

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
October 26, 2007 - November 26, 2007

DELINQUENCY CASE LAW

Florida Supreme Court

No new opinions in November 2007

I. First District Court of Appeals

C.H. v. State, ___ So.2d. ___, (Fla.1st DCA 2007). C.H. was adjudicated delinquent for resisting an officer without violence. C.H. appealed arguing that there was insufficient evidence to support the trial court's denial of his motion for acquittal and that the trial court erred in allowing the State to speak first and last in closing argument. The District Court held that there was sufficient evidence to deny the motion for acquittal but that the trial erred in directing the State to proceed first and last in closing argument. The District Court found that Florida Rule of Juvenile Procedure 8.110(d) provides that "[a] child offering no testimony in his or her behalf except his or her own testimony shall be entitled to the concluding argument." Further, the recent enactment of section 918.19, Florida Statutes (2006) governing the order of closing arguments applies only to adult criminal cases. E.K. v. State, 963 So.2d 309 (Fla. 1st DCA 2007). In the instant case, C.H. only offered his own testimony as evidence at trial. Therefore, the District Court held that C.H. was entitled to the concluding argument under rule 8.110(d) and the trial erred in directing the State to proceed first and last in closing argument. Case was affirmed in part and reversed in part and remanded. <http://opinions.1dca.org/written/opinions2007/11-30-07/07-2493.pdf> (Nov. 30, 2007).

II. Second District Court of Appeals

J.D.H. v. State, __ So.2d ___, 2007 WL 3400551 (Fla. 2nd DCA 2007). Juvenile was arrested for resisting officer without violence. Incident to a search, the juvenile was found to be in possession of cocaine. Juvenile pled guilty to possession of cocaine after his motion to suppress the evidence was denied. Adjudication was withheld. Juvenile appealed. The District Court of Appeal reversed and remanded the case for discharge. The District Court found that the simple act of fleeing from officers, without more, does not constitute the offense of resisting or obstructing an officer. The offense of resisting or obstructing an officer requires that the police have an articulable well-founded suspicion of criminal activity that justifies detention of the defendant and that the defendant fled with knowledge of this intent to detain. In this case, the police saw a group of boys and young men congregating at a basketball court. When police pulled up in a marked police car all persons fled. The District Court found that while it appeared J.D.H. fled with knowledge of the intent to detain him, the officers in this case did not testify to any facts that would support a legal basis to detain J.D.H. before he fled. Since J.D.H. fled from officers who had no legal right to detain him in the first place, he could not have been lawfully arrested for resisting an officer without violence. Since the resultant search was made pursuant to an unlawful arrest and the items seized should have been suppressed. Accordingly,

the District Court reversed and remanded the case for discharge.
<http://www.2dca.org/opinion/November%2016,%202007/2D06-3974.pdf> (Nov. 16, 2007).

C.G.H. v. State, So.2d ___, 2007 WL 3408308 (Fla. 2nd DCA 2007). Juvenile was adjudicated guilty of the delinquent acts of burglary of a conveyance and third-degree grand theft in connection with the taking of a camera. The juvenile appealed. The District Court of Appeal reversed the finding of guilt of grand theft and remanded this matter to the trial court with directions to reduce the grand theft to petit theft and enter a new disposition order. The District Court found that the evidence did not support the adjudication for third-degree grand theft. An essential element of third-degree grand theft is proof that the value of the stolen property is \$300 or more at the time of the theft. In this case, evidence was presented concerning the purchase price of the camera, but no other information was given to establish the value of the camera at the time of the theft. Thus, the evidence was insufficient to sustain a finding of guilt of third-degree theft. Case was remanded with instructions to reduce the grand theft to petit theft and enter a new disposition order.
<http://www.2dca.org/opinion/November%2016,%202007/2D06-4185.pdf> (Nov. 16, 2007).

