FLORIDA TRAFFIC-RELATED APPELLATE OPINION SUMMARIES

January – March 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)

Wiggins v. DHSMV, 209 So. 3d 1165 (Fla. 2017)

The defendant was arrested for DUI and his license was suspended. The hearing officer affirmed the suspension. But on review the circuit court found that, because the dashboard camera video evidence "totally contradicted and refuted" the arresting officer's testimony and arrest report, "it was unreasonable as a matter of law for the hearing officer to accept the report and the testimony as true." DHSMV sought review, and the First District Court of Appeal quashed the circuit court's order, concluding that "the circuit court essentially reweighed the evidence and conducted a de novo review," and it certified a question of great public importance, which the supreme court rephrased as follows:

> WHETHER A CIRCUIT COURT CONDUCTING FIRST–TIER CERTIORARI REVIEW UNDER SECTION 322.2615, FLORIDA STATUTES, APPLIES THE CORRECT LAW BY REJECTING OFFICER TESTIMONY AS COMPETENT, SUBSTANTIAL EVIDENCE WHEN THAT TESTIMONY IS CONTRARY TO VIDEO EVIDENCE.

The supreme court answered in the affirmative and disagreed with the appellate court's holding, and held that "in this context of section 322.2615 first-tier review, a circuit court must review and consider video evidence of the events which are of record as part of its competent, substantial evidence analysis" and that "in this limited context . . . evidence which is totally

contradicted and totally negated and refuted by video evidence of record, is not competent, substantial evidence."
http://www.floridasupremecourt.org/decisions/2017/sc14-2195.pdf

***State v. Hamilton*, __ So. 3d __, 2016 WL 685610 (Fla. 2d DCA 2017)**

After his arrest for DUI, the defendant was charged with refusing to submit to a breath, blood, or urine test. The county court denied his motion to dismiss, but the circuit court granted his petition for writ of prohibition and ordered the county court to dismiss the charge because "the offense underlying the refusal charge was related to the offense underlying a DUI charge of which he had been acquitted one day before the State had filed the information on the refusal charge." The state appealed, and the appellate court quashed the circuit court order, holding that it was well established "that prohibition is available only to prevent a lower tribunal's unauthorized exercise of jurisdiction," and that the grant of prohibition "wholly negated the State's ability to proceed with its prosecution and left the State with no other avenue for review."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/February/February%2022,%202017/2D16-2754.pdf

***Williams v. State*, __ So. 3d __, 2016 WL 651834 (Fla. 5th DCA 2017)**

The defendant was arrested for DUI and refused a breath test. He was then issued five UTCs, including one for refusal to submit a second time, in violation of section 316.1939, Florida Statutes. He filed a motion to dismiss that charge, asserting that the statute was unconstitutional as applied to him. The county court denied his motion to dismiss and certified the following question as one of great public importance: "If the implied[-]consent statute provides consent to search as an exception to the Fourth Amendment warrant requirement, then can that consent be withdrawn by refusal to submit to an otherwise lawful test of breath, blood or urine and can the second such refusal be punishable as a criminal offense?" The defendant appealed, and the appellate court affirmed the conviction, stating:

> In *Williams v. State*, 167 So.3d 483 (Fla. 5th DCA 2015), this Court answered the certified question in the affirmative and held that breath-alcohol tests are generally reasonable. Williams sought review in the Florida Supreme Court, which accepted jurisdiction. *Williams v. State*, 2015 WL 9594290 (Fla. Dec. 30, 2015). While this case was pending, the United States Supreme Court issued its decision in *Birchfield v. North Dakota*, —– U.S. ——–, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), holding, among other things, that breath-alcohol tests administered without a warrant are permissible as searches incident to a lawful arrest for driving under the influence. The Florida Supreme Court then vacated our decision in *Williams* and remanded the case to this Court for reconsideration in light of *Birchfield*. *Williams v. State*, 2016 WL 6637817 (Fla. Nov. 9, 2016). We allowed supplemental briefing and again affirm Williams's conviction.
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> *Birchfield* has made our task significantly easier. . . . [O]ur Fourth Amendment jurisprudence is governed by decisions of the United States Supreme Court. Art. I, § 12, Fla. Const. Thus, we adopt the holding in *Birchfield* that breath-alcohol tests

are permissible under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement.

http://www.5dca.org/Opinions/Opin2017/021317/5D14-3543.op.pdf

***Allen v. State*, __ So. 3d __, 2016 WL 33695 (Fla. 4th DCA 2017)**

The defendant's probation was revoked and he was sentence to four years' imprisonment after he was charged with DUI, refusing to submit to a breath test, leaving the scene of a crash involving damage to property, and driving with a suspended license as a habitual traffic offender. He appealed, alleging that "the court erred in finding that he violated his probation, and then violated his constitutional rights at sentencing when it required him to make an admission of guilt in exchange for a reduced sentence." The appellate court reversed, stating: "Although there was sufficient evidence to support the court's finding of a probation violation, we agree with appellant that his constitutional rights were violated during sentencing and reverse for a new sentencing hearing."
https://edca.4dca.org/DCADocs/2015/2574/152574_DC08_01042017_081505_i.pdf

***Mulvey v. Forman*, 207 So. 3d 894 (Fla. 4th DCA 2017)**

The plaintiff filed a complaint for declaratory relief to remove erroneous public records, alleging that his DHSMV driving record included three incorrect DUI convictions. He served a request for admissions on the clerk of court, asking for admissions that the 1978 DUI charge was nolle prossed, the 1982 DUI charge was dismissed, and the 1984 DUI charge did not exist. The clerk of court admitted that the 1978 DUI was nolle prossed but stated that the 1982 DUI had a "disposition of Adjudicated, Convicted by Plea" and that he "lacks the information or knowledge necessary to admit or deny" the requested admission about the 1984 conviction. Following discovery the plaintiff filed a verified motion for summary judgment based on his claims of erroneous records. The trial court entered a nonfinal order granting the motion, but it addressed only the 1978 and 1982 DUI cases. The plaintiff then filed a motion for an amended order, arguing that the order granting his motion for summary judgment "(1) contained 'an apparent scrivener's error'; (2) improperly stated that Count II in the 1982 case was an adjudication; and (3) failed to address his claim that the 1984 conviction for DUI does not exist." The trial court denied the motion, noting that summary judgment had been entered for the plaintiff. The plaintiff appealed, and the appellate court reversed in part and remanded, stating that with regard to argument (1), the plaintiff "failed to identify the alleged scrivener's error with particularity. Therefore, the plaintiff has not shown any reversible error on this issue." With regard to (2), "[t]he trial court correctly found that Count II in the 1982 case was an adjudication." However, as to (3), "[t]he plaintiff correctly argues that the trial court failed to address his claim that his purported 1984 conviction for DUI does not exist. [That failure] was an abuse of discretion."
https://edca.4dca.org/DCADocs/2015/4687/154687_DC08_01042017_083538_i.pdf

***State v. Palmer*, 24 Fla. L. Weekly Supp. 672a (Fla. 20th Cir. Ct. 2016)**

The defendant was charged with DUI (2nd), and within the recapture period of speedy trial the state filed an amended information, changing the blood or breath alcohol level from ".08 or above" to ".15 or above." The defendant filed a motion for discharge, alleging that the state

had added a new element. The trial court eventually granted the motion and the state appealed, arguing that it should have been allowed to proceed with the prosecution under the original information. The circuit court, in its appellate capacity, agreed with the state and reversed the trial court's order granting the defendant's motion for discharge. It stated that "no evidence suggests that the State had any intention of abandoning prosecution of [the defendant] for DUI when it filed the amended information, nor once the amended information was stricken. Additionally, there is no indication that [the defendant] would have been prejudiced by the reinstatement of the original information. . . . [T]he charge in the amended information was not a new charge but a 'modification' of the original charge."

