It is my sentence to downward depart by one year and impose a sentence of [*double chai*] 36 years, Florida state prison.

The district court reversed the sentence and remanded, noting it could not say the sentence would be the same without reliance on the impermissible ground.
http://www.4dca.org/opinions/Sept%202011/09-14-11/4D09-229.op.pdf

<u>Marrero v. State</u>, __ So. 3d ___ (Fla. 2011), 2011 WL 4089299, SC09-2390.

The supreme court held that, before a defendant can be convicted of felony criminal mischief, the state must prove the amount of damage associated with the criminal conduct. The court resolved a conflict with decisions of the First and Second Districts in numerous cases as well as with two decisions of the Florida Supreme Court.

In Marrero, defendant drove his Ford F150 truck through the entrance of a casino in Miami-Dade County. The crash required each of four entry doors to be replaced and resulted in the injury of one casino patron. The state charged defendant with felony criminal mischief. The supreme court held that the amount of damages is an essential element of felony criminal mischief, and that a defendant can be convicted of felony criminal mischief only if the damage in question is $1,000 or greater. The court remanded for the trial court to reduce the conviction to second-degree misdemeanor criminal mischief as defined in section 806.13(1)(b), Florida Statutes (2006).
http://www.floridasupremecourt.org/decisions/2011/sc09-2390.pdf

Odum v. State, __ So. 3d __ (Fla. 5th DCA 2011), 2011 WL 3962128, 5D11-467.

The district court reversed and remanded the trial court's order summarily denying defendant's motion for postconviction relief.

A jury found defendant guilty of vehicular homicide and reckless driving causing serious bodily injury. Defendant drove his truck at excessive speed through a red light and into a minivan, killing one person and seriously injuring another. Defendant had alcoholic beverages in his vehicle and smelled of alcohol. The trial court pronounced a sentence of 20 years on count one and 5 years on count two, for a total 25 years in prison. Five days later, the court entered a written order increasing the sentence on count one to 25 years, with both counts to run concurrently.

Defendant did not raise this change in the sentence on direct appeal; rather, he argued he was improperly sentenced as a habitual felony offender. The district court affirmed the convictions and sentences. Odum v. State, 4 So. 3d 1258 (Fla. 5th DCA 2009). On postconviction motion, defendant complained that the trial court was not allowed to alter his sentence after he began serving it.

The district court stated that the reason for the change in the sentence was not clear from the record. The record reflected that the oral sentence was 20 years on count one and 5 years on count two, to be served consecutively, but the written sentence was 25 years on count one and a suspended 5-year sentence on count two, concurrent. In denying defendant's rule 3.850 motion, the trial court concluded that the sentence, as written, was proper because the overall term (25 years) was the same as the orally pronounced sentence, so that defendant suffered no prejudice.

The district court remanded for resentencing because defendant correctly asserted that the trial court was obliged to execute a written sentencing document that conformed to the oral pronouncement of sentence.
http://www.5dca.org/Opinions/Opin2011/090511/5D11-467.op.pdf

<u>Barcomb v. State</u>, ___ So. 3d __ (Fla. 4th DCA 2011), 2011 WL 3903118, 4D10-401.

The district court reversed defendant's conviction for felony driving while license revoked, holding that the prosecutor improperly impeached defendant and error was not harmless.

An officer stopped defendant for speeding. When defendant could not produce a driver's license, the officer verified that his license was revoked. Defendant said he was driving because his girlfriend, who was in the front passenger seat, had a headache. The officer issued a citation for speeding and driving with a suspended license but did not arrest him. When the girlfriend agreed to drive, he allowed her to drive from the scene. Defendant was later charged with felony driving while license revoked.

The state believed that defendant had previously been convicted of a felony in New York based upon an NCIC report showing a 1996 conviction in New York for DUI for which he received five years probation. The defense disputed the record and asked the court to require that the state not cross-examine on the conviction unless the prosecutor could prove that defendant was, in fact, a convicted felon from New York. The judge denied the request, finding that, if the prosecutor had a good faith basis to ask the question, "Have you ever been convicted of a felony?" she could ask it.

Defendant conceded his driver's license had been suspended because he previously had a DUI and didn't know whether it was a misdemeanor DUI or felony DUI. Section 90.610(1), Florida Statutes, provides that a party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime, if the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment.

Section 90.610 speaks only to which convictions are admissible to impeach and not to procedure. However, Florida courts have established through case law the method of using convictions. Questions regarding past convictions should not be asked unless counsel has knowledge of a conviction and possesses a certified copy of the judgment.

The state argued that any error would have been harmless because defense counsel first raised the question of defendant's prior convictions by asking defendant on direct exam about a prior conviction. Defense counsel, however, raised the issue on direct examination after the trial court had already ruled that the state could ask the question about prior felonies even without having the certified copy.

The district court stated that it could not find the error harmless beyond a reasonable doubt. Defense counsel informed the court that had she known about the conviction prior to jury selection, she would have changed her jury selection strategy. Further, the mere fact that a defendant has been convicted impacts the defendant's

believability. Here, defendant's believability was critical to his defense of necessity. Thus, the error in denying the motion was not harmless.
http://www.4dca.org/opinions/Sept%202011/09-07-11/4D10-401.pdf

State v. Hood, __ So. 3d __ (Fla. 2d DCA 2011), 2D10-54.

The district court reversed the trial court's order granting defendant's motion to suppress evidence, which was seized pursuant to a search warrant, of a vehicle theft.

Defendant was charged with one count of grand theft, one count of burglary, and two counts of grand theft of a motor vehicle. A car audio business had been broken into and a set of tires and two cars with custom paint jobs were missing. The victim (the business owner) observed that someone had rammed a car into the back door of the business. Maroon paint led the victim to believe it had come from defendant's car because defendant had been driving a maroon car. The victim identified one of the cars in a garage attached to a house. A man was working on the car. The victim also identified defendant's maroon car parked at the house.

The victim called police and a detective went to the residence without a search warrant. Nobody answered the door, but the detective heard a noise inside the garage, which was open by three inches. He touched the door, the door lifted, and he pushed it up the rest of the way. He took a few steps inside, then left to prepare a search warrant. The affidavit included information gathered during his search of the garage, plus information from the victim and from another detective.

The second detective waited at the house until the owner came home. When he asked her if he could search the house, she told him to get a warrant. He asked the owner whether there was anybody in the house. Because she did not know if anybody was inside, the detective entered with her to secure the residence. He walked through the entire house except for one locked room. He observed a set of tires in the middle of a back bedroom. He told the first detective about the tires and left the home.

The trial court granted the motion to suppress, finding that because there were no exigent circumstances and there was no consent, the detectives had unlawfully entered and searched the home. Accordingly, the officers' observations could not be used to support a search warrant. The trial court noted that it believed the victim's observations provided a substantial basis for concluding that probable cause existed. But, relying on Mercier v. State, 579 So. 2d 308 (Fla. 2d DCA 1991), and Segura v. U.S., 468 U.S. 796 (1984), the trial court found that these facts could not form the basis for a warrant because the officers' observations made during unlawful entry had tainted the affidavit.

