

FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

October – December, 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

Department of Highway Safety and Motor Vehicles v. Maggert, 941 So. 2d 431 (Fla. 1st DCA 2006).

After an administrative hearing resulted in a drivers license suspension, the circuit court granted the defendant's petition for writ of certiorari based on the absence of a statement in the arrest report indicating that the non-arresting officer initiated the stop upon suspicion of impairment.

The district court quashed the circuit court order and granted the department's petition for writ of certiorari. The court noted that the arrest report indicated that the first officer (non-arresting) had been flagged down by a motorist and advised that the motorist had observed the defendant's vehicle weaving in and out of traffic and that the defendant appeared to be impaired. The first officer subsequently observed the defendant's driving and requested a fellow officer to stop the defendant, a stop that resulted in the defendant's arrest for driving under the influence. The district court concluded that, under the facts of the case, objective evidence established probable cause to believe the defendant was impaired while driving a vehicle, irrespective of the absence of a statement in the arrest report that the non-arresting officer initiated the stop for suspicion of impairment.

Robitaille v. State, 942 So. 2d 440 (Fla. 4th DCA 2006).

The defendant was involved in an accident in which the ATV he was driving was towing an eight-year old boy in a disabled go-cart. The defendant lost control of the ATV and the boy died of a head injury, resulting in the defendant being charged with DUI manslaughter and

manslaughter by culpable negligence. He was found guilty and convicted of the former charge and acquitted of the latter charge.

The district court affirmed but considered in detail two of the defendant's issues, to wit, that his trial attorney provided ineffective assistance by failing to object to the state's toxicologist's testing regarding blood alcohol levels and by failing to object to opinions expressed by an officer which were allegedly beyond the officer's area of expertise.

In relation to the first issue the district court noted that the defendant's blood alcohol level was 0.14 approximately three hours after the accident. In addition there was testimony that the defendant's speech was slurred, his eyes were bloodshot, and the odor of alcohol was on his breath. The state introduced hypothetical toxicology evidence that his blood alcohol level at the time of the accident was at least either .09 or .081. The defendant objected, arguing that his body weight and height and food consumption during the time before the accident had not been taken into consideration. The district court disagreed, noting that the defendant had not shown how the corrected weight and height could have changed the outcome of the case and that the defendant's testimony that he had begun drinking early in the day undermined his argument that he should be considered to be in the low end rather than the high end of the test result ranges.

The latter issue related to the testimony of the investigating officer with regard to the speed of the defendant's ATV as well as the length of rope attached to the go-cart. While the district court conceded that the trial court had not qualified the officer as an expert, the court noted that based upon the officer's experience there was no reason to believe that the judge would not have found him qualified if defense counsel had raised an objection. In any case, the issues involved in the officer's testimony were relevant to the charge of manslaughter by culpable negligence rather than DUI manslaughter, the elements of which are a blood alcohol level of .08 and the causation or contribution to an accident involving a death (the causation element satisfied by testimony of excessive speed by the ATV).

Adams v. State, 941 So. 2d 553 (Fla. 1st DCA 2006).

Upon advice of counsel, the defendant pled guilty to, and was convicted of, two counts of DUI manslaughter and one count of DUI with serious bodily injury. In a postconviction motion, the defendant alleged that his counsel provided ineffective assistance in advising him to plea to DUI with serious bodily injury when he was the only person injured. The circuit court denied the motion.

The district court reversed, holding that the defendant had stated a facially sufficient claim for postconviction relief in light of the court's holding in Smith v. State, 793 So. 2d 1118 (Fla. 1st DCA 2001), that a defendant could not be convicted of DUI with serious bodily injury when the only person that sustained an injury was the defendant. The court observed that there was no factual basis for the defendant's plea and that the circuit court had erred by finding that the Smith opinion was inapplicable since it would have to apply retroactively to the defendant's conviction. The district court noted that Smith was decided prior to the entry of the plea and

therefore counsel should have been aware of this decision before advising the defendant to enter the plea.

