FLORIDA TRAFFIC-RELATED APPELLATE OPINION SUMMARIES

April – June 2016

[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.]

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I. Driving Under the Influence (DUI)

***Birchfield v. North Dakota*, __ S.Ct. __, 2016 WL 3434398 (2016)**

Three cases from Minnesota and North Dakota, challenging implied consent laws, were consolidated. The United States Supreme Court held that law enforcement officers need a search warrant before requiring drivers to take blood alcohol tests incident to DUI arrests, but not for breath tests, which are less physically intrusive. Drivers' licenses may be revoked for refusing drunk driving tests, but state laws that impose additional criminal penalties for refusal will be affected by the holding.
http://www.supremecourt.gov/opinions/15pdf/14-1468_8n59.pdf

***Goodman v. Fla. Dept. of Law Enforcement*, __ So. 3d __, 2016 WL 3002178 (Fla. 4th DCA 2016)**

After an automobile collision, the defendant was charged with DUI manslaughter/failed to render aid and vehicular homicide/failed to give information or render aid. He filed a motion to exclude his blood alcohol test results, challenging FDLE rules regarding the collection and labeling of blood for blood alcohol content testing. The trial court transferred the issue to DOAH under the doctrine of primary jurisdiction, but an ALJ found that the rules were "valid exercises of delegated legislative authority," and the trial court denied the defendant's motion to exclude. The defendant was convicted and appealed the ALJ's order, arguing that rule 11D-8.012, Florida Administrative Code (regarding labeling and collection of blood samples), "does not set standards

either for the type and size of needle to be used or the tourniquet application protocol to be followed in the collection of a blood sample for, " and rule 11D-8.013 (blood alcohol analyst permits) "fails to explicitly require the analysts to screen for and reject compromised blood samples, or to document irregularities in the tested samples," and therefore the blood alcohol test results were unreliable. But the appellate court affirmed, stating that the defendant's argument was "an overbroad solution in search of a problem that does not exist," and that he "failed to show that the rules do not ensure the accuracy of the blood testing program."
http://www.4dca.org/opinions/May%202016/05-25-16/4D14-3263.op.pdf

***Howle v. State*, 23 Fla. L. Weekly Supp. 996a (Fla. 15th Cir. Ct. 2015**)

The defendant was charged with DUI causing or contributing to injury to person or property. He appealed, arguing "(1) that the trial court abused its discretion in denying his motion to strike a juror for cause, and (2) that the cumulative effect of the State's comments made during rebuttal closing argument prejudiced [him] to the point where he was denied a fair trial." The circuit court, in its appellate capacity, reversed and remanded, finding merit in the defendant's first argument. The juror's responses to questions as to whether he would "automatically lean one way or the other if [he] heard that the case involved prescription medication . . . created uncertainty as to his impartiality, and . . . he was never rehabilitated."

II. Criminal Traffic Offenses

***Odom v. State*, __ So. 3d __, 2016 WL 3512477 (Fla. 1st DCA 2016)**

Pursuant to a plea, the defendant was adjudicated guilty of driving while license suspended or revoked (DWLSR) resulting in death, and vehicular homicide. In his postconviction appeal he claimed "that the trial court committed reversible error in (1) denying [his] motion for a competency evaluation after the evidentiary hearing; and (2) denying [his] requests to amend his postconviction motion by adding a double jeopardy claim." The appellate court affirmed as to the first claim but reversed and remanded as to the second. As the state conceded, the defendant "correctly asserted that dual convictions for vehicular homicide and DWLSR resulting in death violate double jeopardy where there is a single death."
https://edca.1dca.org/DCADocs/2015/3540/153540_DC08_06282016_081905_i.pdf

***Leonard v. State*, __ So. 3d __, 2016 WL 3201073 (Fla. 2d DCA 2016)**

The defendant was convicted of leaving the scene of an accident with death and tampering with evidence. The appellate court affirmed as to the first conviction without comment, but reversed as to the tampering conviction "[b]ecause the trial court erroneously admitted hearsay testimony pertinent to the tampering charge over timely defense objection and it is not clear from the record that the trial court did not rely on that evidence in reaching its determination of guilt."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/June/June%2010,%202016/2D15-1949.pdf

***Lucas v. State*, __ So. 3d __, 2016 WL 3216279 (Fla. 2d DCA 2016)**

The defendant was charged with leaving the scene of an accident, burglary of an unoccupied structure, and fleeing and attempting to elude a police officer. The court affirmed as to the first two charges, but reversed as to the third "[b]ecause the trial court erred in refusing to instruct the jury on a permissive lesser included offense."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/June/June%2010,%202016/2D14-4211rh.pdf

***State v. Lambo*, __ So. 3d __, 2016 WL 3090591 (Fla. 2d DCA 2016)**

The defendant was charged with leaving the scene of a crash with injury. The trial court dismissed the charge, holding that law enforcement's failure to preserve evidence (photos that were used unsuccessfully for witnesses to identify the defendant) violated the defendant's due process rights. The appellate court reversed, stating that "the photo packs themselves are not the exculpatory evidence. It is the testimony of the witnesses that is critical. That is, without the witnesses' testimony the photo packs hold little evidentiary value and are only potentially useful to the defense."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/June/June%2001,%202016/2D15-597.pdf

***State v. Miller*, __ So. 3d __, 2016 WL 3066474 (Fla. 3d DCA 2016)**

The defendant was charged with violating section 322.34(5), Florida Statutes, driving while license suspended, revoked, canceled, or disqualified. He filed a motion to dismiss. The trial court held that "having, at some time, a Florida driver's license is an element of a section 322.34(5) offense," which the defendant had never had, and it treated the motion to dismiss as a motion for reduction of charges to the lesser included offense of driving without a valid driver license and found the defendant guilty of that lesser offense. The state appealed, but the appellate court affirmed, holding that because the defendant never had a driver license, "he could not be convicted as a 'person whose driver license has been revoked' under section 322.34(5)." It certified conflict with the Second, Fourth and Fifth District Courts of Appeal.
http://www.3dca.flcourts.org/Opinions/3D15-0628.pdf

***Schreiner v. State*, __ So. 3d __, 2016 WL 3058337 (Fla. 1st DCA 2016)**

The defendant was convicted of and sentenced for driving while license permanently revoked. On remand, his sentence was reduced from four years of imprisonment to one year of jail with one year of credit followed by six months of probation. Since he had served two years and 4.7 months of the original erroneous prison sentence, he appealed, arguing that "he should have received credit for time served in prison against the probationary period." The appellate court agreed and reversed and remanded with directions that the defendant be awarded credit against his probationary sentence.
https://edca.1dca.org/DCADocs/2015/3532/153532_DC13_05312016_102300_i.pdf

***Damoah v. State*, 189 So. 3d 316 (Fla. 4th DCA 2016)**

The defendant crashed into a tree at a highway exit ramp, killing her passenger. She was charged with vehicular homicide and moved for a judgment of acquittal, arguing that "excessive speed, without more, is insufficient to establish a vehicular homicide." She also asked for a

special jury instruction defining "reckless manner," which the trial court denied. She was found guilty of vehicular homicide and sentenced to 12 years in prison followed by three years of probation. The appellate court reversed and remanded with directions to enter a judgment of acquittal, stating:

> Here, other than the testimony about the speed of the [car] at the beginning of the skid mark, there was no other evidence that supported the conviction. This was not a residential neighborhood; it was an exit ramp from an interstate highway. [The defendant's] blood alcohol level was well below the legal limit. There was no evidence of other drugs in her system. There was no description of erratic driving conduct before the skid began. There was no evidence of inclement weather conditions. There were only two occupants in the car. The [car's] approximate speed was 14-16 mph over the highway speed limit. Because the ramp had recently been repaved, there were neither recommended speed signs nor warning signs about the curve in the exit ramp. While sufficient for a finding of simple negligence, these facts do not amount to the operation of a motor vehicle in a reckless manner likely to cause the death of, or great bodily harm to, another. . . .
>
> [T]he evidence was also insufficient to support the lesser included offenses of reckless driving and culpable negligence. Vehicular homicide "cannot be proven without also proving the elements of reckless driving, which requires proof of a 'willful or wanton disregard for the safety of persons or property.'"

http://www.4dca.org/opinions/April%202016/04-20-16/4D14-2412.op.pdf

***Pehlke v. State*, 189 So. 3d 1036 (Fla. 2d DCA 2016)**

The state asked for six months' incarceration for the defendant, who was convicted of fleeing to elude a law enforcement officer with lights and sirens activated. The court imposed nine months' incarceration, and the defendant appealed, "arguing that the trial court committed fundamental error by considering his lack of remorse." The state conceded it was error, and the appellate court reversed the sentence and remanded for resentencing by a different judge, stating: "The trial court's solicitation of an expression of contrition and imposition of a harsher than recommended sentence when expressions of remorse were not forthcoming lead to our conclusion that the trial judge contravened [the defendant's] due process right to maintain his innocence at all stages of the proceedings."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/April/April%2015,%202016/2D15-2150.pdf

***Guillen v. State*, 189 So. 3d 1004 (Fla. 3d DCA 2016)**

The defendant was convicted of DUI manslaughter with failure to render aid, (2) vehicular homicide with failure to render aid, and (3) leaving the scene of a crash involving death. He appealed, arguing that "the trial court abused its discretion by: (1) denying his motion for a continuance; (2) denying his motion to preclude the State from calling [a specific expert witness]; and (3) permitting the State to introduce photographs of the deceased victim's injuries."

