FLORIDA TRAFFIC-RELATED APPELLATE OPINION SUMMARIES

October – December 2015

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

I. Driving Under the Influence (DUI)

***State v. Meyers*, __ So. 3d __, 2015 WL 6735289 (Fla. 2d DCA 2015)**

After "showing all the telltale signs of inebriation while behind the wheel of his car," the defendant was stopped by police, failed field sobriety tests, refused breath tests, and was arrested. He was charged with felony DUI and with a misdemeanor for failing to take the breath test. The speedy trial period closed on the misdemeanor, and the trial court discharged both counts. The appellate court reversed the order of discharge as to the felony DUI, stating that "the court erred in concluding the DUI was governed by the misdemeanor 90-day clock rather than the felony 175-day clock." It further stated that "there is no credible claim that [the defendant] was unaware he was being charged with felony DUI."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/November/November%2004,%202015/2D14-5053.pdf

***State v. Mulvaney*, __ So. 3d __, 2015 WL 5737051 (Fla. 5th DCA 2015)**

The defendant was charged with DUI resulting in serious bodily injury. The trial was continued six times at the defendant's request, and the Friday before the trial was to begin the state filed an amended information, adding a charge of reckless driving causing serious bodily injury. On the following Monday, the state told the trial court about the amended information, and the court, noting that the case was 541 days old, asked the state whether it had good cause to file an amended information the day before trial. The state asserted that the amendment was

necessary because it had recently received the defendant's "medical records that showed no toxicology tests had been conducted following the crash" and that the newly added charge was based on the same facts as those underlying the original charge. The defendant did not object to the amended information or request a continuance. "[T]he trial judge struck the amended information, reinstated the original information, and ordered the trial to proceed on the original information," but did not give specific reasons for the rulings. The state appealed, and the appellate court reversed and remanded, stating: "The State is not required to seek leave of court to amend an information and may substantively amend an information at any time, up to and including the time of trial, 'unless there is a showing of prejudice to the substantial rights of the defendant,'" which there wasn't in this case. The court distinguished this case from cases where an amendment substantively altered the elements of the crime charged. It also stated: "Because [the defendant] did not object to the amended information or seek a continuance, we do not need to determine whether adding the charge of reckless driving causing serious injury . . . would necessarily cause prejudice to him. In any event, [he] now has adequate time to prepare a defense to the amended information."
http://www.5dca.org/Opinions/Opin2015/092815/5D15-437.op.pdf

***State v. Williams*, 23 Fla. L. Weekly Supp. 408b (Fla. 17th Cir. Ct. 2015)**

The defendant was charged with DUI causing property damage. The trial court granted his motion to dismiss, contending that "the State failed to present any evidence that Defendant drove or was in actual physical control of the vehicle." The trial court granted the motion, finding that "there was no wheel witness and the testimony and evidence adduced at the hearing showed that the only witness . . . that could potentially place Defendant behind the wheel of the vehicle had a 'lack of credibility.'" The trial court further "found the officers to be credible 'on the basis of . . . being honest,' but not credible in their 'work product.'" But the circuit court, in its appellate capacity, reversed and remanded, holding that while the state did not file a traverse, and therefore the facts alleged in the motion to dismiss were deemed admitted, those facts were sufficient to establish a prima facie case:

> First, the State presented sufficient evidence that Defendant was in actual or physical control of his vehicle, at the time of the accident, based on the combination of the two officers' personal, direct observations of Defendant and the accident scene, as well as the identification of the driver by [a civilian witness who] did identify the driver of the vehicle to law enforcement soon after the accident took place and those law enforcement officers determined that the individual identified was the defendant. . . .
>
> Second, the trial court made various impermissible factual findings and credibility determinations as to [the civilian witness's] testimony as well as that of the two officers. The trial court granted the motion to dismiss "based on the testimony and the real lack of credibility of the bridge tender." "In a Rule 3.190(c)(4), Florida Rules of Criminal Procedure, proceeding, the trial court may not try or determine factual issues nor consider either the weight of the conflicting evidence or the credibility of the witnesses." . . . Had the trial court taken the evidence in the light most favorable to the State, and resolved all inferences in favor of the State, a

prima facie case would have been established and the offense charged could not have been properly dismissed.

***Keefe v. Thomas*, 23 Fla. L. Weekly Supp. 404a (Fla. 17th Cir. Ct. 2015)**

The defendant was charged with DUI and sought to admit her medical records into evidence to support "her argument that she was not able to perform the roadside sobriety exercises due to her medical conditions." The trial court excluded the records, and she appealed. The circuit court, in its appellate capacity, affirmed, stating that it agreed with the trial court that introducing the defendant's medical records "would be more prejudicial than probative, as well as confusing and misleading to the jury." It noted that "there was no expert to explain the medical records to the jury, no one knew the date that the [defendant] received the records in the mail, [her] trial counsel only intended to introduce a portion of the medical records into evidence to corroborate her diagnosis, and there is nothing in the record to describe what the progress notes contained." The court also noted that the defendant "failed to lay the proper foundation to introduce the medical records as a business record" and her attorney did not include the required certification or declaration from the records custodian or other qualified person.

***State v. Vancora*, 23 Fla. L. Weekly Supp. 402a (Fla. 17th Cir. Ct. 2015)**

The defendant was charged with DUI and filed a motion to suppress, which the trial court granted, "holding that by turning on his overhead lights, the officer effectuated a stop for which he had no reasonable articulable suspicion or community care function to perform." The circuit court, in its appellate capacity, reversed and remanded, holding that the trial court's finding was "contrary to Florida law, which advocates a totality-based analysis." The officer had found the defendant stopped in the right-turn lane at a red light despite no traffic coming, and the defendant did not move after the light turned green. The defendant was leaning over in the driver's seat and was unresponsive.

***State v. Thomas*, 23 Fla. L. Weekly Supp. 314a (Fla. 17th Cir. Ct. 2015)**

The defendant was charged with DUI and filed a motion to suppress, arguing that the stopping deputy "did not observe him commit a traffic infraction and did not have a reasonable suspicion that he was under the influence." The trial court granted the motion, but the circuit court, in its appellate capacity, reversed and remanded, stating that the stop was lawful. It noted that the deputy had seen the defendant's vehicle weaving, hitting the median, going up a curb, blowing out a tire, coming back onto the roadway, and continuing along the road. The deputy testified that he was concerned the driver could be impaired or having a medical issue, so he followed him, again observing the vehicle weaving between lanes, even though not affecting other traffic. It stated that "even assuming *arguendo* that no specific traffic infractions were committed or observed by [the deputy], under the applicable case law, he nevertheless had lawful justification for the stop under the totality of the circumstances."

***Ramirez v. State*, 23 Fla. L. Weekly Supp. 308a (Fla. 15th Cir. Ct. 2015)**

The defendant was convicted for failure to submit to a chemical test and filed a motion for new trial, arguing that "the trial court erred when it permitted an improper opinion on the ultimate issue by allowing a State Trooper to testify that she had probable cause to arrest [the

defendant]." The circuit court, in its appellate capacity, reversed and remanded for a new trial, stating that

> the trial court abused its discretion by admitting [the trooper's] probable cause testimony because such testimony was an improper opinion on the ultimate issue and invaded the province of the jury. . . . [She] was asked to name a legal standard -- probable cause -- and apply that legal standard to the facts in this case. . . . The trial court also erred by overruling [the defendant's] objection that [the trooper's] opinion invaded the province of the jury, because the opinion failed to assist the jury in understanding the issues at trial. . . . Opinions that do not help the jury understand the issues at trial are independently inadmissible regardless of whether they embrace the ultimate issue because they invade the province of the jury to draw conclusions and inferences.

The state argued that the error was harmless because the trooper's "subjective, personal belief that she had probable cause would be obvious to the jury." But the court disagreed, stating that the trooper "did not couch her testimony as a subjective, personal belief, but repeatedly made the objective statement that probable cause existed for the arrest."

II. Criminal Traffic Offenses

***Jackson v. State*, __ So. 3d __, 2015 WL 9008779 (Fla. 4th DCA 2015)**

The defendant pled guilty to armed carjacking and robbery with a firearm. The trial court imposed consecutive ten-year mandatory minimum sentences, although the crimes occurred on the same date and involved the same victim, as "nothing in the plain language of the statute indicates that it applies only where more than one victim is involved." The appellate court affirmed but certified the following question: "Does section 775.087(2)(d)'s statement that 'The court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense' require consecutive sentences when the sentences arise from one criminal episode?"
http://www.4dca.org/opinions/Dec.%202015/12-16-15/4D14-4918.op.pdf

***Hood v. State*, __ So. 3d __, 2015 WL 8923941 (Fla. 2d DCA 2015)**

The defendant's probation was revoked, and sentences were imposed, for resisting arrest without violence and driving with a suspended license. The appellate court affirmed the probation revocation and the sentences without comment, but remanded for correction of a scrivener's error on the written order of revocation.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/December/December%2016,%202015/2D14-4977.pdf

***State v. Depriest*, __ So. 3d __, 2015 WL 7873408 (Fla. 1st DCA 2015)**

The defendant was charged with vehicular homicide. He filed a motion to dismiss, contending that "his actions did not rise to the level of recklessness required to prove the offense." The trial court granted his motion, and the state appealed. The appellate court reversed,

finding that "the undisputed facts established a prima facie case of vehicular homicide as a matter of law." After passing a van on a two-lane highway, the defendant remained in the wrong lane for about a half mile, until colliding with the victim's car. A "witness saw the victim's headlights and stated that [the defendant] took no evasive action." The defendant acknowledged that he "drove the wrong way for one-half mile for his convenience should he need to pass another car." The court noted that the defendant