Department of Highway Safety and Motor Vehicles v. Stenmark, 941 So. 2d 1247 (Fla. 2d DCA 2006).

The defendant was stopped and ultimately arrested for driving under the influence. The arresting officer testified to observing the defendant's head bobbing up and down and approached her vehicle thinking she may have passed out. Upon seeing that she had passed out, the officer testified that he attempted to turn the vehicle off, at which time the defendant woke up and the vehicle began drifting into the middle of the intersection. The defendant, at the officer's direction, shifted the vehicle into park. The administrative hearing officer, accepting the officer's testimony, ruled that the stop was lawful.

The circuit court granted the defendant's petition for writ of certiorari, giving credence to the defendant's innocent explanation that her head was bobbing up and down because she was cleaning up food which had spilled in her lap. She stated that after the light at the intersection had turned green she began to drive off until being confronted by an officer grabbing the keys of her car.

The district court quashed the circuit court's ruling, holding that the trial court had improperly reweighed the evidence, thereby departing from the essential requirements of the law. The district court explained as follows:

As the circuit court's opinion observed [the defendant] had an innocent explanation for the behavior that drew the officer's attention. But this did not refute the officer's testimony that when he approached to check on [the defendant's] safety, he discovered that she was, in fact, passed out behind the wheel of a car that was stopped at an intersection with the motor running. That evidence supported the hearing officer's order.

Moe v. State, 944 So. 2d 1096 (Fla. 5th DCA 2006).

The defendant was arrested, tried, and convicted of driving under the influence based, in part, on the result of a breath test administered using the Intoxilyzer 5000. At trial the defendant did not challenge the accuracy of the test results, stipulated that the machine had been tested in accordance with applicable regulations, and conceded that the results were within acceptable tolerances. However, the defendant filed a discovery motion seeking the source code for the Intoxilyzer's software for the ostensible reason of verifying whether it had been substantially modified from the approved version of the machine. The state failed to produce the code and the defendant moved to compel production. The trial court denied the motion and certified the following question of great public importance:

Under the criminal rules of discovery and the holding in State v. Muldowney, 871 So. 2d 911 (Fla. 5th DCA 2004), can the State of Florida be required to produce the source code for the Series 5000 Intoxilyzer?

The district court answered the question in the negative, holding that the state did not have the source code in its possession since it was a trade secret and the property of the manufacturer, which had invoked its statutory and common law privileges protecting the code from disclosure. The district court distinguished Muldowney, stating that it could not be used as authority to interpret the requirement in section 316.1932(1)(f)4., Florida Statutes, to wit, that the state provide “full information concerning the test,” to extend to information that could not be obtained by the state.

Johnson v. State, 944 So. 2d 474 (Fla. 4th DCA 2006).

The defendant was charged with fourth offense felony driving under the influence. After being found guilty by a jury of driving under the influence, the court determined the existence of three prior offenses and the defendant was convicted. In addition, the trial judge imposed a public defender fee and other costs.

Upon appeal, the district court affirmed the conviction, stating that while the defendant had the right to a jury trial on the issue of the prior convictions, his counsel, in his presence, had waived that right to a jury trial on that issue. The district court then remanded on the public defender lien issue, holding that the trial judge had not complied with the requirement in rule 3.720(d)(1), Florida Rules of Criminal Procedure, that the defendant be advised of the right to contest the amount of the public defender’s fee. The district court rejected the defendant’s argument that the other fees imposed by the court must be reversed because the trial court did not refer to the statutory authority for their imposition, reiterating its disagreement with the holding in Sutton v. State, 635 So. 2d 1032 (Fla. 2d DCA 1994), noting that Sutton had imposed a technical requirement beyond that required in any statute.

Lescher v. Department of Highway Safety and Motor Vehicles, 946 So. 2d 1140 (Fla. 4th DCA 2006).