***Arguello v. State,* 24 Fla. L. Weekly Supp. 593a (Fla. 11th Cir. Ct. 2016)**

The defendant was convicted of DUI and appealed, asserting, among other things, that "the State impermissibly shifted the burden of proof by arguing that [she] failed to demonstrate that she was not impaired." The circuit court, in its appellate capacity, agreed and reversed, based on the state's argument that "knowing . . . that she would lose her license for 12 months, she refused to provide a [breath] sample. If it was just a concussion, if it was just an accident that someone else had crashed in to her, *then why not -- if have you (sic) nothing to lose, demonstrate that you are not impaired.*"

II. Criminal Traffic Offenses

***State v. Wiley*, __ So. 3d __, 2017 WL 1093197 (Fla. 1st DCA 2017)**

The defendant pled no contest to multiple offenses after a road-rage incident in a fast-food drive-through lane. Her scoresheet showed a lowest permissible sentence of 58 months in prison, but the trial court imposed a downward departure sentence (11 months and 30 days in jail, followed by ten years' probation), which is authorized "when the court finds that '[t]he defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction . . . and the defendant is amenable to treatment.'" The state appealed the downward departure sentence, but the appellate court affirmed, noting that the state conceded that the defendant met the requirement that the court first find that it *can* depart based on valid legal grounds supported by the facts. As to the second issue – whether the court *should* depart – the court stated that this "was a 'judgment call within the sound discretion of the trial court,' . . . and . . . we cannot say that the trial court abused its discretion by imposing a downward departure sentence under the circumstances of this case."
https://edca.1dca.org/DCADocs/2015/0858/150858_DC05_03232017_081111_i.pdf

***Bynes v. State*, __ So. 3d __, 2017 WL 1018516 (Fla. 4th DCA 2017)**

The defendant was charged with driving without a valid license, causing death. She entered a negotiated plea and was placed on community control followed by probation. Shortly after that the state alleged that she committed a violation of probation (VOP) by committing new law violations, including battery on a law enforcement officer, and the trial court imposed a two-year sentence for the battery, to run concurrently with the VOP case. The defendant filed a rule 3.850 motion, raising seven claims of ineffective assistance of counsel relating to the VOP case. The trial court denied the claims summarily, and the defendant appealed. The appellate court

reversed and remanded as to the defendant's claims that her attorney "failed to convey a favorable plea offer and provided misadvice regarding her sentence."
https://edca.4dca.org/DCADocs/2016/2209/162209_DC08_03152017_090946_i.pdf

McInerney v. State, __ So. 3d __, 2017 WL 1013195 (Fla. 4th DCA 2017)

The defendant was sentenced to 15 years in prison for DUI manslaughter. He appealed, arguing that the trial court erred in (1) admitting an eyewitness's statement over a hearsay objection during the sentencing hearing, (2) ordering the amount of restitution after his notice of appeal was filed, and (3) denying his motion for a downward departure. The appellate court affirmed as to the admission of hearsay, holding that "hearsay is admissible in non-capital sentencing hearings." It also affirmed the denial of the downward departure motion, finding no merit in the defendant's argument. But it reversed and remanded on the restitution issue, stating that "the trial court ordered restitution and reserved jurisdiction to determine the amount. But, it waited until after the defendant filed his notice of appeal to hold the hearing. By that time, the trial court had been divested of jurisdiction."
https://edca.4dca.org/DCADocs/2015/1527/151527_DC08_03152017_095315_i.pdf

Linton v. State, __ So. 3d __, 2017 WL 946311 (Fla. 5th DCA 2017)

After committing an armed carjacking and a high-speed chase that resulted in the death of his passenger, the defendant was convicted of first-degree murder with a weapon (Count I), fleeing or attempting to elude a law enforcement officer causing serious injury or death (Count II), vehicular homicide (Count III), and driving without a valid license causing serious bodily injury or death (Count IV). The trial court granted his motion to dismiss the vehicular homicide count based on double jeopardy, but denied his motion to dismiss the driving without valid license charge. He appealed, arguing that "the enhanced convictions of Counts II and IV must be vacated because a single course of conduct causing a single death cannot support convictions for both a homicide offense and an offense enhanced by the same death." The appellate court affirmed as to Count I but, based on *State v. Cooper*, 634 So. 2d 1074 (Fla. 1994) (appropriate to convict person of both DUI manslaughter and driving while license suspended, but inappropriate to enhance degree of both crimes by using single homicide), reversed and remanded "for the trial court to: (1) vacate the current judgment and sentence for Count II and enter judgment convicting [the defendant] of fleeing or attempting to elude a law enforcement officer . . . ; and (2) vacate the current judgment and sentence for Count IV and enter judgment convicting [him] of driving without a valid license." It certified conflict with *McKinney v. State*, 51 So. 3d 645 (Fla. 1st DCA 2011), which it could not reconcile with *Cooper*.
http://www.5dca.org/Opinions/Opin2017/030617/5D15-4394.op.pdf

State v. Gonzalez, __ So. 3d __, 2017 WL 945567 (Fla. 5th DCA 2017)

The defendant was charged with leaving the scene of an automobile crash involving injuries. The court struck the information and dismissed the charged based on the failure of the state to obtain sworn testimony from a material witness, as it "did not obtain an affidavit or equivalent from the victim of the collision [but rather] obtained the affidavit of the investigating officer who responded to the scene of the collision." The state appealed and the appellate court reversed, stating:

> When a challenge is made to an information based on the sufficiency of the sworn testimony upon which the prosecutor relied, . . . the question for the trial court is whether the prosecutor acted in good faith, not whether the evidence relied on is substantial enough. Unless the sworn testimony is so lacking that a reasonable prosecutor cannot be said to have acted in good faith, then the challenge should be rejected. . . . Here, . . . the affidavit is more than sufficient to support a finding of probable cause to levy the charge. It contains substantial evidence of the crime, not the least of which was a confession. . . . Many criminal cases are commenced and proven at trial without victim testimony when the victim is deceased, uncooperative, or otherwise unavailable.

http://www.5dca.org/Opinions/Opin2017/030617/5D15-4099.op.pdf

***McDowell v. State*, __ So. 3d __, 2017 WL 899913 (Fla. 1st DCA 2017)**

The defendant was sentenced to 15 years in prison for DUI manslaughter. She appealed, arguing that "the trial court committed fundamental error in suggesting that her sentence may have been different had she cooperated and admitted guilt at an earlier stage of the case." The state conceded that the defendant was entitled to relief, and the appellate court vacated the sentence and remanded with instructions for her to be resentenced before a different judge. https://edca.1dca.org/DCADocs/2016/3227/163227_DC13_03072017_090050_i.pdf

***McDonald v. State*, __ So. 3d __, 2017 WL 897431 (Fla. 1st DCA 2017)**

The defendant was convicted of vehicular homicide. He appealed, arguing that the trial court "violated Florida Rule of Criminal Procedure 3.410 when it failed to consult with counsel before responding to a question submitted by the jury during deliberations." During deliberations the jury had sent two notes to the court asking about the defendant's driving record and speeding tickets, and for a copy of the trooper's report. To both notes the court, with both parties' assent, sent the jury notes instructing that the jury must rely on the evidence that it heard or that was admitted at trial. But the jury then sent a note with a third question, asking whether the passenger in the car struck by the defendant had her seatbelt on. The judge did not discuss the note with the parties' attorneys but rather brought the jury back in without explanation and read to the jury from the jury instructions, stating:

> . . . . And the second paragraph, I'm going to read it, and I'm going to reread it and I'm going to reread it and I'm going to reread it, and I want you to listen to me very carefully.
>
> It is to the evidence introduced in this trial and to it alone that you are to look for that proof." . . .
>
> Now, if you don't understand that, I don't mind keep on saying it, but the only thing that you are to consider is the evidence admitted in this trial. No other investigations, no other inquiries, no other matters are going to be submitted to you, nothing else. The only thing that you consider your verdict on is what you have heard from this witness stand and the exhibits produced during the course of the trial. Have I made myself clear?

Rule 3.410 at the time provided in part: "After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read or played back to them they may be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read or played back to them. The instructions shall be given and the testimony presented *only after notice to the prosecuting attorney and to counsel for the defendant*." The appellate court held that the trial court violated the rule, and it reversed and remanded for a new trial.
https://edca.1dca.org/DCADocs/2014/4458/144458_DC13_03072017_084717_i.pdf

***In re Standard Jury Instructions in Criminal Cases—Report No. 2016-08*, __ So. 3d __, 2017 WL 708307 (Fla. 2017)**

The supreme court amended standard criminal jury instructions, including 7.8 (Driving Under the Influence Manslaughter). Instruction 7.8 was amended to correct and add statutory citations, and a note was added to clarify that if a jury finds that the defendant drove with an unlawful blood or breath alcohol level, no instruction on the "prima facie evidence of impairment" is necessary because impairment would be moot.
http://www.floridasupremecourt.org/decisions/2017/sc16-1681.pdf

***Prestano v. State*, __ So. 3d __, 2017 WL 651807 (Fla. 5th DCA 2017)**

Prestano pled no contest to leaving the scene of an accident that resulted in death (Count I), DUI manslaughter (Count II), and driving while license suspended (Count III). He filed a motion for postconviction relief, arguing that (1) "his convictions for both DUI manslaughter and leaving the scene of an accident that resulted in death violated the prohibition against double jeopardy," and (2) his attorney "misadvised him as to the potential of his defense." The trial court denied his motion, and he appealed. The appellate court affirmed as to his first argument, stating that the defendant "asserts that

> *State v. Cooper*, 634 So.2d 1074 (Fla. 1994), and *State v. Chapman*, 625 So.2d 838 (Fla. 1993), forbid the use of a single death to "enhance the degree" of two crimes" [and] that in this case, the death from the manslaughter was unlawfully used to 'enhance' the leaving the scene of the accident charge. We disagree.
>
> Where a defendant is convicted of DUI manslaughter and a non-homicide traffic offense that does not require proof that the defendant caused a death, *Cooper* and *Chapman* do not apply and double jeopardy is not violated unless the offender's failure to render aid is used to enhance the DUI from a second-degree felony to a first-degree felony. . . . Prestano pleaded no contest to second-degree DUI manslaughter, an unmodified homicide offense, and leaving the scene of an accident that resulted in death, a non-homicide traffic offense. Accordingly, his convictions do not violate double jeopardy.

