FLORIDA TRAFFIC-RELATED APPELLATE OPINION SUMMARIES

April – June 2017

[Editor's Note: In order to reduce possible confusion, the defendant in a criminal case will be referenced as such even though his/her technical designation may be appellant, appellee, petitioner, or respondent. In civil cases, parties will be referred to as they were in the trial court; that is, plaintiff or defendant. In administrative suspension cases, the driver will be referenced as the defendant throughout the summary, even though such proceedings are not criminal in nature. Also, a court will occasionally issue a change to a previous opinion on motion for rehearing or clarification. In such cases, the original summary of the opinion will appear followed by a note. The date of the latter opinion will control its placement order in these summaries.]

I. Driving Under the Influence (DUI)

***State v. Gebar*, 25 Fla. L. Weekly Supp. 154b (Fla. 17th Cir. Ct. 2016)**

The defendant was charged with DUI and DUI (property damage). He filed a motion to suppress, arguing that the odor of alcohol alone did not provide reasonable suspicion to detain him for a DUI investigation. The state's witness did not appear at the first hearing, which was continued, or the second hearing, at which the state asked for another continuance. The trial court granted the defendant's motion to suppress, stating that even though the notice of hearing did not indicate it, the court had ordered the state to "have their witnesses at the second hearing." The state appealed, and the circuit court, in its appellate capacity, reversed, stating: "The trial court asserted it ordered the State, at the last hearing, to have their witnesses present for the current hearing. However, the trial court failed to memorialize its intention in writing on the notice for hearing or elsewhere. The trial court failed to anticipate a possibility that occurs frequently: a new assistant state attorney is assigned to the division once the previous assistant state attorney is transferred or promoted. The new assistant state attorney could not be expected to know the trial court ordered the witness to be present at the hearing without written notice somewhere in the case file." The court noted further that "the assistant state attorney gave a valid explanation for the absence of his witness. Specifically, the hearing had been set before he took over the division, the case file did not indicate a hearing had been set, and he only discovered the case was set for a hearing without subpoenas having been sent out by the previous prosecutor when he checked the docket for the upcoming week on Friday. Furthermore, the assistant state attorney

assured the witness would appear at a later date because now he knew he had to issue a subpoena."

***State v. Ledermann*, 25 Fla. L. Weekly Supp. 151a (Fla. 17th Cir. Ct. 2016)**

The defendant was charged with DUI and DUI enhanced. He filed a motion to exclude his breath test results, arguing that "the State failed to substantially comply with the relevant Florida Administrative Code provisions pertaining to the regulation of breath testing instruments" by conducting department inspections, after an authorized repair, at FDLE's ATP rather than upon return of the instruments to the county sheriff's department, and by shipping the instruments to and from FDLE in Tallahassee, for repairs and the annual Department Inspection, which allowed non-law enforcement personnel access to the instrument. The trial court granted the defendant's motion to exclude, and the state appealed. The circuit court, in its appellate capacity, reversed, holding that the FDLE inspections "are 'conducted subsequent to repair and prior to being placed in evidentiary use' as the plain language of the rule requires. The rule does not require that the inspection occur at any particular location [or] require the authorized repair facility to return an Intoxilyzer instrument directly back to the local agency in order to have a Department inspection following the repair." It noted further that "section 316.1932(1)(b)(2) provides, '[a]ny insubstantial differences between approved techniques and actual testing procedures in any individual case do not render the test or test results invalid.'"

***State v. Kapp*, 25 Fla. L. Weekly Supp. 146a (Fla. 17th Cir. Ct. 2016)**

The defendant was charged with DUI. He filed a motion to suppress, citing lack of probable cause for the arrest. The trial court granted his motion, the state appealed, and the circuit court, in its appellate capacity, reversed, stating that it did "not need to determine whether [the defendant's] refusal to perform the field sobriety exercises may be used as a basis in determining probable cause for DUI. [He] had an odor of alcohol; his passenger admitted that they had been drinking alcohol; he ran a stop sign, a potentially reckless or dangerous act; he had glassy or bloodshot eyes; and he had a flushed face. Taken together, the Court finds these indicators sufficient to establish probable cause for DUI."

***Fielder v. State*, 24 Fla. L. Weekly Supp. 910a (Fla. 6th Cir. Ct. 2016)**

The defendant was issued a uniform DUI traffic citation. At arraignment he filed a motion for discharge for speedy trial violation, since his citation was not filed of record until 95 days after his arrest. The trial court denied his motion, and he sought review. The circuit court, in its appellate capacity, denied review, finding that the UTC was a valid charging document and therefore the state was entitled to the 15-day recapture window.

***Oliver v. State*, 24 Fla. L. Weekly Supp. 663a (Fla. 9th Cir. Ct. 2016**)

The defendant was issued uniform traffic citations for leaving the scene of an accident and DUI. He filed motions to discharge the citations based on speedy trial violations, which the trial court denied. The defendant sought a writ of prohibition, which the circuit court, in its appellate capacity, granted in part, stating: "[Defendant] was entitled to immediate discharge of the Leaving the Scene of an Accident charge because both the Information and the citation were filed after the expiration of the 90-day speedy trial period. The trial court correctly denied [his]

motion to discharge the DUI citation. The DUI was a separate criminal conduct from the Leaving the Scene of an Accident offense, and [he] was not entitled to immediate discharge because the Information and citation were filed before the speedy trial period expired."

II. Criminal Traffic Offenses

Davis v. State, __ So. 3d __, 2017 WL 2821931 (Fla. 5th DCA 2017)

When he was 17, the defendant pled nolo contendere to attempted robbery with a deadly weapon, aggravated battery with a deadly weapon, aggravated battery on a law enforcement officer with a deadly weapon, and fleeing or attempting to elude a law enforcement officer at a high speed or with wanton disregard. The trial court designated him as a youthful offender and sentenced him to one year of community control followed by probation. When he was 18, the defendant substantively violated community control by committing an armed carjacking, along with several technical violations. The trial court revoked community control and probation and sentenced him to an aggregate 45 years in prison. He appealed, arguing that *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), "prohibited a juvenile nonhomicide offender from receiving a sentence that precluded the offender from a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" But the appellate court affirmed because, although the defendant was a juvenile when he initially committed the crimes, he was 18 when he violated community control. It cited Justice Pariente's concurring opinion in *Guzman v. State*, 183 So. 3d 1025 (Fla. 2016).
http://www.5dca.org/Opinions/Opin2017/062617/5D16-2236.op.pdf

Carter v. State, __ So. 3d __, 2017 WL 2790709 (Fla. 1st DCA 2017)

The defendant was charged with carjacking and leaving the scene of an accident involving unattended property. The jury found him guilty of carjacking and he was sentenced to life as a habitual felony offender. He filed a motion for postconviction relief, which the trial court denied. He appealed, arguing that "his attorney rendered ineffective assistance for advising him that a 'claim of right' defense might be successful at trial, when in fact 'claim of right' is not a valid defense to carjacking," and that "if he had been properly advised that this defense was invalid, he would have accepted a negotiated sentence of greater than ten years in prison or entered an open plea to the court." The appellate court affirmed, stating that the cases on which the defendant relied

> involve an actual plea offer advanced to the defendant that was rejected. In such a case, it is already known that the State was willing to offer a specific plea bargain; the test involves whether the defendant would have accepted it but for the misadvice, and whether the court would have accepted the negotiated plea. Conversely, a claim that a defendant would have entered an open plea—which subjects the defendant to the same sentencing exposure as sentencing after trial—and that the court would have chosen to impose a lesser sentence than imposed after trial, is exactly the sort of "mere speculation" that cannot support postconviction relief for ineffective assistance. For the same reason, it is difficult to envision an appropriate remedy for a defendant making such a claim: the sentencing court on remand would have the same sentencing options that were

available when it imposed the post-trial sentence that the defendant actually received.