The defendant’s drivers license was permanently revoked on December 1, 2000, based on his four prior driving under the influence convictions. On August 3, 2005, he applied for a restricted hardship license, apparently based on a statutory provision authorizing such licenses until 1998, when the provision was repealed. However, the bill repealing it was declared unconstitutional in 2003, in response to which the Legislature reenacted the repeal effective July 1, 2003. The department denied the defendant’s request and the circuit court upheld the denial. The defendant had argued that the 2003 reenactment of the repeal of the hardship license provision violated the ex post facto provision of the Florida Constitution found in Article I, section 10.

The district court denied the defendant’s petition for writ of certiorari, holding that the possibility of a license reinstatement was an administrative matter, rather than the type of punishment subject to the ex post facto provision. The court then certified the following question to the Supreme Court:

Does the amendment to section 322.271(4), Florida Statutes, which eliminated hardship driver's licenses effective July 1, 2003, violate the prohibition against ex post facto laws as to persons who could have applied for a hardship license before the amendment become effective?

[Note: The Fourth District, in Mulder v. Department of Highway Safety and Motor Vehicles, 946 So. 2d 1240 (Fla. 4th DCA 2007), reaffirmed Lescher and certified the same question.]

Mcalevy v. State, 947 So. 2d 525 (Fla. 4th DCA 2006).

Within the context of an arrest for battery, resisting arrest, and driving under the influence, the defendant was administered a blood alcohol test for medical reasons (blood transfer at the scene of arrest). The state sought to obtain the test results as being relevant to its ongoing DUI investigation, to wit, probative of a .08 reading or impairment. The trial court granted the state's motion, concluding that witness testimony was not necessary since the motion could be considered on the motion itself and the probable cause affidavit. The court then determined that the state had shown the requisite nexus between the medical records and the pending criminal investigation.

The district court affirmed, rejecting the defendant's argument that the state must provide live witness testimony or nonhearsay evidence. The court, distinguishing the state's approach from a search warrant, reasoned as follows:

In this case, however, the state sought [defendant's] medical records by way of a subpoena. In determining whether the state had shown a nexus between the medical records and the pending criminal investigation, the county court concluded it could rely upon the state's argument and the probable cause affidavit (akin to an accident report, as in [citation omitted]). The court further concluded it did not have to hear evidence in the form of witness testimony to make its determination. Based upon the [relevant] authorities petitioner fails to demonstrate that the circuit court's denial of relief constituted a departure from the essential requirements of law. We therefore deny the latest writ and approve the circuit court's ruling.

State v. Kelly, 946 So. 2d 1152 (Fla. 4th DCA 2006).

The defendant was charged with felony driving under the influence, based on two prior uncounseled DUI misdemeanor convictions. The trial court granted the defendant's motion to dismiss, which had argued that the prior uncounseled pleas could not be used to enhance the DUI charge to a felony, since the defendant could have been incarcerated in the prior misdemeanor cases for more than six months.

The district court affirmed, holding that it was bound by Hlad v. State, 585 So. 2d 928 (Fla. 1991), which in turn had been based on decisions of the United States Supreme Court. In light of the fact that the United States Supreme Court had since ruled that only actual

imprisonment could preclude a prior uncounseled misdemeanor conviction from being used to enhance a penalty, the district court certified the following question for the consideration of the Florida Supreme Court:

Can an uncounseled prior misdemeanor conviction, in which the defendant could have been incarcerated for more than six months, but was not incarcerated for any period, be used to enhance a current charge from a misdemeanor to a felony?

Criminal Traffic Offenses

Patterson v. State, 938 So. 2d 625 (Fla. 2d DCA 2006).

The defendant was charged with the third degree felony offense of driving while license suspended as a habitual traffic offender in violation of section 322.34(5), Florida Statutes. He entered a plea of no contest, reserving the right to appeal the issue of the trial court's denial of his motion to exclude prior uncounseled pleas. The defendant had argued that some of the prior convictions that supported his designation as a habitual traffic offender were entered in violation of his right to counsel.