But based on the defendant's second argument – that his attorney "misadvised him that his defense for Count I was not viable" and that "but for his counsel's ineffectiveness, he would have proceeded to trial on Count I and prevailed" – the appellate court remanded for an evidentiary hearing because the record did not conclusively refute that claim. The court stated:

"In denying ground two, the trial court relied on [the defendant's] general waiver of all defenses during his plea colloquy. A general waiver of defenses, however, does not conclusively show that [he] was not misadvised as to the legal sufficiency of his defense."
http://www.5dca.org/Opinions/Opin2017/021317/5D16-2500.op.pdf

***Ball v. State*, 208 So. 3d 327 (Fla. 5th DCA 2017)**

The defendant pled guilty to vehicular homicide and was sentenced as a habitual felony offender (HFO) and prison release reoffender (PRR) to 22 years in prison, the first 15 of which were mandatory based on his being classified as a PRR. He appealed, arguing that the PRR classification was improper because vehicular homicide was not a specifically enumerated offense under the PRR statute and therefore he could not be so classified unless his offense fell under the catchall provision of the statute for "[a]ny felony that involves the use or threat of physical force or violence against an individual." He argued that "physical force or violence is not a necessary element of vehicular homicide," but the appellate court disagreed and affirmed. It stated: "Physical force or violence is 'necessary as a condition or result' of vehicular homicide . . . because it requires the death of a person caused by a defendant who 'knowingly drove a vehicle under circumstances that would likely cause death or great bodily harm to another.'"
http://www.5dca.org/Opinions/Opin2017/010917/5D16-625.op.pdf

***Clark v. State*, 207 So. 3d 1019 (Fla. 4th DCA 2017)**

The defendant was stopped for speeding, and the officer saw marijuana on the passenger. As the officer was handcuffing the passenger, the driver drove away at high speed, dragging the officer 15 to 20 feet down the road. The driver was charged with attempted second degree murder of a law enforcement officer with a weapon, high speed or wanton fleeing law enforcement, and leaving the scene of an accident resulting in property damage. He was convicted of attempted second degree murder and appealed, arguing that the court erred in failing to grant his motion for judgment of acquittal. The appellate court reversed, stating: "Because the State did not prove that appellant acted out of ill will, hatred, spite, or evil intent, an element of the crime of second degree murder, the court erred in denying the motion for judgment of acquittal on the attempted second degree murder charge. As the evidence was sufficient to convict of the lesser included offense of attempted manslaughter, we reverse for imposition of a conviction and sentence for that offense."
https://edca.4dca.org/DCADocs/2015/4022/154022_DC13_01042017_082454_i.pdf

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

At different times in 2015, the defendant was issued a UTC for leaving the scene of an accident, the state filed an information charging him with leaving the scene of an accident involving property damage, an unsigned citation was filed for leaving the scene, the state filed an information charging the defendant with DUI, and the stated filed a DUI citation (which the defendant did not sign). About two months after the last citation was issued, the defendant filed motions to discharge both citations based on violation of his right to a speedy trial. The trial court denied both motions, finding the defendant's "receipt of the citation for the Leaving the Scene charge was sufficient as a charging document, the charge of DUI arose out of a separate incident, and [the defendant] was not in custody for DUI until December 10, 2015." The

defendant filed a petition for writ of prohibition, arguing that "the trial judge erred in denying the motion to discharge and the court was required to dismiss the charge for Leaving the Scene of an Accident because the citation was filed after the ninety-day speedy trial period expired." The state contended "the citation and notice to appear for Leaving the Scene of an Accident was a valid charging document and [the defendant] was required to comply with the procedures in Florida Rule of Criminal Procedure 3.191(p) by filing a notice of expiration before seeking discharge."

The circuit court, in its appellate capacity, granted the petition for writ of prohibition in part and denied it in part, remanding the case for discharge on the leaving the scene charge and for further proceedings on the DUI charge, stating that the 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. [But] [t]he 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."

III. Civil Traffic Infractions

***Redlich v. State*, 24 Fla. L. Weekly Supp. 788b (Fla. 11th Cir. Ct. 2016)**

The defendant was stopped at a DUI checkpoint, and rather than give the city police officer his driver license, he placed a "Fair DUI" flyer and his license against his window. He was charged with a noncriminal traffic violation for refusal to physically hand his license over to the officer, and the hearing officer dismissed the citation. The city filed a motion for new trial, which the hearing officer granted, and two attorneys hired by the city acted as prosecutors at the county trial, over the defendant's objection. The county court found the defendant in violation of section 322.15(1), Florida Statutes, and he appealed, arguing that "the prosecution of a noncriminal traffic infraction, charged as a violation of a state statute, cannot be conducted by a municipality or its retained private counsel." The circuit court, in its appellate capacity, agreed with the defendant and reversed.

IV. Arrest, Search and Seizure

***Montes-Valeton v. State*, __ So. 3d __, 2017 WL 728097 (Fla. 2017)**

After a single-vehicle traffic accident that resulted in a fatality, the defendant was charged with DUI manslaughter, DUI damage to property or person, and careless driving. He filed a motion to suppress the results of a blood test, which the trial court denied. The supreme court reversed, stating: "[T]he Third District impermissibly relied on the fellow officer rule when there had been no communication concerning the suspect from the officer possessing probable cause to the officer effecting the search." The officer who had arrived at the scene and noticed indicia of impairment later delegated the role of lead crash investigator to another officer, but there was no record that he communicated his concerns of DUI to anyone. The supreme court further stated: "We also reject the Third District's alternative conclusion that voluntary consent supported the blood draw." Although an officer had read the implied consent warnings to the

defendant and had him sign a written consent for the blood draw, the officer had not had probable cause to require the blood draw.
http://www.floridasupremecourt.org/decisions/2017/sc14-1672.pdf

***State v. Beans*, __ So. 3d __, 2017 WL 1202692 (Fla. 5th DCA 2017)**

Police officers investigating a noise complaint at the defendant's apartment smelled burning marijuana. He refused to let the officers in, and a few minutes later the officers saw the defendant walk to his car and drive away. They followed him, confronted him, saw a firearm under his foot, and arrested him. He filed a motion to suppress, which the trial court granted. The appellate court affirmed, stating that "the State conceded a lack of reasonable suspicion to confront [the defendant]. The only legal argument it advanced was that the encounter . . . was consensual." The court found that

> the encounter was not objectively consensual. First, [the defendant] was initially confronted at his home by two uniformed police officers. . . . Second, the words used by the officers were accusatory in nature, rather than general questions, suggesting that Appellee was not free to leave. . . . Third, the officers did not tell [his] that he was free to leave. . . . Finally, and the factor that we deem most significant here, not only did police not tell [the defendant] that he was free to go about his business, they manifested quite the contrary through their conduct. Despite a clear manifestation by [the defendant] that he had no interest in talking to police, they continued to attempt to make contact with him by knocking on his door after he shut it, following him in a marked police car through several turns, and approaching him on foot in the drive-thru.

http://www.5dca.org/Opinions/Opin2017/032717/5D16-647.op.pdf

***State v. Hayward*, __ So. 3d __, 2017 WL 1210087 (Fla. 5th DCA 2017)**

While under surveillance during a "controlled purchase" with a confidential source, the defendant parked and exited his car, and police officers approached him. He tried to flee, and police saw him throw away a bag of cocaine. They searched his car and found cocaine, methamphetamine, a scale, and a bag of plastic bags, and got a warrant to search his home based on the belief that "additional controlled substances, evidence of distribution of controlled substances, and proceeds from the sale/delivery of controlled substances is stored inside [his] residence." After the search of the defendant's home, he was charged with drug crimes and resisting an officer without violence. He filed a motion to suppress, which the trial court granted, "finding that the nexus needed to search [the] apartment was not established." But the appellate court reversed, finding that the detective's affidavit "was sufficient to establish probable cause for the search warrant."
http://www.5dca.org/Opinions/Opin2017/032717/5D16-1717.op.pdf