https://edca.1dca.org/DCADocs/2016/4541/164541_DC05_06272017_093222_i.pdf

***Garrison v. Dept. of Health, Board of Nursing*, __ So. 3d __, 2017 WL 2730091 (Fla. 5th DCA 2017)**

After a road-rage incident involving a minor, the defendant pled nolo contendere to aggravated battery with a deadly weapon and misdemeanor battery. The Florida Department of Health, Board of Nursing, suspended his nursing license for a year and fined him, and he appealed, arguing that the board "fundamentally erred in considering the arrest affidavit. Generally, an administrative board may not consider matters not contained in the complaint." But the appellate court affirmed, stating that "the complaint set forth the statutory violations on which [the defendant's] penalty was based and indicated that the charges stemmed from a road rage incident. The arrest affidavit, which expanded on those charges, was entered into evidence without objection." Nor did the defendant request a formal hearing, and therefore the existence of disputed issues of material fact was not preserved for appeal.
http://www.5dca.org/Opinions/Opin2017/061917/5D16-3293.op.pdf

***State v. Lawrence*, __ So. 3d __, 2017 WL 2264612 (Fla. 4th DCA 2017)**

The defendant pled no contest to felony driving with a revoked license and was placed on probation. He was later was charged with violating probation by committing new offenses, including robbery, burglary, grand theft, battery, possession of a weapon by a convicted felon, possession of cannabis, and witness tampering. He fled the scene of the crime but was later taken into custody and released on bond. The state moved to revoke bond under section 903.0351(1)(b), Florida Statutes, because he had been arrested for robbery and burglary. The defendant argued that section 903.0351(1)(b) was unconstitutional because it precluded bond based on a defendant's "'arrest' without (i) requiring that the arrest be supported by probable cause or (ii) providing for an evidentiary hearing on the issue." The court refused to revoke bond, finding section 903.0351(1)(b) unconstitutional because, as it "does not implicitly require that the predicate arrest be lawful, a defendant has no opportunity to challenge the revocation of his bond even if the arrest 'is of a questionable nature.'" The state filed a petition for writ of certiorari. The appellate court granted the writ and quashed the order that denied the state's motion to revoke bond, stating: "The court erred as a matter of law when it found section 903.0351(1)(b) unconstitutional and unenforceable. Because there is no constitutional right to bail pending a violation of probation hearing, there can be no constitutional infirmity in not providing a procedure for seeking bail. Similarly, the failure to explicitly state that arrests pursuant to the statute be lawful and with probable cause does not render the statute unconstitutional as every statutory authorization of arrest implicitly requires the arrest be lawful and with probable cause."
https://edca.4dca.org/DCADocs/2016/3693/163693_DC03_05242017_093033_i.pdf

***Finney v. State*, __ So. 3d __, 2017 WL 2211427 (Fla. 1st DCA 2017)**

The defendant was charged violating section 322.34(5), Florida Statutes (driving with revoked license), but the trial court granted his motion to dismiss because he never had a Florida driver license. The state then filed an amended information charging him with violating section 322.34(2)(c) for driving while license was suspended or revoked. The defendant moved to dismiss, arguing that he couldn't be charged under section 322.34(2)(c) because he was a "habitual traffic offender" as defined in section 322.264. The trial court denied his motion, stating that the result of such claim "cannot possibly have been the intent of the legislature and this result goes against public policy and neglects public safety." The defendant filed a petition for writ of prohibition, arguing that the circuit court lacked jurisdiction because he "is not subject to prosecution under section 322.34(2)(c) and the highest offense that he can be charged with is driving without a valid license, a misdemeanor." The appellate court agreed and granted the petition, noting that "the State is not precluded from prosecuting [the defendant] in county court for driving without a valid license."
https://edca.1dca.org/DCADocs/2017/0356/170356_DC03_05192017_092705_i.pdf

***Smith v. State*, __ So. 3d __, 2017 WL 1951097 (Fla. 2d DCA 2017)**

The defendant was convicted of refusal to submit to testing (count three), driving while license suspended or canceled (count four), and reckless driving with serious bodily injury (count five), and was sentenced to 364 days' jail for counts three and four, and five years' prison for count five, all to be served concurrently. He appealed, and the appellate court affirmed as to counts three and four but reversed as to count five "because the State failed to prove that the defendant's] operation of his vehicle was reckless.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/May/May%2010,%202017/2D16-1013.pdf

***Johnson v. State*, __ So. 3d __, 2017 WL 1829285 (Fla. 1st DCA 2017)**

After being stopped for a vehicle equipment violation the defendant drove away, and the stopping officer claimed he was dragged by the defendant's vehicle. The defendant was convicted of fleeing or attempting to elude a law enforcement officer and sentenced to five years in prison, based on the following factors: at the time of the offense the defendant was out on bond and was being taken into custody for failing to appear in court, he represented a specific danger to the officer, the video of the incident showed the defendant accelerating while the officer was partly in or attached to the defendant's vehicle, "the defendant represented a danger to other traffic as a semi-truck could be seen entering the video frame seconds after the defendant fled the scene of the traffic stop," while released on bond the defendant violated probation in a separate offense, and the defendant was serving an independent prison sentence for a violation of probation. The defendant appealed, and the appellate court reversed and remanded for entry of a non-state prison sanction because "none of the . . . grounds stated by the trial court explain how a non-state prison sanction, such as jail, could present a danger to the community, as required by the plain meaning of the statute as well as by subsequent case law."
https://edca.1dca.org/DCADocs/2016/1577/161577_DC13_05052017_090604_i.pdf

***State v. Sandomeno*, 217 So. 3d 110 (Fla. 4th DCA 2017)**

The defendant pled guilty to DUI causing serious bodily injury and was sentenced to five years in prison. After sentencing, the state moved for a restitution order, which the trial court denied, finding that a restitution order must be imposed at sentencing. The state appealed and the appellate court reversed, noting that section 775.089(1)(a), Florida Statutes, makes restitution mandatory, and that "Florida Rule of Criminal Procedure 3.800(c) . . . allows for modification to a sentence within 60 days after it is imposed. The trial court thus erred in denying the state's motion for an order of restitution filed 5 days after imposition of defendant's sentence." https://edca.4dca.org/DCADocs/2015/3298/153298_DC13_04192017_090946_i.pdf

***Newton v. State*, 216 So. 3d 745 (Fla. 5th DCA 2017)**

The defendant was convicted of DUI manslaughter and two counts of DUI with property damage. The appellate court remanded as to four claims, which the trial court on remand denied summarily. The defendant appealed, and the appellate court reversed as to one claim: that his trial counsel was ineffective for failing to properly prepare the defense expert witness. The appellate court further stated: "On remand, the trial court must either attach records conclusively refuting [the defendant's] twelfth claim, or hold an evidentiary hearing." http://www.5dca.org/Opinions/Opin2017/041017/5D16-4339.op.pdf

***Martinez v. State*, 216 So. 3d 734 (Fla. 4th DCA 2017)**

The defendant was sentenced to 30 years for DUI manslaughter. The trial court denied his motion for relief and he appealed, arguing that the sentence was illegal because it exceeded "both the statutory maximum of fifteen years and the lowest permissible sentence of twenty-two years under the Criminal Punishment Code." The appellate court affirmed, stating that "(1) relief is barred by collateral estoppel; and (2) although the sentence is illegal, there is no manifest injustice to warrant an exception to the collateral estoppel bar." https://edca.4dca.org/DCADocs/2015/0551/150551_DC05_04122017_085057_i.pdf