K.T.M. v. State, ___ So.2d ___ (Fla. 2nd DCA 2007). K.T.M. appealed restitution order. K.T.M. and two other juveniles were charged with burglary of a dwelling, burglary of a conveyance, grand theft, and grand theft of a motor vehicle. As part of a plea agreement, K.T.M. pled guilty to burglary of a conveyance and grand theft and the State agreed to drop the remaining charges. K.T.M. had also agreed to pay restitution as determined by the court. The court accepted the plea, withheld adjudication and placed K.T.M. on probation. At a subsequent restitution hearing, the State presented evidence concerning the damages caused by K.T.M. and the codefendants. K.T.M. testified as to what damages he caused and what damages were caused by the codefendants. No evidence was presented as to K.T.M.'s ability to earn money or ability to pay restitution. The trial court found that K.T.M. was jointly and severally liable for all the damage and ordered K.T.M. to pay the full amount of the damages as restitution. The trial court made no findings as K.T.M.'s ability to earn money or ability to pay restitution. The District Court held that it was reversible error for a trial court to order restitution by a child without making findings concerning the child's ability to ear and ability to pay. See M.W.G. v. State, 945 So.2d 597 (Fla. 2nd DCA 2006). The District Court reversed the restitution order and remanded for a new restitution hearing with directions that the trial court must address K.T.M.'s ability to earn and pay restitution before determining the amount of restitution awarded.
<http://www.2dca.org/opinion/November%2028,%202007/2D06-5568.pdf> (Nov. 28, 2007).

III. Third District Court of Appeals

No new opinions in November 2007

IV. Fourth District Court of Appeals

No new opinions in November 2007

V. Fifth District Court of Appeals

No new opinions in November 2007

DEPENDENCY CASE LAW

Florida Supreme Court

No new opinions in November 2007

I. First District Court of Appeals

E.B. v. Department of Children and Families, --- So.2d ----, 2007 WL 4105523 (Fla. 1st DCA 2007). Pursuant to Fla. Stat. §39.521(3)(b)(2006), if a child is adjudicated dependent as to one parent the non-offending parent should be given custody unless the trial court finds that parent to be unfit or that the child would be endangered if placed in his or her custody. The best interest standard does not apply. <http://opinions.1dca.org/written/opinions2007/11-20-07/07-1303.pdf> (Nov. 20th, 2007).

A.W. v. Department of Children and Families, --- So.2d ----, 2007 WL 4105543 (Fla. 1st DCA 2007). A developmentally impaired mother appealed her termination of parental rights. The court affirmed the termination order and stated that Appellant's purported substantial compliance with her case plan was merely technical, at most, and in no way demonstrated her ability to comprehend and implement the basic parenting skills and practices necessary to assure her child's health, safety, and well-being. <http://opinions.1dca.org/written/opinions2007/11-20-07/07-1724.pdf> (Nov. 20th, 2007)

T.S. v. Department of Children and Families, --- So.2d ----, 2007 WL 4105565 (Fla. 1st DCA 2007). The court reversed the decision to terminate the father's parental rights when the termination was based upon abandonment due to the father's incarceration for 8 months and his failure to pay child support. The court held that there was no evidence that father had the ability to either support his child or meaningfully contact his child during the eight months he was in jail. The appellate court also stated that the trial court's finding to the contrary was not supported by competent, substantial evidence. <http://opinions.1dca.org/written/opinions2007/11-20-07/07-2161.pdf> (Nov. 20th, 2007).

II. Second District Court of Appeals

No new opinions in November 2007

III. Third District Court of Appeals

J.O. v. Department of Children and Family Services, --- So.2d ----, 2007 WL 3274708 (Fla. 3rd DCA 2007). The father appealed an order adjudicating his minor children dependent. The court affirmed the trial court's decision that the children's physical and mental health were at substantial risk of imminent harm based upon the father's previous history of dealing drugs out of his home. Judge Sheperd affirmed; however, he stated that he had reservations about holding proof of past conduct, without more, sufficient to support an imminency adjudication. <http://www.3dca.flcourts.org/Opinions/3D07-0595.pdf> (Nov. 7th, 2007).

