

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE
August 2008

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

M.G. v. State, __ So.2d __, 2008 WL 3913970 (Fla. 1DCA 2008). The juvenile appealed her adjudication of delinquency for giving a false name or identification to a law enforcement officer asserting two grounds for reversal of the trial court's ruling denying her motion to dismiss. The juvenile argued that the State provided insufficient evidence of identity and that she established the affirmative defense of recantation. During a traffic stop the juvenile identified herself to a police officer as Victoria Herring with a birth date of June 12, 1989. The officer ran this information through the criminal justice information network. There was an outstanding warrant for Victoria Herring and the juvenile was arrested. While being taken to the county jail, the juvenile told the officer that she had provided false information and then provided her true name and date of birth. The Juvenile Assessment Center was contacted to verify her information. The Juvenile Assessment Center informed the officer that the juvenile had a pickup order. The juvenile was charged with giving a false name or identification to a law enforcement officer in violation of s. 901.36(1), F.S. (2007). At the juvenile's adjudicatory hearing, the officer testified, "I could not tell you that that was the female that I-I could not positively confidently tell you that that was the female that I ... had contact with that night. But she does look familiar." The State then asked, "On a scale from one to ten, what do you think she is?" The officer replied, "I would say at least a nine." The officer then pointed out the juvenile and described her clothing. During cross examination, the juvenile's counsel asked the officer, "And you just testified that you are pretty sure, but you are not totally sure that this was [juvenile] in the courtroom today?" The officer answered, "Yes. Again, I had contact with thousands of people since then." No other evidence was presented regarding identity. The defense moved for a judgment of dismissal arguing that the identification was inadequate and the juvenile had recanted her false statements to the officer. The motion was denied. The First District found that the arresting officer's testimony that the juvenile "looked familiar" and his identification of her as "at least a nine" on a scale of one to ten, along with the exchange during cross-examination, provided legally sufficient evidence that the juvenile was the person whom the officer arrested. The fact that the officer honestly acknowledged his limited recollection of the juvenile's identity did not provide a legal basis to reverse the adjudication. Next, the First District found that the common law defense of recantation applies to prosecutions for giving a false name to law enforcement officers in violation of s. 901.36(1), F.S. (2007). Whether the recantation occurred before or after the arrest is often the critical factor in evaluating the recantation defense. Once a defendant is arrested, the policy reasons that excuse providing false information are no longer applicable. The First District held that the defense did not apply in this case because the juvenile did not recant the false information until after her arrest. The juvenile had argued that the recantation defense applied because she recanted her false information within three blocks of where the officer initiated her transport to the county jail. She alleged there was no harm to the officer in providing this false information because the

juvenile detention center is “basically in the same place” as the county jail. The juvenile further asserted that she would have been arrested regardless of whether she provided false information in light of her pickup order, thus negating any adverse reliance on the false information. The First District rejected the juvenile’s argument that no harm resulted from providing false information because she would have been detained on the basis of her pickup order. The juvenile’s actions forced the officer into making what he thought was a necessary arrest. Had the juvenile provided truthful information, the officer could have promptly determined that the juvenile was a juvenile and responded accordingly. The juvenile’s adjudication was affirmed.

<http://opinions.1dca.org/written/opinions2008/08-27-08/08-0864.pdf> (August 27, 2008).

Second District Court of Appeal

C.H.C. v. State, __ So.2d __, 2008 WL 2941158 (Fla. 2DCA 2008). The Second District Court of Appeal, upon its own motion, withdrew its previously issued opinion filed July 16, 2008 and substituted a new opinion dated August 1, 2008. The juvenile had challenged his adjudication for obstructing or opposing an officer without violence. In its previous opinion, the Second District held that the State's evidence failed to establish that the deputy was engaged in the lawful execution of any legal duty when he attempted to detain the juvenile. Accordingly, the Second District reversed and remanded for entry of an order granting the juvenile's motion for judgment of dismissal. The deputy was the only witness to testify at the adjudicatory hearing. The deputy testified that while on patrol he heard a call go out for a disturbance in the area. The deputy was not dispatched, but after a few minutes, one of the deputies at the scene requested backup. The deputy responded. When he arrived at the scene he saw his corporal walking down a flight of stairs surrounded by a large group of people. The corporal directed the deputy to detain the juvenile. The deputy observed the juvenile walking in a circle clinching his fists and yelling profanities. The deputy did not know exactly what the juvenile was saying. The deputy described the juvenile as screaming and yelling at the deputies on the scene. The deputy approached the juvenile, made eye contact, and said, “Come over here.” The juvenile ran from the area. The deputy yelled, “Police, stop,” but the juvenile continued to run. The deputy chased the juvenile but lost visual contact. The deputy placed a radio alert and other deputies then found the juvenile and detained him. The Second District found that the crime of obstructing or opposing an officer without violence required a showing that the officer was engaged in the lawful execution of a legal duty. In cases involving an investigatory detention, it was necessary to prove that the officer had a reasonable suspicion of criminal activity that would support the detention. The Second District held that the State failed to show that the deputy had the necessary reasonable suspicion of criminal activity. First, the conduct attributed to the juvenile before he fled did not constitute “disorderly conduct” because the deputy did not indicate that the juvenile was inciting an immediate breach of the peace. Second, the State cannot rely on the “fellow officer rule” as justification for the detention because there was no record evidence that another officer on the scene had the reasonable suspicion necessary to justify the detention. Finally, the Second District noted that the juvenile's flight from the scene could not alone support the charge of obstructing or opposing an officer without violence because the State failed to show that the deputy was engaged in the lawful execution of a legal duty when he ordered the juvenile to stop. In its new opinion, the Second District made the