> was not briefly distracted. He made a calculated and willful decision to travel in the wrong lane for one-half mile at a speed which was very likely to kill or seriously maim in the event of a head-on collision, which occurred. A jury could lawfully and reasonably decide that willfully and unnecessarily driving 55 mph for a half-mile in the wrong lane of traffic, when fully capable of returning to the correct lane, was a willful and wanton disregard for the safety of others. To affirm the trial court's order would be equivalent to holding that a driver who travels in the wrong lane of traffic until he kills another driver in a head-on collision is mere negligence. We decline to so hold.

https://edca.1dca.org/DCADocs/2015/1822/151822_DC13_12042015_093522_i.pdf

***Turner v. State*, __ So. 3d __, 2015 WL 7566490 (Fla. 4th DCA 2015)**

The defendant was sentenced to concurrent probation terms for DUI manslaughter, serious bodily injury, and injury to a person or property. The conditions of probation were to "(1) live without violating the law; (2) abstain entirely from the use of alcohol and/or illegal drugs; and (3) submit to random urinalysis testing." After she tested positive for cocaine, her probation was revoked and sentence imposed. She appealed, arguing that the revocation was based solely on hearsay evidence, "namely a laboratory report confirming the presence of cocaine and the probation officer's testimony regarding the results of an in-office drug test that he personally conducted." The appellate court affirmed, finding that "the probation officer's testimony constitutes corroborating non-hearsay evidence." It noted a conflict among other appellate district courts, but it adopted the Fifth District's holding in *Bell v. State*, __ So. 3d __, 2015 WL 5883607 (Fla. 5th DCA 2015), and held that "a probation officer's testimony regarding the results of an in-office drug test that the qualified officer personally conducted is non-hearsay corroborating evidence and thus can be sufficient to support revocation. . . . In sum, the trial court's finding [of VOP] was sufficiently supported by both hearsay (the laboratory report) and non-hearsay (the officer's testimony) evidence."
http://www.4dca.org/opinions/Nov.%202015/11-25-15/4D14-3821.op.pdf

***Acoff v. State*, __ So. 3d __, 2015 WL 7444072 (Fla. 1st DCA 2015)**

The defendant was convicted of leaving the scene of a crash involving death (Count I), DUI manslaughter (Count II), and two counts of DUI causing or contributing to serious bodily injury (Counts IV and V). He appealed the DUI-based convictions, arguing that the state "did not establish the *corpus delicti* for those offenses, and therefore, could not introduce and rely on his statements admitting he was the driver of the vehicle that caused the crash. He specifically argues that under Florida law, the State was required to bring forth independent evidence that he was driving the offending vehicle." The appellate court disagreed and affirmed.

After the accident, a police officer went to the apartment of the vehicle's registered owner, the defendant's fiancée/roommate. The officer testified that the defendant said the person the officer was looking for "don't have anything [to] do with it; it's all on me," and that after he was put in the police car and read his *Miranda* rights, but not arrested, the defendant said "he had been driving 'my woman's vehicle,' trying to get home, when 'basically I, I went to sleep. I went to sleep on the wheel and that's what happened.'" Further, in a recorded jailhouse telephone conversation the defendant told his fiancée the house keys "were stuck in the ignition of [her] car," that he had been "totally out of it," and that there had been no one in the car with him. The appellate court stated that while "[i]t is a fundamental principle of law that no person be adjudged guilty of a crime until the state has shown that a crime has been committed, . . . there was circumstantial evidence that the fatal crash was caused by an impaired driver. . . . This evidence is not overwhelming. But it did not need to be overwhelming or uncontradicted to show a crime occurred and satisfy the *corpus delicti* rule. [It] simply had to 'at least show' that an impaired driver caused the crash that killed someone." Further, "[t]here was additional circumstantial evidence sufficient to identify [the defendant] as the driver . . . without reference to his admissions."
https://edca.1dca.org/DCADocs/2013/2712/132712_DC05_11242015_103434_i.pdf

***State v. Wiley*, __ So. 3d __, 2015 WL 7294570 (Fla. 1st DCA 2015)**

The defendant had pled no contest to multiple offenses that arose from a "road rage" incident. The trial court imposed a downward departure sentence, finding that the defendant needed and "was amenable to specialized treatment for her bipolar disorder." The state appealed. challenging the trial court's decision to impose a downward departure sentence. The appellate court affirmed because the issue was not properly preserved. The state had argued against a downward departure, but "its argument was not sufficient . . . to preserve the issue for appellate review because the prosecutor did not also object to the sentence after it was imposed." The court certified conflict with *State v. Ayers*, 901 So. 2d 942 (Fla. 2d DCA 2005).
https://edca.1dca.org/DCADocs/2015/0858/150858_DC05_11192015_123246_i.pdf

***Tosado v. State*, 175 So. 3d 935 (Fla. 5th DCA 2015)**

The defendant appealed his convictions of possession of burglary tools, grand theft, burglary of a structure, criminal mischief, driving without a valid license, and driving with a suspended license. The appellate court reversed in part and remanded with instructions for the trial court to vacate the judgment and sentence for driving without a valid license: "Although [the defendant] did not raise this issue below, a violation of the prohibition against double jeopardy constitutes fundamental error, which can be raised for the first time on appeal. . . . The State properly concedes that the elements of driving without a valid license are subsumed by the elements of driving with a suspended license."
http://www.5dca.org/Opinions/Opin2015/100515/5D13-1840.op.pdf

***State v. Whidden*, 23 Fla. L. Weekly Supp. 405a (Fla. 17th Cir. Ct. 2015)**

The defendant was charged with DUI, DUI with property damage, and leaving the scene of an accident. The trial court granted his motion to suppress unlawful stop and detention, physical evidence, observations, and statement, and the state appealed. The circuit court, in its

appellate capacity, reversed. The trial court had found that "[t]here was no fresh pursuit, in fact, the defendant wasn't even observed until he was in Deerfield by the Coconut Creek [Police]. There was no and is no evidence that there was ever any damage to the other vehicle. Under the leaving the scene [statute], there is a requirement that there be damage to the vehicle, so there was no offense for which they stopped him and there was no evidence of a fleeing by the defendant." But the circuit court, in its appellate capacity, noted:

> A "citizen-informant" whose information is at the high end of the tip reliability scale is one who is not motivated by pecuniary gain, but by a desire to further justice. . . . In the instant case, the [Community Service Aid] was at least a "citizen-informant" who witnessed [the defendant] back into a car, saw the owner get out of the vehicle, and watched the [the defendant] drive away without immediately stopping at the scene. [The] CSA . . . followed [the defendant] while calling the Coconut Creek Police Department and providing law enforcement with continuous information. Despite the trial court's findings that law enforcement did not see any damage to the other vehicle in the hit and run, [the CSA's] testimony that he did not wait to see if there was damage but instead followed the vehicle he observed leave the scene of the crash nevertheless provided reasonable suspicion of criminal activity and justification for a traffic stop for further investigation.

***Blue v. State,* 23 Fla. L. Weekly Supp. 206a (Fla. 9th Cir. Ct. 2015)**

The defendant appealed his convictions of driving while license suspended and fleeing and eluding an officer. He appealed, arguing that it was error for the trial court, over his hearsay objection, to admit into evidence a Florida ID card, social security card, and bus pass with his name. "It also allowed a police officer to testify that he found the documents in a car after he made a traffic stop. He testified that the driver stopped, but ran off on foot, abandoning the vehicle. The officer identified [the defendant] as the person whom he had seen driving the car and running away. [The defendant] testified that it was not him who was driving and that his wallet containing these documents had been stolen." The circuit court, in its appellate capacity, affirmed, noting:

> Items found at a crime scene are routinely introduced at trial to demonstrate the identity of the perpetrator. While such evidence often consists of fingerprints, blood, hair and the like, it may also consist of personal property possibly belonging to a defendant, including written documents containing a defendant's name that tend to indicate his involvement in a crime. . . . The documents here . . . were not introduced to prove any information contained in them. Rather, they were items possibly belonging to [the defendant] found at the scene. They were not inadmissible hearsay and the trial court did not abuse its discretion in admitting them. While a conviction could not be sustained based on this circumstantial evidence alone, . . . the jury also had the positive identification made by the officer to support its finding of guilt.

III. Civil Traffic Infractions

***Asbury v. DHSMV*, 23 Fla. L. Weekly Supp. 316a (Fla. 17th Cir. Ct. 2015)**

The defendant was cited for driving while license suspended or revoked without knowledge. He chose the option of paying the civil penalty, under which "the person cited . . . shall be deemed to have admitted the infraction and to have waived his or her right to a hearing on the issue of the commission of the infraction." Because his use of that option resulted in his adjudication on the DWLS infraction, DHSMV later used it as a "predicate offense" to qualify him as a habitual traffic offender. He therefore sought to have the judgment and sentence vacated, arguing that his payment of the civil penalty, "which had the effect of a guilty plea, must be considered involuntary, since he was not informed of the consequence of a driver's license suspension" as required by case law and the Florida Rules of Criminal Procedure. But the circuit court, in its appellate capacity, affirmed, stating: "First, by choosing the option of paying the civil penalty directly to the Clerk of the Court, as set forth in the statute, [the defendant] chose to admit to the infraction and waived his right to a hearing. Second, Rule 3.172 explicitly states that it does not apply when a defendant is not present for a plea. Third, in his initial brief, [the defendant] readily admits that, because noncriminal traffic infractions are civil actions, the rules of criminal procedure nevertheless do not apply."