The district court held that information obtained from the victim was sufficient to establish probable cause for a search warrant, independent of evidence uncovered during the warrantless entry and search of the house and garage, because it suggested that defendant had stolen the vehicles from the victim's business and that evidence of the theft and burglary could be located at the house. The district court stated that the trial court

incorrectly believed that suppression was required because information obtained during the unlawful entry and search had tainted the affidavit.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/September/September%2002,%202011/2D10-54.pdf

Deleon v. State, 66 So. 3d 391 (Fla. 2d DCA 2011).

The district court reversed defendant's judgment and sentence for carjacking with a deadly weapon but affirmed the conviction of resisting an officer without violence.

The jury returned a verdict of guilty of carjacking with a deadly weapon and resisting an officer without violence. Defendant was sentenced as a prison releasee reoffender (PRR) to life in prison on the carjacking count and to time served on the resisting count. (A charge of possession of a firearm by a convicted felon was heard in a separate trial.)

Defendant argued that the trial court erred in instructing the jury on carjacking with a deadly weapon because the specific offense was not charged in the information. He contended that the information alleged only that he possessed a firearm during the offense and that the jury could not therefore find that he possessed a deadly weapon. Defendant suggested that carjacking with a deadly weapon is not a lesser-included offense of carjacking with a firearm.

The district court concluded that the trial court committed fundamental error in instructing the jury on an offense—carjacking with a deadly weapon—that was not charged in the information. The district court stated that the instruction clearly had an effect on the jury's verdict as evidenced by the special verdict form finding him guilty of carjacking with a deadly weapon. The district court stated that the jury was instructed on a theory that was unsupported by the evidence; the victim testified that defendant carried a gun, and there was no evidence that he carried any other weapon.

The district court further concluded that the error was compounded when the jury was incorrectly instructed that carjacking with a deadly weapon is a lesser-included offense of carjacking with a firearm. The district court held that carjacking with a deadly weapon is not a permissive lesser-included offense of carjacking with a firearm because the two offenses do not appear separate on the face of the statutes and the accusatory pleading did not allege the facts necessary for carjacking with a deadly weapon.

The district court reversed defendant's conviction and sentence for carjacking with a deadly weapon and remanded for the trial court to enter a judgment and sentence for carjacking, which was properly alleged in the information and proved by the state.

Defendant also argued that his written sentence for carjacking with a deadly weapon failed to comport with the oral pronouncement of sentence because he was orally sentenced as a PRR to life in prison but the written sentence reflected a minimum

mandatory term of life for the use of a firearm. The state conceded the error. Reversal of defendant's conviction rendered this issue moot.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/August/August%2003,%202011/2D09-5740.pdf

<u>Haag v. State</u>, 67 So. 3d 351 (Fla. 2d DCA 2011).

The district court agreed with defendant's double jeopardy argument and reversed his convictions for leaving the scene of a crash involving injury. Defendant was convicted of vehicular homicide (count 1), leaving the scene of a crash involving injury (counts 2 and 3), and reckless driving with serious bodily injury (counts 4 and 5).

Defendant argued that his conviction for vehicular homicide/leaving the scene pursuant to section 782.071(1)(b), Florida Statutes (2007), and his two convictions for leaving the scene of a crash involving injury pursuant to 316.027(1)(a), Florida Statutes (2007), violated double jeopardy principles and constituted fundamental error. The three counts at issue involve three different victims. In count 1, a victim died as a result of the crash. The victims in counts 2 and 3 sustained injuries as a result of that same crash.

The district court explained that defendant's two convictions for leaving the scene of a crash involving injury under section 316.027 are subsumed within the conviction for vehicular homicide/leaving the scene under section 782.071(1)(b). Therefore, double jeopardy principles require that the two convictions under section 316.027 be reversed. The court reversed defendant's convictions and five-year sentences on counts 2 and 3 for leaving the scene of a crash and affirmed his remaining convictions and sentences on counts 1, 4, and 5.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/July/July%2015,%202011/2D09-5934.pdf

III. Arrest, Search and Seizure

<u>Ford v. State</u>, __ So. 3d __ (Fla. 2d DCA 2011), 2011 WL 41049132D09-5866.

The district court reversed the trial court's order finding that defendant violated his community control conditions (5) and (7) and held that the state failed to establish his constructive possession of marijuana found in a car in which he was a passenger, in his recording studio, and in his apartment.

Defendant had been convicted of possession of cannabis with intent to sell or deliver, possession of drug paraphernalia, fleeing and attempting to elude a police officer, and driving while license canceled, suspended, or revoked. Defendant's community control conditions confined him to his studio office and his home.

A police officer conducted surveillance of defendant and his recording studio. The officer followed a car occupied by defendant and two other persons, stopped the car when it ran a stop sign, and contacted the community control officer. One of the officers

saw a gallon-sized bag of marijuana on the back seat and a white trash bag containing a bag of marijuana on the back seat. Defendant told the officer the driver handed the contraband to him when officers stopped the car and told defendant to hide it.

Defendant denied that the marijuana was his. The officers arrested defendant for possession of 1104 grams of marijuana and possession of marijuana with intent to sell or deliver. The trial court found that defendant committed two violations of community control condition (5) by failing to live and remain at liberty without violating any law and one violation of condition (7) by possessing drugs not prescribed by a physician.

The district court held that evidence was insufficient to establish that defendant possessed the marijuana. Despite defendant's admission that the driver tossed the marijuana to him to hide, this momentary possession did not establish defendant's dominion and control. Defendant did not have actual possession when stopped.

To prove constructive possession, the state must show that defendant knew of the contraband's presence and could exercise dominion and control over it. The fact that the car did not belong to defendant weighed against a finding of constructive possession. Momentary possession did not equate to dominion and control. Thus, the district court concluded that evidence was insufficient to satisfy the preponderance of the evidence requirement to find violations of community control conditions (5) and (7) based upon defendant's possession of marijuana discovered in the car. As to allegations of marijuana in the studio, the district court held that evidence was insufficient to establish that defendant constructively possessed the marijuana.

Defendant did not appeal the trial court's ruling that he also violated condition (6), associating with persons involved in criminal activity, and condition (15), failing to remain confined to his approved residence. The district court stated it was unclear from the record whether the trial court would have revoked defendant's community control and imposed the same sentence based on violations of these two conditions alone.

The district court reversed the order of revocation and remand for the trial court to consider whether the two remaining violations alone warranted revocation and, if it so finds, to enter a written order in conformity therewith.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/September/September%2016,%202011/2D09-5866.pdf

<u>Montgomery v. State</u>, ___ So. 3d ___ (Fla. 5th DCA 2011), 2011 WL 4102292, 5D10-1500.

The district court affirmed defendant's conviction for trafficking in cocaine, driving while license revoked as a habitual offender, possession of cannabis, and possession of drug paraphernalia, stating that the trial court did not err in denying his motion to suppress evidence obtained during a traffic stop.

Defendant's playing of loud music from his car drew attention of police. When it was discovered that his driver's license was suspended, he was arrested and his car was searched. The police found drugs and drug paraphernalia in the car.