The appellate court affirmed, stating that the first issue was not preserved for appellate review, and the trial court did not abuse its discretion. While the state's expert was disclosed late, the state argued that this was "caused, in part, by the defendant's failure to disclose that [his] expert . . . had revised his vehicular speed calculations, and that these revisions required the opinion of a more experienced expert, like [the state's witness], to provide rebuttal testimony." The appellate court stated: "Although it appears that there was no discovery violation, because the record is unclear and because the trial court conducted a Richardson hearing, we will briefly address the *Richardson* factors." It held the record supported a finding that the alleged discovery violation was not willful, material, or prejudicial. It also agreed with the trial court that the probative value of the objected-to photographs of the victim's injuries was not outweighed by their potential prejudicial effect.
http://www.3dca.flcourts.org/Opinions/3D14-1540.pdf

III. Civil Traffic Infractions

IV. Arrest, Search and Seizure

***English v. State*, __ So. 3d __, 2016 WL 2755988 (Fla. 2016)**

The defendant was stopped for obstruction of a license plate because his tag light and wires were "hanging down in front of the license plate, obstructing the officers' view of the plate and rendering at least one letter on it unreadable. The tag became readable, only momentarily, when the vehicle turned and caused the wires to shift. However, after the turn, when the wires shifted back, the view of the tag was obstructed again." As a result of evidence seized during the stop, criminal charges were brought against the defendant. He filed a motion to suppress, arguing that the stop was invalid. The trial court granted the motion, but the Fifth District of Appeal reversed, holding that the stop was proper because section 316.605(1), Florida Statutes, "requires the alphanumeric designation on the license plate to be plainly visible and legible at all times 100 feet from the rear." The defendant appealed, arguing that under *Harris v. State*, 11 So. 3d 462 (Fla. 2d DCA 2009), the appellate court should have affirmed the trial court decision, since the obscuring material was external to the license plate. But the supreme court affirmed and, resolving a conflict among district courts, held that "the plain language of section 316.605(1) is clear and unambiguous, and requires that a license plate be plainly visible and legible at all times without regard to whether the obscuring matter is on or external to the plate."
http://www.floridasupremecourt.org/decisions/2016/sc14-2229.pdf

***Alfonso-Roche v. State*, __ So. 3d __, 2016 WL 3065576 (Fla. 4th DCA 2016)**

A deputy investigating stolen boats saw two trucks leaving the area. He got the license plate number of the maroon truck and, since that truck was blocking his view of the other (gray) truck's plate and was blocking him from changing lanes, he turned on his floodlights, after which he saw a boat engine cover in the bed of the maroon truck. He reported the gray truck to his sergeant and followed the maroon truck. After the maroon truck ran a stop sign, the deputy stopped it and saw a stolen boat engine, oil dripping out of the truck bed, oil and gas dripping from the engine lines, bolt cutters, a box of black gloves like those found on surveillance cameras, and a blow torch. Meanwhile, the sergeant stopped the gray truck, which had been

stolen and whose driver had fled, and found two boat engines, and later found the two stolen boats. The defendant was arrested for grand theft of a motor vehicle and first degree grand theft. He appealed, and the appellate court reversed the grand theft of a motor vehicle conviction/sentence based on his argument that "the evidence was insufficient to support the charge of grand theft of a motor vehicle and his counsel was ineffective in failing to move for a judgment of acquittal."
http://www.4dca.org/opinions/June%202016/06-01-16/4D13-3689.op.Gr.conc.CN.conc.dissent.pdf

***Sousa v. State*, __ So. 3d __, 2016 WL 3065485 (Fla. 2d DCA 2016)**

An officer received a BOLO about a robbery involving three male suspects. He decided to stop the only vehicle he saw after the BOLO, which had three occupants, although he conceded "he did not have much to go on." The defendant ultimately pled no contest to attempted robbery and then appealed. The appellate court reversed, holding that the officer did not have a well-founded suspicion of criminal activity to justify the stop. The BOLO was vague, and a "vehicle's mere presence near the scene is insufficient to give rise to a reasonable suspicion that its occupants were connect to the recent [crime]." Further, the officer "did not receive a vehicle description or learn that the suspects even fled in a vehicle . . . until after he initiated the stop."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/June/June%2001,%202016/2D15-1005.pdf

***State v. Liles*, *State v. Willis*, __ So. 3d __, 2016 WL 1385925 (Fla. 5th DCA 2016)**

Liles and Willis were involved in separate fatal traffic crashes, but the cases were consolidated. They both initially refused blood draws, and after they were arrested and charged they filed motions to suppress. The trial court granted the motions because "the blood was obtained without a warrant, consent, or any other recognized exception to the warrant requirement." The state appealed, and the appellate court reversed, finding that, while the neither the consent nor exigent circumstances exceptions applied, the good-faith exception set forth in *United States v. Leon*, 468 U.S. 897 (1984), did apply. It held that "it was reasonable for the officers to have a good-faith belief in the constitutional validity of a warrantless blood draw authorized by section 316.1933(1)(a)," Florida Statutes, and that exclusion of the blood in these cases "would have no deterrent effect on future police misconduct," which is the primary purpose of the exclusionary rule.
http://www.5dca.org/Opinions/Opin2016/040416/5D15-405.op.pdf

***Exantus-Barr v. State*, __ So. 3d __, 2016 WL 1366968 (Fla. 4th DCA 2016)**

After an armed robbery was reported, the defendant was located via a tracking app on the victim's iPhone and identified from the victim's description of the robber. As police officers approached, the defendant and two others got in a car and drove away. An officer stopped them, found some of the victim's stolen items, and arrested the defendant. He filed a motion to suppress, claiming the stop was unlawful. But the appellate court affirmed, stating that "the totality of the circumstances . . . gave rise to a reasonable suspicion" for the stop.
http://www.4dca.org/opinions/April%202016/04-06-16/4D14-2889.op.pdf

***Aguiar v. State*, __ So. 3d __, 2016 1260891 (Fla. 5th DCA 2016)**

The defendant was a passenger in a vehicle that was stopped because a brake light was out and the driver was not wearing a seat belt. Ultimately the defendant was convicted of possession of cocaine, attempted tampering with physical evidence, and possession of drug paraphernalia. He appealed, and the appellate court considered "whether a police officer may, as a matter of course, detain a passenger who attempts to leave the scene of a lawful traffic stop without violating the passenger's Fourth Amendment rights." It affirmed, holding that an officer could do so, receding from previous case law and certifying conflict with other district courts of appeal.
http://www.5dca.org/Opinions/Opin2016/032816/5D15-1627.en%20banc.op.pdf