same findings as the prior opinion but expanded its analysis as to why the juvenile's flight from the scene failed to support the charge. The Second District added that while flight in knowing defiance of a law enforcement officer's order to stop could constitute a violation of s. 843.02, F.S., the officer must be justified in ordering the detention based on founded suspicion that the defendant was engaged in criminal activity. In the instant case, the Second District found that there was no record evidence that any officer had the founded suspicion necessary to justify the detention. The flight in this case occurred after the unlawful order to stop and not prior to a lawful order justified by Illinois v. Wardlow, 528 U.S. 119 (2000). Because the State failed to show that the deputy was engaged in the lawful execution of a legal duty when he ordered the juvenile to stop, the case was reversed and remanded for entry of an order granting the juvenile's motion for judgment of dismissal.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/August/August%2001,%202008/2D07-3426.pdf (August 1, 2008).

Third District Court of Appeal

B.S. v. State, ___ So.2d ___, 2008 WL 3914846 (Fla. 3DCA 2008). The Third District Court of Appeal found that the determination of delinquency was supported by legally sufficient evidence citing Melton v. State, 546 So.2d 444 (Fla. 1st DCA 1989); and State v. Woods, 624 So.2d 739 (Fla. 5th DCA 1993), review denied, 634 So.2d 629 (Fla.1994). However, because the trial court erroneously denied the juvenile's opening and concluding final arguments as required by Florida Rule of Juvenile Procedure 8.110(d), and D.B. v. State, 979 So.2d 1119 (Fla. 3d DCA 2008), the cause was remanded for further proceedings below consistent with D.B. <http://www.3dca.flcourts.org/Opinions/3D07-2088.co.pdf> (August 27, 2008).

J.C. v. State, ___ So.2d ___, 2008 WL 3359357 (Fla. 3DCA 2008). The juvenile appealed his adjudication for one count of resisting an officer with violence in violation of s. 843.01, F.S. (2006) and two counts of battery on a police officer in violation of ss. 784.03 and 784.07(2)(b), F.S. (2006). An officer was providing security at a high school football game. During the game the officer entered the men's restroom where he saw that two individuals were standing in a single restroom stall with the door open. The officer could not see what the two occupants were doing. The first occupant left the stall and walked quickly by the officer. As he approached the officer the first occupant turned toward the direction of the stall, put his hand over his mouth, and made a noise like he was clearing his throat. The first occupant then ran out of the restroom. The officer heard the toilet flush. The second occupant, the juvenile, exited the restroom stall and walked toward the officer. The officer moved in front of the juvenile and told him to stop. The juvenile stopped, stepped back, then put his head down and hit the officer with his chest and shoulder. The officer tried to take the juvenile into custody and called for backup. Two other officers arrived. In the ensuing struggle, the juvenile struck one of the backup officers and cut his lip. The juvenile argued that in order to convict for resisting an officer with violence, it was necessary to establish that the officer was engaged in the lawful execution of a legal duty. In order to convict for battery on a law enforcement officer, it was likewise necessary for the State to establish that the officers were engaged in the lawful performance of their duties. The juvenile contended that the investigatory stop was illegal and

the officers were not engaged in the lawful execution of a legal duty. The juvenile argued that there was no founded suspicion which justified an investigatory stop. The Third District Court of Appeal disagreed and held that there was a founded suspicion in this case that justified an investigatory stop citing Barron v. State, 823 P.2d 17, 20 (Alaska Ct.App.1992)("When a police officer who is in a public area observes two people using the same restroom stall, and apparently not using the stall for its intended purpose, then these observations may permit the police officer to take further reasonable steps to investigate."); People v. Mercado, 501 N.E.2d 27, 29-30 (N.Y.1986) (investigation by officer was permissible where officer "ascertained that two men were using a single toilet stall in a manner that indicated to him that the stall was not being used for its intended purpose."); and Wylie v. State, 296 S.E.2d 743, 744 (Ga.Ct.App.1982) (investigation permissible where "the officer's suspicions were alerted by the fact that there were apparently two men in the stall facing each other, without speaking, for a period of time."). The Third District held that the juvenile's motion for judgment of dismissal was properly denied and affirmed.

<http://www.3dca.flcourts.org/Opinions/3D07-1816.pdf> (August 13, 2008).