Defendant filed a motion to suppress, contending that evidence was illegally obtained. He asserted that section 316.3045(1)(a), Florida Statutes (2005), a noise statute, was unconstitutionally vague and overbroad and restricted his right of free expression. The trial court denied his motion. Defendant entered a plea, reserving his right to appeal denial of the motion to suppress. Defendant argued that the statute's "plainly audible" standard was impermissibly vague and failed to provide fair notice of what conduct is prohibited. The district court concluded that Florida's "plainly audible" standard was no less precise than the "loud and raucous" standard approved by the U. S. Supreme Court in City of Cincinnati v.Discovery Network, Inc., 507 U.S. 410, 428-29 (1993).

The district court agreed with the Second District's holding in State v. Catalano, 60 So. 3d 1139, 1143-44 (Fla. 2d DCA 2011), that the statute was a content-based restriction on free expression that violated First Amendment rights in a manner more intrusive than necessary. The district court agreed with Catalano that the statute was unconstitutionally overbroad. However, the district court concluded that a reasonable police officer would not have known that section 316.3045(1)(a) was unconstitutional at the time defendant's vehicle was stopped. The court stated that this was particularly true because, in Davis v. State, 710 So. 2d 635 (Fla. 5th DCA 1998), the Fifth District upheld an earlier version of the statute against a constitutional challenge.

Although the district court concluded that defendant suffered a Fourth Amendment violation, the court also held that he was not entitled to suppression of the drugs and drug paraphernalia and that the motion was properly denied. U.S. v. Calandra, 414 U.S. 338, 347 (1974) (recognizing that exclusionary rule's primary purpose is to deter future unlawful police conduct, not repair it, and thus, not designed to safeguard personal constitutional right of party aggrieved).
http://www.5dca.org/Opinions/Opin2011/091211/5D10-1500.op.pdf

Meme v. State, __ So. 3d __ (Fla. 4th DCA 2011), 2011 WL 4056165, 4D08-3594.

The district court affirmed defendant's conviction for possession of cocaine.

Defendant argued that the trial court erred in failing to grant a motion for judgment of acquittal, because the state presented insufficient proof that defendant had actual or constructive possession of cocaine.

A police officer observed a vehicle with an expired license tag. He activated his lights and had a clear view of the car's interior. He observed the driver bend down and toward the right side of the floorboard. The driver stopped the vehicle and the officer approached, smelling marijuana. Defendant (the driver) appeared nervous and sweating and uttered statements such as "I'm going to jail."

The officer went back to his vehicle to write a citation for driving with an expired tag. When he re-approached, he asked to search based upon the smell of marijuana, and defendant consented. The officer located a tube containing cocaine under the seat in the same area where the officer had observed defendant bend down before the stop. The cylinder was under the seat. When the officer placed defendant under arrest, defendant continued to make statements, such as "I'm going to jail. My life is over."

The trial court found that the state had proved constructive possession of cocaine by defendant. Defendant was in close proximity to the tube and prior to the stop had reached in the area where the cocaine was located.

The district court stated that, in this circumstantial evidence case, the state was not required to rebut every possible variation of events that could be inferred from the evidence, but only to introduce competent evidence inconsistent with defendant's theory. The district court concluded that the state presented sufficient evidence to withstand the motion for judgment of acquittal. The circumstantial evidence was inconsistent with defendant's hypothesis of innocence that he did not know that cocaine was in the vehicle. The district court noted that, although the court mistakenly stated that there were only two passengers in the vehicle, the motion for judgment of acquittal was still correctly denied. The totality of evidence was sufficient to prove possession by defendant.
http://www.4dca.org/opinions/Sept%202011/09-14-11/4D08-3594.op.pdf

Tracey v. State, ___ So. 3d ___ (Fla. 4th DCA 2011), 2011 WL 3903075, 4D09-3565.

The district court affirmed defendant's judgments of conviction for possession of more than 400 grams of cocaine, fleeing and eluding, driving while license revoked as an habitual offender, and resisting arrest without violence.

The district court addressed defendant's contention that the trial court erred in denying his motion to suppress evidence derived from "real time" cell site location information ("CSLI"). The court held that there was no Fourth Amendment violation, because law enforcement used real time CSLI to track defendant's location on public roads. The court held that, although there was a violation of chapter 934, Florida Statutes, the exclusionary rule was not an authorized remedy.

A detective applied for an order authorizing installation and use of a pen register and a trap and trace device regarding defendant's cell phone. The application stated that defendant was "the subject of a criminal [narcotics] investigation" and that a pen register and trap and trace device "would be an investigative tool to record inbound and outbound dialed digits" from defendant's phone to "identify possible co-conspirators."

The trial court granted the application. Although there was no request for it, the order also directed the cell phone company to provide the sheriff's office "historical Cell Site Information indicating the physical location of cell sites, along with cell site sectors, utilized for the calls . . . ." The order did not address real time CSLI. The order called for collection of a different type of information than incoming and outgoing numbers.

Monitoring cell phone locations using real time CSLI, officers tracked defendant's trip across Florida. Defendant and the alleged co-conspirator called each other ten times before defendant arrived in Broward County. Officers set up surveillance at co-conspirator's known stash houses. The co-conspirator's cell phone moved to a location near one of the stash houses. Defendant's cell phone was tracked to the same area. Officers determined that a GMC Envoy was from Florida's west coast; defendant was identified as its driver. Officers were aware that defendant's license was suspended. He was stopped and arrested for that offense. A search uncovered cocaine in the Envoy; officers stopped the alleged co-conspirator and found $23,000 in cash in his car.

Before trial, defendant moved to suppress evidence derived from real time, prospective CSLI obtained from his cell phone. He explained that real time cell site information is a subset of prospective cell site information, which, he contended, requires a warrant. The trial court found that: (1) defendant had standing to challenge the order and surveillance of his cell phone, but did not have standing to challenge the order and surveillance of the alleged court-conspirator's cell phone; (2) the application for an order relating to his phone set forth a sufficient legal basis for installation and use of a pen register, but did not set forth a sufficient factual basis to issue a warrant; and (3) officers used the cell phone as a tracking device to locate defendant in the vehicle.

The trial court denied defendant's motion to suppress, ruling that the pen register application had not established probable cause, but that, because defendant had been seen committing an independent crime in public where he had no expectation of privacy, the Fourth Amendment did not require suppression of evidence acquired after arrest for that independent crime.

The district court explained that, since it concerns an individual's location on public roads, this case did not involve a Fourth Amendment violation. The district court stated that it did not need to decide whether prospective CSLI is subject to a probable cause requirement because the state failed to meet the standard required by section 934.23(5), Florida Statutes. The application failed to offer "specific and articulable facts" to show that CSLI was "relevant and material to an ongoing criminal investigation."

The district court concluded that a finding that the state violated section 934.23 in obtaining real time CSLI did not mean that an exclusionary rule applies to prevent the state from using any "evidence derived" from the violation. Under federal and Florida law, the exclusionary rule is not a remedy for violations of section 934.23. For these reasons, the district court held that the trial court correctly denied the motion to suppress, even though law enforcement relied on real time CSLI to locate defendant without complying with chapter 934, Florida Statutes.
http://www.4dca.org/opinions/Sept%202011/09-07-11/4D09-3565.op.pdf

State v. Smith, 67 So. 3d 409 (Fla. 4th DCA 2011).