***State v. Worsham*, __ So. 3d __, 2017 WL 1175880 (Fla. 4th DCA 2017)**

The defendant was involved in an accident in which his passenger died, and his vehicle was impounded. Twelve days later, without a warrant, the police downloaded data from the vehicle's event data recorder ("black box"). The defendant was arrested and charged with DUI

manslaughter and vehicular homicide, and he filed a motion to suppress. The trial court granted the motion and the appellate court affirmed, stating: "A car's black box is analogous to other electronic storage devices for which courts have recognized a reasonable expectation of privacy. Modern technology facilitates the storage of large quantities of information on small, portable devices. The emerging trend is to require a warrant to search these devices. . . . Considering that the data is difficult to access and not all of the recorded information is exposed to the public, [the defendant] had a reasonable expectation of privacy . . . and . . . a warrant was required." https://edca.4dca.org/DCADocs/2015/2733/152733_DC05_03302017_114829_i.pdf

***State v. Fair*, __ So. 3d __, 2017 WL 1018519 (Fla. 4th DCA 2017)**

The defendant was charged with DUI, among other things, and more than 175 days after her arrest the state charged her with possession of PVP. She had waived speedy trial in the misdemeanor DUI action, but moved to be discharged as to the PVP possession charge, arguing that it was filed outside the speedy trial time limits. The state argued "that the defendant waived her right to a speedy trial by requesting, and receiving, multiple continuances in the transferred misdemeanor case," but the trial court discharged her, concluding that "the PVP charge was filed after the speedy trial period had expired." The state appealed, but the appellate court affirmed, stating that "the charge for possession of PVP did not arise from the same conduct or criminal episode as the DUI charge. Therefore, the waiver of speedy trial in the misdemeanor DUI action cannot be attributed to the defendant in the felony possession of PVP action." https://edca.4dca.org/DCADocs/2016/1067/161067_DC05_03152017_090352_i.pdf

***Thomas v. State*, __ So. 3d __, 2017 WL 922375 (Fla. 4th DCA 2017)**

A police officer stopped the defendant for making a turn without signaling. While waiting for backup, the officer saw the defendant throw a pill container, which contained 3.31 grams of crack cocaine. A backup officer found a green pill container with 0.19 grams of crack cocaine, and the defendant was arrested and charged with possession of 3.5 grams of cocaine with intent to sell or deliver and driving without a valid license. A jury convicted him of driving without a valid license but failed to reach a verdict on the charge of possession of cocaine with intent to sell. He was tried a second time, and he filed a motion for a judgment of acquittal, which the trial court denied. He was convicted and sentenced to ten years in prison, and he appealed.

The appellate court reversed, finding that the state had not met its burden to prove the elements of the crime beyond a reasonable doubt. It stated: "Although the quantity or packaging of drugs may indicate an intent to sell, these circumstances do not automatically establish intent to sell. This is particularly so where the quantity of drugs is relatively small. . . . Here, the evidence was equally consistent with the theory that appellant possessed the cocaine for personal use. This is tantamount to reasonable doubt." Nor was there evidence connecting the cash found on the defendant to illegal drug sales, or any "other suspicious circumstances to suggest [his] intent to sell the cocaine he possessed. Before the arresting officer stopped [him] for the traffic violation, he did not observe [him] conducting a sale of cocaine or engaging in any conduct consistent with illegal drug sales. No rational trier of fact could find that the evidence at trial established beyond a reasonable doubt that [he] had an intent to sell the cocaine." https://edca.4dca.org/DCADocs/2015/3424/153424_DC13_03082017_093637_i.pdf

Sanders v. State, 210 So. 3d 246 (Fla. 2d DCA 2017)

With a bag over his shoulder, the defendant left a residence that was under surveillance for drug-related activity. A detective followed the van he and a companion drove away in. Another detective stopped the car because the window tint was too dark and because the van didn't stop at a stop sign, and issued two traffic warnings. The driver consented to a search, the occupants of the van were asked to get out of the van, and the detective found a bag he believed held ingredients for making methamphetamine, and which turned out to contain methamphetamine, and arrested the defendant. At trial the defendant moved for a judgment of acquittal, arguing that the state failed to show he had actual or constructive possession of the bag. The trial court denied the motion, "finding that the State presented a prima facie case of actual possession due to the location of the bag and [the defendant's] unusual behavior." The defendant was convicted and appealed, and the appellate court reversed, stating:

> The State's evidence established only that the contraband was within [the defendant's] ready reach not that it was under his control. The State was unable to establish that [he] was the white man observed carrying a bag into the van. Additionally, there were two open duffle bags between [the defendant's] feet, and there was no evidence establishing that the bag found to contain contraband was the same bag that the man—even had it been [him]—brought into the van.
>
> In short, the only evidence presented by the State to establish possession was [the defendant's] close proximity to the bag containing contraband and his "unusual" behavior. This court has repeatedly held that such evidence is insufficient."

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/February/February%2008,%202017/2D15-2360.pdf

State v. Johnson, 208 So. 3d 843 (Fla. 1st DCA 2017)

Police officers went to the defendant's house to execute an arrest warrant. He arrived as the officers were leaving, and before the defendant exited his car an officer told him why they were there. As the defendant's child was asleep in the car, he asked the officers if they could arrest him outside the child's sight. They agreed, the defendant walked behind his car, and the offices arrested, handcuffed, and searched him. While retrieving cash that the officers had put in the car to prevent it from blowing away, an officer saw a baggie with white power in it and the defendant was charged with possession of cocaine. He moved to suppress the evidence, arguing that "the officer's intrusion into his car to retrieve the cash . . . required a warrant or probable cause." The trial court granted the motion, and the state appealed, arguing that "the officer's intrusion into the car was to protect [the defendant's] property, meaning no warrant or probable cause was required," and that even if there was a Fourth Amendment violation, the exclusionary rule would not apply. The appellate court reversed, stating that "the officer's intrusion into [the defendant's] car was not unreasonable under the Fourth Amendment. It is undisputed that the officer reached into [the] open car door to retrieve [the defendant's] cash for safekeeping, not to search for evidence of a crime." The appellate court also held that the officer's seizure of the cocaine once inside the car was lawful because the baggie was in the plain view of the officer, who had a right to be in the position to see it.

https://edca.1dca.org/DCADocs/2015/5289/155289_DC13_01312017_081246_i.pdf

***Thomas v. State*, __ So. 3d __, 2017 WL 922375 (Fla. 4th DCA 2017)**

An officer stopped the defendant after seeing him turn without signaling, and saw him toss a pill container containing crack cocaine. Another officer found a green container, which also contained cocaine. The defendant was charged with possession of 3.5 grams of cocaine with intent to sell or deliver and driving without a valid license. He was convicted and sentenced to ten years in prison. He appealed, arguing that "the trial court erred in denying his motion for judgment of acquittal because the state's evidence was legally insufficient." The appellate court agreed and reversed and remanded. It stated that the evidence, which was all circumstantial, "was legally insufficient to prove an intent to sell the cocaine, especially in light of the state's expert's opinion testimony that [the defendant's] possession of some of the cocaine pieces could have been either with an intent to sell or for his own personal use."
https://edca.4dca.org/DCADocs/2015/3424/153424_DC13_01042017_081846_i.pdf

***Brunson v. State*, __ So. 3d __, 2017 WL 362578 (Fla. 4th DCA 2017)**

After a shooting, an officer responding to a BOLO saw the defendant exit a car, stopped him, and found a loaded gun in the car. The defendant was arrested for carrying a concealed firearm. He appealed, arguing that the trial court should have granted his motion for a judgment of acquittal because the state did not prove the firearm was "on or about his person" or "readily accessible" at the time of the encounter. The appellate court agreed and reversed, noting that "the defendant already was out of his vehicle when approached by law enforcement."
https://edca.4dca.org/DCADocs/2015/2704/152704_DC13_01252017_091327_i.pdf

***Wagner v. State*, 208 So. 3d 1229 (Fla. 3d DCA 2017)**

The defendant was stopped by undercover police officers who saw him speed out of a parking lot and fail to stop at two intersections. He was arrested and charged with drug offenses. At trial his attorney discovered that the stopping officer had drafted an offense incident report, but because the state had told the defendant's attorney it did not have an OIR he objected to the state's failure to supply it. The trial judge asked the defendant's attorney what prejudice the defendant would suffer by proceeding without the OIR, and he stated that "upon being told by the State that no OIR existed part of the defense was to show the lack of investigation by the police." The court ordered the trial to continue without the OIR, and the defendant was convicted of possession of MDMA, cocaine, and marijuana and sentenced to five years in state prison. He appealed, and the appellate court reversed, stating that

> the trial court erred by failing to conduct a proper hearing pursuant to *Richardson v. State*, 246 So.2d 771 (Fla. 1971). Upon being notified of an alleged discovery violation, the court must conduct a *Richardson* hearing to inquire about the circumstances surrounding the state's violation of the discovery rules and examine the possible prejudice to the defendant. . . . [T]he trial court made no inquiry to determine whether the discovery violation was willful or inadvertent, trivial or significant, and failed to determine whether the discovery violation procedurally prejudiced the defense. . . . Further, the trial court improperly shifted