J.C. v. State, ___ So.2d ___, 2008 WL 3360956 (Fla. 3DCA 2008). The juvenile appealed her adjudication arguing that she was not afforded the opportunity to make the concluding closing argument in her adjudicatory hearing pursuant to Florida Rule of Juvenile Procedure 8.110(d). The trial court held that the State correctly conceded error and reversed the adjudication. Further, because the error in question was procedural, and not substantive, only a limited remand for a "procedurally sufficient closing" was necessary, so long as the judge who presided over the original adjudicatory hearing was available. See D.B. v. State, 979 So.2d 1119, 1121 (Fla. 3d DCA 2008) ("[A]fter a procedurally sufficient closing, the judge's reconsideration of the case will remedy the procedural violation...."). The juvenile argued that two cases, E.K. v. State, 963 So.2d 309 (Fla. 1st DCA 2007), and C.H. v. State, 969 So.2d 567 (Fla. 1st DCA 2007), expressly and directly conflict with the limited remedy set in place by this Court in D.B. The Third District found that neither opinion was clear as to whether "further proceedings" or "additional proceedings" meant new closing arguments or a new adjudicatory hearing. The Third District declined to certify conflict because no "express" conflict existed between the cases that would require certification.

<http://www.3dca.flcourts.org/Opinions/3D07-2438.pdf> (August 13, 2008).

N.S. v. State, ___ So.2d ___, 2008 WL 2986441 (Fla. 3DCA 2008). The juvenile appealed an order withholding adjudication of delinquency and placing her on probation for credit card theft in violation of s. 817.60(1), F.S. (2006). The juvenile argued that the trial court erred by allowing the State to introduce inadmissible hearsay evidence, over defense objection. The Third District Court of Appeal held that the evidence was improperly admitted, but concluded that the error was harmless beyond a reasonable doubt, and affirmed. The victim testified that she went to a skating lesson, which she paid for with her credit card. During her lesson, she left her purse in the "skating box." Later, she discovered that the credit card had been taken. After notifying her bank and the police, the victim called the administrative manager at the facility where she took the skating lesson. The manager testified that the juvenile was at the facility on the date of the skating lesson. During her testimony, the State introduced into evidence an employment

application the juvenile had filled out and a video surveillance tape showing the juvenile and another girl, who was also charged, in the vicinity of the victim's purse. The detective, who conducted the investigation, testified that after he retrieved the videotape and the employment application he made contact with the juvenile. After being advised of her Miranda rights, the juvenile waived her rights and provided the detective a statement admitting her involvement in the theft of the victim's credit card. During the victim's testimony, the State introduced, over defense objection, a computer printout of the victim's credit card statement that listed purchases made with the credit card on the date it was stolen, under the business record exception to the hearsay rule. The victim identified several purchases listed on the statement that were made after she realized her credit card was missing which were neither made nor authorized by her. The juvenile claimed that the introduction of the victim's bank statement was error because the State failed to establish the requisite predicate for its admission under the business record exception to the hearsay rule. The Third District agreed and held that prior to admitting the computer printout under the business record exception to the hearsay rule, the State was required to lay a proper predicate. Because that was not done in this case, the trial court erred in admitting the bank statement into evidence and in allowing the victim to testify about the information it contained. Although the introduction of the victim's bank statement was error, the Third District also found that it was harmless beyond a reasonable doubt. The juvenile was charged pursuant to s. 817.60(1), F.S. (2006) with taking or receiving the victim's credit card without the victim's consent, with the intent to use, sell, or transfer the credit card to a person other than the issuer of the credit card or the credit card holder. The juvenile was not charged with using the card. Thus, any evidence regarding the unauthorized use of the credit card, especially since the statement did not identify who made the unauthorized charges, was not relevant to any element of proof for the offense charged. The Third District concluded that the error was harmless in light of the overwhelming evidence presented against the juvenile, which included the videotape showing the juvenile's presence at the time the victim's credit card was taken from her purse, the proximity to the victim's purse and strange behavior which appeared to be a diversionary tactic to enable the theft to be committed without detection, and her admission to the detective that she was involved in the theft of the credit card.

<http://www.3dca.flcourts.org/Opinions/3D07-0869.pdf> (August 6, 2008).

Fourth District Court of Appeal

M.S. v. State, __ So.2d __, 2008 WL 2906946 (Fla. 4DCA 2008). The juvenile appealed an order revoking his probation and committing him to a high risk residential program with special conditions of DNA testing and a sex offender program. The Fourth District Court of Appeal affirmed the revocation of probation but found error in the disposition order and reversed. The State originally charged the juvenile with making a false fire alarm. The juvenile entered a guilty plea and the trial court withheld adjudication and placed him on probation. Subsequently, the State filed a Petition for Violation of Probation alleging the juvenile committed the offense of lewd lascivious exhibition and exposure of sex organs. At the violation hearing, evidence and argument were presented regarding two incidents and the lewd and lascivious offense and a wholly separate uncharged offense of battery on a school employee. The trial court found the