IV. Fourth District Court of Appeals

L.T. v. Department of Children and Families, --- So.2d ----, 2007 WL 3274834 (Fla. 4th DCA 2007). A dependent child claimed that the court violated Fla. R. Juv. P. 8.350(c) when she had to attend a commitment hearing by telephone instead of in person after which she was involuntarily committed to a residential treatment facility. The court concluded that the child's physical appearance at the hearing was not in the child's best interest since the child was considered a danger to herself and others. The court also noted that the child was represented by counsel at the hearing and had a GAL present. <http://www.4dca.org/Nov%202007/11-07-07/4D07-1047.op.pdf> (Nov. 7th, 2007).

C.J. v. Department of Children and Families, --- So.2d ----, 2007 WL 4126864 (Fla. 4th DCA 2007). The trial court erred when it admitted and relied on inadmissible hearsay testimony at a dependency adjudicatory hearing. Section 39.507(1)(b) Fla. Stat. (2007) provides that an "[a]djudicatory hearing shall be conducted by the judge ... applying the rules of evidence in use in civil cases." The court also noted that for domestic violence to constitute abuse to the child the child must be present; however, a dependency finding based upon neglect or imminent neglect does not require that the child personally observe the acts. A history of domestic violence has also been recognized as supporting a finding of a threat of prospective harm. <http://www.4dca.org/opfrm.html> (Nov. 21, 2007).

T.M. and L.A. v. Department of Children and Families, --- So.2d ----, 2007 WL 4126910 (Fla. 4th DCA 2007). The court affirmed the parents' termination of parental rights based upon prospective abuse after their child sustained a broken leg that was deemed abuse by a medical expert. In prospective abuse cases, DCF must prove a connection between past acts of abuse and the prospect that it will occur again. The court found that TPR due to prospective abuse was appropriate based upon the history of violence in the relationship, the mother lying about the relationship being finished, the failure of the mother to protect the child from the father and the fact that the mother had already lost her rights to an older child on account of the father's violence in the relationship. <http://www.4dca.org/opfrm.html> (Nov. 21, 2007).

V. Fifth District Court of Appeals

J.M. v. Department of Children and Families, ___ So.2d ___, 2007 WL 3407778 (Fla. 5th DCA 2007). Mother was not entitled to reopen her case after children were placed in long term relative care without showing that the permanent placement was no longer in the children's best interest. See Fla. Stat. [§ 39.621\(9\)](#)(2007). <http://www.5dca.org/Opinions/Opin2007/111207/5D07-2156.op.pdf> (Nov. 16th, 2007).

DISSOLUTION OF MARRIAGE CASE LAW

Florida Supreme Court

No new opinions in November 2007

I. First District Court of Appeals

Blackmon v. Blackmon, 1D07-0438, ___ So.2d ___ (Fla. 1st DCA 2007).

Former husband appealed the final judgment of dissolution on several grounds; the appellate court reversed and remanded on the issues of alimony, determination of former husband's income, and partition of the marital home. The trial court had ordered an increase in child support payments upon the parties' minor child reaching majority; the appellate court held that an automatic increase absent a specific finding of circumstances justifying it is error. Also, the appellate court found that the trial court had reached a figure for supplemental income without making any specific factual findings to support it. Finally, the trial court had ordered that the wife be permitted to remain in the marital home until the minor child reached majority at which time the house was to either be refinanced or sold with the former husband receiving his equity. The trial court provided the former wife avenues through which she could gain additional time to complete this process without setting a deadline; the appellate court held that the trial court had erred by not having set an absolute deadline for partition and cited Carlson v. Carlson, 346 So. 2d 132 (Fla. 2nd DCA 1977), for the holding that when partition is ordered in a DOM proceeding, some reasonable deadline for completion of the process must be set. <http://opinions.1dca.org/written/opinions2007/11-06-07/07-0438.pdf> (November 6, 2007).