***Farley v. State*, 213 So. 3d 1140 (Fla. 1st DCA 2017)**

The defendant pled guilty to DUI manslaughter. He filed a timely motion for postconviction relief, alleging ineffective assistance of counsel because his trial attorney told him that "all of the discovery materials pertaining to his blood draw had been received and contained nothing beneficial to the defense when, in fact, several discovery requests were still awaiting a response." The defendant also alleged that "but for this deficient performance he would not have entered a negotiated plea and instead would have insisted on going to trial." The appellate court found the claim facially sufficient and reversed and remanded "for the postconviction court to either attach portions of the record refuting the claim . . . or to hold an evidentiary hearing." https://edca.1dca.org/DCADocs/2016/3491/163491_DC08_04042017_092036_i.pdf

***Smith v. State*, 25 Fla. L. Weekly Supp. 144a (Fla. 17th Cir. Ct. 2016)**

The defendant was charged with driving with license suspended and operating vehicle with unsafe equipment. Before trial, the court announced the trial would be held without a jury. The defendant's attorney asked the court to certify that it would not impose incarceration or an adjudication of guilt if the defendant were convicted after the bench trial. The court denied the defendant's request for a jury trial and refused to certify that the sentence would not include

incarceration or an adjudication of guilt. The court found the defendant guilty on both counts and sentenced him to an adjudication of guilt and court costs for each count. The defendant appealed, arguing that the trial court erred by denying his request for a jury trial or failing to certify that he would not be sentenced to incarceration or an adjudication of guilt. The circuit court, in its appellate capacity agreed, and affirmed the convictions but reversed and remanded as to the sentences. It stated that, while the defendant "was not entitled to a jury trial, he was entitled to an announcement by the trial court that, if convicted, it would not incarcerate or adjudicate him, which it failed to do. Therefore, in the interests of judicial economy, and because both [parties] do not object, this Court finds that Defendant's sentence, but not judgment, should be reversed and remanded to the trial court for entry of a withhold of adjudication."

***State v. Williams*, 25 Fla. L. Weekly Supp. 143a (Fla. 17th Cir. Ct. 2016)**

The defendant was charged with leaving the scene of an accident. She filed a motion to dismiss, arguing that "the undisputed facts failed to establish a prima facie case of guilt." The state traversed, but the trial court granted the defendant's motion to dismiss, stating that "because the State did not rely upon *sworn* statements from the driver of the other vehicle ('Driver 2'), it rendered the traverse technically deficient." The state appealed, and the circuit court, in its appellate capacity, reversed, stating that there was no requirement under rule 3.190(d), Florida Rules of Criminal Procedure, for sworn testimony from Driver 2 to support the state's traverse.

***State v. Jaume*, 25 Fla. L. Weekly Supp. 140a (Fla. 17th Cir. Ct. 2016)**

The defendant was charged with possession of cannabis, DUI-property damage-enhanced, DUI-property damage, DUI-enhanced, and DUI. He filed a motion to dismiss for lack of identification, which the trial court granted. The state appealed, and the circuit court, in its appellate capacity, reversed, stating there was sufficient circumstantial evidence to show that the defendant was the driver of the vehicle involved.

***Martinez v. State*, 24 Fla. L. Weekly Supp. 920a (Fla. 9th Cir. Ct. 2017)**

The defendant sought review of the hearing officer's final determination that he was speeding. The circuit court, in its appellate capacity, denied review, stating: "We affirm because [the defendant] did not sufficiently preserve his objection to evidence of his speed as obtained from a radar speed measuring device for appellate review," and "there was competent substantial evidence that the device was approved." As to the defendant's argument that he should have been charged under a more specific statute, the court stated: "A statute pertaining to county and municipal roads does not seem to be more general than a statute pertaining to state roads and roads connecting municipalities [and] the same punishment is incurred under both statutes."

III. Civil Traffic Infractions

***Rogers v. State*, 25 Fla. L. Weekly Supp. 145a (Fla. 17th Cir. Ct. 2016)**

The defendant was charged with speeding, by uniform traffic citation, and with racing on a highway, by information. The jury found him not guilty of the racing charge, but the trial court found him guilty on the speeding infraction and imposed a $500 fine and suspended his license

for a year. The defendant filed a motion to correct illegal sentence, arguing that the maximum fine that could be imposed for the speeding ticket was $250 and that the trial court lacked statutory authority to impose a one-year license suspension. The trial court "found that it erred in imposing a $500 fine, because it should have imposed a $1,000 minimum mandatory fine based on his speeding in excess of 50mph of the speed limit. It additionally found that the one year license suspension was within its authority." The defendant appealed, arguing that the maximum penalty for driving over 30 mph above the speed limit is $250, and that the increased penalty after sentencing constituted a double jeopardy violation. The circuit court, in its appellate capacity, reversed in part, holding that the trial court did have the statutory authority to impose the $500 it originally imposed because the defendant was found guilty of driving 55 mph over the limit, but the trial court did not have the authority to increase the fine upon the defendant's motion to correct illegal sentence. It also reversed the license suspension because the offense (speeding) did not result in an accident; therefore, section 316.655(2), Florida Statutes, permitting revocation/suspension, was not applicable.

IV. Arrest, Search and Seizure

Vangansbeke v. State, __ So. 3d __, 2017 WL 2730086 (Fla. 5th DCA 2017)

The defendant was a passenger in a car that was pulled over for failure to yield at a stop sign. The officers requested a canine unit, which alerted to drugs. The defendant was searched, drugs and drug paraphernalia were found, and she was arrested. She filed a motion to suppress, which the trial court denied. She appealed, but the appellate court affirmed, stating that while a "dog-sniff that prolongs a traffic stop . . . results in an unlawful seizure in violation of the Fourth Amendment absent reasonable suspicion to prolong the stop," in this case "[t]he combination of four individuals in the vehicle, along with the officers' lack of access to a computer, necessitated by the work of the tactical unit, resulted in an approximately twenty-minute delay from the initial stop to the beginning of the dog-sniff. Despite the length of the stop, the record shows that the officers were scrupulous in performing their duties and did not act to prolong the encounter."
http://www.5dca.org/Opinions/Opin2017/061917/5D16-2688.op.pdf

State v. Holt, __ So. 3d __, 2017 WL 1967412 (Fla. 5th DCA 2017)

The appellate court reversed the lower court order suppressing evidence and remanded, stating: "*See State v. Green*, 943 So. 2d 1004, 1005 (Fla. 2d DCA 2006) (illuminating interior of vehicle using flashlight does not implicate Fourth Amendment; officer had probable cause to believe vehicle contained cocaine after illuminating inside of vehicle and seeing razor blade with white residue on center console)."
http://www.5dca.org/Opinions/Opin2017/050817/5D16-651.op.pdf

State v. Sandrin, 25 Fla. L. Weekly Supp. 156a (Fla. 17th Cir. Ct. 2016)

The defendant was charged with DUI and driving while license suspended. He filed a motion to suppress, arguing that the driving pattern observed by the stopping officer was insufficient to support reasonable suspicion for a traffic stop. The trial court granted his motion, and the state appealed. The circuit court, in its appellate capacity, reversed, stating that the officer saw the defendant

> make a wide turn onto a roadway, cross the double yellow lane road markings, and drive for a short distance in the eastbound lane while traveling westbound. These observations provided . . . reasonable suspicion to perform a stop for the traffic infraction of failing to obey a traffic control device.
>
> It may very well be that the trial court could properly have determined, *during the guilt phase proceedings*, that [the defendant] was not guilty of committing the instant traffic offense. . . . However, that does not mean that [the officer] did not have an objectively reasonable suspicion to stop [the defendant] or that [his] constitutional rights were violated when he was pulled over.