juvenile had violated his probation based on both offenses. The Department of Juvenile Justice (DJJ) filed a Pre-Disposition Report noting two violations of probation. The Report recommended commitment to a moderate risk program followed by conditional release. The report indicated a need for DNA testing and recommended the juvenile be placed in a residential environment for juvenile sex offenders. At the disposition hearing, the trial court announced that it would depart from DJJ's recommendation. The trial court adjudicated the juvenile delinquent on the charge of making a false fire alarm, committed him to a high risk residential program, and ordered a sex offender program and DNA testing. The trial court indicated the reasons for the harsher disposition, including the juvenile's sexually deviant behaviors. The trial court further explained that the juvenile's twenty-nine disciplinary referrals at school since the violation hearing indicated the need to depart from the recommended disposition. The juvenile filed a motion to correct the disposition order arguing that the trial court had failed to justify the need for the higher restrictiveness level. The juvenile then filed a second motion and requested the court to strike the higher level commitment program, the DNA testing, and the sex offender program from the disposition order. The motion raised the fact that the trial court had relied on the battery offense, which was not alleged in the violation, to revoke the juvenile's probation. The motion also disputed the trial court's reliance on pure hearsay to find a violation on the exposure allegation. The trial court denied the motions. In his appeal, the juvenile argued that the trial court erred in revoking his probation, enhancing the commitment level, and in ordering the special conditions. The Fourth District found that a court may not revoke a defendant's probation for a violation not alleged in the affidavit of violation. The record indicated that the charge of battery on a school employee was never alleged in the affidavit of violation of probation. Thus, the trial court erred in relying on that allegation in revoking the juvenile's probation. However, because the State sufficiently proved the lewd and lascivious exhibition offense that was alleged in the affidavit of violation reinstatement of the juvenile's probation was unwarranted. On remand, the uncharged violation should be stricken from the order of revocation. The juvenile also argued that the lewd and lascivious conduct offense was supported only by hearsay testimony. The Fourth District disagreed and found that the victim's hearsay testimony, which was recounted by two separate witnesses, was corroborated by direct evidence of the juvenile's behavior at the time of the incident, as well as of the victim's immediate reaction to that behavior. This was sufficient evidence from which the trial court found that the juvenile had violated his probation. See Russell v. State, No. SC06-335, 33 Fla. L. Weekly S302 (Fla. May 1, 2008) (trial court correctly found defendant in violation of probation by considering more than just the victim's hearsay statement). Therefore, the trial court did not abuse its discretion in revoking the juvenile's probation. The Fourth Districts found that error occurred in the disposition order rendered by the court. A trial court's decision to depart from the DJJ's recommendation is reviewed under an abuse of discretion standard and must be supported by competent and substantial evidence. The Fourth District held that although the trial court made a compelling case for the need of a structured environment the court gave no explanation why the commitment level recommended by the DJJ was inadequate. For this reason, the commitment to a high risk residential program was reversed. Further, the trial court did not have authority to order the juvenile's placement in a sex offender program. While the conduct resulting in the violation of probation was of a sexual nature, the underlying offense was not. Therefore, the trial court erred in imposing this

additional requirement in the disposition order. Additionally, the trial court erred in requiring DNA testing of the juvenile. Section 943.325, F.S. (2007), required any person convicted of certain enumerated offenses to submit to DNA testing. This provision applied to juvenile offenders as well as adults. The new law violations charged in the violation of probation affidavit were among those enumerated in the DNA statute. However, the juvenile was not adjudicated delinquent of an enumerated offense. He was adjudicated of the underlying charge of making a false fire alarm. Thus, the DNA requirement was also stricken from the disposition order. Reversed in part, affirmed in part, and remanded.

<http://www.4dca.org/opinions/July2008/07-30-08/4D07-2403.op.pdf> (July 30, 2008).

Fifth District Court of Appeal

M.P. v. State, __ So.2d __, 2008 WL 3978209 (Fla. 2DCA 2008). The juvenile appealed the trial court's order finding her in contempt of court and sentencing her to five days in secure detention, three of which were suspended, followed by a consecutive term of fifteen days in secure detention, all of which was suspended. The juvenile argued that the trial court's sentence violated the limitations of s. 985.037(2), F.S. (2007). The juvenile violated the terms of her juvenile probation order in multiple ways. As a result, the trial court issued four orders to show cause, each alleging a different violation of the same probation order. At the hearing on the orders to show cause, the court consolidated the four orders and thereafter treated the matter as if there were two orders to show cause, each alleging two separate violations of the same probation order. The juvenile did not dispute the violations; rather she argued that she could only receive a single five-day placement in secure detention. Section 985.037(2) provided:

A child may be placed in a secure facility for purposes of punishment for contempt of court if alternative sanctions are unavailable or inappropriate or if the child has already been ordered to serve an alternative sanction but failed to comply with the sanction. A delinquent child, who has been held in direct or indirect contempt, may be placed in a secure detention facility not to exceed 5 days for a first offense and not to exceed 15 days for a second or subsequent offense.