> the burden to the defense to explain how it had been prejudiced by the alleged discovery violation. . . .
>
> We cannot say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation.

http://www.3dca.flcourts.org/Opinions/3D16-0298.pdf

V. Torts/Accident Cases

Rhoades v. Rodriguez, __ So. 3d __, 2017 WL 1040892 (Fla. 5th DCA 2017)

Rhoades rear-ended Rodriguez, and Rodriguez sued him. The trial court issued an order limiting the testimony of one of the Rhoades's expert witnesses, and Rhoades sought review, arguing that, because of "an increase by the trial courts, post-*Daubert*, to strike expert witnesses prior to trial, this court should recede from our nearly unanimous en banc decision in *Bill Kasper Construction Co. v. Morrison*, 93 So.3d 1061, 1062 (Fla. 5th DCA 2012), where we held that certiorari review of a trial court's pretrial order striking a defendant's expert witnesses was unwarranted due to the availability of postjudgment appellate relief [and] that immediate interlocutory review of such pretrial orders is now necessary." But the appellate court denied review, declining "to recede from *Bill Kasper*. Moreover, subsequent to Rhoades filing his petition, the Florida Supreme Court has declined to adopt the '*Daubert* amendment' to section 90.702, to the extent that it is procedural. . . . As the supreme court's opinion could very well result in the trial court reconsidering or vacating the instant interlocutory order prior to trial, the issues we are being asked to consider may become moot."
http://www.5dca.org/Opinions/Opin2017/031317/5D16-4285.op.pdf

Duarte v. Snap-On, Inc., __ So. 3d __, 2017 WL 1014441 (Fla. 2d DCA 2017)

Duarte was injured when a truck owned by Snap-On and driven by Mullins rear-ended him. He sued Snap-On and Mullins, and two months later was rear-ended in another accident. The court dismissed his lawsuit as a sanction for fraud upon the court related to his answers to interrogatories and deposition transcripts. The appellate court reversed, stating: "The documentary record before the trial court was not sufficient to justify a decision that dismissal, rather than impeachment at trial or a traditional discovery sanction, was the appropriate remedy for Mr. Duarte's conduct."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/March/March%2015,%202017/2D15-1952.pdf

Haney v. Sloan, __ So. 3d __, 2017 WL 836611 (Fla. 1st DCA 2017)

After a car accident, Sloan won a $1.6 million verdict against Haney. The appellate court reversed "[b]ecause the trial court improperly directed a verdict on the amount of past medical expenses when conflicting record evidence existed at trial."
https://edca.1dca.org/DCADocs/2015/3905/153905_DC13_03032017_083811_i.pdf

Zurich American Insurance Co. v. Cernogorsky, __ So. 3d __, 2017 WL 697725 (Fla. 3d DCA 2017)

While walking in front of The Green Companies' office on the way into the building, Cernogorsky was hit by an automobile driven by an underinsured motorist. He received the motorist's policy limits and rejected his own UM policy limits. He sought $1 million in UM benefits under The Green Companies' policy with Zurich, alleging that "he was injured as a pedestrian while in the course and scope of his employment with The Green Companies." A jury found in favor of Cernogorsky, and Zurich appealed. The appellate court reversed, holding that Cernogorsky was not a named insured under the Zurich policy. Further, the court rejected "Cernogorsky's argument that even though the Zurich policy included no UM coverage provisions, that coverage nonetheless was available to him because The Green Companies had not executed a written waiver of UM coverage. The coverage provided by the Zurich policy was excess coverage not governed by section 627.727(1) which mandates a written UM waiver." The court held further that even there had been deemed to have been UM coverage, Cernogorsky could not recover as a class I insured, as he "was neither a named insured under the Zurich policy nor a resident family member of an insured," nor as a class II insured, as he was not "lawfully occupying or driving a covered automobile."
http://www.3dca.flcourts.org/Opinions/3D16-0689.pdf

Depriest v. Greeson, __ So. 3d __, 2017 WL 672155 (Fla. 1st DCA 2017)

In the time period between the death of Schnitzspahn (the vehicle owner) and the appointment of a personal representative, Schnitzspahn's daughter drove his car and was in an accident with the Depriests. The Depriests sued Schnitzspahn, and after becoming aware that he had died, they sued his estate, alleging it was vicariously liable for damages caused by the daughter's use of the car "because the estate had legal title to the car [and] the personal representative had prior knowledge of the daughter's use of the car and implied control over the car, and had impliedly consented to the daughter's use of the car by failing to take any affirmative action to prevent her from using it." The trial court granted summary judgment to the estate, holding that it "was not the title holder or otherwise the owner when the accident occurred." The plaintiffs appealed, but the appellate court affirmed, stating:

> The undisputed facts of this case fail to establish the element of consent necessary to maintaining a cause of action under Florida's dangerous instrumentality doctrine. . . .
>
> Rather than use the . . . factors to establish implied consent, [the Depriests] rely on [the personal representative's] failure to act despite having authority to act—with his knowledge of authority to act demonstrated by his taking the car title to a probate lawyer. We reject this argument as a matter of law. To say that implied consent arises from a nominated personal representative's failure to act when authority to act exists is to create a duty to act prior to appointment, directly contrary to the Probate Code's distinction between authority and duty. . . . [The Depriests'] argument could subject nominated personal representatives to liability from which the Legislature intended to shield them in the period after a death and

before issuance of letters of administration formally appointing them as personal representatives.

https://edca.1dca.org/DCADocs/2016/0807/160807_DC05_02212017_084311_i.pdf

***Diecidue v. Lewis*, __ So. 3d __, 2017 WL 535447 (Fla. 2d DCA 2017)**

Lewis lost control of a vehicle, and the vehicle entered a ballpark. A little league coach reached into the car and managed to stop it, injuring his back in the process. He sued Lewis and Nowak (the vehicle owner), and filed a UM claim against his own insurer, Allstate. Allstate made a proposal of settlement for $50,000, which Diecidue rejected. The trial jury awarded Diecidue $18,500, which was reduced to $3,700 after reduction for his proportion of comparative negligence and his PIP and MedPay recoveries. Diecidue and Allstate both filed motions for taxation of costs, and Allstate's motion included a request for attorney's fees based on the proposal for settlement. The trial court awarded Diecidue $64,401.34 in costs (plus $89.56 in insurance premiums and statutory interest) and Allstate $103,744.31 in attorney's fees and costs, resulting in a net award of $35,553.41. Diecidue appealed, arguing that "Allstate's proposal for settlement was inconsistent with the release form attached to the proposal, which created ambiguities. Specifically, Diecidue pointed out that the release required Diecidue to falsely represent that he had no unmarried dependents able to bring a claim for loss of consortium." The appellate court reversed and remanded, agreeing with Diecidue that the trial court erred in awarding Allstate attorney's fees based on the proposal for settlement.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/February/February%2010,%202017/2D15-1852.pdf

***Progressive Express Insurance Co. v. Anzualda Brothers, Inc.*, 208 So. 3d 1289 (Fla. 1st DCA 2017)**

In an action after a fatal automobile accident, the trial court entered a declaratory judgment that insurance coverage existed in favor of Anzualda Brothers, Inc., "by operation of estoppel." The insurer appealed, arguing that the vehicle the Anzualda Brothers driver had been driving "was not a listed vehicle on the insurance policy" and that Anzualda Brothers "failed to prove all three elements of its coverage by estoppel claim." Anzualda Brothers cross-appealed, alleging that the trial court erred in refusing to enforce a settlement agreement and consent judgment that had been agreed to by the insurer and "entered in the separate, underlying tort case between [Anzualda Brothers] and the victims." The trial court appellate court reversed, noting that in an insurance coverage by estoppel claim, the party claiming coverage must prove that "(1) the defendant company made a representation of material fact; (2) the plaintiff reasonably relied on that representation of material fact; and (3) the plaintiff was prejudiced by its reliance." It held that Anzualda Brothers had failed to prove prejudice. Because it remanded for the trial court to enter final judgment in the insurer's favor, it found Anzualda Brothers' cross-appeal moot.
https://edca.1dca.org/DCADocs/2015/4700/154700_DC13_02102017_082251_i.pdf

***Ducksbury v. Progressive Express Insurance Co.*, __ So. 3d __, 2017 WL 192028 (Fla. 4th DCA 2017)**

The insured was using his vehicle to haul a trailer carrying his friend's motorcycle. The trailer flipped, damaging the motorcycle. His insurer refused to indemnify and defend him in a subrogation action because coverage was excluded for damage caused to property "being transported by" the insured. The trial court granted a summary judgment in favor of the insurer, and the defendant appealed, arguing that the term "'being transported by' indicates that possessory control of the property is required before the exclusion can apply [and] that, because the friend never relinquished control of the motorcycle, the friend was the one transporting it, and thus the exclusion does not apply." The appellate court affirmed, holding that the plain meaning of the term "encompasses the friend's motorcycle as being carried or conveyed [by the defendant] while it was inside a trailer being pulled by a vehicle that [he] was driving. No further interpretation of the very simple, unambiguous language is required."
https://edca.4dca.org/DCADocs/2015/4520/154520_DC05_01182017_085252_i.pdf