The district court reversed dismissal of charge that defendant carried an unauthorized concealed firearm in his vehicle and remanded for further proceedings.

Defendant was stopped by a sheriff's deputy for unlawful speed. Upon realizing that defendant's license was suspended, the deputy asked whether he had any weapons or drugs in the vehicle. Defendant informed the deputy that there was a firearm under the passenger seat. Defendant accompanied the deputy to his patrol car where the deputy conducted a license check. Approximately seven minutes later, the deputy retrieved the firearm from under the front passenger seat.

Defense counsel argued that dismissal was warranted because the firearm was not "readily accessible" to defendant when the firearm was retrieved while he was outside the vehicle. The trial court granted the motion to dismiss. The state argued that the court erred in granting the motion because there was a prima facie case that the firearm was readily accessible to defendant at the time the deputy encountered him, and therefore defendant failed to set forth undisputed facts demonstrating that a prima facie case was not established. The state argued that defendant had to demonstrate the weapon was not on or about his person and was not hidden from the ordinary sight of another person.

In entering its order granting the motion to dismiss, the trial court stated:

> The issue before the Court is one of the statutory interpretation of F.S. § 790.01, i.e., is under the passenger seat of a vehicle, when the Defendant is outside of his vehicle, "on or about his person." In this particular case, under the undisputed facts, the firearm is not "on or about" the Defendant's person.

Section 790.01(2), Florida Statutes (2009), reads in pertinent part: "A person who carries a concealed firearm on or about his or her person commits a felony of the third degree." Concealed firearm is defined by section 790.001(2): "Any firearm, as defined in subsection (6), which is carried on or about a person in such a manner as to conceal the firearm from the ordinary sight of another person."

Defendant argued that based on one line of cases, any time a firearm is retrieved from a vehicle after the person charged is out of the vehicle, the requirement that the firearm be "on or about the person" or "readily accessible" cannot be met. The district court held that in the present case defendant concealed the firearm underneath the passenger seat as the deputy approached the vehicle. The district court explained that it could not say as a matter of law that the firearm was not "on or about his person" or not "readily accessible" to him. Therefore, the court remanded for further proceedings.
http://www.4dca.org/opinions/Aug%202011/08-10-11/4D10-1785.op.pdf

State v. Herron, __ So. 3d __ (Fla. 3d DCA 2011), 2011 WL 3477030, 36 Fla. L. Weekly D1731, 3D10-2538.

The district court affirmed an order of the trial court granting defendant's motion to suppress evidence of a firearm seized from his person following a traffic stop.

After executing a valid routine traffic stop, a police officer ordered defendant out of his vehicle, and to place his hands on top of the roof for an external pat-down search. After defendant placed his hands on the roof of the vehicle, the officer observed a bulge on the small of defendant's back. A subsequent search revealed a holster and firearm.

Upon a lawful traffic stop, a police officer may order a driver out of his or her vehicle. However, such a stop does not give rise to a valid reason for a pat-down. Such a pat-down is authorized only where the officer has a reasonable suspicion to believe the suspect is armed with a dangerous weapon. § 901.151(5), Fla. Stat. (2009).

The state argued that the pat-down was lawful because defendant appeared "excruciating[ly] nervous, fidgety," could not produce a driver's license, proof of insurance, or car registration, and appeared to be "looking out the window [for] an avenue of escape." The state further noted that the officer did not feel comfortable returning to his vehicle to check identification of defendant under the circumstances.

The district court held that these events were insufficient to justify a pat-down without additional articulable suspicion that defendant was armed with a dangerous weapon. The after-the-fact observation of a bulge on defendant cannot be used as justification for a pat-down. Thus, evidence of defendant's nervousness and the officer's hunch that "there was something going on," before the patdown were insufficient to create requisite reasonable suspicion that defendant was armed with a dangerous weapon. http://www.3dca.flcourts.org/Opinions/3D10-2538.pdf

Beauger v. State, __ So. 3d __ 2011 WL 3300191, 36 Fla. L. Weekly D1659 (Fla. 4th DCA 2011), 4D09-4972.

The district court affirmed the trial court's denial of defendant's dispositive motion to suppress narcotics located in the trunk of a vehicle, holding that defendant lacked standing to contest the search.

After being apprehended, defendant disclaimed any possessory interest in the vehicle and claimed lack of knowledge of the vehicle's existence. To establish standing to challenge a search, a defendant "must show a proprietary or possessory interest in the area of search." State v. Singleton, 595 So. 2d 44, 45 (Fla. 1992).
http://www.4dca.org/opinions/Aug%202011/08-03-11/4D09-4972.op.pdf

Harris v. State, __ So. 3d __ (Fla. 2011), 2011 WL 1496470, 36 Fla. L. Weekly S163, SC08-1871.

In a revised opinion on rehearing denial, the supreme court held that the state meets its burden of establishing probable cause to search a vehicle by demonstrating that an officer had a reasonable basis for believing a drug-detection dog to be reliable based on the totality of the circumstances. The court explained that the fact that a drug-

detection dog has been trained and certified to detect narcotics, standing alone, is not sufficient to demonstrate the reliability of the dog.

The court's decision resolved a conflict between the First District in Harris v. State, 989 So. 2d 1214 (Fla. 1st DCA 2008) and decisions of the Second District in Gibson v. State, 968 So. 2d 631 (Fla. 2d DCA 2007), and Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003).

In Harris, the state charged defendant with possession of the listed chemical pseudoephedrine with intent to use it to manufacture methamphetamine, more commonly known as meth, in violation of section 893.149(1)(a), Florida Statutes (2006). Defendant moved to suppress seized evidence, arguing that it was found pursuant to an illegal search of his truck resulting from an alert on the truck by a drug-detection dog. Defendant introduced evidence that dog was unreliable because the same dog had alerted on defendant's truck in another traffic stop (for a traffic infraction), and a subsequent search revealed only an open bottle of liquor and no illegal substances.

The trial court denied the motion to suppress, but made no finding as to the drug-detection dog's reliability. On appeal, the First District in Harris held that the state can establish probable cause to search a vehicle by demonstrating that a dog is properly trained and certified to detect illegal drugs. The supreme court quashed Harris and approved Gibson and Matheson, holding that if a trial court, in considering a motion to suppress, relies on training and certification records and fails to consider other factors concerning a dog's performance, then the court does not have a complete picture of the numerous circumstances that bear on reasonableness of an officer's belief in a dog's reliability and whether an alert in a particular case indicates a fair probability that there are drugs present inside the vehicle. Thus, the state must present all records and evidence necessary to allow the trial court to evaluate the dog's reliability.
http://www.floridasupremecourt.org/decisions/2011/sc08-1871.pdf

Wiggs v. State, __ So. 3d __ (Fla. 2d DCA 2011), 2011 WL 3300139, 36 Fla. L. Weekly D1688, 2D09-3545.