The Fifth District Court of Appeal found that they addressed a similar situation in J.D. v. State, 954 So.2d 93 (Fla. 5th DCA 2007). In that case, the DCA held that consecutive placements in secure detention for multiple violations of a single behavior order violated the statutory limitations set forth in s. 985.037(2), F.S. J.D. v. State made clear that multiple violations of a single order are treated differently than "multiple probation violations" as that term was defined in Williams v. State, 594 So.2d 273, 274 n. 3 (Fla.1992). In Williams, the Florida Supreme Court defined "multiple probation violations" as "successive violations which follow the reinstatement or modification of probation rather than the violation of several conditions of a single probation order." Id. In this case, the Fifth District held that there were several violations of a single probation order and not "multiple probation violations." Therefore, juvenile's consecutive placements in secure detention for multiple violations of a single probation order violated the provisions of s. 985.037(2). Accordingly, the trial court's adjudication of contempt was affirmed, but the disposition order was reversed and remanded

for correction of sentence. Finally, the Fifth District noted that in the event that the juvenile was restored to probation after her release from secure detention, any future violation would be considered a “second or subsequent offense” and could subject her to a fifteen-day placement in secure detention. <http://www.5dca.org/Opinions/Opin2008/082508/5D07-2359.op.pdf> (August 29, 2008).

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Guardian ad Litem Program and Department of Children and Families v. T.R., 2008 WL 3823266, 33 Fla.L.Weekly D2000 (Fla. 1st DCA 2008). The appellate court reversed an order denying termination of parental rights and remanded the case for further proceedings. The Department had filed a petition for dependency and termination of parental rights alleging that a child and his half-sibling had suffered severe injuries while in the custody of their mother and the step-father of one of the children. One child had suffered three fractured ribs and had never been treated and the other child was admitted to the hospital with multiple bruises, a broken left arm, and bleeding in the brain and back of the throat. The trial court found that the children had sustained significant injuries, constituting egregious conduct, while in the custody of the mother and step-father. The court found that the children’s life, safety, well-being, physical, mental, or emotional health were threatened pursuant to section 39.806(1)(f), Florida Statutes and terminated parental rights as to the child who had suffered the broken arm and bleeding in the brain. As to the child who with the fractured ribs, the court determined that a suitable relative placement existed with the child’s maternal grandmother and therefore termination of parental rights was not in that child’s best interests. The First District Court of Appeal noted that the statute mandates that “the availability of a nonadoptive placement with a relative *may not receive greater consideration* than any other factor weighing on the manifest best interest of the child and *may not be considered as a factor weighing against termination of parental rights.*” *Id.* quoting section 39.810(1), Florida Statutes (2007)). A possible relative placement is not a reason to delay a decision to terminate parental rights if termination is otherwise in the manifest best interest of the child. (citations omitted). The court read the order as stating that the trial court based its finding solely on the availability of a relative placement, in violation of the statute. The court therefore reversed and remanded for further proceedings. The trial court was ordered to weigh all relevant factors to determine whether termination was in the child’s manifest best interests. <http://opinions.1dca.org/written/opinions2008/08-15-08/07-6373.pdf> (August 15, 2008).

F.S. v. Department of Children and Family Services, 2008 WL 3540252, 33 Fla.L.Weekly D2001 (Fla. 1st DCA 2008). The court noted, *per curiam*, that to the extent that the order under review denying the father's motion for clarification and to vacate, dismiss, dissolve, or set aside dependency denies relief under rule 8.270(b), the order is affirmed. The court also treated certain other papers as a petition for a writ of certiorari seeking review of the child's post-dependency placement, and denied the petition.
<http://opinions.1dca.org/written/opinions2008/08-15-08/08-0593.pdf> (August 15, 2008).

M.M. v. Department of Children and Family Services, 2008 WL 3540242, 33 Fla.L.Weekly D2001 (Fla. 1st DCA 2008). The court affirmed the order on appeal, noting that section 39.810(1) provides that the availability of a nonadoptive placement with a relative may not be considered as a factor weighing against termination of parental rights. The court further cited section 39.621(6) in noting that because the mother's parental rights had been terminated, the child would not be reunited and that adoption was the primary permanency option. The trial court had not precluded the paternal great grandmother from seeking to adopt the child.
<http://opinions.1dca.org/written/opinions2008/08-15-08/07-6527.pdf> (August 15, 2008).

