FLORIDA TRAFFIC-RELATED APPELLATE OPINION SUMMARIES

October – December 2014

[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)

***Goins v. State*, ___ So. 3d ___, 2014 WL 7191024 (Fla. 5th DCA 2014)**

The defendant pled guilty to DUI, fourth or subsequent offense. The trial court denied his motion for postconviction relief and he appealed, arguing that "his 1985 DUI could not be used as a predicate to enhance the charge for his fourth DUI in this case to a felony because the 1985 DUI was uncounseled." The appellate court held that "a prior misdemeanor conviction in which a defendant is unrepresented due to a denial of counsel cannot be used as a later statutory enhancer" and "that the order denying the postconviction motion should be reversed and the case remanded for the lower court to (1) attach documents showing [the defendant] waived a right to counsel in the 1985 DUI conviction, (2) attach documents refuting [his] claim that he did not have counsel, or (3) hold an evidentiary hearing."
http://www.5dca.org/Opinions/Opin2014/121514/5D14-1518.op.pdf

***State v. Henderson*, ___ So. 3d ___, 2014 WL 5781868 (Fla. 5th DCA 2014)**

The defendant had entered a plea to DUI (her fourth), resisting an officer with violence, and driving while license suspended or revoked. The trial court imposed a downward departure from the sentencing guidelines because the defendant needed substance abuse rehabilitation and had a minor son at home. The appellate court reversed, but at resentencing the court imposed the identical sentence, based on the defendant's argument that "[t]he offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse." The appellate court reversed again and remanded for imposition of a guideline sentence, stating that it was not an "isolated incident" merely because "the defendant has never

committed the exact offense for which . . . she is currently being sentenced. . . . [The defendant] had three prior DUI convictions. The second, third, and fourth DUIs were committed within a two-year period. The fourth DUI occurred just ten months after the third DUI, while [she] was still on probation. The fact that she was able to avoid being arrested for ten months does not render her last DUI isolated." Also, the record did not show that the defendant was remorseful. http://www.5dca.org/Opinions/Opin2014/110314/5D13-2441.op.pdf

***Vuong v. FDLE*, 149 So. 3d 174 (Fla. 4th DCA 2014)**

The defendants, who had been charged with DUI after submitting to breath tests, filed a chapter 120 rule challenge to administrative rules governing FDLE's approval and oversight of breath test instruments, arguing that the rules "constitute an invalid exercise of delegated legislative authority" and

> are vague, do not provide sufficient guidelines or standards, and/or vest unbridled discretion in FDLE[;] that the rules do not require breath instrument manufacturers to provide FDLE notice of modifications to an already approved model of breath instrument; do not require FDLE to retest or reapprove breath instruments modified by the manufacturer; and do not set forth criteria or guidelines addressing the retesting or reapproval of modified instruments. They also complained of the rules' failure to specifically require or address inspection and/or calibration of the flow sensor on the breath instrument.

The ALJ concluded that the defendants had failed to meet the burden of proving the invalidity of the rules, and the appellate court affirmed.
http://www.4dca.org/opinions/Oct%202014/10-22-14/4D13-2199.op.pdf

***Hannan v. State*, 22 Fla. L. Weekly Supp. 338b (Fla. 17th Cir. Ct. 2014)**

A police officer saw the defendant swerving within one lane while exiting a restaurant parking lot. He followed the defendant, saw him swerve three or four more times, stopped him, was informed by dispatch that there was an outstanding warrant, and noticed the defendant's balance was unstable, his eyes were bloodshot, and he smelled of alcohol. The defendant was charged with DUI and refusal to submit to testing. He appealed the trial court's limitations on cross-examination of testifying officers, but the circuit court, in its appellate capacity, affirmed, stating that any possible error was not preserved or was harmless "due to the overwhelming evidence of guilt."

***State v. Tyson*, 22 Fla. L. Weekly Supp. 300a (Fla. 6th Cir. Ct. 2014)**

The defendant was charged with DUI and filed a motion in limine to exclude at least part of the 911 recording. The trial court granted the motion, and the circuit court, in its appellate capacity, affirmed, holding that the trial court's decision to allow only 45 seconds of the recording to be played at trial was not an abuse of discretion.