IV. Arrest, Search and Seizure

***W.B. v. State*, __ So. 3d __, 2015 WL 7008164 (Fla. 3d DCA 2015)**

An officer tried to stop the defendant, a juvenile who was driving a motor scooter, because he thought the defendant wasn't old enough to drive the scooter and he believed the defendant was required to wear protective eyewear. As the officer approached, the defendant jumped off the scooter and fled. The officer caught him and arrested him for resisting arrest without violence. The trial court convicted the defendant, withheld adjudication, and placed him on probation, but the appellate court reversed, holding that the officer did not have a lawful basis for the traffic stop. While the state argued that the officer reasonably believed, based on prior encounters, that the defendant was not old enough to drive the scooter, the appellate court called the officer's knowledge about the defendant's age stale. It also noted the exceptions to the protective eyewear requirement — when the driver is at least 16 and when the motor is smaller than 50 cc or is rated two-brake horsepower or less — neither of which applied. http://www.3dca.flcourts.org/Opinions/3D15-0772.pdf

***Aguiar v. State*, __ So. 3d __, 2015 WL 6554397 (Fla. 5th DCA 2015)**

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. The defendant exited the vehicle, but the officer ordered him back in the vehicle, after which the officer saw a bag of cocaine. The defendant was arrested and was convicted of possession of cocaine, attempted tampering with physical evidence, and possession of drug paraphernalia, to which he pled nolo contendere, reserving the right to challenge the denial of his motion to suppress. The appellate court reversed and remanded with instructions that the defendant's motion to suppress be granted and all charges be dismissed. It stated that

> although a "traffic violation sufficiently justifies subjecting the driver to detention . . . [t]he restraint on the liberty of the blameless passenger is, in contrast, an unreasonable interference." As such, an "officer must have an articulable founded suspicion of criminal activity or a reasonable belief that the passenger poses a threat to the safety of the officer, himself, or others before ordering the passenger to return to and remain in the vehicle." . . . Here, the officer clearly had no basis to order [the defendant] back into the vehicle at the time that he did so. The officer was simply concerned that [the defendant] might "run," or leave, which [the defendant] had a right to do. . . . The State's attempt to justify the detention based upon [the defendant's] reaction to the unlawful command to return to the vehicle—that [he] did not comply immediately, but questioned the command and looked nervous, etc.—is unavailing. It should not require explanation that whether an officer has reasonable suspicion to detain an individual should be judged on the facts observed by the officer prior to the command to stay or return—not after.

http://www.5dca.org/Opinions/Opin2015/102615/5D15-1627.op.pdf

***McCray v. State*, 177 So. 3d 685 (Fla. 1st DCA 2015)**

While executing a search warrant at a residence, a deputy saw the defendant drive up. Eventually the defendant was convicted of unlawful possession of oxycodone, and he appealed, arguing that it was error for the trial court to deny his motion to suppress. But the appellate court affirmed, agreeing with the trial court that when the deputy asked the defendant to exit the vehicle, it "transformed the casual citizen encounter into an investigative stop; that [the defendant's] nervousness and hidden hand provided lawful grounds—concern for officer safety—for the detention; and that [the defendant's] consent to search the vehicle was voluntary." Further, "the search was valid pursuant to the search warrant which specifically authorized officers to search vehicles located on the curtilage of the residence."
https://edca.1dca.org/DCADocs/2014/0024/140024_DC05_10202015_100023_i.pdf

***Munroe v. State*, 177 So. 3d 320 (Fla. 1st DCA 2015)**

The trial court denied the defendant's motion to suppress, reading "the plain language of section 316.605(1), Florida Statutes, to mean that a license tag's alphanumeric designation may not be obstructed by any matter." The appellate court affirmed but reiterated that it had certified conflict with *Harris v. State*, 11 So. 3d 462, 463–464 (Fla. 2d DCA 2009) (concluding that "[m]atters external to the tag, such as trailer hitches, bicycle racks, handicap chairs, u-hauls, and the like are not covered by the statute").
https://edca.1dca.org/DCADocs/2015/1202/151202_DC05_10262015_103235_i.pdf

***State v. Baba*, 23 Fla. L. Weekly Supp. 410b (Fla. 17th Cir. Ct. 2015)**

The defendant was arrested for DUI and filed a motion to suppress, arguing that the stop was unlawful. The trial court granted the motion, but the circuit court, in its appellate capacity, reversed. It stated that "the State presented sufficient evidence that [the deputy] had reasonable, founded suspicion for the initial stop of Defendant based on the combination of her personal,

direct observations of Defendant's driving pattern and the observations of [another officer], as a citizen informant, that were relayed to her by dispatch."

***Ballou v. State*, 23 Fla. L. Weekly Supp. 217a (Fla. 17th Cir. Ct. 2015)**

A deputy stopped the defendant for running a stop sign and driving without headlights and noticed indicia of impairment, and the defendant admitted having had two or three drinks. The defendant was charged with DUI. He filed a motion to suppress, asserting that the deputy lacked reasonable suspicion to initiate a DUI investigation because the defendant "was not speeding, swerving, or driving in an erratic manner; . . . did not try to elude the deputy; . . . was able to provide his license, registration, and insurance . . . without fumbling; . . . did not stumble when exiting his vehicle; the deputy could not be certain that [his] speech was actually slurred, rather than an accent; and the deputy could not detect the smell of alcohol." The trial court denied the motion, and the defendant pled no contest and reserved his right to appeal. He appealed the denial of the motion to suppress, but the circuit court, in its appellate capacity, affirmed, holding there was competent, substantial evidence to support the trial court's findings.

***State v. Urbina*, 23 Fla. L. Weekly Supp. 216a (Fla. 17th Cir. Ct. 2015)**

A trooper saw the defendant driving slowly on the interstate, swerving, and almost hitting the center median twice. He stopped her to check on her safety and noticed indicia of impairment. The defendant was charged with DUI and filed a motion to suppress, arguing that the trooper did not have probable cause for the stop. The trial court granted the motion, holding that the trooper had only "mere suspicion." The state appealed, and the circuit court, in its appellate capacity, reversed and remanded, stating that "the trooper had an objectively reasonable basis for making the stop."

V. Torts/Accident Cases

***Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247 (Fla. 2015)**

The plaintiff, a developmentally disabled adult, was injured when a car hit him while he was riding a bicycle. His father sued his uninsured motorist carrier, State Farm. The trial court allowed State Farm to introduce evidence of "future medical bills for specific treatment or services that are available . . . to all citizens regardless of their wealth or status," but precluded it from introducing evidence of the plaintiff's future Medicare or Medicaid benefits. The jury awarded the plaintiff $1,491,875.54 in damages, including $469,076 for future medical expenses. State Farm appealed, and the Second District Court of Appeal reversed the trial court ruling that denied admissibility of the plaintiff's future Medicare benefits and held that "because there was no evidence that [the plaintiff] paid for his Medicare benefits, these benefits were free and unearned" and therefore admissible under *Florida Physician's Ins. Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984). The plaintiff appealed and the supreme court reversed, holding that the Second DCA misapplied *Stanley*. It stated: "Not only does this conclusion overlook details contained within the record, but it also ignores the discussion in *Stanley* that collateral sources may qualify as an expense, obligation, or liability to the plaintiff. . . . We conclude that future Medicare benefits are both uncertain and a liability under *Stanley*, due to the right of reimbursement that Medicare retains."

The supreme court also cited policy concerns, stating that "our holding is consistent with the recognition of the inherently prejudicial effect of evidence of collateral source benefits," and that "it is absolutely speculative to attempt to calculate damage awards based on benefits that a plaintiff has not yet received and may never receive, should either the plaintiff's eligibility or the benefits themselves become insufficient or cease to continue." It receded from *Stanley*, stating that

> to consider Medicare, Medicaid, and other similar social legislation benefits as exceptions to the general rule that precludes admission of collateral sources circumvents the purpose of the collateral source rule. It is a basic principle of law that tortfeasors should not receive a windfall due to benefits available to the injured party, however those benefits were accrued. . . . We now agree with the dissent in *Stanley* that tortfeasors—and here, those who insure against the actions of tortfeasors—should not enjoy such a windfall at the expense of taxpayers who fund social legislation benefits."

http://www.floridasupremecourt.org/decisions/2015/sc13-1768.pdf

***Anderson v. State*, __ So. 3d __, 2015 WL 9491860 (Fla. 5th DCA 2015)**

Anderson was the driver of a car involved in an accident in which a passenger died and two others were seriously injured. He suffered a traumatic brain injury and lost the use of one arm, and his parents were appointed as his guardians. He was charged with one count of DUI manslaughter and two counts of DUI with serious bodily injury. The trial court found him competent to stand trial, despite contrary evaluations by three psychologists. His "public defender sought to challenge the trial court's determination but, due to procedural errors on counsel's part, failed to obtain appellate review of that finding," which gave rise to Anderson's motion for postconviction relief based on ineffective assistance of counsel. The trial court denied the motion, but the appellate court reversed, stating: "Defense counsel steadfastly maintained that his client was not competent to proceed and advised Anderson that the proper way to challenge the trial court's ruling on his competency was to enter a 'conditional' plea of no contest that 'reserve[ed] his right to appeal the competency determination made by the [trial court].' This advice was patently wrong. To make matters worse, counsel for the State agreed that Anderson would have the right following the plea to appeal the court's competency determination." It stated further that Anderson's attorney "was obviously unfamiliar" with the limitation that "[a] trial court's determination that a defendant is competent to stand trial is generally not reviewable until after a conviction at trial." Furthermore, "[d]efense counsel recommended that Anderson enter a 'conditional' plea of no contest in order to appeal the trial court's competency determination. Ineffectiveness does not get much clearer than that. Anderson desired to appeal the competency determination, and he alleged in his motion that, if not for the affirmative misadvice of counsel, he would have rejected the plea offer and proceeded to trial." http://www.5dca.org/Opinions/Opin2015/122815/5D14-2625.op.pdf