***Cole v. State*, 190 So. 3d 185 (Fla. 3d DCA 2016)**

After a concededly lawful traffic stop, the defendant was charged with trafficking in cocaine, tampering with evidence, and possession of drug paraphernalia. He appealed his conviction and sentence, arguing that the trial court erred in denying his motion to suppress and in denying three challenges for cause during jury selection. The state conceded that the trial court committed reversible error in at least one of its challenge denials, and the appellate court reversed for a new trial. But it nevertheless addressed the motion to suppress, holding that the trial court properly denied it "because the defendant voluntarily abandoned the drugs found under the defendant's car, and the police inevitably would have discovered the drugs found on defendant's person." The defendant had argued that the officer did not have reasonable suspicion to pat him down, but the appellate court stated: "Florida's stop and frisk law requires 'not probable cause but rather a reasonable belief on the part of the officer that a person temporarily detained is armed with a dangerous weapon,'" which the evidence supported. While the appellate court agreed with the defendant that "the officer exceeded the limited scope of a patdown search, we nevertheless conclude that the evidence is not subject to suppression because the drugs found in [his] sock would have inevitably been discovered."
http://www.3dca.flcourts.org/Opinions/3D14-2574.pdf

***State v. Jennings*, 189 So. 3d 1001 (Fla. 4th DCA 2016)**

The trial court had granted the defendant's motion to suppress, in which he had argued that the stop was not based on a "well-founded suspicion of criminal activity." The state appealed, but the appellate court affirmed, "[d]eferring to the trial judge's evaluation of credibility."
http://www.4dca.org/opinions/April%202016/04-06-16/4D15-993.op.pdf

***State v. Barnes*, 189 So. 3d 362 (Fla. 1st DCA 2016)**

During a traffic stop, Barnes tried to flee. The police officer caught Barnes and noticed he was chewing something. He asked Barnes to spit it out, but Barnes swallowed the substance. A test on residue in Barnes' mouth tested positive for cocaine, but the FDLE crime lab report said "insufficient sample for identification." Barnes was charged with tampering with evidence, but the trial court found the state had failed to make a prima facie case and dismissed the charge. The appellate court reversed, stating: "Barnes asserts that because the officer could not say whether

the object was already in Barnes' mouth when the officer initiated the traffic stop, the State cannot prove that Barnes put the object in his mouth with the intent to impair the object's availability for a police investigation. However, we find the allegations were sufficient, particularly in light of the fact that Barnes turned his head and continued to chew the object until he swallowed it, refusing to comply with the officer's order to spit out the object."
https://edca.1dca.org/DCADocs/2015/3292/153292_DC13_04292016_084441_i.pdf

***Foley v. State*, 188 So. 3d 930 (Fla. 5th DCA 2016)**

The defendant was a passenger in a vehicle that was stopped for a traffic infraction. The driver refused consent for the deputy to search the vehicle, and the deputy called for a K-9 backup. The dog alerted to the front passenger door, and the deputies found methamphetamine, a gun, and ammunition. The defendant was arrested and filed a motion to suppress. The trial court denied the motion, holding that the defendant did not have standing to contest the search. But the appellate court reversed, stating that the defendant "established a proprietary interest in what was located in one of the bags (ammunition) and had standing to contest the search of the bag. . . . Second, if the length of time of the traffic stop was prolonged by the dog sniff, then [the defendant's] continued detention became unlawful, and he had standing to seek to suppress evidence obtained during the subsequent search."
http://www.5dca.org/Opinions/Opin2016/040416/5D15-1995.op.pdf

***State v. Seward*, 188 So. 3d 927 (Fla. 5th DCA 2016)**

The defendant was charged with driving while his license was revoked as a habitual traffic offender. He filed a motion to dismiss, claiming that he was "allegedly riding a bicycle," and that while he was prohibited from "driving a motor vehicle with a revoked driver's license, section 322.01(27), Florida Statutes (2014), excluded motorized bicycles from the definition of 'motor vehicle.'" The state filed a traverse, arguing that "the officer's sworn statement that [the defendant] was driving a gas-powered bicycle in excess of thirty miles per hour precluded [the defendant's] reliance on the 'motorized bicycle' exclusion" under the statutory definition of "bicycle." The trial court granted the defendant's motion to dismiss, and the state appealed. The appellate court reversed, stating that the state's traverse specifically denied the defendant's "averment that he was riding a bicycle [and] asserted additional material facts [that], if proved at trial, would remove [the] 'bicycle' from the motorized bicycle exclusion to the definition of a motor vehicle." The defendant had also argued that the state's traverse "included a defective jurat." But the jurat "recited that the information set forth in the traverse was 'based on evidence and sworn testimony received by the Office of the State Attorney in the investigation of this case.' This type of jurat has been found to be sufficient."
http://www.5dca.org/Opinions/Opin2016/040416/5D15-3568.op.pdf

V. Torts/Accident Cases

***Nunez v. Allen*, __ So. 3d __, 2016 WL 3452511 (Fla. 5th DCA 2016)**

Nunez struck Allen's truck. Allen sued Nunez and his father, whose vehicle Nunez was driving when the accident occurred. Allen served separate proposals for settlement on Nunez and his father and was eventually awarded attorney's fees and legal assistant's fees. The Nunez's

appealed, and the appellate court reversed, finding that Allen's proposals for settlement were "ambiguous and therefore invalid." It stated that the language "raised the legitimate question as to whether acceptance resolved [Allen's] claim for 'all damages' against just the named offeree or resolved the entire claim against both [Nunez's]. . . . [T]his may be significant in a case such as this where one defendant is the permissive driver of the vehicle and the other defendant is vicariously liable by being the owner of the vehicle."
http://www.5dca.org/Opinions/Opin2016/062016/5D14-4386.op.pdf

***Allen v. Montalvan*, __ So. 3d __, 2016 WL 3419303 (Fla. 4th DCA 2016)**

After an accident in which Allen and three of her family members were injured and two were killed, she hired Jacobs' law firm to sue the defendants on their behalf. Progressive sent the law firm two checks in exchange for releases, but the conditions of the releases were in dispute. The children received nothing from Progressive, and about two weeks after the releases were returned to Progressive, Allen, through a new law firm, filed a complaint for damages against the defendants. The defendants raised affirmative defenses in their answer, "including that the claims were barred by settlement or accord and satisfaction arising from the prior release, as well as contributory negligence on the part of the mother and deceased driver." Progressive intervened and moved to enforce the purported settlement by dismissing the claims against the defendants, and to set a nonjury hearing to determine the validity and enforceability of the purported settlement. Allen objected, arguing that the settlement issue should be submitted to a jury. The trial court held in favor of the defendants and granted their motion to enforce the settlement, and dismissed the children's claims. Allen appealed, and the appellate court reversed for further proceedings, stating: "Progressive, in good faith, left the amounts given to each injured party to be determined by [Allen] and her attorneys. . . . However, Progressive and the two other appellees, as parties to the settlement agreement, had an obligation to ensure the settlement was legally binding. Because the proposed settlement did not comply with the requirements of section 744.3025, it was invalid as to the claims of the children. As such, the trial court erred by dismissing the children's complaint based upon that agreement."
http://www.4dca.org/opinions/June%202016/06-22-16/4D15-675.op.pdf

***James v. City of Tampa*, __ So. 3d __, 2016 WL 3201221 (Fla. 2d DCA 2016)**

James was a passenger in a vehicle that was struck by a city sanitation truck. He sued the city, and the city argued that he had, at most, sustained a minor aggravation of injuries from a previous accident "and that any injury stemming from the second crash had been resolved long before the trial." On his claim of permanent injury the trial court directed a verdict in favor of the city. The appellate court reversed because the defendant had presented expert testimony in support of that claim.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/June/June%2010,%202016/2D15-1754.pdf

***State Farm Mut. Auto. Ins. Co. v. Smith*, __ So. 3d __, 2016 WL 3127513 (Fla. 2d DCA 2016)**

Smith was involved in a car accident while driving a friend's car. The trial court entered a final judgment holding State Farm liable to Smith under his mother's UM policy. State Farm appealed, arguing that the UM motorist provisions of Smith's mother's policy did not apply

because the car Smith was driving was not uninsured. The appellate court agreed and reversed, noting that "a vehicle is deemed insured . . . where the policy under which the claim for uninsured motorist benefits is made extends liability coverage to the insured in connection with the vehicle in question." It further stated that

> Smith was an insured under two insurance policies—the [friend's] policy and the Smith policy. . . . [T]he [friend's] policy was insufficient to respond to Smith's injuries and the liability provisions of the Smith policy applied to the vehicle but excluded coverage for Smith's injuries in this particular accident. . . . [T]he Smith policy provides that any vehicle "insured under the liability coverage of this policy" is excluded from the definition of "uninsured motor vehicle." The necessary result is that the [friend's] car is insured under the Smith policy and is therefore outside the scope of section 627.727(1)'s requirement that State Farm extend uninsured motorist coverage to Smith.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/June/June%2003,%202016/2D14-1402.pdf