V. Torts/Accident Cases

***Reeters v. Israel*, __ So. 3d __, 2017 WL 2814888 (Fla. 4th DCA 2017)**

When he was 14 years old, Reeters was arrested with carjacking with a firearm, carrying a concealed firearm, and fleeing or eluding police. He was charged as a juvenile and released from custody, but eight months later the state charged him as an adult with armed carjacking, robbery with a firearm, aggravated fleeing and eluding (high speed), and driving without a license. The court issued a capias for his arrest, with no bond. Reeters petitioned for a writ of habeas corpus, claiming that the trial court improperly held him without bond for offenses punishable by life and citing *Treacy v. Lamberti*, 141 So. 3d 174 (Fla. 2013), which held that juvenile offenders were entitled to bond because they could not be charged with a crime punishable by life imprisonment under Florida's then-statutory scheme. The appellate court denied the petition, stating that *Treacy* did not apply. It cited 2014 changes in juvenile sentencing law and held: "Because life is now a possible punishment for juveniles charged as adults with offenses punishable by life, bond may be denied where the proof of guilt is evident or the presumption is great."
https://edca.4dca.org/DCADocs/2017/1366/171366_DC02_06282017_091952_i.pdf

***Dowd v. Geico General Insurance Co.*, __ So. 3d __, 2017 WL 2791447 (Fla. 3d DCA 2017)**

While bicycling in a pedestrian crosswalk, the plaintiff was struck by an uninsured motorist. He sued Geico, his insurer, seeking underinsured/uninsured motorist coverage. Geico made two proposals for settlement, which the plaintiff rejected. The trial court therefore awarded Geico attorney's fees, but the appellate court reversed, stating that "a discrepancy between the language in the proposals for settlement and the releases [which had broader language] creates an ambiguity that renders the agreements unenforceable."
http://www.3dca.flcourts.org/Opinions/3D15-1725.pdf

***Richbell v. Toussaint*, __ So. 3d __, 2017 WL 2664701 (Fla. 4th DCA 2017)**

After their daughter was killed in an automobile accident, the plaintiffs brought a wrongful death action against the defendants. The jury found the driver of the car that rear-ended the decedent 60% at fault and the decedent 40% at fault, and no negligence on the part of the driver of the truck, coming from the opposite direction, which the decedent collided with. The court denied the plaintiffs' motion for a new trial and entered final judgment for the truck driver,

his companies, and the trailer's owner. The plaintiffs appealed, and the owner and the driver of the car that rear-ended the decedent cross-appealed an order that denied their motion to limit the judgment against the owner of that vehicle under section 324.021(9)(b)(3), Florida Statutes (limiting the liability of a vehicle owner who "loans" the vehicle to a permissive user). The appellate court affirmed as to the plaintiffs' appeal but reversed on the cross-appeal, stating that although the vehicle owner was a passenger in the vehicle at the time of the accident, "the driver was a permissive user under the statute. The owner relinquished temporary control of the vehicle while maintaining his ownership interest. Our application of the statute under the facts in this case comports with the statute's goal of limiting the financial responsibility of an owner vicariously liable only because of the dangerous instrumentality doctrine."
https://edca.4dca.org/DCADocs/2014/4549/144549_DC08_06212017_105122_i.pdf

***Sherman v. Savastano*, __ So. 3d __, 2017 WL 2665064 (Fla. 4th DCA 2017)**

The plaintiff sued the defendant for injuries he sustained after he was struck in a crosswalk by the defendant's vehicle. He rejected the defendant's proposal for settlement, but the jury awarded him less than 75% of the amount offered. The defendant moved for attorney's fees, but the court denied his motion, finding his proposal ambiguous and unenforceable. He appealed, and the appellate court reversed, stating that "the proposal stated that as a condition of settlement '[t]he parties will execute a joint stipulation for dismissal with prejudice of the action.' As this was a one count, one plaintiff negligence lawsuit, there is no question as to what a dismissal could or would entail. The only possibility of ambiguity concerned whether the action would be dismissed with prejudice, and the language in the proposal clarified that the dismissal would be with prejudice."
https://edca.4dca.org/DCADocs/2016/2793/162793_DC13_06212017_095753_i.pdf

***Ring Power Corp. v. Condado-Perez*, __ So. 3d __, 2017 WL 2672621 (Fla. 2d DCA 2017)**

The plaintiffs were injured when their vehicle was struck by a truck driven by an employee of Ring Power. After a verdict in favor of the plaintiffs the defendants appealed, arguing that it was error for the trial court to find inadmissible a statement made by one of the plaintiffs to a paramedic/EMT – that "he swerved to avoid a mattress in the road and lost control of the car and went off the road." The appellate court reversed and remanded for a new trial, stating that the exclusion of the statement was error and not harmless. The plaintiff who made the statement "conceded the trustworthiness of the [EMS report] and yet maintains that a singular statement within it is not trustworthy." The court further noted that the hearsay exception under which the plaintiff's statement was admissible (admissions of a party opponent) "has no trustworthiness component."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/June/June%2021,%202017/2D16-353rh.pdf

***County of Cumberland, New Jersey v. Kwap*, __ So. 3d __, 2017 WL 2665062 (Fla. 4th DCA 2017)**

Cumberland County hired PTS America, a prisoner extradition company, to transport Kwap from Florida to New Jersey. En route, Kwap was injured in an accident, and he sued PTS and Cumberland County. The county filed a motion to dismiss for lack of personal jurisdiction as

it had not committed a tort in Florida and PTS was an independent contractor rather than its agent. The circuit court denied the county's motion and it appealed, noting an affidavit it had filed with its motion to dismiss, from the sheriff of Cumberland County, stating that "PTS operated as an independent contractor because PTS used its own equipment and hired its own personnel; and because the County did not dictate or control any aspect of the transport, such as the route, timing, use of particular equipment, or the personnel employed by PTS." The appellate court reversed, noting: "When a complaint includes sufficient jurisdictional allegations, the burden shifts to the defendant to rebut those allegations through an affidavit or other evidence. In this case, the defendant filed an affidavit sufficient to rebut the jurisdictional allegations in the plaintiff's complaint. The burden then shifted back to the plaintiff to clearly establish a factual basis to justify the exercise of personal jurisdiction. The court's failure to consider the evidence submitted beyond the four corners of the plaintiff' complaint was error."
https://edca.4dca.org/DCADocs/2016/3250/163250_DC13_06212017_095941_i.pdf

***Stokes v. Wynn*, __ So. 3d __, 2017 WL 2457348 (Fla. 4th DCA 2017)**

Stokes was injured when struck by a car, which was rented from Hertz by Wynn but driven by Phillips, who fled the scene. Stokes sued Hertz, Wynn, and Phillips, but the final judgment found Phillips solely liable. Stokes appealed, arguing that it was error for the trial court to instruct "the jury that Wynn could not be liable if Phillips simply exceeded the scope of Wynn's consent," but the appellate court affirmed on that and other issues, stating that "whether a conversion or theft of the vehicle had taken place was an issue for the jury, and the court properly instructed the jury."
https://edca.4dca.org/DCADocs/2015/0873/150873_DC05_06072017_083359_i.pdf

***Regalado v. Vila*, __ So. 3d __, 2017 WL 2457215 (Fla. 3d DCA 2017)**

A café and its owners were cited twice by the city's code enforcement board for operating an illegal sidewalk café, but before a hearing could be held on the second citation the plaintiffs were injured at the café when a vehicle crashed into them. The plaintiffs sued the café owners, who raised as an affirmative defense the claim that the city "was negligent by failing to properly maintain the roads, the intersection, and the area where the incident occurred, and by failing to control the traffic and speed of cars in that area." The plaintiffs sought to depose the city mayor and city manager as to whether the mayor's office had authorized the café to continue operating the sidewalk café. The mayor and city manager filed motions for protective orders, which the trial court denied. They sought review, but the appellate court denied their petition, stating: "Plaintiffs sought the discovery by first deposing seven City of Miami officials who presumably would have known how and why [the] illegal sidewalk café was permitted to continue operating after receiving two citations from code enforcement. . . . But each official testified that they did not know. The City has failed to identify a specific individual who could provide the information that Plaintiffs seek."
http://www.3dca.flcourts.org/Opinions/3D16-2659.pdf