***Hunter v. Shaw*, __ So. 3d __, 2015 WL 9584917 (Fla. 1st DCA 2015)**

The Shaws sued Hunter, alleging vicarious liability in his capacity as sheriff after an on-duty deputy rear-ended their car. The defendant moved to dismiss for improper venue, but the

trial court denied the motion, "relying in a 'joint defendant' exception to the [sheriff's] home venue privilege." The appellate court reversed, agreeing that "the trial court erred by interpreting too broadly the recognized joint tortfeasor exception to the home venue privilege, in effect improperly creating a new 'co-defendant' exception'."
https://edca.1dca.org/DCADocs/2015/3361/153361_DC13_12312015_092417_i.pdf

***Ortega v. Belony*, __ So. 3d __, 2015 WL _____ (Fla. 3d DCA 2015)**

After an automobile accident, Belony sued Ortega. The jury found Belony 70% at fault and awarded $0 for past or future pain and suffering. The trial court found this contrary to the evidence and ordered the jury to reconsider, after which the jury awarded Belony $5,000 for pain and suffering. The trial court found this "coldblooded" and awarded $245,000 for pain and suffering. The appellate court reversed, stating "there is no basis on which to conclude, as a matter of law, that a jury of reasonable persons could not have reached a $5,000 award for pain and suffering on the evidence presented. . . . Although Belony suffered a severe, permanent injury in the car accident, he has proven to be resilient in his recovery and by the time of trial, felt 'almost normal.' Therefore, the jury did not act unreasonably."
http://www.3dca.flcourts.org/Opinions/3D14-1655.pdf

***Panzera v. O'Neal*, __ So. 3d __, 2015 WL 7749965 (Fla. 2d DCA 2015)**

O'Neal, a truck driver employed by Publix, fatally struck Anthony Panzera as he was running across a multilane interstate roadway. Panzera's estate sued O'Neal and Publix, and the trial court entered a final order granting summary judgment in favor of the defendants. The estate appealed, and the appellate court affirmed, agreeing with the trial court that there were no issues of material fact. Around 3 a.m., Panzera had climbed a fence on a dark stretch of I-75. He was wearing a dark shirt. The Publix truck had a governor that limited its speed to 65 mph, which was five mph under the speed limit. The truck also had a system that generated "a sudden deceleration report when the semi experienced a drop in speed of seven miles per hour or more in less than one second." The system's report that night showed the driver was going 65 mph when he suddenly began to decelerate. Skid marks on the road were consistent with O'Neal's testimony that he braked and swerved to avoid hitting Panzera, and the FHP corporal who prepared the traffic homicide investigation report "concluded that the evidence available at the scene indicated that O'Neal took immediate evasive action, that O'Neal could have done nothing more to avoid the collision, and that Panzera caused the collision." The estate had not presented admissible evidence or expert testimony to refute that conclusion, but rather merely "speculative lay opinion testimony."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/December/December%2002,%202015/2D14-4302co.pdf

***Taylor v. Culver*, __ So. 3d __, 2015 WL 7731432 (Fla. 1st DCA 2015)**

In an automobile negligence action, Taylor appealed, arguing that "the trial court erred in excluding the testimony of his expert biomedical engineer where the testimony was relevant to material issues of fact and to refute the testimony of [Culver's] biomedical engineering expert. Secondly, [Taylor] argues a new trial is required due to improper argument during opening and closing arguments." The appellate court agreed and reversed and remanded, concluding that the

trial court abused its discretion in excluding the testimony, and citing case law "to support the conclusion that the proffered testimony of [Taylor's] biomechanics expert was relevant to the disputed issues concerning velocity and the directionality of forces involved in the accident, and thus, to the issue of causation. The trial court in this case was aware of this binding precedent but inexplicably elected to discount and discard its authority."
https://edca.1dca.org/DCADocs/2014/4444/144444_DC13_12012015_102855_i.pdf

***Middleton v. Hager*, __ So. 3d __, 2015 WL 7566539 (Fla. 3d DCA 2015)**

Middleton was allegedly injured when a vehicle she was in was rear-ended by a tractor-trailer driven by Hager, who was employed by Martin-Brower (MB). She sued Hager and MB, who filed a motion to dismiss. Despite finding that Middleton had made misleading, false, and "incredible" statements, the general magistrate recommended that the trial court deny the motion to dismiss and instead order the sanction or an award of attorney's fees and costs. But the trial court dismissed Middleton's complaint with prejudice, based on fraud upon the court. She appealed, and the appellate court affirmed, "holding that the trial court did not err in determining the proper effect of the magistrate's factual findings, and did not abuse its discretion in imposing the ultimate sanction of dismissal."
http://www.3dca.flcourts.org/Opinions/3D15-0136.pdf

***Ferrer v. La Serna*, __ So. 3d __, 2015 WL 7566488 (Fla. 4th DCA 2015)**

After an automobile accident, La Serna sued Ferrer for injuries. The jury awarded her $8,000 for past and future medical expenses, which was $3,695.31 less than what she had sought. The trial court granted her motion for an additur for $3,695.31, but the appellate court reversed, finding that "the trial court erred in not providing its findings in support of additur. Furthermore, because the evidence was conflicting and the jury could have reached its verdict consistent with the evidence, we reverse with instruction to reinstate the jury verdict."
http://www.4dca.org/opinions/Nov.%202015/11-25-15/4D14-2475.pdf

***Jimenez v. Ortega*, __ So. 3d __, 2015 WL 7302661 (Fla. 5th DCA 2015)**

After a car accident, Ortega sued Jimenez for loss of his pickup truck, medical costs, lost wages, and past and future pain and suffering. Jimenez contested the damages for lost wages and pain and suffering. During depositions, Ortega "gave false or misleading answers to questions central to the disputed issues in his case: namely, regarding the extent, duration, and severity of his pain and suffering and his ability to work." A surveillance video showed Ortega performing activities inconsistent with his claimed injuries, and he admitted that some of his deposition testimony had been false. Jimenez therefore moved to dismiss the case, arguing that Ortega had perpetrated a fraud upon the court. "Sensing the trial court had reservations about dismissing the entire claim, Jimenez's counsel suggested the trial court consider dismissing those claims the fraud helped perpetuate, namely, the claims for pain and suffering and lost earnings." The trial court took the motion under advisement and the trial continued, and the jury awarded Ortega the total amount he had requested for medical costs and property damage, $136,823.45 for lost wages, and $186,614.84 for pain and suffering. The trial court entered a written order denying Jimenez's motion to dismiss and rendered final judgment in favor of Ortega. Jimenez appealed, and the appellate court affirmed the awards for medical costs and property damage, but reversed

the awards for lost earnings and for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a pre-existing condition, and loss of enjoyment of life.
http://www.5dca.org/Opinions/Opin2015/111615/5D14-1818.op.pdf

***Pena v. Fox*, __ So. 3d __, 2015 WL 7074652 (Fla. 2d DCA 2015)**

Pena was allegedly injured in an automobile accident involving Fox. Before suing Fox, Pena's attorney made a settlement offer to Fox's insurer, USAA. The offer requested the policy limits in exchange for Pena's release of all claims against Fox relating to the accident and imposed certain conditions to the release; i.e., Pena would release only her claims and only as to Fox, and "[t]herefore, any attempt to provide a release which contains a hold harmless or indemnity agreement, which releases anyone other than your insured, or which releases any claim other than my client's claim will act as a rejection of this good faith offer." But the release USAA prepared and sent with a settlement check included a paragraph where Pena would "release, acquit, and forever discharge Matthew R Fox his/her heirs, executors and assigns, from any liability" and "while I/we hereby release all claims against Releasee(s), its agents, and employees, the payment hereunder does not satisfy all of my/our damages resulting from the accident . . . . I/We further reserve my/our right to pursue and recover all unpaid damages from any person, firm, or organization who may be responsible for payment of such damages, including first party health and automobile insurance coverage, but such reservation does not include the Releasee(s), its agents, and employees." Viewing the language "Releasee(s), its agents, and employees" as an attempt to expand the release to include USAA, Pena considered her offer rejected and filed a lawsuit against Fox. Fox filed a motion to enforce the settlement, which the circuit court granted, finding that "the term Releasee refers to Matthew R. Fox." The court dismissed Pena's complaint with prejudice, and she appealed.

The appellate court reversed the order dismissing the complaint and remanded, stating there was no meeting of the minds. Further, Florida law "requires that 'an acceptance of an offer must be absolute and unconditional, identical with the terms of the offer.'. . . An attempted acceptance can become a counteroffer 'either by adding additional terms or not meeting the terms of the original offer.' . . . The release USAA delivered appears to have done both."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2015/November/November%2013,%202015/2D14-3357.pdf

***Volusia County v. Joynt*, __ So. 3d __, 2015 WL 7017429 (Fla. 5th DCA 2015)**

While sunbathing, Joynt was severely injured when a county beach patrol truck ran her over. She got a judgment against the county for $2.6 million, and the county appealed the part of the judgment awarding damages for lost earning capacity and future medical expenses, arguing "there was no reasonable evidence on which the jury could legally predicate a verdict." The appellate court agreed and reversed as to those damages, noting that about a year after the accident Joynt resumed her former employment, and the "claimed future medical expenses are either not reasonably certain to be incurred, or . . . there is no basis upon which the jury could have, with reasonable certainty, determined the amount of those expenses."
http://www.5dca.org/Opinions/Opin2015/110915/5D14-3403%20op.pdf

***Explorer Ins. Co. v. Cajusma*, __ So. 3d __, 2015 WL 6757633 (Fla. 5th DCA 2015)**

Cajusma was driving the insured automobile and was in an accident. Two occupants of the other vehicle — Luma and Johnson —sued him for negligence, and Lancaster, the chiropractic clinic that treated Pade and other injured individuals, sued Explorer for unpaid bills. Explorer sought a declaratory judgment that it "should be relieved from the obligation to pay benefits and from providing liability coverage because material misrepresentations had been made in connection with those claims." Cajusma and Pade filed motions for summary judgment in the declaratory judgment action, seeking attorney's fees and costs. Explorer voluntarily dismissed its action, but the trial court granted the motions for attorney's fees and costs, finding that "the payment of the property damage and the agreement to provide Mr. Cajusma with a defense in the liability lawsuits operated as a confession of judgment regarding insurance coverage under the policy" and that "Explorer's voluntary dismissal of its declaratory judgment action triggered [Cajusma's and Pade's] entitlement to attorney's fees and costs."