***Dismex Food, Inc. v. Harris*, __ So. 3d __, 2016 WL 3078099 (Fla. 3d DCA 2016)**

Harris was rear-ended by a truck operated by Dismex's employee. The jury awarded Harris past and future medical expenses but found that he had not sustained a permanent injury. The trial court granted Harris' motion for new trial, finding that he "was prejudiced and denied a fair trial by the cumulative effect of defense counsel's violation of the sequestration rule and the defense witness's violation of the trial court's ruling confining his testimony to the opinions in his report." Dimex appealed, and the appellate court reversed, holding that the trial court's ruling was not supported by the record evidence.
http://www.3dca.flcourts.org/Opinions/3D14-1461.pdf

***Ochoa v. Koppel*, __ So. 3d __, 2016 WL 2941099 (Fla. 2d DCA 2016)**

In an automobile negligence action, Ochoa filed a proposal for settlement. One day before the 30-day period to accept the proposal expired, Koppel filed a motion seeking to enlarge the time in which to respond to the proposal. The hearing on the motion was two months later, and a day after the hearing, before the trial court rendered a decision on the motion, Koppel served a notice of accepting Ochoa's proposal for settlement. Ochoa moved to strike the notice as untimely. The trial court agreed with Koppel, however, that "her filing of a motion to enlarge time under rule 1.090 tolled the thirty-day period in which she was authorized to accept the proposal," and it granted her motion to enforce settlement. Ochoa appealed, arguing that the filing of a rule 1.090 motion to enlarge the time to accept a proposal for settlement does not toll the 30-day period for accepting the proposal until the court decides the motion. The appellate court agreed, reversed, and certified conflict with *Goldy v. Corbett Cranes Services, Inc.*, 692 So. 2d 225 (Fla. 5th DCA 1997).
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/May/May%2020,%202016/2D14-1866.pdf

***Insurance Co. of State of Pennsylvania v. Ramirez*, __ So. 3d __, 2016 WL 2908445 (Fla. 4th DCA 2016)**

The insurer filed a motion to join an indispensable party in an automobile accident action. The trial court denied the motion, and the insurer sought review. The appellate court denied review, stating: "The trial court did not depart from the essential requirements of law in determining that the other injured person was not indispensable. . . . The other injured person had not filed suit. Even if he had, he cannot be considered indispensable, where it is not a departure from the essential requirements of law to deny consolidation of two claims arising out of the same accident."
http://www.4dca.org/opinions/May%202016/05-18-16/4D15-3689.op.pdf

***Kotlyar v. Metropolitan Cas. Ins. Co.*, __ So. 3d __, 2016 WL 2894118 (Fla. 4th DCA 2016)**

Metropolitan, as subrogee of its insured, filed a negligence action against Kotlyar, who owned the vehicle his wife was driving. The trial court entered a final default judgment against Kotlyar. He filed a motion to vacate, asserting that "the judgment was void because the complaint sought *unliquidated* damages, and that a defaulting party is entitled to notice and an opportunity to be heard when the amount of damages is unliquidated," and that "his failure to respond to the complaint was due to excusable neglect, that he had a meritorious defense to the action, and that he acted with due diligence in moving to set aside the default." The trial court denied his motion, and he appealed. The appellate court reversed and remanded.
http://www.4dca.org/opinions/May%202016/05-18-16/4D14-1878.op.pdf

***Steeprow v. Penfold*, __ So. 3d __, 2016 WL 2760159 (Fla. 5th DCA 2016)**

Steeprow sued Penfold for automobile negligence. Penfold moved for a directed verdict, which the trial court granted. Steeprow appealed, but the appellate court affirmed, stating: "Steeprow has the burden of demonstrating error. Because no transcript of the proceedings exists, our review is limited to the pleadings, judgment and other matters contained in the record. In the absence of an adequate transcript on appeal, a judgment . . . which is not fundamentally erroneous . . . must be affirmed. . . . Steeprow also has not complied with Florida Rule of Appellate Procedure 9.200(b)(4), which governs the preparation of a record when no transcript of the proceedings is available."
http://www.5dca.org/Opinions/Opin2016/050916/5D15-3967.op.pdf

***Government Employees Ins. Co. v. Macedo*, __ So. 3d __, 2016 WL 2610605 (Fla. 1st DCA 2016)**

Macedo was injured in an automobile accident with GEICO's insured, Lombardo, Macedo made a $50,000 settlement proposal, which GEICO rejected, and a jury awarded her more than $200,000. She then joined GEICO to the judgment and sought taxable fees and costs, which the trial court awarded against GEICO jointly and severally with Lombardo. GEICO appealed. The appellate court affirmed, stating "GEICO's policy with Mr. Lombardo gave it the sole right to litigate and settle claims, and contractually obligated it to pay for 'all investigative and legal costs incurred by us' and 'all reasonable costs incurred by an insured at our request.' The policy didn't provide a definition of legal or other costs, nor exclude, for example, costs and fees awarded to a plaintiff driver pursuant to the offer of judgment statute." The court again certified conflict with *Steele v. Kinsey*, 801 So. 2d 297 (Fla. 2d DCA 2001).
https://edca.1dca.org/DCADocs/2015/2896/152896_DC05_05062016_094712_i.pdf

***Williams v. City of Jacksonville*, __ So. 3d __, 2016 WL 2610603 (Fla. 1st DCA 2016)**

Williams was injured by a police vehicle, and she sued the city. The trial court granted the city's motion to dismiss the complaint with prejudice and dismissed the action based on pre-suit notice time limitations. The appellate court reversed and remanded "[b]ecause the allegations in the complaint were sufficient to withstand the motion to dismiss . . . , and because the affirmative defense and additional facts argued by the parties are not cognizable upon a motion to dismiss."
https://edca.1dca.org/DCADocs/2015/4553/154553_DC08_05062016_095252_i.pdf

***Piedra v. City of North Bay Village*, __ So. 3d __, 2016 WL 2339857 (Fla. 3d DCA 2016)**

Piedra's 12-year-old son and his friend were riding a motorized skateboard, in a crouched position, on the street when they were hit by a truck. The truck driver testified that he could not see the boys because the foliage at the intersection was too high. The police officer determined that the boy "was at fault as he was an unauthorized operator of a 'motor vehicle,' and because he was sitting on the skateboard could not be seen" by the truck driver. Piedra sued the truck driver for negligence but later voluntarily dismissed him. Piedra also sued the city for negligently allowing a known hazardous condition to exist, the city's landscaping maintenance contractor for negligent maintenance, and the owner of the property where the hedges were. The trial court granted summary judgement in favor of all defendants, but the appellate court reversed, stating that the defendants had not "met their burden of proof to conclusively show the absence of a genuine issue of material fact."
http://www.3dca.flcourts.org/Opinions/3D14-2379.pdf

***State Farm Mut. Auto. Ins. Co. v. Brewer*, __ So. 3d __, 2016 WL 2290150 (Fla. 2d DCA 2016)**

Goellner fell asleep while driving and caused an automobile accident with Brewer. The Brewers sought punitive damages because there was evidence that Goellner had taken prescription sleeping medication before his three-hour drive. The jury returned a verdict in favor of the Brewers and found they were entitled to punitive damages of $248,000, "or 100% of Goellner's net worth." Goellner sought remittitur or a new trial, which the trial court denied, and it entered final judgment against him for the full amount of the jury verdict. Goellner appealed, arguing the punitive damages amount was "so large as to be unconstitutional." The appellate court reversed and remanded as to the punitive damages award, calling it "excessive to the point of being unconstitutional."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/May/May%2004,%202016/2D14-2611.pdf

***Maines v. Fox*, 190 So. 3d 1135 (Fla. 1st DCA 2016)**

The defendant Maines ran a red light, causing an accident. A final judgment was entered against him, and he appealed, arguing that the trial court erred in "1) admitting testimony regarding why . . . Maines ran the red light, causing the accident; 2) improperly limiting the testimony of [Maines'] expert concerning the specific causation of appellee's injury; and 3) awarding attorney's fees based on the rejections of [the plaintiff Fox's] proposals for settlement."