The district court reversed defendant's conviction for possession of cocaine with intent to sell or deliver because a drug-detection dog's alert on his vehicle did not provide probable cause to search. Defendant had entered a plea while reserving the right to appeal the denial of his dispositive motion to suppress.

After defendant was stopped for running a red light, a drug-detection dog alerted on his vehicle. Deputies searched the vehicle and found cocaine. Defendant filed a motion to suppress in which he argued the dog's alert did not provide probable cause to search. Defendant challenged the dog's reliability, citing "false alerts" by the dog. The state presented testimony and documents regarding the dog's training and field record.

The specific question before the district court was whether the dog's alert to the exterior of defendant's vehicle provided probable cause to support a warrantless search of

the interior. The framework for analysis was set forth in Harris v. State, 36 Fla. L. Weekly S163 (Fla. Apr. 21, 2011), in which the supreme court adopted a "totality of the circumstances approach" that places the burden of producing evidence to establish the dog's reliability on the state. *Id.* at S168.

The district court held that, under the totality of circumstances, the trial court erred in determining that the state established probable cause based on the dog's alert and, thus, the court erred in denying defendant's motion to suppress.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/August/August%2003,%202011/2D09-3545.pdf

Aders v. State, 67 So. 3d 368 (Fla. 4th DCA 2011).

The district court affirmed the trial court's order denying defendant's motion to suppress evidence from a traffic stop, holding that an officer has reasonable suspicion to effect a traffic stop when he or she conducts a computer check of a car's tag and learns the tag is registered to the same make of car, but to one of a different color.

A deputy observed a black Honda. He learned that the Honda's color did not match the color on a law enforcement database, which indicated the Honda should have been light-blue. The deputy stopped the Honda. The only occupant was defendant. He gave the deputy his VIN and insurance information, which also described the car as light blue. However, the VIN and registration matched. Defendant told the deputy that he had painted the car but had not yet changed the color on the registration. The deputy gave him a warning. Before defendant left the scene, however, the deputy requested his consent to search the car. Defendant consented and volunteered that he had drug paraphernalia in the car. The deputy also uncovered marijuana and pills.

In the trial court, defendant challenged the stop, arguing that the deputy did not have a reasonable, articulable suspicion to justify an investigatory stop under Terry v. Ohio, 392 U.S. 1 (1968). The trial court ruled that the deputy was justified in making the stop to determine if the license plate was attached to the correct vehicle. Improperly transferring a license plate is a second-degree misdemeanor under section 320.261, Florida Statutes (2010). The district court concluded that a color discrepancy is enough to create a reasonable suspicion of the violation of this law. The district court affirmed the denial of the motion to suppress.
http://www.4dca.org/opinions/July%202011/07-27-11/4D10-2074.op.pdf

State v. D.R., 67 So. 3d 372 (Fla. 3d DCA 2011).

The district court reversed the trial court's order granting defendant's motion to suppress evidence found during a vehicle stop, stating that the order relied upon an incorrect sequence of events.

The district court explained that the trial court's order correctly stated that the car in which defendant was riding was stopped because it matched a BOLO description, and

the purpose of the stop was to wait for the victim to arrive for a possible I.D. The order incorrectly stated that the officers searched defendant after the victim showed up and failed to identify the car occupants as her assailants.

The district court concluded that the sequence of events in the record was established by the officers' testimony. That evidence showed that defendant had been arrested for possessing a concealed firearm in his boot before the victim showed up to identify suspects; at the point defendant was asked to remove his boot, the initial purpose of the investigatory stop had not yet been resolved. If the purpose of the BOLO stop was met prior to defendant being searched, then detention had ended and further search was illegal. If the purpose of the BOLO stop was not yet achieved, then detention was ongoing and search was not illegal if based on reasonable suspicion.

The district court remanded for a determination as to whether, given the officers' experience and observations, they had reasonable suspicion to search defendant in the context of an ongoing detention.
http://www.3dca.flcourts.org/Opinions/3D10-2479.pdf

IV. Torts/Accident Cases

Benitez v. Joseph Trucking, Inc., ___ So. 3d ___ (Fla. 5th DCA 2011), 2011 WL 3962106, 5D10-1097.

The district court reversed the trial court's order granting defendants' motion for directed verdict, concluding there was sufficient evidence to support a jury verdict and that causation could properly be considered by a jury.

Plaintiffs filed a negligence action against defendants after plaintiff suffered injuries in a single-vehicle crash. The vehicle was a tractor-trailer consisting of a "trailer" or "cab" and a flat-bed trailer. The tractor-trailer was owned by defendant and used by a trucking company owned by defendant and her husband. The company had retained plaintiff as an independent contractor to transport large concrete pieces from the manufacturer to a construction site. On the day of the crash, plaintiff retrieved the tractor-trailer from the trucking company and proceeded to the concrete manufacturer. There, six concrete pieces were loaded onto the trailer.

Plaintiffs alleged that (1) defendants owed a duty to plaintiff to maintain the tractor-trailer in proper working condition, and (2) the trailer was unsafe because it had been negligently maintained by defendants. Plaintiff alleged that, as a result of its deteriorating condition, the trailer bed had broken during the transportation of the concrete pieces. As a result, a concrete piece had sunk into the trailer bed, causing a shifting of the load's weight and tipping of the tractor-trailer. Defendants denied liability and pled comparative negligence. Defendants argued that the crash was caused by plaintiff driving too fast when he tried to negotiate a curve and/or by plaintiff improperly loading the concrete pieces.

The jury determined that both plaintiff and defendant were negligent and that each party's negligence was a legal cause of injury to plaintiff. Seventy percent of negligence was apportioned to defendant and thirty percent to plaintiff. In granting the motion for directed verdict, the trial court determined that plaintiffs' evidence was insufficient to establish a nexus between the alleged defective condition of the trailer and the crash.

The district court found that facts supported a finding of a causal relationship between defendants' alleged negligence and the crash. The district court concluded that a jury could reasonably find from evidence that the trailer bed was in poor condition as a result of defendants' negligent maintenance. The district court rejected defendants' argument that plaintiffs were required to present expert testimony on causation. The district court concluded it is not beyond the common knowledge of laymen that deterioration of a trailer's wooden bed reduces its load-bearing capacity and that sudden shifting of weight on a trailer bed could cause a tractor-trailer to flip.
http://www.5dca.org/Opinions/Opin2011/090511/5D10-1097.op.pdf

Bowen v. Taylor-Christensen, ___ So. 3d __ (Fla. 5th DCA 2011), 2011 WL 3754623, 36 Fla. L. Weekly D1898, 5D09-3888.

The district court affirmed a final judgment in favor of defendant/appellee in a wrongful death suit in which plaintiff/appellant had sought to hold defendant vicariously liable under Florida's dangerous instrumentality doctrine for the death of her husband.

The district court held that the trial court properly concluded that beneficial ownership of a vehicle is key to vicarious liability, and that determination whether a title holder possesses naked title or is the beneficial owner of the vehicle hinges on evidence concerning whether title holder had control and authority over use of the vehicle.