The appellate court affirmed as to Cajusma but reversed as to Pade. It discussed the confession of judgment doctrine, noting the underlying policy of "discouraging insurers from contesting valid claims and reimbursing insureds for attorney's fees when they must sue to receive the benefits owed to them." It stated further:

> Explorer filed a separate declaratory judgment action seeking a determination of whether it was required to provide Cajusma a defense and whether it was required to pay his claims under the insurance policy. Also, . . . Explorer asserted that Cajusma was not entitled to a defense under the policy; however, it continued to provide him with a defense in the tort action while litigating the declaratory judgment action. . . . [T]he tort actions in the instant case were ultimately dismissed. Finally, . . . Explorer provided Cajusma with a defense despite contending, in the declaratory judgment action, that it was not obligated to do so. Accordingly, Cajusma received a benefit and was entitled to recover his attorney fees and costs upon Explorer's dismissal of its declaratory judgment suit.

But Pade, on the other hand, "did not receive a recovery or any other benefit, did not receive a defense from Explorer, and Explorer did not pay anyone on behalf of Pade. Accordingly, Pade was not entitled to recover statutory attorney's fees and costs."
http://www.5dca.org/Opinions/Opin2015/110215/5D14-2608.op.pdf

***Maniglia v. Carpenter*, __ So. 3d __, 2015 WL 6738849 (Fla. 3d DCA 2015)**

After an automobile accident, Carpenter was awarded damages from Maniglia. Maniglia sought a new trial because the trial court had excluded certain evidence relating to a golf cart accident and physical altercation with police that Carpenter had been involved in a month after the accident. The appellate reversed and remanded, holding that "the golf cart incident included facts that addressed both Carpenter's credibility and his proof of causation. The possibility of 'unfair' prejudice did not 'substantially' outweigh the probative value of that evidence."
http://www.3dca.flcourts.org/Opinions/3D14-0989.pdf

***Matamoros v. Infinity Auto. Ins. Co.*, 177 So. 3d 682 (Fla. 3d DCA 2015)**

The plaintiff was a passenger in his vehicle, which was being driven by a mechanic. The vehicle was in an accident, and the plaintiff's insurer denied coverage. He filed a complaint against his insurer, seeking a declaration that the policy provided coverage for the accident and that the insurer had breached its insurance contract. The trial court provisionally granted the insurer's motion for summary judgment, granting the plaintiff leave to file a motion for rehearing once the deposition transcript of the driver of his car had been filed. He later filed a motion for rehearing, along with the transcript. The trial court granted the motion, set aside the summary judgment order, and sua sponte dismissed the plaintiff's complaint without prejudice, apparently determining that his "declaratory judgment and breach of contract claims were not yet ripe for adjudication." He sought a writ of mandamus, which the appellate court granted, holding that "this motion was an authorized motion for rehearing pursuant to rule 1.530 of the Florida Rules of Civil Procedure, and not a second motion for rehearing."
http://www.3dca.flcourts.org/Opinions/3D15-1030.pdf

***State Farm Mut. Auto. Ins. Co. v. Gonzalez*, __ So. 3d __, 2015 WL 5965211 (Fla. 3d DCA 2015)**

Gonzalez was hit by a vehicle and was treated at Mariners Hospital's ER. She was awarded $685 in PIP and medical payment benefits for the treatment from her insurer, State Farm, and State Farm appealed. The appellate court reversed, holding that Gonzalez had failed to comply with statutory notice requirements.
http://www.3dca.flcourts.org/Opinions/3D14-2290.pdf

***New Hampshire Indem. Co. v. Gray*, 177 So. 3d 56 (Fla. 1st DCA 2015)**

After suffering injuries in a motor vehicle collision with Belizaire, Gray successfully sued Belizaire, and a final judgment for costs was imposed jointly and severally against Belizaire and his insurer, New Hampshire Indemnity Company (NHIC). NHIC challenged the judgment, asserting that (1) it was improperly joined in the judgment because the plaintiff failed to comply with service of process requirements, and (2) the trial court failed to "articulate any basis" for adding NHIC to the judgment and to make a finding that the policy covered the plaintiff's taxable costs.

The appellate court affirmed. It held that the second argument was not preserved for appellate review, and that even if it had been preserved, "the judgment was not defective for failing to include the findings NHIC asserts were necessary." As to NHIC's first argument, while the plaintiff did not comply with section 627.4136(4), Florida Statutes (did not serve a copy of the motion directly on NHIC when he first filed the joinder motion), he argued that he complied with service requirements "by sending a supplemental certificate in which he averred that he sent a copy of the motion via certified mail on the same day NHIC filed its memorandum in opposition to the motion" and that "the statute requires the insurer to be joined by sending the insurer a copy of the motion via certified mail at or before the time the final judgment to which it is joined is entered, which he did." The appellate court held that under the circumstances, "even if NHIC did not receive the certified mail copy of the motion before the hearing, it did not suffer any prejudice as a result, and the court did not abuse its discretion by not dismissing the joinder motion and ruling on the merits. . . . This leaves the substantive question of whether the insurance policy at issue affords coverage for the taxable litigation costs included in the

judgment at issue and, thus, whether joining NHIC in the judgment was proper." The appellate court held that the policy did provide coverage for the taxable litigation costs included in the judgment, based on the provision in the "Supplementary Payments" section of the policy that stated that, in addition to liability coverage, NHIC would pay "Other reasonable expenses incurred at *our* request." It certified conflict with *Steele v. Kinsey*, 801 So. 2d 297 (Fla. 2d DCA 2001).
https://edca.1dca.org/DCADocs/2014/3348/143348_DC05_10082015_102406_i.pdf

VI. Drivers' Licenses

***DHSMV v. Brown*, __ So. 3d __, 2015 WL 7568618 (Fla. 3d DCA 2015)**

DHSMV suspended the defendant's license for DUI. The circuit court granted the defendant's petition for certiorari review because the breath alcohol test affidavit and refusal affidavit were not notarized. DHSMV petitioned for second-tier certiorari review of the circuit court's order, which the appellate court granted because the circuit court had ignored *Gupton v. Dep't of Highway Safety*, 987 So. 2d 737 (Fla. 5th DCA 2008) (officer can attest to signature of affidavit, and in absence of controlling case law in Third District, circuit court was required to apply *Gupton*). The appellate court stated further that the defendant "also argues that the circuit court may have decided that the signatures on the affidavits, although coupled with department names and badge numbers, prevented a proper identification of the officers, or that the times on the reports, which did not denote a.m. or p.m., were not sufficiently exact. But the [hearing officer] obviously found this information sufficient to fu[l]fill its purposes. Because the circuit court was acting in an appellate capacity when reviewing the factual findings of the hearing examiner, [it] could not reweigh this evidence."

***Objio v. DHSMV*, __ So. 3d __, 2015 WL 7302568 (Fla. 5th DCA 2015)**

The defendant's license was suspended for DUI. The arresting officer was subpoenaed for the formal hearing but did not appear. The hearing officer offered to continue the case and extend the defendant's temporary driving permit, but the defendant's attorney declined, stating that "section 322.2615(11) was absolute in its terms and required the hearing officer to invalidate the suspension" and that section 322.2615(9) prevents a temporary driving permit to be issued "to a person who sought and obtained a continuance of the hearing." The hearing officer sustained the suspension, and the defendant appealed. The circuit court upheld the suspension, noting that the arresting officer had timely submitted a written request for continuance and therefore had not "failed to appear." The defendant sought review, and the appellate court quashed the circuit court's order, holding that the circuit court had applied the incorrect law and stating: "The circuit court reasoned that [the arresting officer's] absence did not trigger the mandatory invalidation provision of section 322.2615(11) and found that [the defendant] could not avoid the consequences of license suspension by refusing to accept the hearing officer's initial offer of a continuance. The circuit court upheld the hearing officer's order sustaining the suspension of [the defendant's] license and noted that there seemed to be a conflict between sections 322.2615(6) and (11)." Section 322.2615(11) provides that if the arresting officer fails to appear pursuant to subpoena, the department shall invalidate the suspension, and section 322.2615(6) provides that "failure of a subpoenaed witness to appear at the formal review hearing is not grounds to invalidate suspension." But the appellate court noted that

> section 322.2615 treats the non-attendance of subpoenaed arresting officers differently than the non-attendance of other subpoenaed witnesses. Section 322.2615(6)(c) provides that "failure of a subpoenaed witness to appear at the formal review hearing is *not* grounds to invalidate suspension." (emphasis added). . . . However, in a situation such as this, where no continuance is ordered, section 322.2615(11) is absolute, mandatory, and quite clear when it states that "[i]f the arresting officer . . . fails to appear pursuant to a subpoena as provided in subsection (6), the department *shall* invalidate the suspension." *Id.* (emphasis added). Because there is no ambiguity in the wording of subsection (11), there is no need to resort to any other source for explanation or definition. . . . Thus, when the arresting officer . . . failed to appear at the hearing after being duly subpoenaed, the hearing officer was required, under section 322.2615(11), to invalidate the suspension.