The appellate court affirmed as to allowing testimony about why Maines ran the red light "because under the circumstances of the case, the testimony was pertinent to Andrew's speed, which was relevant to whether the accident caused appellee's injury." And as to the expert testimony, it held that while "the trial court abused its discretion in refusing to allow the expert biomechanical engineer, who was also an expert medical doctor, to render an opinion as to the specific causation of appellee's injury," the error was harmless "because the expert was allowed through other testimony to convey substantial portions of his opinion to the jury." But it reversed as to the attorney's fees, stating that "the offers of settlement were internally inconsistent and ambiguous."
https://edca.1dca.org/DCADocs/2015/0739/150739_DC05_05032016_091127_i.pdf

***Restrepo v. Carrera*, 189 So. 3d 1033 (Fla. 3d DCA 2016)**

[Substituted opinion on motion for clarification.] Restrepo sought review of a trial court order that directed her to "provide cell phone numbers and/or names of providers used during the six (6) hour period before the time of the crash and the six (6) hour period after the crash, same to be provided within thirty (30) days from the date of this Order." Carrera conceded, and the appellate court found, that the order violated Restrepo's "Fifth Amendment rights, while her criminal case is pending, and constitutes a departure from the essential requirements of law from which petitioner has no adequate remedy on appeal." Therefore, the appellate court granted review and quashed the order.
http://www.3dca.flcourts.org/Opinions/3D15-1964.rh.pdf

***State Farm Mut. Auto. Ins. Co. v. Long*, 189 So. 3d 335 (Fla. 5th DCA 2016)**

After being injured in a motorcycle accident, Long sued State Farm for $100,000 in uninsured/underinsured motorist coverage. The jury returned a verdict in favor of Long for $166,000, including $116,000 for past and future medical expenses, $46,283.96 of which was for stipulated past medicals. To support his claim, Long called Nordelo, his orthopedic surgeon's physician assistant, to testify as to future medical expenses. State Farm objected to Nordelo's testimony, "arguing that because he is a physician's assistant-not a surgeon-he was not competent to give his opinion on Long's need for a future surgery or the costs associated with such a surgery," and that "because Nordelo was not the one actually billing for and performing the surgery, he was not qualified to testify regarding the costs associated with the surgery." The appellate court agreed and reversed for a new trial on the issue of future damages, noting that "the decision to diagnose the need for a future surgery rests solely with the physician." The court held that although a physician assistant could qualify to testify regarding the treatment and care he or she provided, in this case "Nordelo's ability to 'know how [the physician] thinks' is not sufficient to establish that he had the requisite knowledge and skill necessary to make him competent to opine on the issue of whether, within a reasonable degree of medical certainty, Long required future surgery. Such an opinion was beyond his qualifications and expertise." The court further found that Nordelo's testimony was not harmless, "as it was used exclusively to establish Long's claim for future damages."

Long argued that chapter 766, Florida Statutes, governing medical malpractice cases, "supports the proposition that a qualified health care provider who is not a medical doctor is permitted to testify as an expert regarding future damages." But the court held that while

"Nordelo may qualify as a medical expert under this statute for purposes of the medical malpractice presuit screening process, this is not a medical malpractice case. Furthermore, we have previously recognized that 'section 766.102(5) provides a less stringent standard for qualification of experts in the medical malpractice screening process than might be required of an expert to offer testimony at trial.'" Thus it concluded that "the trial court abused its discretion when it allowed [Nordelo] to offer an opinion on the issue of whether a future surgery for Long was appropriate and reasonably certain to occur."
http://www.5dca.org/Opinions/Opin2016/041816/5D14-3704.op.pdf

VI. Drivers' Licenses

***Futch v. DHSMV*, 189 So. 3d 131 (Fla. 2016)**

The defendant was stopped and allegedly refused to submit to a blood-alcohol test. His license was suspended for a year, and he sought review. At his hearing, the hearing officer did not allow his attorney to ask more than two questions of his expert witness and upheld the suspension. The defendant sought review, and the circuit court invalidated the suspension, finding the hearing officer denied the defendant due process. DHSMV sought second-tier review, and the Fifth District Court of Appeal granted review and found that while the hearing officer had violated the defendant's due process, the proper course was for the circuit court to remand back to DHSMV for another hearing rather than invalidate the suspension. The defendant sought supreme court review based on conflict with opinions from the First and Second district courts of appeal. The supreme court granted review and quashed the decision of the Fifth District Court of Appeal to grant certiorari review, and remanded for reinstatement of the circuit court's decision. It stated that "the Fifth District inappropriately exercised its certiorari jurisdiction to review the circuit court order. We reassert that 'second-tier certiorari should not be used simply to grant a second appeal; rather, it should be reserved for those situations when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.' . . . There was no miscarriage of justice here."
http://www.floridasupremecourt.org/decisions/2016/sc14-1660.pdf

***Clackler v. DHSMV*, 24 Fla. L. Weekly Supp. 24a (Fla. 14th Cir. Ct. 2016)**

The defendant's license was suspended and he sought review, arguing that, because his statements to police were inadmissible, there was no competent substantial evidence to support the hearing officer's determination that the arresting officer had probable cause to believe he was in actual physical control of the vehicle. The circuit court, in its appellate capacity, denied review, stating that although the evidence was sparse, "the facts and circumstances of the vehicle crash, standing alone, provide competent substantial evidence" to support the determination.

***Martinez v. DHSMV*, 24 Fla. L. Weekly Supp. 19a (Fla. 9th Cir. Ct. 2016)**

The defendant was stopped after making a left turn without signaling that cut off two vehicles and was arrested for DUI, and his license was suspended for refusal to submit to a breath test. He sought review, arguing a lack of evidence to support a determination of probable cause or reasonable suspicion for the stop because there were mistakes in the arrest report. But the circuit court, in its appellate capacity, denied review, noting that the hearing officer had

found that "the [police] Officer's testimony cleared up any inconsistencies as to the accuracy of the stop and arrest."

***Sinns v. DHSMV*, 24 Fla. L. Weekly Supp. 17a (Fla. 9th Cir. Ct. 2016)**

The defendant's license was suspended for refusal to submit to a breath test, and he sought review. The circuit court, in its appellate capacity, denied review, stating, with regard to the defendant's arguments: "Because the statutory requirements regarding admissibility of radar results are inapplicable to license suspension proceedings, there was competent substantial evidence that the officer had probable cause to stop [the defendant] for speeding. None of [the defendant's] arguments regarding the officer stopping him outside of the officer's jurisdiction have merit. Finally, binding law dictates that this Court reject [the defendant's] argument that it is illegal to require him to submit to a breath test without a search warrant."

***Sumner v. DHSMV*, 24 Fla. L. Weekly Supp. 16a (Fla. 8th Cir. Ct. 2016)**

The defendant's license was suspended for refusal to submit to a breath test. He sought review, arguing that "the deputy who conducted the traffic stop did not have probable cause to believe [he] had committed a traffic infraction because failure to maintain a lane does not constitute an infraction unless the driver's conduct affects other traffic, and there was no testimony that [his] driving affected other traffic." The circuit court, in its appellate capacity, denied review, stating that:

> even without a traffic infraction, a traffic stop is valid if a deputy has a valid objective basis for the stop. . . . Further, a car that weaves within its own lane and slows then speeds up even 10 miles per hour exhibits erratic driving sufficient to justify a stop. . . . In this case, there is competent substantial evidence that [the defendant] was weaving, and crossed the lane marker, and varied his speed over a 20 mile per hour range, all within the course of one mile. . . . [T]his, combined with the deputy's testimony that he conducted the traffic stop to determine what issues the driver might be having, is sufficient to show he had a valid objective basis for the stop.

The defendant also argued that "an anonymous 911 call is not enough to support a traffic stop." But the court noted that the stop was not "based on facts contained in an anonymous report" but rather the deputy "conducted the stop based on independent observations he made after identifying the vehicle as the one likely reported to the 911 operator."