***Government Employees Insurance Co. v. Arreola*, __ So. 3d __, 2017 WL 2389503 (Fla. 2d DCA 2017)**

Elizabeth Arreola was in an accident, and the other driver sued her and Maria De Arreola, the owner of the car Elizabeth was driving. The other driver served $25,000 proposals for settlement on both Arreolas, which Geico did not accept. The jury returned a verdict against the Arreolas for over $80,000, plus attorney fees of $121,000 under the proposal for settlement statute. The Arreolas sued Geico, arguing it breached its fiduciary duty in the handling of the claim and that it was liable under respondeat superior because the attorney it assigned to their case was negligent. The Arreolas moved for summary judgment as to the attorney's fees judgment, arguing that Geico was liable under the supplemental additional payments provision of their policy, which had not been alleged in the complaint. The trial court granted the motion and entered a partial summary judgment, which "let execution issue." Geico appealed, and the appellate court issued an order to show cause as to why Geico's appeal should not be dismissed as being an appeal of a nonfinal, nonappealable order. In its response, "Geico raised the alternative argument that this court should exercise its certiorari jurisdiction to quash the partial judgment because it authorizes execution prior to the entry of a final appealable judgment." The appellate court agreed, and although the judgment was not an appealable partial final judgment, the court converted it to a petition for writ of certiorari, granted the petition, and quashed the summary judgment, stating:

> Before an appellate court can exercise its certiorari jurisdiction, "[a] petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal." . . . The latter two requirements are jurisdictional. . . . Geico has satisfied the jurisdictional prongs in this case because the partial judgment subjects it "to execution at a time when it has no appellate remedy and therefore cannot protect its assets by filing a supersedeas bond." . . . Such an order also constitutes a departure from the essential requirements of law.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/June/June%2002,%202017/2D16-2831.pdf

***Persaud v. Cortes*, __ So. 3d __, 2017 WL 2200227 (Fla. 5th DCA 2017)**

Persaud rear-ended a vehicle, injuring the driver (Santiago) and killing a passenger (Batista). Persaud was convicted of DUI manslaughter and was given two life sentences. Batista's mother (Cortes) sued Persaud, as personal representative of Batista's estate and on behalf of his survivors, for wrongful death, negligence, and punitive damages. The jury awarded $1.25 million in punitive damages and Persuad appealed, arguing that "the trial court abused its discretion by refusing to read the following instruction about the award of punitive damages: '**[However, you may not award an amount that would financially destroy** (defendant(s)).]' Fla. Std. Jury Instr. (Civ.) 503.1(c)(2)." The appellate court agreed and reversed, stating:

> The usage note for the instruction regarding financial destruction states, in part:
>
> > 7. This instruction is to be given when requested by the defendant. . . . It appears that this instruction can only be used when evidence of the defendant's net worth has been introduced.

> . . . . Here, Persaud satisfied both requirements. [The plaintiffs] themselves recognized during the charge conference that Persaud requested the instruction. . . . "Concerning instructions a party has requested in writing which are rejected by the court, 'there is no requirement for [an] additional objection to preserve that issue for appeal." . . . Thus, the law required no further objection for Persaud to preserve the trial court's failure to give the requested jury instruction.
>
> Persaud satisfied the second requirement regarding evidence of net worth by introducing the testimony of his mother, who discussed his lack of assets and employment without any objection or challenge from Appellees. . . . Because the trial court elected to provide this instruction, which required evidence of net worth, it also should have provided the requested instruction about financial destruction, which required the same. Persaud persuasively argues the provision of this jury instruction, in light of his financial circumstances, would have resulted in a punitive damages award of less than $1.25 million, an amount that he reasonably contends will financially destroy him.

http://www.5dca.org/Opinions/Opin2017/051517/5D16-863.op.pdf

***Bryant v. Mezo*, __ So. 3d __, 2017 WL 2131495 (Fla. 4th DCA 2017)**

After a minor automobile accident, Bryant and her husband sued Mezo for personal injuries. The trial court dismissed the lawsuit for fraud upon the court because of Bryant's failure to disclose certain prior injuries and medical treatment. She appealed, arguing that the defendant had not shown that her failure to disclose was due to fraud rather than failed memory. The appellate court affirmed, stating: "Not only did the plaintiff fail to disclose any prior neck or back injury, she continued to deny these injuries when confronted by records and medical bills related to those injuries. . . . The trial court did not abuse its discretion in dismissing the plaintiffs' complaint."
https://edca.4dca.org/DCADocs/2016/0386/160386_DC05_05172017_090229_i.pdf

***Swanson v. Beilman*, 216 So. 3d 784 (Fla. 5th DCA 2017)**

Beilman sued Swanson for personal injuries from an automobile accident. After Swanson rejected an additur, the trial court granted a new trial. Swanson appealed, and the appellate court affirmed, but it held that the new trial would be limited to economic damages because the jury had found that Beilman did not sustain a permanent injury.
http://www.5dca.org/Opinions/Opin2017/050817/5D15-2901.op.pdf

***Ward v. Morlock*, __ So. 3d __, 2017 WL 1788020 (Fla. 5th DCA 2017)**

Morlock was in South Carolina and lent a relative his vehicle. The relative rear-ended Ward's vehicle, and she sued Morlock, as the vehicle owner, under Florida's dangerous instrumentality doctrine. Morlock filed a motion for final summary judgment, arguing "South Carolina law, rather than Florida law, governed and that under South Carolina law, the mere ownership of a vehicle is, without more, insufficient to establish the owner's liability for the negligence of the driver." The trial court granted Morlock's motion, but the appellate court reversed, stating that because the plaintiff and defendant were Florida residents, and Morlock's

relative who hit Ward's vehicle was a Pennsylvania resident, "Florida is the state with the most significant relationship for the issue of vicarious liability, and the trial court should have applied Florida's dangerous instrumentality law."
http://www.5dca.org/Opinions/Opin2017/050117/5D16-1641.op.pdf

Duarte v. Snap-on Inc., 216 So. 3d 771 (Fla. 2d DCA 2017)

Duarte sued after his vehicle was rear-ended by a truck driven by Mullins and owned by Snap-on. He sued Snap-on and Mullins, but the trial court, without an evidentiary hearing, dismissed his lawsuit as a sanction for fraud upon the court involving discovery with regard to a subsequent accident. He filed a motion for clarification and rehearing, and the appellate court withdrew its March 15, 2017, opinion and reversed because "the limited record before the trial court was insufficient to establish that this case is among the hopefully rare ones involving an unconscionable scheme to interfere with a trial court's ability to impartially resolve a dispute or a defendant's ability to prepare a defense."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/May/May%2003,%202017/2D15-1952rh.pdf

Akhnoukh v. Benvenuto, __ So. 3d __, 2017 WL 1400582 (Fla. 2d DCA 2017)

Akhnoukh, driving his father's vehicle, rear-ended Benvenuto's vehicle. Benvenuto sued, and the Akhnoukhs asserted as affirmative defenses, among others, that Benvenuto was negligent and failed use a seatbelt. They sought to depose Benvenuto's 8-year-old son, who was a passenger in her vehicle, and Benvenuto filed a motion for protective order, which the trial court granted. The defendants sought review, and the appellate court granted certiorari relief and quashed the order prohibiting the deposition, stating:

> Florida Rule of Civil Procedure 1.310(a) provides that after commencement of the action a party may take a deposition of any person. Rule 1.280(c) provides that a party or person from whom discovery is sought may seek a protective order and that the trial court may issue an order that denies or restricts discovery "for good cause shown." When "justice requires," the court may issue an "order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* The party seeking the protective order has the burden to show good cause. . . .
>
> When a party has been denied the right to depose an alleged material witness without a finding of good cause to preclude the deposition, the trial court departs from the essential requirements of law. . . .
>
> The trial court did not require Benvenuto to establish good cause for the protective order. She based her argument on her son's age, lack of maturity, and experience but provided no evidence. She also did not provide any evidence of how the taking of the deposition may be detrimental to her son. The trial court made no findings of good cause and departed from the essential requirements of law in prohibiting the deposition.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/April/April%2019,%202017/2D16-4018.pdf

VI. Drivers' Licenses

***Leathers v. DHSMV*, 25 Fla. Law Weekly Supp. 10a (Fla. 14th Cir. Ct. 2017)**

The defendant was denied a hardship license and sought review, arguing that "the hearing officer improperly considered [his] pending charge for driving with a suspended license in determining whether [he] qualified for a hardship license." But the circuit court, in its appellate capacity, denied review, noting that "the hearing officer clearly stated that he did not rely on the pending criminal charges, but instead relied on the traffic citation for operating a vehicle without proof of insurance issued on July 3, 2016, which was final at the time of the hearing. Notably, this was in addition to [the defendant's] admission that he drove a vehicle inside a . . . parking lot . . . while his license was suspended."