The appellate court also noted in a footnote that this was "not a situation where the formal hearing was continued based upon the arresting officer's pre-hearing written request for a continuance."
http://www.5dca.org/Opinions/Opin2015/111615/5D15-769.op.pdf

***DHSMV v. Dean*, 179 So. 3d 939 (Fla. 5th DCA 2015)**

The circuit court quashed the suspension of the defendant's driver license because there was insufficient probable cause for the stop, and DHSMV filed a petition for writ of certiorari. The appellate court denied the petition, stating: "While the lower court applied the wrong standard of law to justify a stop of a motor vehicle—probable cause, rather than reasonable suspicion—we find, under the 'tipsy coachman' doctrine, that the trial court reached the proper result and deny the petition for writ of certiorari." The dissenting opinion cautioned that "[l]eft unchecked, the precedential value of the erroneous ruling on subsequent administrative hearings will result in a miscarriage of justice."
http://www.5dca.org/Opinions/Opin2015/100515/5D15-2038.op.pdf

***Miller v. DHSMV*, 23 Fla. L. Weekly Supp. 396a (Fla. 13th Cir. Ct. 2015)**

The defendant's license was suspended, and the circuit court, in its appellate capacity, denied review. The underlying hearing had been left open for a day to allow the defendant to submit additional evidence, and after the hearing the presiding hearing officer was unavoidably unable to issue the written order. A substitute hearing officer viewed all the documents and listened to the recorded proceedings, and then issued a written order upholding the suspension. The defendant argued that "his due process rights were violated and the suspension should be reversed because the order was not issued 1) by the original hearing officer, and 2) within the time provided for by statute." The circuit court stated: "This proceeding consisted of the presentation of documentary and recorded evidence only. No live witnesses presented testimony. Counsel for Petitioner was present to make legal argument, but Petitioner did not appear. The original hearing officer did not have to evaluate the credibility of witnesses based on their conduct at the hearing. And the successor hearing officer had the benefit of a recording of the original proceeding." Further, while DHSMV must send notice of its decision to the person seeking review within seven working days after a formal review hearing, "[t]he day of the

hearing is not included in the computation of time, nor is any day the division office is closed. . . . The order was timely."

***Hancock v. DHSMV*, 23 Fla. L. Weekly Supp. 395a (Fla. 13th Cir. Ct. 2015**)

The defendant's license was suspended for refusal to submit to a breath test. She petitioned for review, "stating a hopeless conflict in the documentary materials suggests a lack of competent substantial evidence to support upholding [the] suspension, where the conflict casts doubt on whether [she] had been read the implied consent before or after the traffic stop." The circuit court, in its appellate capacity, denied review, stating that the criminal report affidavit showed that law enforcement first made contact with the defendant at 8:46 p.m. when she was

> asleep or passed out behind the wheel of her car in traffic. It further indicates that the time of arrest was 9:40 p.m. and that Implied Consent and request for a breath test were effected at 10:10 p.m. The time of arrest and request for the breath test, as well as the reading of implied consent are confirmed by the Breath Alcohol Analysis Report and the DUI Report. The citation alone reflects a time of 10:19 p.m., although that time is not connected to any particular event and may be read to reflect the time the citation was issued. It is up to the hearing officer to resolve conflicts in the evidence. . . . Although the Order Upholding Suspension does not articulate the basis for the hearing officer's conclusion, this court has recently denied certiorari under virtually identical facts.

***Holton v. DHSMV*, 23 Fla. L. Weekly Supp. 387a (Fla. 4th Cir. Ct. 2015**)

The defendant's license was suspended for DUI. He petitioned for review, arguing (1) that "the hearing officer's refusal to issue subpoenas for the FDLE annual inspector and the JSO monthly inspector of the machine used to test his breath alcohol content denied him procedural due process," and (2) that the officer "placing him in the locked back seat area of his patrol car amounted to a de facto arrest, and that, at the time it occurred, [the officer] lacked probable cause to arrest" him. The circuit court, in its appellate capacity, quashed the suspension and remanded for a new hearing based on the first argument, and stated that "where an inspection report is considered, it is a violation of due process to deny a driver the right to cross-examine the person who prepared the report."

***Moskalenko v. DHSMV*, 23 Fla. L. Weekly Supp. 301a (Fla. 7th Cir. Ct. 2015**)

The defendant's license was suspended because his application provided a fraudulent address. He sought review, arguing that the only evidence of fraud at the formal hearing was the FHP investigation report, which was hearsay because the investigating trooper did not testify. The report referred to the defendant's license application and an affidavit from the owner of the property at the address on the application, but neither document was attached to the report or submitted to the hearing officer. Further, the trooper's report was not sworn to or made under oath. The circuit court in its appellate capacity, granted review, quashed the suspension, and remanded, distinguishing the case from cases involving suspensions following DUI arrest, at which a hearing officer may "rely solely on the hearsay documents submitted by law enforcement officers."

***Arthur v. DHSMV*, 23 Fla. L. Weekly Supp. 300a (Fla. 6th Cir. Ct. 2015)**

While investigating two 911 calls, deputies found the defendant passed out in the driver's seat of a car with the engine running. Ultimately the defendant's license was suspended for DUI. He sought review, arguing that "the deputies performed an illegal investigatory stop by blocking his car and asking him to unlock his door without requisite suspicion that he was, or was about to be, involved in a crime." The circuit court, in its appellate capacity, denied review, stating that the defendant "was not conscious of his surroundings when the deputies arrived, and an investigatory stop cannot be said to occur until the person in the car is aware of the police presence." Therefore he "was not detained until he awoke and became aware of the police presence." The defendant further argued that "if he was not involved in an investigatory stop when the deputy blocked his only means of exit, then he was involved in an investigatory stop when he awoke and was commanded to unlock his door." But the court stated: "As a general rule, an investigatory stop begins when a police officer asks a suspect to roll down the window or exit the vehicle. . . . However, the rule does not apply in this case because [the deputy] was not asking [the defendant] to unlock the door to perform an investigatory stop; he was asking [him] to do so because he was concerned for [the defendant's] well-being and was therefore performing a welfare check," which did not require reasonable suspicion before the deputies could ask the defendant to unlock his door. And by the time the deputies confirmed that he "was not suffering from a medical condition, they had requisite cause to conduct an investigatory stop."

***Myers v. DHSMV*, 23 Fla. L. Weekly Supp. 298b (Fla. 4th Cir. Ct. 2015)**

The circuit court, in its appellate capacity, quashed and remanded the defendant's license suspension for DUI, stating that the hearing officer's denial of a subpoena duces tecum to obtain the breath test operator's certification records denied the defendant her due process right to rebut evidence against her.

***Behr v. DHSMV*, 23 Fla. L. Weekly Supp. 298a (Fla. 4th Cir. Ct. 2015)**

The circuit court, in its appellate capacity, quashed and remanded the defendant's license suspension, stating that the stop was not lawful. The record was devoid of any evidence (1) that the officer "observed any driving within his own jurisdiction, or that this stop was made in fresh pursuit," or that "any other vehicle was affected by the petitioner's changing lanes without using her turn signal." It also held that DHSMV's argument on the theory of citizen's arrest was without merit as the officer "made no arrest, nor could he, based on his observations prior to the stop. He conducted a traffic stop for a civil traffic infraction. A private citizen has no authority to do so." Further, the hearing officer's denial of subpoenas duces tecum as to two officers denied the defendant of her right to due process.

***Wilson v. DHSMV*, 23 Fla. L. Weekly Supp. 297c (Fla. 4th Cir. Ct. 2015)**

The defendant's license was suspended for DUI. He sought review, arguing that he was denied due process when the hearing officer refused to admit into evidence the FDLE Intoxilizer maintenance and inspection documents for the breath test machine. The circuit court, in its appellate capacity, granted review, quashed the suspension, and remanded.

***Freeman v. DHSMV*, 23 Fla. L. Weekly Supp. 222a (Fla. 20th Cir. Ct. 2015)**

The defendant's Florida driver license was revoked for five years after two Pennsylvania DUI convictions. He sought review, arguing that he had only one DUI conviction, not two, because after his first DUI he completed an Accelerated Rehabilitative Disposition (ARD) program in Pennsylvania, after which the charge was dismissed and his criminal record was expunged. But the circuit court in its appellate capacity, denied review, stating: "A review of Pennsylvania Law clearly indicates that for the purposes of a civil penalty under the administrative suspension scheme, an acceptance into the ARD program, even completion, would qualify as a conviction." Therefore, the license suspension was proper.

***Rihan v. DHSMV*, 23 Fla. L. Weekly Supp. 214a (Fla. 12th Cir. Ct. 2015)**

The defendant rear-ended another vehicle at a red light, and he told the deputy that he could not stop because of the rain. The deputy noticed that the defendant had bloodshot, watery eyes and smelled of alcohol. After receiving a *Miranda* warning, the defendant told the deputy that he was coming from a restaurant where he had two drinks, and he refused to complete field sobriety exercises. After an implied consent warning, he also refused to take a breath test. His license was suspended, and he sought review, arguing that because of the accident report privilege, his pre-*Miranda* statements should not have been admitted into evidence. But the circuit court, in its appellate capacity, denied review, stating that although the hearing officer did not review a formal crash report, the information obtained during the crash investigation, as reflected in the probable cause affidavit, was not privileged under § 316.066, Florida Statutes, "by virtue of §322.2615(2)(b)" and therefore was properly introduced and considered by the hearing officer. "Moreover, the Court finds that the statements attributed to the victim and the [defendant] during the crash investigation constitute competent and substantial evidence supporting the decision under review." It stated further that "the accident report privilege does not preclude the consideration of the investigating officer's observations of the [defendant's] demeanor, speech patterns, or breath scent" or post-*Miranda* statements made by the defendant. The court concluded by stating that the officer's observations and the defendant's post-*Miranda* admission that he was coming from a restaurant where he had had two drinks "constitute competent substantial evidence to support the finding that law enforcement had probable cause to believe that [he] was in actual control of a vehicle while intoxicated."