***State v. Garcia et al.*, 22 Fla. L. Weekly Supp. 209d (Fla. 20th Cir. Ct. 2014)**

Twenty-six appeals raising identical issues regarding the Intoxilyzer 8000 were consolidated. The trial court had denied motions to suppress breath test results and required the state "to establish the traditional scientific predicate prior to admitting the results at trial." The state argued this requirement was error, but the circuit court, in its appellate capacity, affirmed, noting that "[t]he trial court ruled that it could not determine whether the instrument was the same as the one approved for use in Florida in light of all of the modifications that occurred and the fact that those modifications were not reported to NHTSA." Nor was the appellate court authorized to make such finding of fact.

***State v. Dalley*, 22 Fla. L. Weekly Supp. 204a (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with DUI by an amended information and sought to quash the information, "alleging it constituted a new offense or a substantial change of the offense, and therefore, was outside the statute of limitations." The trial court agreed and granted the motion to quash. The circuit court, in its appellate capacity, affirmed, stating:

> The filing of an amended information that is "*signed and sworn to* has the legal effect on the Original Information of a *nolle prosequi.* The 'amended' Information supplants the original one and, pursuant to Rule 3.160, Florida Rules of Criminal Procedure, the defendant must be re-arraigned." . . . Here, the State filed an amended information *that was signed and sworn* to, causing the original charge to be *nolle prossed.* Thus, since the amended information was untimely filed, it was not error for the trial court to grant [the defendant's] motion to quash.

***State v. Territo*, 22 Fla. L. Weekly Supp. 193a (Fla. 17th Cir. Ct. 2014)**

An officer stopped the defendant for speeding, noticed indicia of impairment, and, after the defendant failed roadside sobriety exercises, arrested her for DUI. The officer asked the defendant 13 times to submit to a breath test, and she gave indefinite responses until eventually agreeing. The trial court granted her motion to suppress because "the totality of the circumstances evinced an involuntary consent." Giving "great deference to the factual findings made by the trial court," the circuit court, in its appellate capacity, affirmed.

***State v. Moresco*, 22 Fla. L. Weekly Supp. 180b (Fla. 5th Cir. Ct. 2014)**

An officer stopped the defendant for speeding, noticed indicia of impairment, and conducted a DUI investigation. After field sobriety exercises were performed, the officer arrested the defendant for DUI. The trial court granted the defendant's motion to suppress the results of the exercises, holding that although the officer had reasonable suspicion to conduct a DUI investigation, he did not have probable cause to order the defendant to complete the field sobriety exercises, and the defendant did not consent to them. The circuit court, in its appellate capacity, reversed and remanded, stating that "the trial court applied the wrong legal standard. . . . [W]here an officer has a reasonable suspicion that a crime has been committed, the officer is permitted to conduct a reasonable inquiry to determine whether there is probable cause to make an arrest."

***State v. Silva*, 22 Fla. L. Weekly Supp. 74a (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with DUI with property damage. The trial court granted her motion to suppress her refusal to submit to a breath test and a urine test because the deputy, who believed she was under the influence of alcohol but not drugs, advised her "that if she refused to submit to breath *and* urine tests, her licenses would be suspended." The trial court agreed with the defendant that the deputy's request for both tests was unlawful because there was no reason for the urine test. The state argued that in that case only the refusal to take the urine test should be suppressed, but the circuit court, in its appellate capacity, affirmed the trial court's order granting the motion to suppress both refusals.

***State v. Logan*, 22 Fla. L. Weekly Supp. 73a (Fla. 17th Cir. Ct. 2014)**

The defendant was arrested for DUI. She moved to dismiss the information, which had been amended one business day before the special-set trial to state that the defendant was driving "*with a breath-alcohol level of 0.08 or more and/or with a breath-alcohol level of 0.15 or more*." The trial court agreed and granted her motion, and the circuit court, in its appellate capacity, affirmed, stating that

> by adding "with a breath-alcohol level of 0.08 or more" the State was effectively charging two different offenses in the same count, so that the amended Information was vague and confusing. . . . [The defendant] further argued that she was prejudiced in preparing for trial solely in regard to the charge of "with a breath-alcohol level of 0.15 or more" because her main defense was that the State's evidence as elicited in discovery could not exclude that her breath alcohol level was below 0.15 at the time of driving. . . . The State argues the trial court should have considered granting a continuance to allow [the defendant] to prepare for trial on the amended Information. However, the State did not request a continuance until after the trial court had found the amended Information defective and dismissed it. Furthermore, granting a continuance would not remedy [the defendant's] prejudice in preparing for trial.