The district court affirmed, holding that the defendant's conviction relied upon proof of the Department of Highway Safety and Motor Vehicles' designation as a habitual traffic offender rather than upon proof of prior convictions, as would have been the case if he had been charged with the third degree felony of third or subsequent driving while license suspended under section 322.34(2)(c). The court observed that prior convictions are elements of the latter charge and thus may be attacked, unlike in relation to the offense with which the defendant was charged. The district court described the difference as follows:

Here, similarly, the habitual traffic offender statutes do not focus on the reliability of the prior convictions. They reflect a rational legislative judgment that a certain class of persons should be prevented from driving because of potential dangerousness. Similarly, [the defendant] . . . had the opportunity to challenge the validity of one or more of his convictions by seeking postconviction relief before they resulted in a finding that he was a habitual traffic offender. Thus . . . the imposition of the civil disability of license suspension and the enforcement of that disability through a new criminal sanction does not 'support guilt or enhance punishment' on the basis of a conviction that is unreliable.

The court concluded as follows:

We recognize that the application of [citation omitted] to the habitual traffic offender provisions seems to create a logical inconsistency between similar statutes. That is, the State may be prohibited from seeking a third-degree felony conviction for driving while license suspended under section 322.34(2)(c) because it cannot rely on convictions that are 'unreliable' because they were

obtained in violation of the right to counsel, but the State can use the same convictions, by way of an administrative designation that does not assess their reliability, to support a third-degree felony conviction under section 322.34(5). In addition, a prior uncounseled conviction that may no longer be subject to a traditional collateral attack . . . may conclusively support a defendant's designation as a habitual traffic offender, but the same conviction is effectively open to a collateral attack regarding its use on a scoresheet or to support a conviction for a sequential crime.

Nevertheless, the Constitution does not prohibit this inconsistency. . . . [There] is no constitutional issue raised by the use of a possibly 'unreliable' conviction to support an administrative designation and civil disability or the subsequent punishment arising from violating the law while under that designation and disability.

Duff v. State, 942 So. 2d 926 (Fla. 5th DCA 2006).

The defendant was stopped for speeding and eventually issued traffic citations for speeding, passing in a no passing zone, having an expired license, and driving while license revoked as a habitual traffic offender. The defendant was convicted in county court of driving while license suspended and sentenced to serve 30 days in county jail. He was subsequently charged in circuit court with felony driving while license revoked as a habitual traffic offender. He pled no contest to the charge, reserving the right to appeal on double jeopardy grounds, specifically the "degrees variants" principle thereof.

The district court reversed, holding that section 775.021(4)(b)(2), Florida Statutes, excludes from the general legislative intent to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction those situations in which offenses are degrees of the same offense as provided by statute. While observing that the two offenses at issue do contain separate elements (evidenced by the requirement of habitual traffic offender status in the felony offense), the district court nevertheless held that both offenses "address the dual concerns of promoting public safety and punishing those who ignore the law and drive without a valid license" and thus represent degree variants of the same offense rather than fundamentally different offenses. In addition, the court observed that both offenses were in the same statute, section 322.34(5), Florida Statutes, a fact that, while not dispositive, supports the finding of a "degrees variant" exception.

Arino v. State, 944 So. 2d 1120 (Fla. 5th DCA 2006).

The defendant was charged with driving while license revoked as a habitual traffic offender. He moved the trial court to bifurcate his trial into two proceedings, the first to determine whether the defendant was driving while his license was suspended, and the second to determine whether the defendant had been designated a habitual traffic offender. The defendant argued that a failure to bifurcate would be unduly prejudicial because the jury would be informed of his prior criminal activity and his presumption of innocence would be destroyed. The trial court denied the motion and the defendant was convicted.