***Wolf v. DHSMV*, 25 Fla. Law Weekly Supp. 9a (Fla. 13th Cir. Ct. 2016)**

A police officer stopped the defendant for unauthorized entry into a secure area of the airport. He and another officer noticed indicia of impairment, and the defendant was arrested for DUI. The defendant refused a breath test and his license was suspended. He sought review, arguing that "the record lacks competent substantial evidence that he was lawfully detained for a DUI investigation." But the circuit court, in its appellate capacity, denied review, stating:

> The uncontroverted facts show that [the defendant] was initially detained for his unauthorized entry into a secure "sterile" area of [the] Airport. [The first officer] reported that [the defendant] was driving on a Business Purposes Only restricted driver's license. Thereafter, [another officer] made contact with [the defendant] while he was still behind the wheel with his engine running. She detected the odor of alcohol on his breath, along with . . . impaired motor skills and slurred speech. In addition, [the defendant] admitted to the officer that he and his girlfriend had been arguing about his intoxicated state. The court agrees with [the defendant] that the odor of an alcoholic beverage is indicative only of consumption and, alone, does not form the basis to detain a driver. Here, however, there was more. Being in a secure area of the airport was justification enough for the initial stop, and the other factors provided probable cause to believe that [he] may have been driving while impaired. To find otherwise, this Court would impermissibly replace its analysis of the facts, and the weight attributed to those facts, with that of the Hearing Officer.

***Duncan v. DHSMV*, 25 Fla. Law Weekly Supp. 8b (Fla. 13th Cir. Ct. 2016)**

After being stopped for driving without headlights, the defendant was arrested for DUI and his license was suspended for refusal to submit to a breath test. He sought review, arguing that "the signs observed by the law enforcement officers were evidence only of consumption, not impairment." But the circuit court, in its appellate capacity, denied review, stating that "the odor of an alcoholic beverage and red watery eyes, without more, are indicators only of consumption.

Driving without headlights may occur with someone who is not impaired. But, where there is evidence of consumption, the night-time driving without headlights, itself a [statutory] violation . . . , along with the low, mumbled speech, and unresponsive answers to the officers' questions become probable cause to believe that [the defendant] may have been driving while impaired."

***Khan v. DHSMV*, 25 Fla. Law Weekly Supp. 8a (Fla. 13th Cir. Ct. 2016)**

After being stopped for driving without headlights, the defendant was arrested for DUI and his license was suspended for refusal to submit to a breath test. He sought review, asserting that the hearing officer's refusal to issue subpoenas deprived him of due process. But the circuit court, in its appellate capacity, denied review "[b]ecause error on the part of [the defendant] was the basis for the hearing officer's failure to issue the subpoenas, and because the subpoenas were ultimately issued." The defendant also asserted there was no competent substantial evidence to support the lawfulness of his arrest. But the court disagreed, noting that the defendant "was stopped at almost 4:30 in the morning driving without headlights. [His] breath smelled of alcohol and he did not always respond appropriately to [the officer's] questioning. Finally, the results of the HGN showed signs of impairment. That alone furnishes probable cause to arrest."

***Farnesworth v. DHSMV*, 25 Fla. L. Weekly Supp. 2b (Fla. 8th Cir. Ct. 2017)**

After being stopped for having no tag lights, the defendant was arrested for DUI and his license was suspended for refusal to submit to a breath test. He sought review, asserting that there was direct conflict between the deputy's testimony and the documents in evidence at the hearing as to who asked the defendant to take the breath test and read him the implied consent warning. But the circuit court, in its appellate capacity, denied review, stating that "both versions of events result in [the defendant] being read the implied consent warning prior to his refusal to take the breath test. Therefore, the identity of the person who read the implied consent warning is not a material fact."

***Martin v. DHSMV*, 25 Fla. L. Weekly Supp. 1a (Fla. 4th Cir. Ct. 2017)**

The defendant's license was permanently revoked in 2008 for four DUI convictions. He sought review, as one of the convictions was under a municipal ordinance. The circuit court, in its appellate capacity, granted review and quashed the suspension/revocation, stating: "Section 322.28 limits the types of DUI convictions which may be considered as among the four necessary for permanent driver's license revocation. The statutory definition . . . does not include a conviction for violation of a municipal ordinance as a conviction which may count toward revocation [and] this Court is not at liberty to rewrite the statutory law."

***Marshall v. DHSMV*, 24 Fla. L. Weekly Supp. 928a (Fla. 20th Cir. Ct. 2017)**

After a deputy found the defendant asleep at the wheel in the middle of the road and noticed indicia of impairment, his license was suspended for refusal to submit to a breath or urine test. He sought review, which the circuit court, in its appellate capacity, denied, stating that the record contained substantial competent evidence to support the suspension.

***Miller v. DHSMV*, 24 Fla. L. Weekly Supp. 926a (Fla. 13th Cir. Ct. 2016)**

After several citizen calls, a trooper observed the defendant driving erratically and stopped her, noticed indicia of impairment, and arrested her for DUI. "In addition to an earlier refusal, she said 'no' in response to the request to provide a breath sample at the facility, without waiting for the complete recitation of the warning. When the trooper finished reading the warning, [she] did not respond again. In the end, she did not provide a breath sample when asked to do so twice, and, in addition to the negative responses, [the trooper] deemed her conduct a refusal," and her license was suspended. She sought review, arguing that she did not say "no" at the conclusion of the request. But the circuit court, in its appellate capacity, denied review, stating: "It is clear that [the defendant] was read implied consent warnings and refused to take the test. [She] cannot now benefit from her uncooperative behavior at the time she was requested to take the test."

***Carle v. DHSMV*, 24 Fla. L. Weekly Supp. 925b (Fla. 12th Cir. Ct. 2016)**

The defendant's license was suspended for driving with an unlawful alcohol level. She sought review, arguing that the documentary evidence was in conflict regarding the required 20-minute observation period. But the circuit court, in its appellate capacity, denied review, stating:

> The probable cause affidavit states that [the trooper] began the 20 minute observation period at "approximately 12:10 a.m." and it ended "approximately at 12:35 a.m.". The breath alcohol test affidavit also states that 20 minute observation period began at 12:10 a.m. and states that the first breath sample occurred at 12:44 a.m. Moreover, this document states: "[t]he subject was observed for at least twenty minutes prior to the administration of the breath test to ensure that the subject did not take anything orally and did not regurgitate". There is no requirement in the law that the breath test be administered immediately at the expiration of the observation period, so it is not inconsistent to conclude that the breath test was administered more than twenty minutes after the observation period began."