***Bowers v. DHSMV*, 24 Fla. L. Weekly Supp. 14a (Fla. 7th Cir. Ct. 2016)**

A police officer responding to a BOLO of a vehicle with occupants in a "physical disturbance" stopped the defendant and noticed indicia of impairment. The defendant's license was suspended for refusal to submit to a breath test. She sought review, arguing that the police officer did not have reasonable suspicion for the stop. The circuit court, in its appellate capacity, granted review and quashed the suspension, noting that "[m]ere suspicion is not enough to support a stop" and that "the 'totality of circumstances' . . . consisted exclusively of a tip from an unidentified individual who communicated to the police in an unspecified manner that a certain vehicle had been observed in a generically described area, with the occupants of the vehicle said

to be engaged in a 'physical fight.' No traffic infraction or any specific crime was described by either the tipster or the detaining officer."

***Smith v. DHSMV*, 24 Fla. L. Weekly Supp. 12a (Fla. 7th Cir. Ct. 2016)**

The defendant's license was suspended for refusal to submit to a breath test. He sought review, arguing that "the facts presented were inconclusive as to whether [he] was read the implied consent warning *after* his arrest." The circuit court, in its appellate capacity, agreed, granted review, and quashed the suspension. It found that the defendant was "detained" when the officer conducted the DUI investigation, but that there was "no competent substantial evidence to find that [he] was *arrested* prior to the issuance of the implied consent warning. The Refusal Affidavit . . . states that [the defendant] was both arrested and read the implied consent warning at 11:00 p.m. Only one of those actions could take place first, and the DHSMV failed to explain the inconsistency contained in the paper record." Therefore it held there was no competent substantial evidence that the defendant "was arrested prior to being given the implied consent warning."

***McCormick v. DHSMV*, 24 Fla. L. Weekly Supp. 11a (Fla. 6th Cir. Ct. 2016)**

While investigating an accident, the officer noticed indicia of impairment on both drivers. The defendant refused to submit to a breath test, and his license was suspended. He sought review, asserting that at his hearing he had testified that on the way to the jail he "unequivocally recanted his refusal." But the circuit court, in its appellate capacity, denied review, finding that the evidence about the recantation was in dispute, and there was competent substantial evidence to support the hearing officer's determination that the defendant "refused to submit to a breath test.

***Gearity v. DHSMV*, 24 Fla. L. Weekly Supp. 8a (Fla. 6th Cir. Ct. 2016)**

The defendant's license was suspended for DUI. He sought review, asserting that he was not properly detained and therefore the breath test was not lawful. He argued that his detention was not lawful because the deputy who found him asleep in his car did not have knowledge that he "was in actual physical control of the vehicle." The circuit court, in its appellate capacity, did not address this specifically, except to note that the deputy saw that the defendant was sitting on his keys. The defendant also argued that he was illegally detained when he opened his vehicle door because the deputy asked or ordered him to open it, but the court held that the evidence supported the hearing officer's determination that the defendant opened the door without being asked. Another argument was that the deputy illegally detained and searched the defendant when he conducted a pat search, because the deputy did not have reasonable suspicion to believe the defendant was armed, but the court noted that the deputy saw two box cutters in the vehicle door pocket and was concerned that the defendant might have another box cutter in his pocket, and the defendant consented to a pat-down. The defendant further argued that the breath test was not lawful because it was not an approved breath test (he questioned the Intoxilyzer inspection), but the court found no merit in this argument because "the breath test must only be performed '*substantially* according to the pertinent statutes and the methods approved' by . . . FDLE."

The defendant's final argument was that DHSMV departed from the essential requirements of law when it denied his motion to exclude the HGN exercise results, because the there was no evidence that the deputy "was properly trained and qualified to administer the HGN test." The court agreed, but held that since "the record evidence is sufficient to support a DUI arrest, . . . exclusion of the HGN does not change the propriety of DHSMV's Decision affirming suspension."

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

A deputy stopped the defendant after seeing him make an improper turn out of a parking lot "by turning wide into the far left lane, and failing to use a turn signal." He noticed indicia of impairment and called for a DUI investigation. The defendant refused a breath test, and his license was suspended. He sought review, asserting that "[t]he DHSMV's reliance on an unsworn report [a supplemental narrative report in the offense report that was signed and sworn by the DUI-investigating officer, who did not witness the initial stop] departed from the essential requirements of law and violated [his] due process rights." The circuit court, in its appellate capacity, disagreed. However, it granted review and quashed the suspension based on the defendant's other argument: that the hearing officer "should have found that there was no probable cause for the unlawful stop." It held that there was no evidence that the initial stop was based on safety concerns and therefore it was not justified. The deputy based the stop "on two traffic infractions: Failure to signal and an improper turn. Accordingly, the standard for determining whether the initial stop was lawful is determining whether [the deputy] had probable cause to effectuate the stop by virtue of [the defendant] committing a traffic violation. [The deputy] did not issue traffic citations to [the defendant] for his failure to use a turn signal or execution of a wide right turn, so this Court must look to Florida Statutes for the applicable provisions to determine whether [the defendant] actually committed traffic violations." The court held that he had not committed a violation by failure to signal, as "there are no facts in the record that indicate whether any other vehicle was affected" by his failure to do so.

The other basis for the stop was that the defendant made an "improper right turn as it was a wide right turn into the far left." Since the driver was leaving a restaurant parking lot rather than turning at an intersection, the applicable statute was section 316.125, Florida Statutes (which does not prohibit a wide right-hand turn out of a business), rather than section 316.151 (right turn must be "as close as practical to the right-hand curb or edge of the roadway"). Therefore, the defendant did not commit a traffic infraction.

***Seeley-Potter v. DHSMV*, 24 Fla. L. Weekly Supp. 5a (Fla. 6th Cir. Ct. 2016)**

The defendant's license was revoked for five years based on her status as a habitual traffic offender under section 322.27(5), Florida Statutes. She sought review, alleging that "she was not informed that entering a plea to the charges would subject her to habitual traffic offender status" and therefore the earlier pleas were not voluntary. She also asserted that by waiting so long to revoke her license, DHSMV deprived her of the opportunity to seek relief pursuant to rule 3.850, Florida Rules of Criminal Procedure, and that laches applied to prevent the revocation. She also asserted a violation of her due process because she was not given the opportunity to be heard before the revocation order was entered. But the circuit court, in its appellate capacity, denied review, noting that "[c]ourts have previously found the challenged

statute to be constitutional." It stated further that "[t]he statute does not prescribe a limitation period in which the Department must take action to suspend or revoke an individual's license," and that DHSMV "was not a party to the criminal proceedings in which [the defendant] was convicted of the underlying offenses on which the revocation is based [and] alleges it was unable to revoke [her] license until it received notice of [her] convictions from the Clerk of Court. . . . [The defendant] failed to demonstrate [DHSMV] had knowledge of or was on notice of the prior proceedings before the county court, and the defense of laches cannot be applied to prevent [it] from entering the revocation order in this case."

***Maciuba v. DHSMV*, 24 Fla. L. Weekly Supp. 4b (Fla. 6th Cir. Ct. 2016)**

After a police officer stopped the defendant "for 'failure to maintain a single lane' and for being 'passed out' at a green light," the defendant's license was suspended for refusal to submit to a breath test. He sought review, arguing that the officer did not have probable cause for the stop and was outside his jurisdiction. The circuit court, in its appellate capacity, denied review, holding that "adequate grounds for a traffic stop existed based on [the defendant's] pattern of unusual driving behavior," and that although the officer was outside his jurisdiction, he was able to make a "valid citizen's arrest because reasonable grounds existed for [him] to believe [the defendant] breaching the peace by threatening public safety and committing a DUI."

***Franke v. DHSMV*, 24 Fla. L. Weekly Supp. 1a (Fla. 4th Cir. Ct. 2016)**

After an accident the defendant's license was suspended for refusal to submit to a breath test, and she sought review. She argued that the arresting officer's request for her to take the breath test was not lawful because, although a fellow officer who had been the first to make contact with the defendant believed she was under the influence of alcohol, the arresting officer believed she was under the influence of medication. Therefore, the deputy "had no authority to coerce a breath test under *Section 316.1932*, unless reasonable cause can be legally imputed to him." But the circuit court, in its appellate capacity, denied review, finding that reasonable cause to request the breath test based on a officer's fellow officer's observations could be imputed.