Second District Court of Appeal

J.C.-J. v. Department of Children and Family Services, 2008 WL 3539981, 33 Fla.L.Weekly D1995 (Fla. 2nd DCA 2008). The mother appealed termination of her parental rights on grounds of abandonment. Both the Department and Guardian ad Litem conceded that the evidence did not support that termination of parental rights was in the child's manifest best interest and the Guardian ad Litem conceded that the evidence did not support abandonment by the mother. The appellate court noted its concern for the mother's due process rights in the trial court. Specifically, an emergency petition to reactivate protective services was filed in December 2005 and a petition for termination of parental rights was filed in June 2007. The mother had been appointed counsel in August 2007 but had not been properly advised of her right at counsel at all appropriate stages. The court also noted that the mother was not given an opportunity to work on a case plan nor was she provided with any meaningful assistance in completing her case plan. Moreover, the record did not reflect that permitting the mother to complete the case plan would be useless. The court reversed and remanded the case for further proceedings.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/August/August%2015,%202008/2D07-5990.pdf (August 15, 2008).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

C.A. v. Department of Children and Family Services, 2008 WL 3914895, __ Fla.L.Weekly D __ (Fla. 4th DCA 2008). The Fourth District Court of Appeal reversed the trial court's termination

of protective supervision and placement of the child in a permanent guardianship with her grandparents. The child had been adjudicated dependent and placed with the maternal grandparents. The mother's case plan had a goal of reunification and was subsequently amended to incorporate a task that the mother explore non-narcotic alternatives for her pain management. The mother was placed on a waiting list for a medical evaluation. Approximately fourteen months after the child was adjudicated dependent, the court held a permanency hearing and the evidence showed that the mother remained on the waiting list through no fault of her own. The mother had also begun individual and family counseling. Because the mother had not completed her case plan tasks, the court found that the reasons for the child came into care and not been remedied and that the mother had not had her case plan ordered medical evaluation, fifteen months into the case. On appeal, the court noted the statutory requirements for a permanent guardianship found in section 39.6221(1), Florida Statutes and compared them to the ground for termination of parental rights under section 39.806(1)(e), Florida Statutes. The appellate court held that placement of the child in a permanent guardianship with termination of protective supervision due to the mother's noncompliance constituted an abuse of the trial court's discretion since the record showed that compliance was not possible due to the mother's lack of financial resources. The court also noted that the requirement of the medical evaluation only became part of the amended case plan three months prior to the permanency hearing and not the fifteen months found by the trial court. The court reversed and remanded the case for the mother to be given additional time to complete her case plan. <http://www.4dca.org/opinions/Aug%202008/08-27-08/4D08-1297.op.pdf> (August 27, 2008).

Fifth District Court of Appeal

H.B. v. Department of Children and Family Services, 2008 WL 3539517, 33 Fla.L.Weekly D1985 (Fla. 5th DCA 2008). The Fifth District Court of Appeal reversed an adjudication of dependency as not being supported by competent substantial evidence. The court agreed with the father's contention that the evidence was insufficient to prove that he had abused or neglected his child. Taken in the light most favorable to the Department, the evidence established that the father's paramour had physically abused the child on July 9, 2007, shortly before the child's third birthday. The father started a sexual relationship with the paramour at a time when he was 24 years old and the paramour was not yet 18 years old after which the paramour gradually became the child's primary caregiver. Late on July 8, 2007, the father and some guests left the house. Upon the father's return at approximately 1:00 a.m., the paramour explained that the child had fallen down the stairs whereupon the father examined the child and took her to the hospital. The child had significant injuries around her eyes, bruises on her face, and abrasions on her cheeks and neck. The child had also suffered a skull fracture. However, rather than having fallen down the stairs, it appeared that the child had been grabbed around the neck and struck in the face multiple times. The child was sheltered and placed with her mother with the father prohibited from having unsupervised contact. The father missed an interview with law enforcement and the father and his paramour were later arrested for aggravated child abuse and neglect. The Department stipulated at the October 1, 2007 adjudicatory hearing that there was no evidence that the father was present at the time the child was injured. Despite the lack of evidence that the paramour had previously abused

the child, the court adjudicated the child dependent. The trial court noted both that the father had left his daughter with the same girl whom he had admitted to molesting when she was 17 years old and that he had not cooperated with law enforcement. However, on appeal, the court noted that the pertinent issue was the father's purported negligence. There was no sufficient evidence that the father knew or should have known that his paramour posed a threat to his child. The court also rejected the Guardian ad Litem's argument of the father's negligence in leaving the child with an 18 year old caregiver.

<http://www.5dca.org/Opinions/Opin2008/081108/5D07-3759.op.pdf> (August 11, 2008).

Dissolution of Marriage Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

Koch v. Koch, __ So. 2d __, 2008 WL 3165590 (Fla. App. 2 Dist. August 08, 2008)
(NO. 2D07-6050)

Former husband appealed order to secure alimony; appellate court reversed. The final judgment of dissolution of marriage awarded former wife permanent periodic alimony; roughly a year later, former husband notified former wife that he and his new wife would be relocating to St. Maarten where he had accepted a teaching job that would significantly lower his income. In anticipation of that occurrence, former wife moved for contempt, to enforce the final judgment, and to secure alimony. The trial court entered an order prohibiting former husband from encumbering, transferring, or otherwise disposing of the marital home so that it could serve as security for the alimony award; however, former wife did not refer to the marital home in her motion, nor was there a transcript of the hearing. The appellate court pointed out that in absence of a transcript, it could not ascertain whether use of the home as security was tried by consent. Finding that the trial court had modified the final judgment without former wife having filed a supplemental petition to modify, the appellate court concluded that the trial court's order was fundamentally erroneous on its face; and accordingly, reversed.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/August/August%2008,%202008/2D07-6050.pdf (August 8, 2008).