In re Estate of Arroyo v. Infinity Indemnity Insurance Co., __ So. 3d __, 2017 WL 192019 (Fla. 3d DCA 2017)

Arroyo was killed in a car accident, and Reyes was severely injured. Arroyo's parents were appointed as his personal representatives. Reyes sued the estate but never filed a written claim in the probate court. Arroyo's insurer, Infinity, declined to defend the claim, and the estate settled with Reyes by a *Coblentz* agreement, "in which Reyes and the Estate agreed to the entry of a consent judgment, Reyes agreed not to execute the judgment against the Estate, and the Estate assigned any rights it had against Infinity to Reyes." After getting the consent judgment, Reyes sued Infinity under the agreement's assignment of rights provision, "alleging in part that Infinity had demonstrated bad faith by failing to defend the Estate in the negligence lawsuit." Infinity moved for entry of summary judgment in the bad-faith lawsuit, "arguing that, because Reyes failed to file a statement of claim in the probate court regarding the negligence lawsuit, she could no longer do so because the negligence lawsuit was barred by the statute of limitations . . . and the statute of repose . . . set forth in the probate code," and that therefore the estate was immune from Reyes's negligence lawsuit when the personal representatives settled, the *Coblentz* agreement and consent judgment were unenforceable against the estate, and the estate was not exposed to an excess judgment because the *Coblentz* agreement and the consent judgment were not enforceable against it, which was required for Reyes to succeed in its bad-faith claim against Infinity.

Infinity also attacked the bad-faith claim in probate court by filing a motion for leave to intervene in the estate proceedings to determine whether the personal representatives had the authority to settle the negligence lawsuit. The probate court granted the motion to intervene and "concluded that the personal representatives did not have the authority to enter into the *Coblentz* agreement in the negligence lawsuit because at the time the personal representatives entered into the *Coblentz* agreement, the Estate enjoyed absolute immunity from Reyes's claim, and thus, the consent judgment was unenforceable against the Estate." Reyes appealed that order and the order granting Infinity's motion to intervene. The appellate court reversed the probate court's order permitting Infinity to intervene in the estate's probate proceedings because

> Infinity's interest was not at issue before the probate court prior to the filing of the motion to intervene. Because the probate court erred by permitting Infinity to intervene, we also reverse the probate court's subsequent order on Infinity's

> motion to determine. We also reverse the probate court's order on Infinity's motion to determine because it was based on defenses that Infinity was prohibited from raising as a matter of law. Lastly, we reverse the circuit court's order granting Infinity's motion for summary judgment and the subsequently entered final judgment in the bad-faith lawsuit because they were also premised on defenses that Infinity could have raised but failed to raise in the underlying litigation that led to the *Coblentz* agreement."

http://www.3dca.flcourts.org/Opinions/3D15-0194.pdf

American Home Assurance Co. v. D'Agostino, __ So. 3d __, 2017 WL 34565 (Fla. 4th DCA 2017)

The insured was injured in an accident with an uninsured motorist. He sued his UM insurer, AHAC, which made a proposal for settlement, but he rejected the proposal. The insurer prevailed at trial after a jury verdict of no liability, and it filed a motion for attorney's fees and costs. The trial court denied the motion, finding the proposal failed to strictly follow the requirements of Florida Rule of Civil Procedure 1.442(c)(2)(F), and the insurer appealed, arguing that "the trial court erred in invalidating the proposal for settlement because: (1) the proposal's use of the word 'claims' instead of the word 'damages' did not render the proposal ambiguous; and (2) it was unnecessary for the proposal to state 'whether attorney's fees are part of the legal claim' when the plaintiff's complaint did not request attorney's fees." The appellate court agreed and reversed and remanded.
https://edca.4dca.org/DCADocs/2015/2148/152148_DC13_01042017_080756_i.pdf

GEICO General Insurance Co. v. Dixon, 209 So. 3d 77 (Fla. 3d DCA 2017)

The plaintiff, GEICO's insured, was in an accident with an uninsured motorist. Before trial, GEICO and the co-defendant uninsured motorist admitted liability, and the court ordered that the plaintiff was entitled to recover punitive damages against the uninsured motorist in an amount to be determined in the second phase of the proceeding. The jury awarded compensatory damages against GEICO and the uninsured driver and awarded punitive damages against the uninsured driver. GEICO filed a motion for new trial on compensatory damages, which the trial court denied. GEICO appealed, and the court reversed, stating: "GEICO's principal assignment of error is the admission of evidence showing that the uninsured motorist driver was intoxicated beyond the legal limit at the time of the crash in the compensatory phase of the trial. We agree and reverse and remand the case for a new trial on compensatory damages. We find the evidence of the uninsured motorist driver's alcohol use was irrelevant to the issue of the amount of compensatory damages, which was the subject of the first phase of the proceedings, and that any arguable probative value the evidence might have had—say, to the credibility of the testimony of the uninsured defendant driver—was substantially outweighed by the danger of unfair prejudice." The court also discussed "two issues raised by GEICO concerning the sufficiency of the evidence to support the future economic damage award to the plaintiff because they are likely to recur in the new trial."
http://www.3dca.flcourts.org/Opinions/3D13-3005.pdf

Geico General Insurance Co. v. Harvey, 208 So. 3d 810 (Fla. 4th DCA 2017)

The insured's vehicle was registered in both his name and his business's name. After he was involved in a car accident in which another person was killed, his insurer advised him of his right to hire counsel to defend him for "uninsured excess exposure," and it tendered the policy limits to the deceased's estate. The estate ultimately rejected the check and was awarded $8.47 million. The insured filed a bad faith claim against his insurer for failure to settle, and the insurer filed a motion for directed verdict, which the trial court denied. The insurer appealed, and the appellate court reversed, finding that

> the evidence was insufficient as a matter of law to show the insurer acted in bad faith in failing to settle the claim of the decedent's estate against the insured. The evidence, taken in a light most favorable to the insured as the nonmoving party, showed that the insurer unconditionally tendered the estate the policy limits nine days after the accident, the insurer notified the insured that the estate wanted a statement seventeen days after the request, and the insured subsequently failed to provide a statement to the estate despite having the opportunity to do so before suit was filed. Moreover, even if the insurer's conduct were deficient, the insurer's actions did not cause the excess judgment rendered against the insured.

https://edca.4dca.org/DCADocs/2015/4724/154724_DC13_01042017_083817_i.pdf

VI. Drivers' Licenses

***Kelly v. DHSMV*, 24 Fla. L. Weekly Supp. 793a (Fla. 15th Cir. Ct. 2017)**

The defendant's license was suspended for one year for refusal to submit to a breath test. He sought recusal of the hearing officer, and after the hearing officer denied his motion, he orally amended it, asserting that the hearing officer challenged the motion rather than simply address its legal sufficiency. The hearing officer denied the amended motion, and the defendant sought review. The circuit court, in its appellate capacity, agreed with the defendant and granted review, and remanded for a new hearing before a different hearing officer.

***Jamison v. DHSMV*, 24 Fla. L. Weekly Supp. 792a (Fla. 13th Cir. Ct. 2017)**

The defendant was arrested for DUI and his license was suspended for refusal to submit to a breath test, and he sought review. The circuit court, in its appellate capacity, granted review and directed the court clerk to close the case file, stating: "Having determined that the record provides no factual support for the arresting officer's conclusion that [the defendant] violated another driver's right-of-way, the Court finds no justification for the traffic stop."

The court also stated that while DHSMV "alleges a 'semantic difference' between the law enforcement officer's characterization of another driver's reaction to [the defendant's] action (caused her to brake) and hearing officer's characterization of the same action in his written order (*forced* her to brake). Since the Department raises the matter, this court will make clear its impression that the hearing officer's more emphatic restatement in the absence of any supporting evidence suggests a potential and impermissible departure from neutrality." The court stated further: "Compounding the hearing officer's overstatement of [the defendant's] conduct, paragraph 5 of the Department's motion makes the astonishing statement that the other driver

applied her brakes 'to avoid a crash with Petitioner,' adding that 'nothing in the record refutes that fact.' In fact, nothing in the record *supports* that statement. Such mischaracterizations of the facts are unacceptable."