***Gelb v. DHSMV*, 23 Fla. L. Weekly Supp. 1001b (Fla. 20th Cir. Ct. 2016)**

After the defendant was stopped for driving without headlights and then arrested for DUI, his commercial driver license was suspended for refusal to submit to a breath, blood, or urine test. He sought review, which the circuit court, in its appellate capacity, denied, finding there was probable cause for the deputy to believe the defendant "was driving or in actual physical control of a commercial motor vehicle, or any motor vehicle as a holder of a commercial driver's license in this state while under the influence of alcoholic beverages or chemical or controlled substances; that [the defendant] refused to submit to any such test after being requested to do so . . . subsequent to a lawful arrest; that [he] was told that if he refused to submit to any such test his privilege to operate a motor vehicle would be suspended for a period of at least one year."

***Loschiavo v. DHSMV*, 23 Fla. L. Weekly Supp. 999a (Fla. 17th Cir. Ct. 2016)**

The defendant's license was suspended, and he sought review. The circuit court, in its appellate capacity, granted review, stating that "at a formal review hearing relying solely on documentary evidence, the record evidence must competently and substantially establish the

basis to support the traffic stop. . . . While it is permissible for a formal review hearing to be conducted on documentary evidence alone, the documentary evidence nevertheless must make clear how the arresting officer arrived at his or her conclusion supporting probable cause, rather than merely recite conclusions without factual support for such conclusions."

***Nguyen v. DHSMV*, 23 Fla. L. Weekly Supp. 994a (Fla. 14th Cir. Ct. 2016)**

The defendant's license was suspended for DUI, and he sought review. The circuit court, in its appellate capacity, denied review, stating that, while discussing the defendant's argument about a lack of competent substantial evidence, the hearing officer "noted that "[c]ounsel had the means and opportunity to present evidence to the court regarding another person's involvement, or to subpoena the arresting officer to question him in regards to these issues.' [The defendant] argues that the hearing officer impermissibly shifted the burden from the Department to [him] with this statement. However, this statement can be read as a permissible comment on the [defendant's] lack of evidence to rebut the Department's evidence. . . . The Court finds that the hearing officer observed due process and the essential requirements of law."

***Shoot v. DHSMV*, 23 Fla. L. Weekly Supp. 902a (Fla. 12th Cir. Ct. 2016)**

The defendant's license was suspended for refusal to submit to a breath test. He sought review, arguing that "the contents of the evidence admitted into the record at the formal review hearing . . . failed to rise to the level of competent, substantial evidence needed in order to justify making a valid stop of [his] vehicle." The circuit court, in its appellate capacity, granted review, finding "it necessary to direct a response" from DHSMV. It gave DHSMV 30 days to file a "written response showing cause why the relief requested by [the defendant] should not be granted" and then giving the defendant 20 days from the filing of the response to file a reply.

***Gilbert v. DHSMV*, 23 Fla. L. Weekly Supp. 900a (Fla. 12th Cir. Ct. 2016)**

The defendant's license was suspended for DUI. During the hearing, he filed a motion to invalidate the suspension based on an affidavit of the former program manager of FDLE's Alcohol Testing Program, stating that the breath test instrument was not in substantial compliance with the rules and that the breath test was invalid for outlined scientific reasons. The hearing officer denied the motion. The defendant sought review, citing the denial of the motion and the finding that he had an unlawful breath-alcohol level of 0.08 or higher. But the circuit court, in its appellate capacity, denied review, finding that the hearing officer observed the essential requirements of law and the decisions were supported by competent substantial evidence. It held that the agency inspection report admitted at the defendant's hearing "sufficiently established a presumption of proof," and the burden shifted to the defendant to establish that the testing instrument was not in substantial compliance with the rules.

The defendant's claims were that (1) there was no FDLE inspection of the Intoxilyzer after it was returned to the sheriff's Office; (2) "[t]he alcohol reference solution or sources used to inspect the Intoxilyzer . . . were not properly approved by the FDLE"; and (3) the Intoxilyzer was transported to the sheriff's office "in conditions that violate the requirements of Rule 11D-8.007(2)." But the circuit court stated that "the location of the inspection -- whether at the repair facility prior to return, or at the agency after return -- is of no consequence where the inspection

was made after maintenance or repair." Further, "none of the evidence admitted at the hearing contained the information necessary to determine whether the reference solutions or sources used to inspect [the] Intoxilyzer . . . complied with the FDLE approval process outlined in Rule 11D-8.0035," and the "documents relating to the approval of the reference solutions and sources at issue . . . were not actually offered at the hearing; instead, the evidence of noncompliance consisted of [the former program manager's] hearsay claims based on her review of evidence not before the hearing officer." As to the defendant's third claim, "Rule 11D-8.007 . . . neither requires that breath test instruments be shipped in a climate-controlled environment nor prohibits shipping breath test instruments by common carrier. Instead, [the defendant] was required to demonstrate that [the] Intoxilyzer . . . was not kept clean and dry," but his assertions were "conclusory and speculative."

***Baumann v. DHSMV*, 23 Fla. L. Weekly Supp. 899a (Fla. 49h Cir. Ct. 2016)**

The defendant's license was permanently revoked after four DUIs, and the hearing officer denied his request for early reinstatement because the defendant admitted drinking wine during a toast at his son's wedding within five years after the revocation. He sought review, arguing that he was denied due process because (1) DHSMV waited more than 20 years to revoke his license and (2) "the hearing officer acted arbitrarily and capriciously in not reinstating his license due to the alcohol consumption, but ignoring his driving during the previous five years." Holding that neither argument had merit, the circuit court, in its appellate capacity, denied review. It stated: "First, this is not a petition to review the Order of Revocation. That order was entered in 2011, and, as stated in the order, the time to seek judicial review was within thirty days. . . . A circuit court is without jurisdiction to review an order of revocation when the petition for writ of certiorari is filed beyond that time limit. . . . Second, [the defendant] argues that the hearing officer choosing to deny the request for reinstatement based on his drinking alcohol within the past five years, and stating that she would have been able to disregard [his] driving within the past five years, was an arbitrary and capricious decision. A look at the timeline of events and the hearing officer's statement regarding this decision reveals that it is neither."

***McDonald v. DHSMV*, 23 Fla. L. Weekly Supp. 898a (Fla. 9th Cir. Ct. 2016)**

At about 2 a.m., an officer pulled up next to the defendant's vehicle and opened his passenger side window. The defendant opened his window, and the officer asked if he was lost, to which the defendant replied "I just want to go home." The officer noticed indicia of impairment, and the defendant performed poorly on sobriety exercises. The defendant was arrested for driving with unlawful blood alcohol level and his license was suspended. He sought review, arguing "there was no probable cause for the stop and no reasonable suspicion to conduct a DUI investigation." But the circuit court, in its appellate capacity, denied review, finding competent substantial evidence that the interaction was voluntary.

***Ramirez v. DHSMV*, 23 Fla. L. Weekly Supp. 893a (Fla. 7th Cir. Ct. 2016)**

After being stopped for speeding, the defendant was arrested for DUI and his license was suspended for refusal to submit to a breath test. The defendant sought review, arguing there was a lack of "competent substantial evidence to establish probable cause to request that [he] exit his vehicle and perform roadside field sobriety exercises." The circuit court, in its appellate capacity,

granted review and quashed the suspension, stating: "The evidence that the hearing officer had before her regarding indicia of impairment was the minimal articulation from [the deputy] and the probable cause affidavit. This consisted of the observance of a strong odor of alcohol . . . , the [defendant] having some difficulty in removing his driver license from his wallet, and his failure to provide other requested documents," but no other indicia of impairment. Further, the hearing officer ignored the cases the defendant had provided her to support his argument and "failed to consider the deputy's testimony where he clearly indicated there were no other observations to add to his report to support his request for the [defendant] to perform the FSE's." Therefore, it found that the hearing officer did not afford the defendant due process and did not have competent substantial evidence on which to base her decision to uphold the suspension.

The court also noted that there were "conflict and inconsistencies in the documents." The times stated in three citations "were inconsistent with the flow of the stop and arrest of the [defendant]. . . . Florida Courts have held that 'if the department is going to choose to present no live testimony but to rely exclusively on written documents, then clearly it cannot ask the court to ignore discrepancies and inconsistencies in the written documentation where the cause for such discrepancies and inconsistencies is not explained by sworn testimony'."