***Bowman v. DHSMV*, 23 Fla. L. Weekly Supp. 203a (Fla. 6th Cir. Ct. 2015)**

After the defendant was stopped for driving with an expired registration, his license was suspended for refusal to submit to a breath test. He sought review, arguing that "documentary discrepancies in the record create such uncertainty that it is impossible to determine whether the procedures took place in the proper order," and that the suspension order "was not supported by live testimony to resolve those discrepancies." The circuit court, in its appellate capacity, denied review, finding that "[b]ecause the discrepancies in the record were obvious scrivener's errors that do not cause any confusion as to the timing of [the defendant's] refusal, relative to his lawful arrest and the implied consent warning, DHSMV properly relied upon documentary evidence, without the necessity of live testimony, as competent substantial evidence that proper procedures were followed."

***Dunning v. DHSMV*, 23 Fla. L. Weekly Supp. 202c (Fla. 4th Cir. Ct. 2015**)

The defendant's license was suspended for failure to pay child support. He sought review, asserting the suspension should be quashed because DHSMV was notified that he had filed a petition for modification of child support and alimony in the pending family law case, and that his license should not have been suspended during the pendency of that case; that "the proper response would have been intervention by the Department of Revenue in the [pending family] proceedings." The circuit court, in its appellate capacity, denied review, noting that DHSMV "contends that the suspension was entered as a ministerial act at the request of the Department of Revenue, as authorized [by statute]" and that the petition for review "does not cite any facts or authority to support the contention that [DHSMV] deprived [the defendant] of due process of law, departed from essential requirements of law, or that the challenged order is not supported by competent, substantial evidence."

***Trinh v. DHSMV*, 23 Fla. L. Weekly Supp. 201a (Fla. 4th Cir. Ct. 2015**)

The defendant's license was suspended for refusal to submit to a breath test. The circuit court, in its appellate capacity, denied review, finding the arrest was lawful because there was "competent substantial evidence that the police officer had reasonable suspicion within constitutional parameters to detain [the defendant] for a DUI investigation." The officer was dispatched to investigate a suspicious vehicle parked on the road shoulder in a residential area. The vehicle's engine was running and the defendant was "dead asleep" in the driver's seat. The officer had difficulty rousing the defendant and noticed indicia of impairment, and his welfare check was authorized under the circumstances.

VII. Red-light Camera Cases

***State v. Kirshy*, 23 Fla. L. Weekly Supp. 389a (Fla. 5th Cir. Ct. 2015)**

The trial court found the defendant not guilty of running a red light, "based on its determination that the photographic evidence of the infraction was not admissible because the State failed to establish a proper predicate as required by the Florida Rules of Evidence." The state appealed, and the circuit court, in its appellate capacity, reversed, stating: "We find that photographic or electronic images or streaming video are admissible without further authentication under section 316.0083, Florida Statutes. Therefore, it was error for the trial court to require authentication as a condition to receiving these items into evidence."

The circuit court, in its appellate capacity, also found that double jeopardy did not prevent it from reaching the substantive issues on appeal, and that the issue of whether the city attorney can prosecute a traffic infraction based on a traffic device in county court was not raised in the trial court and therefore could not be addressed.

VIII. County Court Orders

***State v. Crist et al.*, 23 Fla. L. Weekly Supp. 491a (Charlotte Cty. Ct. 2015)**

The defendants filed motions to suppress, asserting that "attributes of the State of Florida's Alcohol Testing Program . . . render their Breathalyzer Test Results inadmissible"; i.e., lack of agency inspection each month, lack of department FDLE inspection each year, failure to conduct the required department inspection upon the return of breath testing equipment from an authorized repair facility, allowing unauthorized access to the equipment during transport to FDLE's inspection and repair facility in Tallahassee, failure to promulgate rules for the appropriate transport of breath equipment to and from the inspection and repair facility in Tallahassee, the repairing of the equipment upon its arrival at the inspection and repair facility in Tallahassee and before the annual inspection is conducted, and "[f]ailure to promulgate rules for any kind of pre-annual inspection maintenance." The court denied the motions, noting that the defense witness was the former FDLE employee who had instituted the policy of centralizing inspections that led to the complained-of issues. The court discussed the issues in detail and held that "the Department is technically in compliance with the laws and rules of the Alcohol Testing Program. The issue appears to be whether the supplemental pre-inspection servicing activities of the Department . . . somehow violate[] a Defendant's rights to discovery. This does not appear to be the case."

***State v. Drudy et al.*, 23 Fla. L. Weekly Supp. 477a (Hillsborough Cty. Ct. 2015)**

The defendants filed motions to suppress, asserting that "the use of common carrier, including U.S. mail, to transport the I-8000 between agencies and repair facilities is a violation of Chapter 11D-8." But the court held that "[t]his argument is unsupported either by testimony or the plain language of the F.A.C." The defendants' second argument was that FDLE was not within the definition of an authorized repair facility, which the court noted "does have a certain facile appeal. However, closer analysis reveals the form over substance nature of the argument. The evidence is undisputed by either party that on March 27, 2006, Chapter 11D-8 was amended to include FDLE within the definition of an authorized repair facility. . . . *The amendment was made to prevent defense motions to dismiss or suppress based upon the argument that FDLE was not authorized to open an instrument and replace a part.*" The defendants argued that "the Court must give [their witness's] interpretation of the rule great weight pursuant to established law requiring a court to give great weight to an agency's interpretation of its own rules," since she had been employed at FDLE. But the court stated that while at FDLE the witness "*never expressed the opinion she now expresses with regard to Rule 11D-8.004(2). [She] has only expressed this opinion subsequent to leaving employment with FDLE and becoming employed as a private consultant. As such, her opinion is not the expression of an agency interpretation of its own rule. It is the opinion of a paid witness and entitled to no more weight than the testimony and opinion of any other witness.*" It stated further that "the Court must consider the testimony that [the witness's] departure from FDLE was under less than ideal circumstances. Of much more import however, is that every action [she] took while at FDLE is inconsistent with her currently expressed opinion."

***State v. Hart*, 23 Fla. L. Weekly Supp. 472a (Alachua Cty. Ct. 2015)**

The defendant filed a motion to suppress/motion in limine with regard to breath test results, contending that "a valid breath test was not conducted pursuant to FDLE rules because a Department Inspection was not performed upon the Intoxilyzer 8000 . . . upon its return to the University of Florida Police Department." The court denied the motion, noting that the defendant

had the initial burden to establish that a machine was not in compliance, and finding that the defendant "has not presented any credible evidence that would call into question the scientific accuracy and reliability of the defendant's breath test results in this case. Nonetheless, even if Defendant had shown a rule violation existed, such a violation would be insubstantial under section 316.1932(1)(b)(2). The breath test performed in this case was done so in substantial compliance with the Department's rules, regulations, and the applicable Florida statutes."

***State v. Torrez*, 23 Fla. L. Weekly Supp. 294b (Collier Cty. Ct. 2015)**

The defendant was arrested for DUI and filed a motion to suppress her breath test results. The court denied the motion, stating: "Under the defendant's suggested interpretation, an intoxylizer sent to Tallahassee for an FDLE annual inspection would require an identical reinspection by FDLE virtually the next day upon its return to Collier County. Such an interpretation does not make sense. . . . In the face of [the] lack of clarity [in the rules governing breath test instruments], courts are left to interpret the rule in a manner that makes sense. It is a fundamental principle of judicial interpretation that an absurd result be avoided."

***State v. Frain*, 23 Fla. L. Weekly Supp. 292a (Brevard Cty. Ct. 2015)**

The defendant's vehicle got stuck in a ditch after he drove around barricades in a construction zone. A construction worker saw him walking away and told his supervisor (who was not at the scene), who called 911. A trooper arrived. Meanwhile, a deputy responding to a dispatch about the crash passed a man walking on the road, and after the trooper at the scene radioed about the driver walking away, the deputy turned around and caught up with the defendant. The deputy offered the defendant a ride back to his vehicle so that he could call a tow truck, but testified that it was not "his intention to place the defendant in custody at that time." The defendant was eventually arrested for DUI and filed a motion to suppress, claiming illegal arrest and seizure. The court denied the motion, holding that the encounter was consensual, because "a reasonable person would have felt he was free to ignore the Deputy's attempt to converse, refuse the offer of transportation, and request that the Deputy pull over and let him out of the vehicle at any time."

The court also noted that it "need not determine whether [the deputy] was conducting an accident investigation since no accident reporting privilege attached to [the defendant] once he left the location of his vehicle. . . . Whether the Deputy subjectively believed a DUI investigation might ensue is of no consequence since, this Court concludes [he] was performing his community caretaking function in providing assistance to a citizen requiring it." It stated further that "[u]nder the totality of the circumstances, this court concludes [the defendant] voluntarily consented to speak with [the deputy] and accepted the offer to be transported back to his vehicle in the backseat of the police vehicle. This action on the Deputy's part did not constitute de facto detention nor arrest."