***Moore v. DHSMV*, 24 Fla. L. Weekly Supp. 918a (Fla. 9th Cir. Ct. 2016)**

A police officer saw the defendant in the driver's seat of a running vehicle that was stuck on a construction barrier. He noticed indicia of impairment, and the defendant was arrested for DUI and her license was suspended for refusal to submit to a breath test. She sought review, arguing that she had never admitted being in actual control of the vehicle, that the vehicle was not operable, that she had told the officer that "the crash was her boyfriend's fault," and that the refusal affidavit was improperly notarized. The circuit court, in its appellate capacity, denied review, stating: "Because [the defendant] did not challenge her refusal to submit to the breath test during the formal hearing, the hearing officer's inquiry was limited to whether [the police officer] had probable cause to believe [she] was driving and/or in actual physical control of a vehicle while under the influence of alcoholic beverages and whether he read the Implied Consent Warning to her." The court found that there was competent substantial evidence to support the hearing officer's findings.

***Grove v. DHSMV*, 24 Fla. L. Weekly Supp. 914a (Fla. 7th Cir. Ct. 2016)**

After an accident, the defendant was arrested for DUI and her license was suspended. She sought review, arguing that "without an odor of alcohol on her breath there was a lack of probable cause for the officer to arrest her for DUI." But the circuit court, in its appellate capacity, disagreed and denied review, stating that the odor of alcohol is not required and is just one factor that can indicate impairment. The court also rejected the defendant's argument there was no competent substantial evidence to establish that she was the driver. The defendant also argued that "because her Miranda waiver was insufficient, her post-Miranda statement describing her activities before her crash should not have been admissible due to the accident report privilege." But the court held that even if that were true, there was sufficient additional evidence that the defendant was DUI.

The court further held that the defendant was lawfully arrested for DUI before being asked to take a breath test, that it was not a violation of due process to admit and consider her uncertified driving record, and that, even if the officer was not qualified to conduct the HGN test, any error was harmless since there was other competent substantial evidence of probable cause to believe the defendant was DUI. The court also found unsupported the defendant's assertion that the hearing officer was biased or failed to follow the law.

***Brock v. DHSMV,* 24 Fla. L. Weekly Supp. 912a (Fla. 6th Cir. Ct. 2017)**

After an accident, the defendant's license was suspended for refusal to submit to a breath test. He sought review, arguing, among other things, that "it was a violation of due process to detain [him] at the scene of the accident and to prevent him from speaking with an attorney despite [his] request for an attorney." The circuit court, in its appellate capacity, denied review, stating that the defendant "had no established right to counsel prior to making the decision whether to submit to testing pursuant to the implied consent law" and that the officer's observations of indicia of impairment were sufficient to support a finding of probable cause.

***Sparks v. DHSMV,* 24 Fla. L. Weekly Supp. 900a (Fla. 4th Cir. Ct. 2017)**

The defendant was arrested for DUI and his license was suspended. He sought review, arguing that the Neptune Beach police officer who arrested him in Atlantic Beach had not arrested him lawfully "pursuant to the 'fresh pursuit' doctrine." But the circuit court, in its appellate capacity, disagreed and denied review, stating that the officer had observed the defendant speeding and repeatedly crossing lane markers in Neptune Beach and "initiated the traffic stop in Neptune Beach by turning on his emergency lights."

***Sizemore v. DHSMV,* 24 Fla. L. Weekly Supp. 899b (Fla. 4th Cir. Ct. 2016)**

The defendant failed to stop at a stop sign, and a law enforcement officer who stopped him noticed indicia of impairment. The defendant refused to submit to a breath test and his license was suspended. He sought review, arguing that there was not clear and substantial evidence in the record to support the hearing officer's findings. But the circuit court, in its appellate capacity, denied review, stating that the defendant "was accorded procedural due process, that the hearing officer observed the essential requirements of law, and that the findings reflected in the Decision were supported by competent, substantial evidence."

***Snyder v. DHSMV,* 24 Fla. L. Weekly Supp. 899a (Fla. 4th Cir. Ct. 2016)**

The defendant's license was suspended for DUI. He sought review, arguing that the hearing officer departed from the essential requirements of the law when finding that the defendant was lawfully arrested and denied him his right to due process by disregarding DVD evidence that demonstrated that he was not impaired. But the circuit court, in its appellate capacity, denied review, stating that the defendant's "failure to stop, alcohol consumption, swaying, and FSE refusal, are sufficient, when taken together, to support probable cause for [his] arrest." The court held further that "each of the foregoing factual findings, sufficient to establish probable cause when combined, are supported by competent and substantial evidence in the record." And the court found no procedural due process violation:

> It is not this Court's place to substitute its judgment for that of the hearing officer's with respect to an evaluation of the DVD evidence and its relationship to impairment. However, the finding that the [defendant's] eyes were blood-shot and watery and that he smelled of alcohol are supported by the officer's direct testimony and constitute competent and substantial evidence. That the [defendant] runs a stop sign, sways and refuses to perform field sobriety exercises is captured on the video, prior to his arrest. Merely because findings of fact that did not support the hearing officer's conclusions are not referenced in the written findings of fact, conclusions of law and decision does not mean that the totality of the circumstances were not considered by the arresting officer and the hearing officer in determining probable cause. There is no procedural due process violation.

***Dostie v. DHSMV*, 24 Fla. L. Weekly Supp. 897b (Fla. 4th Cir. Ct. 2017)**

A trooper saw the defendant weaving within his lane, stopped him, and noticed indicia of impairment, and the defendant refused field sobriety exercises. He was arrested and his license was suspended for refusal to submit to a breath test. He sought review, which the circuit court, in its appellate capacity, denied, stating that the record contained substantial competent evidence to support a finding of probable cause for the DUI arrest and the suspension.

***Marvel v. DHSMV*, 24 Fla. L. Weekly Supp. 897a (Fla. 4th Cir. Ct. 2016)**

A trooper stopped the defendant for speeding and noticed indicia of impairment. The defendant refused to submit to a breath test and his license was suspended. He sought review, arguing that there was not "clear and substantial evidence in the record to support a finding of probable cause" for his arrest. But the circuit court, in its appellate capacity, denied review, stating that there was competent substantial evidence to support the hearing officer's conclusions that the defendant was DUI, the arrest was based on probable cause and was legally sufficient for a breath test request, and the license suspension for refusal was supported by a preponderance of the evidence.

VII. Red-light Camera Cases

***Facella v. Orange County Florida*, 24 Fla. L. Weekly Supp. 915a (Fla. 9th Cir. Ct. 2017)**

The defendant received a notice of violation after a red-light camera recorded him crossing an intersection after the light had turned red. He requested an administrative hearing,

but the hearing officer upheld the violation. He appealed, arguing that "his due process rights were violated because he was not permitted to present evidence and testimony regarding the County's red light program" and that nevertheless the record was sufficient to show that the county's arrangement with the vendor violates section 316.0083, Florida Statutes. But the circuit court, in its appellate capacity, affirmed, agreeing with the county that "given the statutorily limited authority and the nature of the local hearing officer position, the [LHO] was not required to rule upon the legality of the County's red light program and as such, did not depart from the essential requirements of the law or deprive [the defendant] of his due process rights when sustaining the County's objection to evidence relating to the contract between the County and ATS. Furthermore, on this record, there is no evidence that the County unlawfully delegated its police powers to ATS when issuing [the] Notice of Violation." The court also stated that the defendant

> elected to pursue a notice of violation hearing before a local hearing officer rather than waiting to receive a UTC and pursuing a hearing before a county court judge. . . . Unlike a notice of violation hearing, the hearing following issuance of a UTC takes place before a county court judge, who would have jurisdiction to hear evidence and argument surrounding the County's utilization of ATS in effectuating the red light program. . . . [I]n electing the preliminary, notice of violation hearing, [the defendant] effectively waived his ability to challenge the legality of the County's red light program in exchange for pursuing a faster and less financially risky proceeding.