Couch v. Wade, __ So. 2d __, 2008 WL 2941165 (Fla. App. 2 Dist. August 01, 2008)
(NO. 2307-2310)

The appellate court held that the trial court erred by failing to review the transcript of the proceedings prior to approving the report and recommendation of the general master.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/August/August%2001,%202008/2d07-2310rh.pdf (August 1, 2008).

Third District Court of Appeal

Rodriguez v. Rodriguez, __ So. 2d __, 2008 WL 2986417 (Fla. App. 3 Dist. August 06, 2008) (NO. 3D06-1447, 3D06-1627)

Former husband appealed a final judgment of dissolution of marriage and a subsequent judgment for child support arrearages on the basis that the trial court had abused its discretion in having awarded former wife: 1) exclusive ownership of the marital home and 2) child support arrearages, without crediting him for payments made prior to the dissolution. The appellate court reversed the trial court's distribution of assets, but affirmed the order awarding retroactive child support and arrearages. During their eleven year marriage, the former couple had lived in two homes: one, a house owned by former husband's family and deeded solely to him by his grandmother during the marriage; and the other, a house purchased by the parties in which they resided for four years preceding their separation. In its distribution of assets, the trial court concluded that the first house was former husband's nonmarital asset; it then awarded former wife exclusive ownership in the second home. The trial court also ordered former husband to pay monthly child support, to pay child support retroactive to the date of filing of the petition, and pay arrearages. The trial court did not credit former husband for monies deposited into former wife's checking account because it reasoned these monies were used to pay expenses. Noting that s. 61.075(1), F.S., requires a court in a dissolution proceeding to separate the nonmarital assets and liabilities prior to distributing them equally in absence of any factors justifying unequal distribution, the appellate court found in this case that because the trial court had determined the first house to be a nonmarital asset, it had abused its discretion in considering the value of that house in distributing the marital assets. It also noted that the statutory provision enabling trial courts to make an unequal distribution is not without limitations. With regard to the child support issue, the appellate court commented that s. 61.30(17), F.S., grants a trial court discretion to award child support retroactive to the date the parents no longer resided together in the same house with the children and that in general, payments made by a party voluntarily and not pursuant to a court order are not credited against child support arrearages absent a showing of compelling equitable circumstances.

<http://www.3dca.flcourts.org/Opinions/3D06-1447.pdf> (August 6, 2008).

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

Kay v. Kay, __ So. 2d __, 2008 WL 3978127 (Fla. App. 5 Dist. August 29, 2008) (NO. 5D07-1014)

In this appeal, the appellate court focused on two issues—the trial court’s distribution of former husband’s disability insurance benefits and the award of attorney’s fees and costs to former wife—reversing on both. A continuance was sought the day before trial by former husband’s attorney based on former husband’s unavailability for trial due to his having been hospitalized for depression. Former wife argued that hospitalization was a delay tactic on former husband’s part and that the motion should be denied or, in the alternative, that former husband be ordered to cover her expenses for trial preparation. The trial court granted the motion, but with a finding that because the hospitalization was contrived, that former wife be awarded fees and costs attributable to the continuance. When trial commenced several months later, the issue of whether former husband’s disability insurance proceeds were a marital asset arose with the trial court ultimately concluding that they were pursuant to s. 61.075(5)(a)(4), F.S.; however, the appellate court held that the disability policy was a nonmarital asset and not subject to equitable distribution. In its reasoning, the appellate court cited its earlier opinion in Freeman v. Freeman, 468 So. 2d 326 (Fla. 5th DCA 1985), for the holding that a disability pension should not be considered a marital asset, but noted that any compensation paid during the marriage for lost wages or lost earning capacity would be considered marital property under Stern v. Stern, 636 So. 2d 735 (Fla. 4th DCA 1993). With regard to former husband’s argument that the trial court erred in ordering him to pay fees and costs after the continuance, the appellate court noted that a trial court has the authority to assess fees when a party moves for continuance on the eve of trial and that the court’s order is reviewable under an abuse of discretion standard. The appellate court found here that although the trial court had acted within in its discretion to grant the continuance, it had abused its discretion by having awarded fees and costs without evidentiary support for either the reasons for the continuance or the amount of the fees and costs.

<http://www.5dca.org/Opinions/Opin2008/082508/5D07-1014.op.pdf> (August 29, 2008).