Defendant's ex-wife, while operating a motor vehicle under the influence of alcohol, struck and killed plaintiff's husband as he was changing a tire on the shoulder of I-95. The jury returned a special verdict against plaintiff, finding that defendant was not an owner of the car his ex-wife was driving. Plaintiff, as personal representative of her husband's estate, filed suit against defendants (the driver and her ex-husband). The complaint explained that the ex-wife was operating a PT Cruiser titled in names of the driver or her former husband when she was involved in the accident. The jury found that the ex-husband was not an owner of the car at the time of the accident.

The ex-husband testified that his ex-wife relocated. In April 2003, he travelled to visit her. His ex-wife told him she needed a car. He bought for her the PT Cruiser that she was operating at the time of the fatal accident. The ex-husband stated that they both signed purchase paperwork. He acknowledged that, according to the title, owners were "Mary Taylor-Christensen or Robert Christenson," but stated it was a gift for her. In the ensuing two years, he never had access to the car, never had authority over the car, never had a key, never insured it, and never had it registered.

Plaintiff contended that, as a matter of law, she was entitled to receive a directed verdict on the issue of the ex-husband's vicarious liability under Florida's dangerous instrumentality doctrine because evidence demonstrated that: (1) he was listed as the co-owner on the title; and (2) he did not do anything to remove his name from the title.

The district court held that plaintiff's theory could not be squared with other Florida case law and that only beneficial ownership triggers liability. The ex-husband's failure to take action to remove his name from the title is a fact the jury may consider in deciding whether he intended to divest himself of a beneficial interest and, therefore, that he was, in fact, an owner, but it does not mean "as a matter of law" that he had a beneficial interest. He only had title and mere title is not enough to make him liable. http://www.5dca.org/Opinions/Opin2011/082211/5D09-3888.op.pdf

Henry v. Hoelke, __ So. 3d __ (Fla. 4th DCA 2011), 2011 WL 3477027, 36 Fla. L. Weekly D1754, 4D09-4281.

The district court reversed comparative fault-finding and remanded for entry of final judgment for the full amount of a jury verdict. The court found that defendant failed to produce competent evidence establishing cause between plaintiff's paralysis and her alleged failure to wear a seatbelt at the time of an automobile rollover crash. The district court affirmed the trial court's order denying defendant a setoff for a hospital bill.

The appeal arose from a crash rendering plaintiff paraplegic. Plaintiff was driving home with her 3-year-old daughter and a friend, when defendant made a left turn into oncoming traffic and struck plaintiff's Kia. The impact caused plaintiff's vehicle to rotate, roll over, and come down on the driver's side.

Defendant placed partial blame on a codefendant for blocking her view. He did not see the collision but he heard it and described movements of the Kia after impact. Codefendant could not see if plaintiff wore her seatbelt. Plaintiff's passenger testified he saw plaintiff put a seatbelt on herself and her child and that she still wore the seatbelt after the crash. The passenger and the plaintiff's child suffered minor injuries.

Plaintiff testified that she made sure her child was restrained in her car seat in the backseat and then put on her own seatbelt. She said she always wore her seatbelt. She could not remember whether she took off her seatbelt after the accident, or if someone else did. Her treating neurosurgeon testified she would most likely be paralyzed for life.

The defendant's expert acknowledged there was no hard evidence of plaintiff's use of a seatbelt. The jury attributed 65% negligence to defendant and 35% negligence to plaintiff. It awarded plaintiff $6,336,160.50 in damages. The trial court entered final judgment for $4,106,004.30 and denied plaintiff's renewed motion for directed verdict.

The district court stated that the seatbelt evidence presented by defendant was "uncertain, speculative, and conjectural." Further, defendant was unable to establish

evidence that plaintiff was not wearing a seatbelt and that the failure to wear the seatbelt caused or contributed to her injuries—without impermissibly stacking inferences. http://www.4dca.org/opinions/Aug%202011/08-10-11/4D09-4281.co-op.pdf

Russo v. Lorenzo, 67 So. 3d 1165 (Fla. 4th DCA 2011).

In a companion appeal to Florida Department of Transportation v. City of Pembroke Pines, case number 4D09-1341, the district court affirmed in part and reversed in part the judgment in a wrongful death suit filed after a police officer died from injuries sustained after his car collided with a vehicle driven by defendant.

A jury found the officer 30 percent at fault for the collision, defendant 55 percent at fault and Florida Department of Transportation (FDOT) 15 percent at fault, and judgment was ultimately entered against the defendant and FDOT. The jury awarded $11,537,700 in damages; $10 million of that figure represented pain and suffering.

On appeal, defendants challenged the verdict on a number of grounds. The district court found that only one of those arguments—a claim that the trial court erred in refusing to permit defendant to elicit testimony concerning payments the officer's wife was receiving from the city of North Miami Beach—warranted relief on appeal, as to damages only, and wrote to address that issue.

Plaintiffs called an economist who testified that, reduced to present day dollars, the plaintiffs had suffered between $1.5 and $1.8 million in lost support. At a side bar, defendant asserted that it was undisputed that decedent's wife was receiving a benefit from the city of North Miami Beach, representing about 60 percent of decedent's salary at time of death and that, for purposes of determining economic losses resulting from the death, this city benefit was fairly characterized as a "pension."

Defendant argued plaintiffs had misleadingly suggested that plaintiffs had wholly lost decedent's pension and thus defendants should be permitted to cross-examine the expert on the subject, putting evidence of the benefit before the jury so as to prevent any double recovery. Plaintiffs insisted the benefit was not a pension, but was a death benefit akin to life insurance. The trial court refused to permit defendants to put evidence of the City benefit before the jury.

The district court held that, if the City benefit were characterized as a pension, then defendants should have been permitted to cross-examine the economist concerning the benefit. The district court remanded to the trial court with directions that the judgment against plaintiffs be reduced by the value of the City of North Miami Beach benefit being received by the wife.
http://www.4dca.org/opinions/Aug%202011/08-10-11/4D09-258.op.pdf;

FDOT v. City of Pembroke Pines, 67 So. 3d 1162 (Fla. 4th DCA 2011).

In a companion appeal to <u>Russo v. Lorenzo</u>, case no. 4D09-258 [see above], the district court reversed a judgment against the Florida Department of Transportation (FDOT) and remanded for entry of judgment in favor of FDOT.

The two appeals stemmed from a wrongful death suit filed after a police officer [decedent/plaintiff] died as the result of injuries sustained from a car crash that resulted in his car hitting a median, rolling over, and striking a palm tree. FDOT was among named defendants and, in this appeal, challenged the judgment following a jury's determination that it was 15 percent at fault for the officer's injuries. The district court found that FDOT's claim that the trial court should have directed a verdict in its favor on sovereign immunity grounds required reversal.

As the result of the collision between the decedent's car and a car driven by defendant, the tires of decedent's car struck a median and the car began to roll, ultimately striking a palm tree planted in the median. The median was designed by an engineering firm hired by the City of Pembroke Pines.