Brulte v. Brulte, 1D07-3592, ___ So.2d ___ (Fla. 1st DCA 2007).

Appeal by a former husband of denial of his motion to dismiss the dissolution of marriage proceeding (DOM) for lack of jurisdiction; former wife argued that his appeal should be dismissed. In agreeing with the former wife, the appellate court noted that the trial court had found that the wife had met the residency requirement for filing as a petitioner for dissolution in Florida and that it had jurisdiction over the parties' children pursuant to the Uniform Child Custody

Jurisdiction and Enforcement Act (UCCJEA), s.61.501-61.542, Florida Statutes. The appellate court held that UCCJEA does not require personal jurisdiction over a party in order to determine custody and reasoned in this case that because the former husband's motion to dismiss did not raise a challenge to the trial court's in personam jurisdiction, that the order denying the motion to dismiss could not be appealed pursuant to Rule 9.130(a)(3)(C)(i), Fla. R. App. P. , nor did the order determine custody which could be appealed via Rule 9.130(a)(3)(C)(iii), Fla. R. App. P. <http://opinions.1dca.org/written/opinions2007/11-13-07/07-3692.pdf> (November 13, 2007).

II. Second District Court of Appeal

Harr v. Harr, 2D07-3169, ___ So.2d ___ (Fla. 2nd DCA 2007).

Former husband sought a writ of prohibition to prohibit the trial court from proceeding on a counterpetition for DOM filed by the former wife arguing that because he served a notice of voluntary dismissal of his petition before the former wife served her counterpetition, that the trial court had no authority to take further action in the proceeding. The trial court had suggested that the parties schedule a hearing to determine several issues including whether former husband's service of the notice of voluntary dismissal effectively terminated the DOM proceeding; in lieu of scheduling a hearing, the former husband petitioned for the writ of prohibition. In denying the writ, the appellate court held that the question of whether a trial court has acted in excess of its jurisdiction cannot be determined until the disputed issues of fact are decided by that court.

<http://www.2dca.org/opinion/October%2026,%202007/2D07-3169.pdf> (October 26, 2007).

III. Third District Court of Appeal

Lopez v. Lopez, 3D06-3067, ___ So.2d ___ (Fla. 3rd DCA 2007).

Former husband appealed from final judgment modifying his alimony obligation to the former wife, which had been entered by the trial court on remand after the former wife had previously appealed termination of alimony. The sole issue on the second appeal was whether the trial court had abused its discretion by not having further reduced the former husband's alimony from what had been entered on remand. Based on what it termed "the unique circumstances presented here," the appellate court held that the trial court had abused its discretion. The former husband had involuntarily retired after having been employed by two banks, each of which had closed, lived in modest circumstances and withdrew from savings every month because his monthly expenses exceeded his monthly income; the former wife had been precluded from presenting evidence of her current finances due to her failure to comply with discovery. Accordingly, the appellate court reversed and remanded to the trial court with instructions that the former husband's support obligation be reduced to \$1.00 per month.

<http://www.3dca.flcourts.org/Opinions/3D06-3067.pdf> (November 7, 2007).

Garcia v. Garcia, 3D06-3065, ___ So.2d ___ (Fla. 3rd DCA 2007).

Former husband appealed an order denying exceptions to a general magistrate's report establishing temporary support for the former wife; former wife cross-appealed a later order denying her motion for contempt for former husband's failure to pay past-due support obligations. Although the appellate court affirmed both of the trial court's orders, based on its finding that the trial court had not abused its discretion in establishing temporary support for the former wife and that the former wife's cross-appeal was flawed, it noted that the trial court's order had left the door open for the wife to renew her attempts to, in the words of the appellate court, "illuminate Mr. Garcia's purported and remarkable decline in income and assets following the commencement of the dissolution proceeding and entry of the support order." The appellate court also noted the difficulties faced by a pro se litigant (here, the former wife) to "follow the money" in proceedings such as this. <http://www.3dca.flcourts.org/Opinions/3D06-3065.pdf> (November 21, 2007).