***Munoz-Calene v. City of New Port Richey*, 24 Fla. L. Weekly Supp. 909b (Fla. 6th Cir. Ct. 2016**)

The defendant was issued a notice of violation after a red-light camera recorded him making a right turn at a red light. He requested an administrative hearing, at which he argued, among other things, that he had executed the right turn in a careful and prudent manner. The hearing officer found, based on *Deutzman v. City of Miami Beach*, 22 Fla. L. Weekly Supp. 973a (January 14, 2015), that a full stop is required under section 316.0083(1)(a), Florida Statutes, and entered a final administrative order adverse to the defendant, The defendant appealed, and the circuit court, in its appellate capacity, reversed and remanded. It stated that the hearing officer's reliance on *Deutzman* was improper:

> In concluding that section 316.0083(1)(a) requires a complete stop, the [local hearing officer] did not examine the statutory language or consider all the testimony. Instead, the LHO treated *Deutzman* as controlling authority and applied its holding to find that [the defendant] committed a violation. *Deutzman* is not controlling authority. It is merely the opinion of a local hearing officer from a different municipality. In fact, this Court questions whether the final administrative order in *Deutzman* has any precedential value. As [the defendant] aptly notes, the citation at issue in *Deutzman* was subsequently *nolle prossed* and the appeal on the final administrative order was dismissed.

VIII. County Court Orders

***State v. Garcia,* 25 Fla. L. Weekly Supp. 205a (Collier Cty. Ct. 2012)**

The defendant was arrested for DUI and filed a motion to suppress the breath test based on testimony from the state's witness confirming that "the Intoxilyzer 8000 has undergone 17 modifications." The court denied the motion but ordered the state to comply with the "normal evidentiary predicate" to show substantial compliance with regard to the testing of the breath testing instrument.

***State v. Roque,* 25 Fla. L. Weekly Supp. 202b (Brevard Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion in limine to restrict use of her breath test, arguing that "the Florida Highway Patrol failed to produce a valid monthly inspection for the month of August" and that there was no indication that the FDLE inspector had remedied a problem found during the August 2015 inspection. The court denied the motion, noting: "Defense Counsel conceded that unlike some other county court cases where there was some question as to what had caused the non-compliance during an agency inspection, here 'we know what the problem is' and [the trooper] 'fixed the issue at hand.'" The court found that the state had substantially complied with all applicable rules.

***State v. MacDonald,* 25 Fla. L. Weekly Supp. 202a (Brevard Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion in limine as to his refusal to submit to a breath test. The court denied his motion, finding "the refusal to be admissible as consciousness of guilt."

***State v. Leird,* 25 Fla. L. Weekly Supp. 195b (Monroe Cty. Ct. 2017)**

The defendant was stopped for having an inoperable tag light and an officer found marijuana in the car. The defendant was arrested and filed a motion to suppress statements she made to the officer. The court granted the motion, stating that while the officer "was justified in telling both the passenger and the Defendant to get out of the car after discovering the marijuana," and that "in the context of a 'routine' traffic stop, courts have held that questioning as to the presence of drugs or weapons for officer safety may be allowable," circumstances occurred that changed the routine traffic stop into a criminal investigation. The defendant was "confronted with evidence of guilt" as her passenger had already been handcuffed and detained after the officer discovered the marijuana. The defendant did not have possession of her driver license, "and she clearly did not have 'a right to leave the place of questioning.' . . . [S]he was 'subjected to treatment' to the extent that her freedom of action was curtailed to a degree associated with formal arrest."

***Insurance Resolution Services v. State Farm Mutual Automobile Insurance Co.*, 25 Fla. L. Weekly Supp. 191a (Hillsborough Cty. Ct. 2017)**

The insured's assignee ("plaintiff") filed motions to strike affirmative defenses and to determine sufficiency of request for admissions objections, but shortly before the hearing it filed a notice of withdrawal of the motions and failed to contact the judge or JA or appear for the

hearing. The court denied the motions and granted sanctions against the plaintiff's attorney for untimely withdrawal of the motions. The defendant had filed a motion for summary judgment, and shortly before the hearing the plaintiff filed a notice of voluntary dismissal, which the court did not receive until after the hearing began. The court held the defendant's motion for summary judgment was moot because of the plaintiff's notice of voluntary dismissal. The plaintiff filed motions for rehearing on its motions to strike and to determine sufficiency and for rehearing on the defendant's motion for summary judgment. The court denied the plaintiff's motions for lack of jurisdiction.

***State v. Pastor*, 25 Fla. L. Weekly Supp. 129a (Henry Cty. Ct. 2017**)

The defendant was charged with DUI and not having a valid driver license. He filed a motion to dismiss because the video that would have shown his field sobriety tests had been destroyed. But the court denied the motion, stating: "Where destroyed evidence is only potentially useful, a showing of bad faith is required. Bad faith exists only when law enforcement intentionally destroys evidence they believe would exonerate the defendant. . . . Since [the deputy] testified that he was unaware of the retention policy for video related to DUI investigations, and had nothing to do with the IT procedure to overwrite jail security video, the Court finds that [he] had no intent to destroy the evidence." It further stated that, based on the breath test results and the deputy's testimony as to the field sobriety tests, "there is no reasonable probability of a different outcome if the video existed."

***State v. Raccuglia*, 25 Fla. L. Weekly Supp. 111a (Palm Beach Cty. Ct. 2017**)

While driving a motorcycle with a passenger, the defendant was pursued by a deputy, drove over 150 mph, and was eventually issued a citation for speeding. He was fined $1,000 and his license was revoked. He objected to the license revocation, but the court stated that Florida statutes provide "numerous provisions by which the legislature has provided discretion for a court to direct suspension or revocation a driver license and that the direction for the revocation of Defendant's license herein under these circumstances is warranted, justified and lawful."

***State v. Duran-Elizarraga*, 25 Fla. L. Weekly Supp. 105b (Manatee Cty. Ct. 2017**)

The defendant was arrested for DUI and filed motions to suppress. The court denied his motion to suppress field sobriety exercise, holding that the trooper "had reasonable suspicion to believe that the Defendant had committed the crime of DUI. The paramedics informed the Trooper they observed the Defendant in actual physical control of the vehicle and had difficulty waking him. The Trooper detected the odor of alcohol on the Defendant's breath and observed that he had slurred speech. No arrest was effected before the Defendant was asked to perform FSEs." To introduce field sobriety exercise evidence that would require scientific testimony rather than lay testimony, however, the state would have to establish a proper predicate.

The court denied the motion to suppress statements as to statements the defendant made before his arrest because under the circumstances a reasonable person would not have "believed that his or her freedom of action was curtailed to the degree associated with formal arrest," but granted it as to statements the defendant made after he was physically arrested by law enforcement.

The court granted the motion to suppress breath test results, finding the arrest unlawful because the paramedics were not "fellow officers" and they did not effect a citizen's arrest.

***State v. Garrett*, 25 Fla. L. Weekly Supp. 71a (Orange Cty. Ct. 2017)**

After an accident, the defendant was arrested for DUI. He filed a motion to suppress, which the court granted, holding that the taking of the defendant's blood pursuant to section 316.1932(1)(c), Florida Statutes, was illegal because while that statute "holds even an unconscious person is deemed to have consented under the right circumstances [it] **does** require that it would be impossible or impractical to administer a breath or urine test," which was not the case here. While the officer testified that a breath test would have been impossible or impractical, no evidence was presented but his conclusory statement.

***State v. Moore*, 25 Fla. L. Weekly Supp. 45a (Duval Cty. Ct. 2015)**

After seeing the defendant travelling the wrong way on a one-way street, an officer stopped him and the defendant was arrested for DUI. He filed a motion to suppress, which the court granted, stating that the unrefuted evidence showed that there was no one-way traffic control device along the relevant portions of the street the defendant had been driving on. The court stated: "The state appears to suggest that this statute can be violated 'in a vacuum' and that it matters not that motorists going the wrong way never know it. However, Section 316.074, Florida Statu[t]es instructs us otherwise and places the point of emphasis on what the motorists perceives and what the motorist is aware of."