FDOT owned the median and was responsible for its design. The firm's plans were submitted to FDOT. There was evidence that FDOT policies precluded an F curb at design speeds in excess of 45 mph. Such limitation was based upon the risk of rollover when a car strikes a curb. After changing the design speed to 45 mph, FDOT approved the plans. Years later, FDOT conducted a speed study on Pines Boulevard. Experts testified that a large differential between posted limit and speed of most drivers creates a hazard. FDOT raised the speed limit to 50 mph, and the F curbs and palm trees remained.

Plaintiffs alleged that FDOT was negligent in approving the design plans. The district court concluded that the alleged negligent activities were planning level functions for which FDOT was immune from tort liability.
http://www.4dca.org/opinions/Aug%202011/08-10-11/4D09-1341.op.pdf

<u>Russell v. Beddow</u>, __ So. 3d __ (Fla. 1st DCA 2011), 2011 WL 3558154, 36 Fla. L. Weekly D1784, 1D10-3869.

The district court reversed and remanded with instructions to enter a judgment in plaintiff's favor on liability and to adjust the damage award. The district court held that the trial court erred by failing to grant plaintiffs' motion for a directed verdict on a seatbelt defense and apportionment of fault. The district court also upheld the jury's zero verdict for lost wages and affirmed the trial court's denial of cost items plaintiffs sought to tax against defendant.

Appellant/plaintiff was the lead driver in a rear-end accident. Appellee/defendant conceded fault. Plaintiff admitted she was not wearing a seatbelt. She testified that her head went forward, causing her face to strike her steering wheel, followed by her head jerking back. She suffered "whiplash" cervical injury and presented evidence of a bulging cervical disc, the cause and extent of which was contested.

Defendant asserted a seatbelt defense, arguing that plaintiff's admitted failure to wear a seatbelt contributed to her injury. Plaintiff moved for a directed verdict, arguing that defendant failed to present competent evidence that plaintiff's failure to wear a seatbelt contributed substantially to her neck injury. The trial court denied the motion, and the jury decided that plaintiff was 35 percent at fault for her neck injury. Plaintiffs renewed their directed verdict motion on this issue and, alternatively, requested a new trial. The trial court denied both motions.

The district court explained that defendant was required to present expert evidence in support of her seatbelt defense. There was no reconstruction expert, leaving only expert medical evidence. A review of medical testimony revealed just three instances where plaintiff's failure to wear a seatbelt was discussed.

On cross-examination, defendant's counsel asked the defense expert about his deposition. When asked about the relationship between plaintiff's failure to wear a seatbelt and her injury, he responded, "Did it make a big difference, no, because it wasn't a big accident." When asked if he was changing that opinion at trial, he replied, "No, same thing." When asked if a seatbelt is "no big deal," he replied, "Well, now let's not go there now. You know, if you're hitting a tree at 50 miles an hour, it's a real big deal."

The defense expert testified that he did not think plaintiff was any worse off as of the time of trial than she would have been had she worn a seatbelt. The district court found this testimony insufficient to satisfy the standard that a defendant present competent evidence to prove that the failure to use an available and operational seat belt produced or contributed substantially to producing at least a portion of her damages. http://opinions.1dca.org/written/opinions2011/08-15-2011/10-3869.pdf

Cascanet v. Allen, ___ So. 3d ___ (Fla. 5th DCA 2011), 2011 WL 3516135, 36 Fla. L. Weekly D1776, 5D09-2247.

The district court reversed and remanded final judgment in a lawsuit for damages for injuries plaintiff suffered when his vehicle was hit at a red light.

Plaintiff appealed final judgment that awarded him only past medical expenses and lost wages. He argued that (1) the trial court erred in allowing defendants' medical examiner to render opinions to the jury that were not contained in his report; and (2) the trial court abused its discretion in allowing defense counsel's improper closing argument because it curried sympathy from the jury for the young defendant.

The accident occurred when plaintiff's car was hit by a car driven by defendant, who was 18 and driving a car owned by her father, also a defendant. Defendant's car "submarined" under plaintiff's car, lifting it, propelling it, then dropping it to the ground. Defendant's car was totaled and plaintiff's car was damaged, but driveable. Plaintiff sought emergency room help later that evening after suffering pain in his back and legs. It was discovered that he had suffered two herniated discs.

The defendant/father did not appear at trial. The defendant/driver sat alone at the defense table with a lawyer who, unbeknownst to the jury, was hired by defendants' insurance company to defend them both in the suit.

Plaintiff testified that he still suffered pain from his injuries, was unable to continue with hobbies related to cars, and could not continue to work as a technician.

The defense presented only one witness, an orthopedic surgeon defendants had hired to perform an independent medical exam (IME) of plaintiff. The district court stated that there was nothing in the defense expert's report or addendum to alert plaintiff that the expert would also testify that discs heal themselves or that there were other possible causes of pain. Rather, the doctor's reports unambiguously confirmed the diagnosis of herniated discs and reflected his opinion that plaintiff's chronic back and leg pain were "likely causally related" to the car accident.

While the defendant/driver was seated alone at the defense table, the jury was asked to consider whether it was "fair" to "burden" her with a substantial damage award and that it was "a bad day for her as well." The district court stated that this was an attempt to conjure sympathy for the young defendant to reduce the award by improperly asking the jury to weigh the effect a substantial award would have on her while ignoring her absent father, also a defendant, and ignoring the fact that there was insurance coverage. This was successful, as demonstrated by the quick return of the verdict finding no permanent injury, when there was undisputed evidence of two herniated lumbar discs and unchallenged testimony of plaintiff's continued pain and prospects for the future. Further, the jury awarded plaintiff almost the exact amount defense counsel said was a fair burden for his client and failed to award any amount for future economic and non-economic damages, despite uncontradicted evidence that plaintiff would need medical care in the future and plaintiff's inability to work.

The district court concluded that a combination of the errors in allowing the defendant's medical expert to testify regarding new opinions not expressed in his report and allowing the improper closing arguments deprived plaintiff of a fair trial.
http://www.5dca.org/Opinions/Opin2011/080811/5D09-2247.op.pdf

V. Drivers' Licenses

State v. Leyva, 65 So. 3d 1137 (Fla. 3d DCA 2011).

The district court reversed a trial court order to the Department of Highway Safety and Motor Vehicles to enforce a subpoena issued, pursuant to section 322.2615(6)(b), Florida Statutes (2010), to a police officer to appear at a hearing requested by defendant to contest suspension of her driver's license for DUI.

The district court stated that plain reading of the statute reveals that enforcement of noncompliance with a subpoena is "in the circuit court of the judicial circuit in which the person failing to comply with the subpoena resides" by "an order of the court."

The district court further stated that the power to hold a person in contempt is indisputably a judicial power. Separation of powers principles prohibit a court from delegating or assigning the judicial power to a coordinate branch of the government in this state. See Article II, § 3, Fla. Const.
http://www.3dca.flcourts.org/Opinions/3D10-3031.pdf

Jones v. State, __ So. 3d __ (Fla. 1st DCA 2011), 2011 WL 4424302, 1D10-1568.

The district court reversed defendant's three-year mandatory sentence for driving while license cancelled, suspended, or revoked. Defendant contended the trial court erred in imposing a prison sentence because the record did not support the finding that a nonstate prison sanction would present a danger to the public. The district court directed the trial court to sentence defendant to a nonstate sanction under section 775.082(10), Florida Statutes.