IV. Fourth District Court of Appeal

Howle v. Howle, 4D06-4084, ___ So.2d ___ (Fla. 4th DCA 2007).

Appellate court found that the trial court had applied the correct legal standard, and accordingly affirmed its final judgment of DOM which allowed former wife to relocate to Kentucky with the parties' four minor children. The former wife had relocated to Kentucky after the parties' separation but prior to the trial; therefore, relocation was addressed as part of the petition for DOM. Because the former husband did not include the trial transcript as part of the record on appeal, the appellate court reviewed the final judgment to see if it was erroneous on its face. The appellate court stated that a trial court is required to consider the six factors enumerated in s. 61.13(2)(d)1-6, FS in considering a request to relocate and found in this instance that the trial court's order reflected that it had adequately considered those factors even though it had not entered a specific finding with respect to each of the factors enumerated. <http://www.4dca.org/Oct%202007/10-31-07/4D06-4084.op.pdf> (October 31, 2007).

Long v Long, 4D06-4585, ___ So.2d ___ (Fla. 4th DCA 2007).

Appellate court found no abuse of discretion in the trial court having folded the former husband's share of private school tuition into the alimony awarded to the former wife nor did it find error in the trial court not having included the former husband's reimbursed business expenses as part of his income. <http://www.4dca.org/Nov%202007/11-07-07/4D06-4585.op.pdf> (November 7, 2007).

Henderson v. Henderson, 4D06-4181, ___ So.2d ___ (Fla. 4th DCA 2007).

Former wife appealed the trial court's award of special equity in the marital home to former husband; former husband cross-appealed, arguing the parties' shares in the home had not been correctly calculated. The appellate court affirmed the awarding of the special equity to the former husband, but reversed and remanded for the trial court to recalculate the amount. This case includes a discussion of the Landay formula which is relied on in determining special equity. Landay v. Landay, 429 So. 2nd 1197 (Fla. 1983). <http://www.4dca.org/Nov%202007/11-14-07/4D06-4181.op.pdf> (November 14, 2007).

Kopecky v. Kopecka, 4D07-1410, ___ So.2d ___ (Fla. 4th DCA 2007).

Former husband appealed the trial court's sua sponte dismissal of his petition for DOM for lack of jurisdiction and improper venue. In reversing and remanding, the appellate court stated that service by publication is the correct statutory method for obtaining service of process over a spouse who is not a resident of Florida and found that here the former husband had met all the statutory requirements. The appellate court also found that s. 47.011, FS regarding venue, does not apply to actions against non-residents, so that the trial court had erred in applying that section to the case because former wife is a non-resident.

<http://www.4dca.org/Nov%202007/11-14-07/4D07-1410.op.pdf> (November 14, 2007).

Francavilla v. Francavilla, 4D06-2128, ___ So.2d ___ (Fla. 4th DCA 2007).

Former wife appealed trial court's enforcement of a prenuptial agreement and a ruling that certain real property was not gifted to her. In affirming the trial court's order in a dissolution case, which the trial court described as having been "about getting money and keeping money," the appellate court noted that where there is conflicting testimony at trial, the trial court's findings should be upheld so long as they are based on competent substantial evidence and also that it is the trial court's responsibility to determine the credibility of the witnesses. The appellate court also discussed at some length the circumstances surrounding the prenuptial agreement and found that in this case the former wife was neither coerced into signing the agreement nor was she treated unfairly or unreasonably under the terms of the agreement. <http://www.4dca.org/Nov%202007/11-21-07/4D06-2128.op.pdf> (November 21, 2007).