The district court affirmed, holding that a bifurcation would not have been proper. The court reasoned that since driving while license suspended is not a lesser included offense of driving while license revoked as a habitual traffic offender, a bifurcated proceeding would have wrongly forced the state to try to prove a crime which it had neither charged nor which was a lesser included offense of the crime charged. The district court added that bifurcation would have provided little benefit for the defendant since the state would still have been permitted to introduce a certified copy of the defendant's driving record.

Galston v. State, 943 So. 2d 968 (Fla. 5th DCA 2006).

The defendant was charged with driving while license permanently revoked in violation of section 322.341, Florida Statutes, while driving on the premises of a private fish hatchery which was closed during a construction project. He moved to dismiss, alleging that the construction site upon which he was driving was not open to the public for purposes of vehicular traffic. The trial court denied the motion, apparently relying on the definition of "highway" in chapter 633 (Fire Prevention and Control), which definition included roads which are temporarily closed for construction, maintenance, or repair. At trial, the court gave a jury instruction that the term highway included roads under construction. The jury found the defendant guilty of driving while license permanently revoked (and fishing without a license).

The district court reversed, holding that the trial court should have instructed the jury on the definition of "highway" in section 322.01(38), which does not contain an exception to the public use requirement for areas under construction, and by not doing so materially changed the applicable law. In addition, the district court noted that the definition of "highway" in chapter 633, which is part of the insurance code, is specifically limited to use in that chapter. The court summarized as follows:

In essence, the trial court added language from section 633.021(12) to the definition in section 322.01(38). This additional language broadened the definition of "highway" to favor the State and prejudice the defendant. Such action violated the expressly stated directives of the Legislature regarding the use of such definitions and violated the rule of lenity. Accordingly, the trial court should have granted [the defendant's] motion for judgment of acquittal. The evidence at trial was undisputed that the area in which [the defendant] was driving was closed to the public.

In re: Standard Jury Instructions in Criminal Cases – No. 2006-1, 946 So. 2d 1061 (Fla. 2006).

The Supreme Court amended jury instructions on DUI manslaughter and vehicular homicide, among other offenses. Specifically, the Court made technical amendments to instruction 7.8 – DUI Manslaughter, section 316.193(3)(c)3., Florida Statutes, but substantially changed instruction 7.9, including expanding the title to read Vehicular or Vessel Homicide, sections 782.071 and 782.072, Florida Statutes. In addition, the Court incorporated statutory enhancements in the penalty provisions for those offenses and added definitions for the terms "victim" and "vessel." Finally, the instruction designated the reckless or careless operation of a

vessel as a Category One lesser included offense.

State v. Elder, Second District, 32 Fla. L. Weekly D27, opinion filed December 20, 2006.

The defendant turned into the path of another vehicle, violating its right-of-way and causing the second vehicle to swerve to avoid a collision. The second car then lost control, drove off the road, flipping over and resulting in the death of the driver and ejection of a passenger. The defendant left the scene and was charged with a violation of section 316.027(1)(b), Florida Statutes, leaving the scene of a crash resulting in death. The trial court granted the defendant's motion to dismiss, which had asserted that a driver cannot be charged with leaving the scene unless there was actual contact between the two vehicles.

The district court reversed, holding that although the defendant did not crash she was "involved" in the crash (as required by the statute) because her driving caused it. While noting that no Florida appellate court had addressed the issue, the district court noted that there was case law from other states supporting its conclusion that the "[defendant's] driving caused the events leading up to the crash, she was 'involved in a crash resulting in the death of any person' and was required by the statute to remain at the scene."

Williams v. State, 946 So. 2d 1163 (Fla. 1st DCA 2006).