***Rodriguez v. DHSMV*, 24 Fla. L. Weekly Supp. 790a (Fla. 11th Cir. Ct. 2017)**

After DHSMV became aware that the defendant had two licenses – a Class E and a Class A, the former omitting his middle name, his license was suspended for a year for obtaining a license by fraud, and he sought review. The circuit court, in its appellate capacity, granted review, stating that the only evidence submitted to prove the department's case was "hopelessly void of any proof that [he] knowingly obtained a license by fraud. In fact, the evidence, that the Defendant used his legal name and legal documents, and was able to obtain a license, equally supports the conclusion that he mistakenly believed he could obtain one."

***Elso v. DHSMV*, 24 Fla. L. Weekly Supp. 788a (Fla. 11th Cir. Ct. 2017)**

The defendant was arrested for DUI and his license was suspended for refusal to submit to a breath test. He filed a motion to disqualify the hearing officer, which was denied, and he sought review. The circuit court, in its appellate capacity, granted review and remanded with instructions for the hearing officer to recuse herself. It stated that while many of the defendant's grounds for recusal were based on earlier substantive rulings against him, which did not require recusal, the defendant had also alleged that the hearing officer had called him "very rude" during a phone conference and hung up on him, and that he therefore had "a well-founded fear that he could not receive a fair and impartial hearing." The court agreed, stating: "While a trial judge's expression of dissatisfaction with counsel or a client's behavior alone does not give rise to a reasonable belief that the trial judge is biased and the client cannot receive a fair trial . . . , here the Hearing Officer acknowledged that she said this, and thus should have recused herself."

***Murphy v. DHSMV*, 24 Fla. L. Weekly Supp. 782a (Fla. 6th Cir. Ct. 2016)**

After an accident, the defendant was arrested for DUI and his license was suspended for refusal to submit to a breath test. He sought review, arguing that (1) there was "a hopeless conflict in the paperwork making up the record" as to whether he "refused a blood test pursuant to a lawful arrest, or whether he refused a blood test prior to his arrest because it was impractical or impossible to administer a breath test; and (2) "he only had an obligation to consent to a blood test if it was impossible or impractical to administer a breath or urine test, and the record lacks competent, substantial evidence that it was impossible or impractical" to do so. The circuit court, in its appellate capacity, disagreed and denied review, noting that the trooper's reports noted "exigent circumstances of time delay from crash and unsure if [the defendant] was going to be admitted into the hospital."

***Myer v. DHSMV*, 24 Fla. L. Weekly Supp. 664b (Fla. 13th Cir. Ct. 2016)**

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 hearing officer should not have considered the Criminal Report Affidavit (CRA) because it "may have been submitted by someone other than the individual arresting law enforcement officer" contrary to section 322.26151, Florida Statutes. But the circuit court, in its appellate capacity, denied review, stating that "[i]t is not unreasonable

for a law enforcement officer's agency to assist the officer with these administrative tasks." The defendant also argued that "even if the CRA is admitted, its contents constitute hearsay on hearsay, which should have been excluded." But the court stated: "This argument is without merit and has been addressed many times in this court."

The defendant further argued that it was "improper for the officers to consider information from an eyewitness who is not a law enforcement officer to make a determination of probable cause." But the court stated: "A founded suspicion sufficient to warrant further investigation may be provided by an ordinary citizen, and the fact that this citizen identified himself to law enforcement increases the reliability of the information he provided." A restaurant manager witnessed the defendant's drunken disturbance and DUI and "reported his observations directly to the responding law enforcement officers, who then conducted further investigation."

The defendant's final argument was that "the hearing officer erred when he failed to grant [his] motion to exclude results of the Horizontal Gaze Nystagmus test (HGN)." The court agreed and held that the HGN evidence should have been excluded and the error was not harmless, and expressed dismay that "this particular error continues to be made at all."

***Coleman v. DHSMV*, 24 Fla. L. Weekly Supp. 660a (Fla. 7th Cir. Ct. 2016**)

The defendant's license was suspended for one year for refusal to submit to a breath test. He sought review, arguing that there was no competent evidence that he was (1) driving or in actual control of the vehicle when he was arrested for DUI, or (2) properly advised of implied consent after he refused to submit a second breath sample. The circuit court, in its appellate capacity, denied review, stating that the crash report contained sufficient information to support a finding of probable cause to arrest the defendant for DUI, from which the Hearing Officer could infer that [the officer] had probable cause to arrest the Petitioner for DUI." It stated further that, having read the defendant the implied consent warning several times before he provided the first breath test sample, the officer was not required to read it again after the defendant refused to provide a second sample.

***Byington v. DHSMV*, 24 Fla. L. Weekly Supp. 656a (Fla. 4th Cir. Ct. 2016**)

After an anonymous tip about a suspicious vehicle, an officer approached the defendant – who was illegally parked in a travel lane with the engine running and lights on and was unconscious and unresponsive – and the defendant was arrested for DUI and his license was suspended for refusal to submit to a breath test. He sought review, arguing that (1) the documentary evidence contained "time discrepancies so hopelessly conflicted that a determination of whether proper legal procedures were followed is prevented"; (2) the initial stop, detention, and arrest were unlawful because he was legally parked; and (3) his refusal was tainted because the deputy misinformed him about getting medical assistance and obtaining a driving permit, and refused to accept his recantation of his refusal.

The circuit court, in its appellate capacity, denied review, stating that as to the defendant's argument (1), the time discrepancies were immaterial and there is no real discrepancy about the order of events. As to argument (2), "the only record evidence that [the defendant] was legally parked was his testimony at the DHSMV hearing, which the Hearing

Officer rejected as unpersuasive," and even if he had been parked legally, the anonymous tip "was sufficient to establish a basis upon which [the deputy] could legally act to conduct an initial stop." As to argument (3), the court stated that "these arguments are without merit as they would require this Court to improperly reweigh the evidence presented at the DHSMV hearing."

***Brazill v. DHSMV*, 24 Fla. L. Weekly Supp. 655a (Fla. 6th Cir. Ct. 2016)**

After an accident, the defendant was arrested for DUI and her license was suspended for refusal to submit to a breath test. She sought review, arguing that (1) there was not competent substantial evidence to support the hearing officer's determination that the law enforcement officer had probable cause to believe she was driving or in actual physical control of the vehicle while under the influence, and (2) the hearing officer considered her "statements made during the civil traffic investigation in violation of the accident report privilege and [her] right against self-incrimination." But the circuit court, in its appellate capacity, denied review, stating that "the consideration of the crash report by the hearing officer . . . is not unconstitutional because any allegedly incriminating statements are not being used in a criminal proceeding."

***Beller v. DHSMV*, 24 Fla. L. Weekly Supp. 653a (Fla. 4th Cir. Ct. 2016)**

The defendant's license was suspended for refusal to submit to a breath or urine test. He sought review, arguing that there was no probable cause to support his arrest and the request for a urine test. The circuit court, in its appellate capacity, granted review and quashed the suspension, stating: "Because Zoloft is not a controlled substance or chemical substance under Florida law, there was insufficient probable cause to request a urine test under *Section 316.1932, Florida Statutes*," and because the urine test was requested in combination with a breath test, the defendant's refusal was not in violation of the law.

***De Arment v. DHSMV*, 24 Fla. L. Weekly Supp. 652a (Fla. 4th Cir. Ct. 2016)**

The defendant's license was suspended for DUI. He sought review, arguing that his arrest was illegal and "the breath test was not administered by a legally authorized and qualified officer." The circuit court, in its appellate capacity, granted review and quashed the suspension, finding that the arrest was not lawful (which rendered moot the issue of the breath test operator). The stopping officer was a federal employee, who was not a "law enforcement officer" under Florida statutes and therefore could not pass his observations on to the arresting officer, who had not observed the defendant in actual physical control of the vehicle, to establish probable cause for arrest. Further, the arresting officer had not requested aid from the stopping (federal) officer, nor was there evidence of a signed affidavit from the stopping officer that would justify a warrantless arrest.

***Culpepper v. DHSMV*, 24 Fla. L. Weekly Supp. 648a (Fla. 2d Cir. Ct. 2016)**

A police officer stopped the defendant for having an unreadable tag, and after noticing indicia of impairment arrested him for DUI. The defendant refused a breath test, and his license was suspended. He sought review, arguing that video evidence showed that his license plate was readable. The circuit court, in its appellate capacity, denied review, noting that "[t]he probable cause affidavit states that the . . . license plate was 'badly bent and damaged, making it nearly unreadable,' and that there was a 'trail ball attached to the bumper which further obstructed the

tag and registration sticker.' This evidence supports the hearing officer's factual finding." The court noted that this was not a case where the DHSMV's only evidence "contained internal contradictions. In the present case, we have two arguably conflicting pieces of evidence, either or both of which may be competent and substantial when considered in isolation. The court cannot reweight the evidence and assign greater weight to the video evidence."