V. Fifth District Court of Appeal

Geoghegan v. Geoghegan, 5D06-1843, ___ So.2d ___ (Fla. 5th DCA 2007).

Finding that the trial court had 1) not sufficiently indicated how it had determined former husband's income and former wife's financial need, and 2) erred in not having awarded attorney's fees and costs to the wife, the appellate court reversed and remanded the portions of the final judgment regarding permanent alimony and attorney's fees and costs. The trial court was instructed to revisit the issue of permanent alimony and to provide factual findings from which a reviewing court

could discern whether the award satisfies the requirements of s. 61.08, FS, and also to reconsider the award of attorney's fees and costs in light of the opinion. (The trial court had ordered that each party be responsible for its own fees and costs). All other parts of the final judgment of DOM were affirmed.

<http://www.5dca.org/Opinions/Opin2007/111207/5D06-1843.op.pdf> (November 16, 2007).

DOMESTIC VIOLENCE CASE LAW

Florida Supreme Court

No new opinions in November 2007

Iowa Supreme Court

Weissenburger v. Iowa Dist. Court for Warren County, --- N.W.2d ----, 2007 WL 3120825 (Iowa, 2007). In a domestic violence case, once the trial court determined the no-contact order should continue in effect, the ex-husband was prohibited under federal law from possessing firearms regardless of whether this prohibition was included in the trial court's no-contact order. Therefore, the trial court had no power to authorize the ex-husband to possess firearms in violation of federal law.

http://www.judicial.state.ia.us/Supreme_Court/Recent_Opinions/20071026/05-0279.pdf (October 26, 2007).

I. First District Court of Appeals

No new opinions in November 2007

II. Second District Court of Appeals

No new opinions in November 2007

III. Third District Court of Appeals

No new opinions in November 2007

IV. Fourth District Court of Appeals

C.J. v. Department of Children and Families, --- So.2d ----, 2007 WL 4126864 (Fla. 4th DCA 2007). The trial court erred when it admitted and relied on inadmissible hearsay testimony at a dependency adjudicatory hearing. Section 39.507(1)(b) Fla. Stat. (2007) provides that an "[a]djudicatory hearing shall be conducted by the judge ... applying the rules of evidence in use in civil cases." The court also noted that for domestic violence to constitute abuse to the child the child must be present; however, a dependency finding based upon neglect or imminent neglect does not require that the child personally observe the acts. A history of domestic violence

has also been recognized as supporting a finding of a threat of prospective harm. <http://www.4dca.org/opfrm.html> (Nov. 21, 2007).

T.M. and L.A. v. Department of Children and Families, --- So.2d ----, 2007 WL 4126910 (Fla. 4th DCA 2007). The court affirmed the parents' termination of parental rights based upon prospective abuse after their child sustained a broken leg that was deemed abuse by a medical expert. In prospective abuse cases, DCF must prove a connection between past acts of abuse and the prospect that it will occur again. The court found that TPR due to prospective abuse was appropriate based upon the history of violence in the relationship, the mother lying about the relationship being finished, the failure of the mother to protect the child from the father and the fact that the mother had already lost her rights to an older child on account of the father's violence in the relationship. <http://www.4dca.org/opfrm.html> (Nov. 21, 2007).

V. Fifth District Court of Appeals

State v. Clavette, --- So.2d ----, 2007 WL 3390922 (Fla.App. 5th DCA 2007). After a domestic violence incident, police entered a residence and arrested Mr. Clavette. Mr. Clavette resisted the arrest with violence, but claimed that his actions were inadmissible in court because the search and subsequent arrest were illegal. The court disagreed and held that the search was legal because one of the other occupants had consented to the search, and Mr. Clavette didn't expressly object to the search. The court also stated that even if the search were illegal, resisting arrest is not permitted pursuant to current case law, and evidence of his actions when he resisted arrest were admissible. <http://www.5dca.org/Opinions/Opin2007/111207/5D07-598.op.pdf> (Nov. 16th, 2007).