McNamara v. McNamara, ___ So. 2d ___, 2008 WL 3978295 (Fla. App. 5 Dist. August 29, 2008) (NO. 5D07-3290)

Appeal by former husband to a non-final order awarding fees and costs to former wife in her quest to disavow a prenuptial agreement containing an express waiver of attorney’s fees. At issue was whether the trial court had erred in determining that Florida law precluded enforcement of that waiver as being contrary to public policy even though the trial court had upheld the agreement itself as well as one of its provisions stating Georgia law would govern interpretation of the agreement. Based on its finding that the waiver was unenforceable under Florida law, the trial court had awarded temporary fees and costs for former wife. Former husband argued on appeal that Florida’s public policy against enforcing such waivers is rooted in a time when the support obligation fell on the husband and that in cases where a wife is well-educated and capable of supporting herself, such waivers should be as enforceable as those regarding alimony or property rights. While acknowledging that some criticism has been leveled at the policy, the appellate court cited the recognition expressed by the Florida Supreme Court in Lashkajani v. Lashkajani, 911 So. 2d 1154, 1157 (Fla. 2005), that “the evolution in Florida law approving prenuptial agreements concerning *post*-dissolution support has so far not extended to provisions waiving the right to recover *pre*-judgment support such as temporary alimony.” Accordingly, the appellate court affirmed the trial court’s order. Former

husband also argued on appeal that the trial court had erred in substituting its judgment for that of the general magistrate with regard to the attorney's fees. The appellate court noted that in addition to the trial court having found errors within the general magistrate's findings that affected the amount of the award that a trial court may make a factual determination without holding further hearings if sufficient evidence exists in the record to make additional findings of fact and conclusions of law, and held that in this case, there was, in its words "ample evidence" to support the additional findings.

<http://www.5dca.org/Opinions/Opin2008/082508/5D07-3290.op.pdf> (August 29, 2008).

Kelley v. Kelley, __ So. 2d __, 2008 WL 3539514 (Fla. App. 5 Dist. August 15, 2008)

(NO. 5D07-2396)

Former husband appealed final judgment of dissolution of marriage; appellate court found two errors and otherwise affirmed. In his motion for rehearing, former husband argued that the trial court's child support calculations did not conform to either s. 61.30, FS, or the caselaw. Although the trial court clarified its reasoning re child support, the calculation was still unclear. The appellate court noted in cases where each parent has an income and each has custody of one of two children, a split custody situation exists and that the judicially accepted approach is to determine the total child support and each child's share while ensuring that neither parent pays more than the proper percentage of the total support. Finding here, that there was no indication that the trial court intended to make an unequal allocation, but that there were inconsistencies in the calculations, the appellate court remanded for the trial court to either correct the numbers or make findings to explain its numbers. The appellate court also found the trial court had erred in its method for equitable distribution by not having made specific findings for allocation of the personal property nor had it made any actual allocation; accordingly, the appellate court remanded for the trial court to make the distributions.

<http://www.5dca.org/Opinions/Opin2008/081108/5D07-2396.op.pdf> (August 15, 2008).

Sacks v. Sacks, __ So. 2d __, 2008 WL 3539485 (Fla. App. 5 Dist. August 15, 2008)

(NO. 5D07-1682)

In what the appellate court termed, "a long and contentious dissolution," former wife appealed a final judgment of dissolution of marriage, alleging various errors; appellate court reversed on one. Former wife had filed a motion for continuance shortly before the final hearing because the social evaluation that the court had ordered to be prepared had neither been completed by the clinical psychologist nor made available to the parties. Her motion was denied. The doctor's preliminary report and recommendation had recognized former wife as the primary caretaker of the two minor daughters, had acknowledged her fitness, and had recommended that she remain the party with primary residential responsibility; however, the revised and updated report, issued almost two and one-half years later and two days before commencement of the trial, contained facts and circumstances which had led to the doctor to change her previous opinion and to recommend that former husband be given primary responsibility for their girls. Former wife's argument on appeal was based on a line of Florida cases emphasizing that the importance of social evaluations to custody decisions is such that due process considerations require that the parties receive the report within a reasonable period of time prior to trial. The appellate court agreed and held that due process required that

former wife have a reasonable opportunity to review and respond to the social evaluation, and that, in this case, she was entitled to a new hearing on the issue of custody.

<http://www.5dca.org/Opinions/Opin2008/081108/5D07-1682.op.pdf> (August 11, 2008).

Anaya v. Anaya, __ So. 2d __, 2008 WL 3154047 (Fla. App. 5 Dist. August 08, 2008) (NO. 5D07-3477)

Former husband appealed the imputation and equitable distribution scheme in a final judgment of dissolution of marriage, arguing that the trial court failed to make the requisite findings of fact to support either determination; however, he did not bring these issues to the trial court's attention via a motion for rehearing. Citing Mathieu v. Mathieu, So. 2d 740, (Fla. 5th DCA 2004), the appellate court held that a party may not complain about inadequate findings in a dissolution of marriage case without first having brought the matter to the trial court's attention in a motion for rehearing.

<http://www.5dca.org/Opinions/Opin2008/080408/5D07-3477.pdf> (August 8, 2008).

Domestic Violence Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

No new opinions for this reporting period.

Fifth District Court of Appeal

No new opinions for this reporting period.