***Maloney v. DHSMV*, 24 Fla. L. Weekly Supp. 647a (Fla. 1st Cir. Ct. 2016)**

After being stopped for driving 20 mph over the speed limit and refusing field sobriety exercises, the defendant was arrested for DUI and his license was suspended. He sought review, arguing that the hearing officer erred in finding there was probable cause to arrest him for DUI. The circuit court, in its appellate capacity, denied review, finding that the defendant's speeding, indicia of impairment, and refusal to submit to pre-arrest field sobriety exercises constituted sufficient evidence to sustain the suspension.

***Stroud v. DHSMV*, 24 Fla. L. Weekly Supp. 591a (Fla. 6th Cir. Ct. 2016)**

After an accident, the defendant's license was suspended for DUI. She sought review, arguing that "(1) there was not substantial, competent evidence to establish that she was driving or in actual physical control of a motor vehicle; (2) the hearing officer departed from the essential requirements of law by considering [her] privileged statements in the traffic accident report, . . . ; and (3) the [HGN] test should not be considered because it was not shown that a properly qualified officer administered it." The circuit court, in its appellate capacity, denied review, noting that the facts supported a determination that the defendant "was in actual physical control of a motor vehicle while under the influence": the trooper identified her from her driver license, noted that the car was registered to her, and noted that there was no one else in the car, and he observed that the defendant had trouble keeping her balance, smelled of alcohol, had bloodshot, watery eyes, had empty alcohol bottles in her car, and performed poorly on field sobriety exercises.

As to the accident report privilege argument, the court stated: "Even if the accident report privilege applied, [the defendant's] Fifth Amendment right would not have been violated because she waived her *Miranda* rights" by "giving independent evidence that she was driving the vehicle."

With regard to the administration of the HGN test, the court held that while there was no evidence that the trooper was properly qualified to administer it, and therefore it should have been excluded, evidence of other field sobriety tests was properly considered and "constituted competent, substantial evidence to support the Hearing Officer's decision."

***Powers v. DHSMV*, 24 Fla. L. Weekly Supp. 587a (Fla. 1st Cir. Ct. 2016)**

The defendant's license was revoked for one year for a fleeing or attempting to elude a law enforcement officer conviction. The circuit court, in its appellate capacity, denied review, holding that although DHSMV cited the wrong statute, it was nevertheless required to revoke the defendant's license for at least one year once it got notice of a driver's "conviction of any felony in the commission of which a motor vehicle is used."

VII. Red-light Camera Cases

***City of Boynton Beach v. Boss*, 24 Fla. L. Weekly Supp. 668a (Fla. 15th Cir. Ct. 2016)**

The defendants' red-light violation citations were dismissed based on *City of Hollywood v. Arem*, 154 So. 3d 359 (Fla. 4th DCA 2014) (arrangement with third-party vendor was impermissible delegation of municipal authority because vendor was issuing UTCs, which should have been done by law enforcement), and the city appealed. The circuit court, in its appellate capacity, reversed, stating that, as in *State ex rel. City of Aventura v. Jimenez*, __ So. 3d __, 2016 WL 4016645 (Fla. 3d DCA 2016), the city's contract with ATS (the vendor) "specifically establishes that ATS does not and cannot make any decisions regarding whether a violation occurred. ATS's discretion is similarly limited by the BRQ [Business Rules Questionnaire], which sets forth easily observable standards that dictate whether ATS should forward or otherwise discard images of potential infractions. Most critically, unlike in *Arem*, . . . here ATS does not itself issue the UTC."

VIII. County Court Orders

***State v. Farmer*, 24 Fla. L. Weekly Supp. 892a (Brevard Cty. Ct. 2016)**

The defendant had received three citations for driving while license suspended. The first was a civil DWLS without knowledge, which was resolved by the defendant entering into a payment plan with the clerk's office and being adjudicated guilty and convicted of the infraction. His second DWLS citation was also a civil infraction. The third DWLS citation was a criminal DWLS with knowledge citation. Because he had three DWLS convictions within a five-year period, he was designated a habitual traffic offender and his license was revoked for five years. He filed a motion to convert adjudication of guilt in the first DWLS to a withhold of adjudication to avoid an HTO designation. The court granted his motion, finding that his failure to act was excusable neglect and enlarged the time for him to file the motion. Finding the motion timely, the court then granted it, stating: "The Defendant seeks to change the adjudication of guilt to a withhold of adjudication on the *first* civil DWLS citation he received. . . . Based on his testimony at the motion hearing and his driving record history, the Court finds that a withhold of adjudication would have been an appropriate and likely outcome if the Defendant would have elected to appear before a county court judge in this matter."

***State v. Okun*, 24 Fla. L. Weekly Supp. 879a (Broward Cty. Ct. 2016)**

The defendant was charged with DUI. His expert's proposed testimony was that the defendant's blood alcohol content was .062 ± .005. The state filed a motion to strike, or in the alternative in limine, regarding the defendant's testimony, arguing that, because the defendant was charged only with DUI with normal faculties impaired, the expert's testimony was not relevant, and "because there was no chemical blood or breath test in this case, the expert's testimony would not give rise to the statutory presumptions in the case." The court granted the state's motion, finding that "having an expert testify to a defendant's BAC being at .062, when there was no chemical blood or breath test administered, which would not give rise to a presumption of impairment or non-impairment, would be more prejudicial than probative. Had

the expert been able to testify that the Defendant's BAC . . . was below .05, such that it would trigger the statutory presumptions of non-impairment, then such testimony would be admissible."

***State v. Jamison*, 24 Fla. L. Weekly Supp. 873a (Hillsborough Cty. Ct. 2016)**

An officer saw the defendant turn left in the path of the vehicle that was ahead of the officer, and the officer stopped the defendant and issued a citation for violating the right of way. The defendant filed a motion to suppress, which the court granted, stating: "Other than simply applying the brakes, [the] officer . . . did not testify to any facts that the vehicle in front of him took any action indicating the necessity to avoid an immediate hazard."

***State v. Fortin*, 24 Fla. L. Weekly Supp. 832a (Flagler Cty. Ct. 2016)**

After being dispatched to check on a possible reckless driver, a deputy saw the defendant enter another driver's lane, causing that driver to swerve out of the lane. The deputy followed the defendant for about three miles, seeing him pull over onto the fog line and following another vehicle too closely, neither of which affected any other vehicles. He stopped the defendant and gave him a citation for failure to maintain a single lane, and the defendant was arrested for DUI. The defendant filed a motion to suppress, which the court granted, noting that because the citation for failure to maintain a single lane requires that another vehicle be affected, "it either happened as testified to in court, prior to the AXON camera being turned on, but contrary to both the report and AXON video, or it happened as set forth in the report, which is not reflected on the AXON video recording."

***State v. Nancarrow*, 24 Fla. L. Weekly Supp. 829a (Volusia Cty. Ct. 2016)**

A deputy saw the defendant pull over onto the shoulder of the road, but he did not see any other abnormal driving pattern, and no other vehicles were affected. The deputy pulled up to the defendant's car and spoke with him, and although the only sign of impairment at that point was the defendant's bloodshot eyes, the deputy parked behind him, approached him again, and eventually called for a DUI investigation backup. The defendant was arrested for DUI and filed a motion to suppress. The court granted the motion, "finding that the second contact between [the deputy] and the Defendant was an investigatory stop and not an encounter." The court found the deputy's second approach was "not a true welfare check. . . . It would be a slippery slope to give an officer carte blanche to use a well-being concern to get around the need for a reasonable suspicion to justify an investigatory stop."

***State v. Polanski*, 24 Fla. L. Weekly Supp. 769a (Collier Cty. Ct. 2009)**

The defendant was arrested for DUI and filed a motion to suppress, which the court denied as to statements made before the arrest but granted as to the field sobriety exercises and refusal to submit to a breath test. It stated that while the deputy "may have had a reasonable suspicion to request the performance of the field sobriety exercises, he did not have probable cause to compel their performance."

***State v. Powell*, 24 Fla. L. Weekly Supp. 633a (Flagler Cty. Ct. 2016)**

After leaving a one-car crash, the defendant was arrested for DUI and filed a motion to suppress statements he made. The court granted the motion, based on the accident report privilege and failure of law enforcement to read him his *Miranda* warnings.

***State v. Cole*, 24 Fla. L. Weekly Supp. 632b (Volusia Cty. Ct. 2016)**

The defendant was arrested for driving while license suspended (habitual) and filed a motion to suppress, arguing that the deputy did not have a legal basis to conduct the traffic stop for failure to maintain a single lane. The court granted the motion, stating that "the Defendant stopped at the stop sign, drove approximately 30 feet on the wrong side of the road and corrected back to the correct lane. No other vehicle traffic was affected. No other erratic or unusual driving was observed. . . . [T]he State opined that because the Defendant drove over a double yellow line, the court should consider this as a violation of a traffic control device under F.S. 316.074. This court rejects that argument. Florida Statute 316.089(1) is more specific to the facts at hand."