***Delaney v. DHSMV*, 23 Fla. L. Weekly Supp. 890b (Fla. 6th Cir. Ct. 2016)**

After being stopped for driving with a flat tire, the defendant was arrested for DUI and his license was suspended. He sought review, but the circuit court, in its appellate capacity, denied review, stating:

> Driving with a flat tire that is "not causing more damage than the average wear and tear" to the road is not against the law in Florida. . . . However, . . . [a] police officer may stop a vehicle "at any time, upon reasonable cause to believe that a vehicle is unsafe." . . . Therefore, if the flat tire "as it existed and as it was observed by the officers would have created an objectively reasonable suspicion that [the] vehicle was unsafe," then the stop is valid. . . . This objective test "mak[es] the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant." . . .
>
> Here, [the officer's] mistaken belief that driving on a flat tire violates the law does not invalidate the stop since an objectively reasonable suspicion that [the defendant's] vehicle was unsafe existed.

***Fanning v. DHSMV*, 23 Fla. L. Weekly Supp. 889a (Fla. 4th Cir. Ct. 2016)**

After a car accident, the defendant's license was suspended for refusal to submit to a breath test. The defendant sought review, arguing a lack of competent evidence that he was the operator of the vehicle involved, as the officer "did not observe [him] behind the wheel and did not relate how he came to that conclusion." But the circuit court, in its appellate capacity, denied review, noting that the arrest report stated that the victim and another witness saw the defendant behind the wheel of his vehicle during the accident.

***Sutton v. DHSMV*, 23 Fla. L. Weekly Supp. 888a (Fla. 4th Cir. Ct. 2016)**

The defendant's license was suspended for 18 months for refusal to submit to a breath, blood, or urine test. The hearing officer admitted an unauthenticated, uncertified driving record, which showed a prior refusal, into the record over the defendant's objection. He sought review, which the circuit court, in its appellate capacity, granted, and it quashed the suspension and remanded.

***Gomez v. DHSMV*, 23 Fla. L. Weekly Supp. 887b (Fla. 2d Cir. Ct. 2016)**

The defendant's license was suspended after his fourth DUI conviction. He argued that there was a lack of competent substantial evidence, based on his unrebutted testimony that he had never been in or been convicted of DUI in Taylor County, that his 1974 conviction was "unreadable," and that "the driving record submitted to the hearing officer was not a certified copy." The hearing officer entered a final order finding that the defendant had "provided sufficient evidence to show that his driving privilege should not have been revoked," but 13 days later entered an amended final order reversing the decision. The defendant sought review, and the circuit court, in its appellate capacity, granted review, quashed the suspension, and remanded, stating that "the amended final order constituted a denial of due process," and finding that under rule 15A-6.010(6), Florida Administrative Code, "the hearing officer had the authority to correct or amend the final order *for substantive reasons* within 15 days from the date of issuance of the order. However, the Court also finds that the Department failed to recite or explain in the amended final order why the prior ruling was being corrected and, further, the hearing officer did not give [the defendant] the opportunity to respond to the proposed change."

***McCray v. DHSMV*, 23 Fla. L. Weekly Supp. 887a (Fla. 2d Cir. Ct. 2016)**

The defendant's license was suspended for refusal to submit to a breath test. She sought review, asserting that the probable cause affidavit and refusal affidavit "failed to contain the written declaration declaring the penalties for perjury in accordance with Fla. Stat. 92.525." But the circuit court, in its appellate capacity, denied review, stating that there was no evidence that the deputy

> did not swear or affirm under oath to the statements made in the Arrest/Probable Cause and Refusal Affidavits. . . . The . . . Affidavits are not legally defective where [the deputy] swore or affirmed to the contents of the documents in the presence of another law enforcement officer, who indicated on the jurat that he was a CO "Corrections Officer" with id# 508, a person authorized under section 92.525 to administer oaths. . . . Section 92.525 prescribes three different ways to establish verification of pleadings, and the written declaration section is just one of those mechanisms.

VII. Red-light Camera Cases

VIII. County Court Orders

***State v. Pastella*, 23 Fla. L. Weekly Supp. 80a (Monroe Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion to suppress. The court granted the motion, holding that the defendant had not violated section 316.089(1), Florida Statutes, as no vehicles were affected by his driving. Nor was there was sufficient evidence to support a reasonable suspicion that the defendant was, had been, or was about to be engaged in criminal activity. The court stated:

> The failure to maintain a single lane alone cannot establish probable cause when the action is done safely. . . . Nevertheless, the failure to maintain a single lane alone, may . . . establish probable cause so long as the stop is supported by a reasonable suspicion of impairment, unfitness or vehicle defects. . . . The only indicia of impairment testified to during the hearing was the observation of dilated pupils. This Court finds that an observation of such a specific nature at such a distance is nearly an impossibility and the Court cannot accept it as credible evidence of impairment but suggests that the officer may have been reaching to describe something unusual or concerning in a mannerism or a shake of the head or a movement but was unable to find the proper words to *articulate* the exact nature of the observation. However this Court must rule on the evidence presented and not on speculation.
>
> In this case, the officer testified that although he did not observe any evidence of endangerment to others, the Defendant was in fact, drifting within his lane and going over onto the broken white divider lines, that taken in conjunction with his previous observation at the police parking lot should rise to the level of founded suspicion. This is based upon his training and experience.
>
> Under an objective standard, the driving pattern in this case is not sufficient to warrant a reasonable suspicion that the Defendant was engaged in criminal activity at the time of the stop nor was the brief previous observation of dilated pupils which was almost impossible to observe enough evidence to support the stop. Therefore the initial stop was unlawful.

***State v. Foki*, 24 Fla. L. Weekly Supp. 55a (Volusia Cty. Ct. 2016)**

After her arrest for DUI, the defendant filed motions to suppress. The court denied the motions, stating: "The driving pattern, including two crashes, combined with the observations by several witnesses that the Defendant emitted the odor of alcohol, had difficulty standing without support, swayed when she walked, slurred her words, and appeared confused provided a reasonable suspicion to compel her to perform field sobriety exercises, and ultimately, provided probable cause for arrest."

***State v. Willert*, 23 Fla. L. Weekly Supp. 54a (Pasco Cty. Ct. 2016)**

The defendant was validly stopped for speeding and was detained for a DUI investigation, after which he was arrested for DUI. He filed a motion to suppress, which the court granted, finding that the defendant "was unlawfully detained beyond the length of time necessary to address the reason for the stop without founded suspicion" and that he "was coerced

into performing field sobriety exercises and . . . compelled to submit to a breath test based on erroneous and misleading legal advice from the arresting officer."

***State v. Vilcea*, 23 Fla. L. Weekly Supp. 50a (Leon Cty. Ct. 2016)**

After seeing the defendant driving 58 mph in a 35 mph zone, a police officer stopped her and asked her to perform field sobriety exercises. He told her that they were voluntary, but that if she did not perform them "he would base his decision to arrest her for driving under the influence on the observations he had already made, i.e., her driving pattern; his observations of their interaction; and the physical signs that she was impaired." The defendant refused and was arrested for DUI. She filed a motion in limine regarding field sobriety exercises. The court noted that the officer's warning "made it clear that refusal to perform F[S]Es was not consequence free. . . . Moreover, under the circumstances, it is not plausible that [her] refusal was an effort to disengage. Rather, she had been warned that her refusal could result in her direct arrest, which it did." Therefore, the court denied the motion in limine and held that "the State is not prohibited from arguing a consciousness of guilt."

***State v. Alli*, 23 Fla. L. Weekly Supp. 1056a (Orange Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion to suppress, arguing that the evidence (her admission that she was driving the car) was obtained illegally and that the accident report privilege applied. The court granted her motion. The defendant's admission, to the trooper who spoke with her at the hospital, that she was the driver was protected under the accident report privilege. There was no testimony that the trooper had "'changed hats' from a traffic crash investigation to a criminal investigation. In fact there was absolutely no testimony offered as to when the traffic accident investigation ended and the criminal investigation began." And the only other evidence was testimony that "came from a non-law enforcement officer. The statements of the driver of the first vehicle could not identify the defendant. Other hearsay testimony could not place the defendant in the car at the time of the accident, but merely informed the officer that the defendant was the owner of the car. This hearsay is speculative at best as to the question of whether the defendant was driving the car at the time of the crash. It constitutes secondhand, unreliable hearsay."