***State v. Bokilo*, 23 Fla. L. Weekly Supp. 289a (Brevard Cty. Ct. 2015)**

Two officers saw the defendant's vehicle cross a median a few times and stop when it hit a wall. One officer noticed alcohol on the defendant's breath and that she appeared tired and her speech was slurred. The other officer testified that the defendant was "shaken up" and had

watery eyes and slow responses. The defendant had neck pain and asked to go to the hospital. An officer directed a hospital employee to draw blood in the ER, but no implied consent warning was read and no voluntary consent was received from the defendant, who never lost consciousness, and the defendant was not offered the choice to take a breath or urine test instead. Based on the blood alcohol results, the defendant was arrested and charged with DUI with a blood alcohol level above .15 and DUI causing damage or injury. She filed a motion to suppress, claiming there was no legal authority for the extraction of her blood. The court granted her motion, holding that although United States Supreme Court cases "may allow for the involuntary warrantless extraction of blood from DUI suspects under federal constitutional law in some circumstances, Florida has extended greater legal protections to their citizens and imposed higher standards for law enforcement." And in this case no statutory authority applied, and the defendant did not consent to the blood draw. For a legal basis for the blood draw in this case, under the implied consent law, the state must show that (1) there was reasonable cause to believe the defendant was DUI, (2) she appeared for treatment at a hospital, and (3) the administration of a breath or urine test was impractical or impossible. The court found that the state did not show that the officer had reasonable cause to believe that the defendant was DUI or that a breath test was impractical or impossible, and in any case the officer's failure to inform the defendant of her ability to refuse to submit to the blood extraction rendered the blood test results inadmissible.

***State v. Cook*, 23 Fla. L. Weekly Supp. 274a (Palm Beach Cty. Ct. 2015)**

The defendants were arrested for DUI and filed motions to suppress the breath tests for failure to comply strictly with the administrative code regarding inspections of the breath test machines. The court denied the motions, noting that case law does not require FDLE's alcohol testing program to comply strictly with the regulations in order for breath tests to be admissible. The court found FDLE was in substantial compliance, which was sufficient. It held further that "[t]he specific issues raised in Defendants' Motions to Suppress do not deprive the State of the presumptions under implied consent."

***State v. Larkin*, 23 Fla. L. Weekly Supp. 271b (Hillsborough Cty. Ct. 2015)**

The defendant was arrested for DUI and filed a motion to suppress "because unapproved alcohol reference solutions were used in both the September 2013 department inspection as well as the monthly agency inspections" of the breath test machine. The court granted the motion, stating:

> The State argues that FDLE was permitted to reanalyze the solution per the FDLE alcohol testing program procedures manual, the defense on the other hand argues that the promulgated rule (11D-8.0035) prohibits re-analysis. The issue is resolved by the FDLE procedures manual. On page 2 of the FDLE alcohol testing program manual, it states that the purpose of the manual "is to document the procedures of the Florida Department of Law Enforcement alcohol testing program. It is not intended to supersede, and when in conflict, is subordinate to, information and processes in the Florida Statutes, Florida Administrative Code, or FDLE policies and procedures". Since FDLE 11D-8.0035 requires all results to fall within acceptable range, this court finds that the promulgated rule and section 2.14 of the FDLE alcohol testing program procedures manual to be in conflict and

> therefore section 2.14 is subordinate to the promulgated rule (11D-8.0035) and therefore, retesting is not permitted since 11D-8.0035 requires all of the results must fall within acceptable range.

The lot at issue was not properly approved, and the use of the non-approved solutions during the department inspections rendered the results inadmissible.

The court further stated that "[s]ince the State made no argument for substantial compliance, this court need not make any ultimate legal findings on this point of law. But, since the State is seeking further appellate review, it should be noted that (Thirteenth Circuit courts) found that the doctrine of substantial compliance did not apply to FDLE or rule 11D-8.0035. Had the State argued this point during the hearing, the court would have rejected the State's position."

The court also stated that a *Brady* violation had probably occurred, but "by granting the motion to suppress for violating FDLE Rule 11D-8.0035, the court does not have to go any further on this issue as it has been rendered moot."

***State v. Darr*, 23 Fla. L. Weekly Supp. 267a (Hillsborough Cty. Ct. 2015)**

The defendant was arrested for DUI and filed a motion to suppress based on the state's violation of applicable administrative rules by (1) using a common carrier to transport the breath test machine, and (2) not complying with the requirement that "the Department inspection after an Intoxilyzer 8000 has been sent to an authorized repair facility must take place at the local agency where the instrument is being use for evidentiary purposes." The court denied the motion, holding that because of a lack of clarity, it had to give great deference to FDLE's interpretation of the applicable rule and concluded that "the use of common carrier to transport the Intoxilyzer 8000 instrument, in order to achieve compliance with other regulatory requirements set forth in Chapter 11D-8, would be a permissible construction of the statute and the Rules, and therefore, would be lawful." As to the second ground, the court stated: "In order to agree with Defendant's argument, this Court would have to find that" the person who authored the rule requiring a "local agency" department inspection following repair at an authorized facility "knowingly and intentionally violated the rules she was responsible for administering by requiring these Department inspections to occur in Tallahassee. The Court does not believe the evidence in this case supports this conclusion. On the contrary, the Court finds that [her] actions during her employment as Program Manager were a reasonable accommodation to the challenges imposed by any budgetary constraints." It further stated: "It is clear that Rule 11D-8.004(2) does not expressly require the authorized repair facility to return an Intoxilyzer instrument directly back to the local agency in order to have a Department inspection following the repair. Without this language, the Court concludes that the action of FDLE/ATP, in performing Department inspections in Tallahassee on Intoxilyzer 8000 instruments that have been subject to repair, is a permissible and reasonable construction of the statute and Rule 11D-8.004(2), and therefore, would be lawful."

***State v. Ramirez*, 23 Fla. L. Weekly Supp. 259a (Volusia Cty. Ct. 2015)**

The deputy stopped the defendant for speeding and noticed the odor of alcohol and that "the Defendant had difficulty obtaining his driver's license as he was having trouble sliding it

out of his wallet to retrieve it." The defendant was arrested for DUI and refused a breath test. He filed a motion to suppress, which the court granted, agreeing with the defendant that the deputy did not have reasonable suspicion to order him out of his vehicle for a DUI investigation. The only indicia of impairment was the odor of alcohol coming from the defendant's breath.

***State v. Berfield*, 23 Fla. L. Weekly Supp. 258a (Volusia Cty. Ct. 2015)**

The defendant was arrested for DUI and filed a motion in limine to exclude the numerical results of breath tests, arguing that "tests two, three, and five were unreliable because the required volume of breath was not met. Further, he claims that the State is estopped from presenting numerical results of tests one and four [which were not administered within 15 minutes of other tests and thus invalid under the implied consent statute] because his license was administratively suspended for refusing to submit to the breath test." The court denied the motion as to test results one and four (although not completed within 15 minutes of each other, they are admissible at trial if the state establishes "the traditional scientific predicate"), but granted it regarding the numerical results in tests two and three, stating: "The facts of the refusals are admissible, but not the numerical results." (Apparently the state conceded that the fifth test was invalid for lack of volume.)

***State v. Luchtenburg*, 23 Fla. L. Weekly Supp. 253b (Pasco Cty. Ct. 2015)**

A deputy looking for a burglary suspect saw the defendant using his cell phone in his car that was parked on the side of the road with the engine running. He had a "hunch" that the defendant might be trying to contact the burglary suspect, and he banged on the defendant's window at least three times. The defendant initially avoided contact, because "he observed the deputy leading the K-9 police dog down the street towards his vehicle and made an affirmative decision that he did not wish to interact with the deputy." Eventually, the defendant "relented and acquiesced to the apparent authority of the deputy and . . . did not feel free to leave." The deputy testified that in addition to based on his hunch, he sought contact with the defendant because he was concerned for his welfare, testifying that the defendant was non-responsive and perhaps passed out or asleep. However, the court noted that the defendant's cell phone was in "illuminated texting mode" the entire time and stated:

> The deputy refused to acknowledge that a cell phone does not maintain that high level of illumination for a lengthy period of time without interaction by the person holding the phone, a response this Court feels is less than credible and not forthcoming regarding a fact that is general knowledge to the public. . . . While [the deputy] stated a concern, he did not have any articulable basis to justify the concern and conceded that, other than appearing to be asleep with an illuminated texting mode phone in his hand, there was no other concern for [the defendant's] welfare.

The court held that there was no reasonable suspicion or other basis to justify a seizure of the defendant, and it granted the defendant's motion to suppress "all evidentiary items obtained as a result of the stop, seizure and detention."

***State v. Partlow*, 23 Fla. L. Weekly Supp. 252a (Hernando Cty. Ct. 2015)**

The defendant was arrested for DUI and filed motions to suppress (1) statements she made during the investigation, based on lack of *Miranda* warnings, (2) evidence of her performance and refusal related to field sobriety exercises, based on the deputy's incorrect statement of law (that she was required to perform and that the requirement was printed on the driver license), and (3) administration and results of her breath test, because law enforcement failed to observe her for 20 minutes before administering the test. The court denied the defendant's motion to suppress her statements because warnings are "not required in the context of a traffic stop that ultimately leads to an arrest for DUI," but granted the other motions.

***State v. Taylor*, 23 Fla. L. Weekly Supp. 251b (Nassau Cty. Ct. 2015)**

The defendant refused to perform field sobriety exercises and was handcuffed and arrested. Because the deputy did not advise the defendant that her refusal could carry a negative consequence, the court excluded from evidence the deputy's request for the performance of the exercises and the defendant's refusal. The court stated that "the danger of undue prejudice in admitting the evidence of the Defendant's refusal outweighs its probative value of her consciousness of guilt."