Defendant was observed by an officer driving his brother's pick-up truck. After the officer observed defendant illegally park the truck, he made contact with defendant and asked for his driver's license. Defendant replied that he did not have a valid license, and after the officer checked against the records of the Department of Highway Safety and Motor Vehicles, he arrested defendant as a habitual traffic offender.

The jury returned a guilty verdict. The trial court noted that defendant's conviction was a third-degree felony, subjecting him to up to five years in prison. Defendant argued that, pursuant to section 775.082(10), the court could not impose a prison sentence absent a finding that a nonstate prison sanction could present a danger to the public. The court sentenced defendant to three years in prison based on findings:

> 1. Defendant has evinced an unwillingness to discontinue driving without a driver's license, despite repeated punishment by the Courts;
> 2. Driving without a license endangers the public due to the probability of Defendant's attempting to elude law enforcement due to his suspended license, which could lead to a high speed automobile chase;
> 3. Another danger to the public is that Defendant's insistence on driving without a license also requires that he drive without automobile insurance, as an unlicensed driver, such as Defendant, cannot have insurance to assist a victim should he be involved in an accident; and
> 4. Defendant's unavailability to drive due to incarceration in State prison is the only method open to the Court for the protection of the public from Defendant's irresponsible and dangerous behavior.

The district court agreed with defendant that these findings were not supported by the record and that the trial court erred in imposing a prison sentence under section 775.082(10). The district court stated that the trial court's additional findings were speculative at best because the record did not reflect that defendant had a history of vehicle accidents or engaging in high speed chases with law enforcement.

http://opinions.1dca.org/written/opinions2011/09-23-2011/10-1568.pdf

State v. Gil, __ So. 3d ___ (Fla. 3d DCA 2011), 2011 WL 3903157, 36 Fla. L. Weekly D1977, 3D10-150.

The district court reversed the trial court's order dismissing the information charging defendant with unlawfully driving a motor vehicle while driver's license revoked as a habitual traffic offender, based on double jeopardy grounds.

The district court agreed with the Fourth District Court's decision in State v. Cooke, 767 So. 2d 468 (Fla. 4th DCA 1999), that convictions for violation of sections 322.34(2) and (5), Florida Statutes, do not constitute double jeopardy.

Defendant was arrested and issued citations for driving with a revoked driver's license pursuant to section 322.34(5) (habitual traffic offender revocation), driving with a suspended driver's license pursuant to section 322.34(2), and other traffic offenses. Defendant was formally charged with violating section 322.34(2), a misdemeanor, and other traffic offenses in county court, and with violating section 322.34(5), a felony, in circuit court. Defendant pled guilty to violating section 322.34(2) and moved to dismiss the felony charged under section 322.34(5), on double jeopardy grounds. The trial court granted the motion, finding that convictions under section 322.34(2) and 322.34(5) constitute double jeopardy.

The district court explained that its analysis was governed by section 775.021(4), Florida Statutes (2009), codifying double jeopardy guidelines established by the U.S. Supreme Court in Blockburger v. United States, 284 U.S. 299 (1932), and the Florida Supreme Court's decision in Valdes v. State, 3 So. 3d 1067, 1076 (Fla. 2009). The district court stated that the issue was whether these offenses are "degrees of the same offense" under section 775.021(4)(b)(2) or "degree variants" under Valdes. The district court stated that section 322.34(5), dealing with habitual traffic offenders, appears at first to be a degree variant of section 322.34(2), dealing with drivers who have had their licenses canceled, suspended, or revoked for a reason other than being a habitual traffic offender. However, on closer inspection, the district court concluded it was not, and, in fact, those offenses have little in common except they both provide for punishment for driving while a driver's license is revoked.

The district court explained that subsection (5) is based on number of traffic convictions during a specified period of time. Because suspension or revocation under subsection (2) of section 322.34 is based on entirely different conduct and on a completely different criteria than a revocation under subsection (5), subsection (5) cannot be a degree variant of subsection (2), and therefore convictions for violating subsection (2) and subsection (5) do not constitute double jeopardy
http://www.3dca.flcourts.org/Opinions/3D10-0150.pdf

Tyler v. State, ___ So. 3d ___ (Fla. 2d DCA 2011), 2011 WL 3300165, 36 Fla. L. Weekly D1691, 2D08-2717.

The district court affirmed the judgment and sentence of defendant convicted of failing to register as a sex offender because he did not obtain an updated driver's license after changing residence, as required by section 943.0435, Florida Statutes.

Defendant argued that the statute is unconstitutional. In the absence of evidence demonstrating its application to defendant's particular circumstances, the district court affirmed on the ground that the statute is facially valid.

A convicted sexual offender is required to report to the local sheriff at least twice a year. § 944.607(13), Fla. Stat. (2007). If the offender changes residence, the offender must within 48 hours register the new address, be photographed, have fingerprints taken, and furnish information. § 943.0435(2). Within 48 hours after reporting to the sheriff's office, the offender must report to the DHSMV to secure or renew a driver's license or identification card bearing the new address. § 943.0435(3), Fla. Stat.

At the time of the offense, the Department charged $10 [now $25] for a replacement driver's license or identification card reflecting a change of address. §§ 322.17(2), 322.051(2)(a), Fla. Stat. (2007). Florida statutes contain no provision for waivers or discounts to indigents. Failure to comply with reporting and registration requirements in chapter 943 is a third-degree felony. § 943.0435(9), Fla. Stat.

Defendant was convicted of an unspecified offense in Texas in 1993, which qualified him as a sexual offender in Florida. His address was listed with FDLE, and a police detective visited defendant in September 2007 to verify his presence. The detective told defendant to update his driver's license, which reflected his previous address. Defendant responded that would do so in a few days. About two weeks later, the detective again made contact with defendant, who advised he was about to move again and would update his license. But defendant had never updated his license. He was arrested and charged with failing to obtain a new license after changing his residence.

The district court stated that a person cannot be imprisoned solely because of indigence. However, defendant introduced no evidence of his inability to pay. Defendant qualified for a public defender. But proving that he could not afford an attorney fell short of proving he could not afford to update his driver's license.

Without evidence of facts sufficient to decide defendant's as-applied challenge, the district court was left to consider facial validity of the statute. To find the statute facially unconstitutional, the court would have to conclude that "no set of circumstances exists under which the statute would be valid." Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005).

DHSMV is required to charge for issuing a replacement driver's license or identification card reflecting a change of address. §§ 322.17(2), 322.051(2)(a). No law requires a typical resident, or even a typical felon, to obtain a driver's license or

identification card. But sexual offenders are legally compelled to obtain this documentation every time they change residences and are expressly required to pay for it.

However, the district court explained, this penalty would present a constitutional violation only for defendants who have made reasonable efforts to pay but cannot do so through no fault of their own. Defendant made no showing that he had tried to update his license but was unable to do so because he could not pay the fee. The district court affirmed judgment and sentence and left the constitutional challenge for another day. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/August/August%2003,%202011/2D08-2717.pdf