The defendant was charged by Uniform Traffic Citation with reckless driving on March 18, 2003, the date of the underlying driving incident. The citation indicated that she was charged with a criminal offense requiring a court appearance and would receive subsequent notification from the court. The defendant received two Notices to Appear dated March 26, 2003, ordering her to appear on April 8, 2003, for arraignment. At that time, she pled no contest to the offenses of reckless driving and driving with unsafe equipment. On April 22, 2003, a bench warrant was issued for the defendant's arrest, which warrant was not effectuated until March 21, 2005. On May 24, 2005, the defendant was charged with the felony offense of aggravated assault with an automobile, a charge arising out of the March 18, 2003, incident. She pled no contest, reserving the right to appeal the denial of her motion to discharge on speedy trial grounds.

The district court reversed, holding that for purposes of the speedy trial rule, specifically rule 3.191(d)(2), Florida Rules of Criminal Procedure, the defendant had been "taken into custody" on March 26, 2003, the date she was served the notice to appear. Thus her subsequent arrest was beyond the 175-day speedy trial period allowed for a felony. The district court held that the defendant had been taken into custody for all crimes arising out of the same criminal conduct or episode, including the charge of aggravated assault.

Arrest, Search and Seizure

Fricano v. State, 939 So. 2d 324 (Fla. 4th DCA 2006).

The defendant was a passenger in a taxi cab stopped for running a stop sign. The

defendant exited the vehicle, speaking loudly and indicating to the officer he was at that location to look at a boat. The officer told him to get back in the vehicle and asked for identification. The officer observed the defendant trying to crush a suspected crack rock and also the presence of a crack pipe on the car seat. The defendant was arrested and subsequently convicted of possession of cocaine and drug paraphernalia, reserving the right to appeal the trial court's denial of his motion to suppress.

The district court reversed, holding that the officer did not have the right to order the defendant back into a car following a traffic stop in the absence of safety concerns on behalf of the officer. The court reasoned as follows:

In this case, the drugs and paraphernalia were not discovered until after police ordered a passenger, who had exited the car following a traffic stop, back into the car. Thus, the issue here is whether the officer's ordering the passenger back into the car, coupled with the request for identification was 'a show of authority' transforming the encounter between the officer and the passenger into an investigatory stop that must have been supported by a well-founded, articulable suspicion of criminal activity. We find that is was.

Lawrence v. State, 942 So. 2d 467 (Fla. 4th DCA 2006).

The defendant was stopped for illegal tinting of windows. The officer placed a tint meter on the passenger rear window and obtained a reading outside the permitted range established by statute. As a result of the stop the defendant was charged with driving while license revoked and possession of cannabis (in addition to the window tint violation). The trial court denied the defendant's motion to suppress, rejecting the argument that section 316.2954, Florida Statutes, did not restrict tinting on the passenger-side window in the rear seating compartment.

The district court affirmed, holding that the reference in section 316.2954 to "windows behind the driver" included the passenger-side rear window since all door windows in the rear-seating compartment of the defendant's vehicle are "necessarily (in varying angles) behind the driver if they are neither forward of or adjacent to the driver's seat." The district court did, however, agree with, but found irrelevant, the fact that a related provision, section 316.2953, only limits window tinting on all windows forward of, or adjacent to, the operator's seat, since the two provisions were to be read in *pari materia* to cover all windows in a vehicle.

Civil Infractions

Abramson v. Beer, 940 So. 2d 586 (Fla. 4th DCA 2006).

Within the context of a civil infraction hearing officer running for judicial election, the issue was whether such officer was subject to section 99.012, Florida Statutes, the "resign to run" law. In answering the question in the negative, the district court referenced section 318.35, Florida Statutes, which provides as follows:

Hearing officers shall be independent contractors and may serve either full time as determined by the chief judge. In either case, they shall serve at the pleasure of the chief judge of the county and circuit in which they are to hear cases *and shall have no definite term of office.*

The district court concluded that the statement that hearing officers have no definite term of office evinced the legislative intent that hearing officers are not covered by the “resign to run law.” The court reasoned that since a hearing officer serves at the pleasure of the chief judge with no definite term it follows that “no part of any judicial term to which he might be elected could intersect with his tenure as a civil traffic infraction hearing officer before taking judicial office.”