***Wyatt v. State*, 22 Fla. L. Weekly Supp. 66a (Fla. 17th Cir. Ct. 2014)**

The defendant was convicted of DUI. He appealed, but the circuit court, in its appellate capacity, affirmed, stating that he

> waived his claim of alleged improper voir dire questioning by his failure to object, and by his acceptance of the jury [and] waived his claim that the prosecutor's alleged improper remarks during the rebuttal portion of closing argument entitled him to a new trial because [his] trial counsel failed to object to the remarks. . . . [T]he prosecutor's remarks did not rise to the level of fundamental error because it did not undermine the confidence in the trial outcome nor did it impair the jury's consideration of the evidence and merits. . . . Any error, although there was none, was harmless in light of the evidence of guilt presented.

***Hamilton v. State*, 22 Fla. L. Weekly Supp. 49b (Fla. 11th Cir. Ct. 2014)**

The defendant was charged with resisting an officer without violence, DUI, and driving while license suspended. The officer testified that the defendant told him her driver license was "kind of suspended" and that she gave him a phony name, and that after she failed the sobriety tests he arrested her, and that she used profanity and racial comments toward him. At pretrial, she moved to suppress reference to the racial slurs and profanity. The trial court denied the motion, finding the slurs relevant to the issue of impairment. A jury found the defendant not guilty of DUI but guilty of resisting an officer without violence. She appealed, arguing that "use of the racial slurs was inflammatory and unduly prejudicial," and that a *Williams* rule violation occurred when her suspended license was mentioned twice. The circuit court, in its appellate capacity, held that the *Williams* rule violation was harmless, but it nevertheless reversed and remanded, stating: "[DUI] is a general intent crime. . . . The elements . . . are driving, being under the influence, and being impaired [and] it was error for the trial court to have admitted the racial slurs to show the intent of the [defendant] when specific intent was not an element of the charge." As to the charge of intent to commit resisting arrest, "the prejudicial effect of admitting verbatim racial slurs to circumstantially prove intent was outweighed by any probative value."

II. Criminal Traffic Offenses

***Davis v. State*, ___ So. 3d ___, 2014 WL 7150501 (Fla. 4th DCA 2014)**

The defendant was convicted of felony murder and related crimes, and high-speed or wanton fleeing. The arrest for the latter charge occurred eight days after the murder, when the defendant sped away from a routine traffic stop, crashed his car, and fled on foot, and items taken from the murder victim's home were found in his car. Among other motions, he "moved to suppress evidence obtained from search warrants for his automobile and his girlfriend's residence and to sever his high speed fleeing charge from the other counts. The trial court denied these motions and ruled that the fleeing charge was 'episodically related to the burglary because [his] automobile contained many of the items reportedly stolen during the burglary when the murder occurred.'" He appealed. Regarding the search warrants, the appellate court affirmed because the evidence in question would have been obtained by lawful means. The court also affirmed the denial of the severance of the high speed or wanton fleeing count, stating: "Two or more offenses can be charged in the same indictment or information 'when the offenses . . . are based on the same act or transaction or on 2 or more connected acts or transactions'" that are linked in an episodic way. The trial court found that the defendant's fleeing "was episodically related to the prior crimes," and the appellate court agreed, stating that it "reasonably could be construed as an attempt to prevent the officers from discovering the stolen items in his car that would link him to the murder scene. The commission of one crime in an attempt to avoid conviction for another is a sufficient connection to link the two crimes."
http://www.4dca.org/opinions/Dec%202014/12-17-14/4D13-794.op.pdf

***Fogarty v. State*, ___ So. 3d ___, 2014 WL 7150495 (Fla. 4th DCA 2014)**

The defendant pled guilty to DUI manslaughter and sought a downward departure from his lowest permissible sentence, which the trial court denied. He appealed, claiming the denial was based on "erroneous facts and incompetent evidence." The state argued that the claim was not appealable, citing *Jorquera v. State*, 868 So. 2d 1250 (Fla. 4th DCA 2004). The appellate court affirmed, stating that no issues of arguable merit exist, but issued the opinion "for the

limited purpose of receding from our decisions in *Jorquera* and *Marshall v. State*, 978 So.2d 279 (Fla. 4th DCA 2008), where we declined review of trial courts' discretionary decisions to deny downward departure sentences. We hold that such determinations are appealable under the process enunciated in *Banks v. State*, 732 So.2d 1065 (Fla.1999)." The court noted that "both case law and Florida Rule of Appellate Procedure 9.140 had expanded appeals to both illegal and unlawful sentences." However, in this case, while the trial court had determined there were grounds for downward departure (isolated incident and defendant's remorse), it decided not to downwardly depart because of the level of the defendant's intoxication. "The court also commented that driving while intoxicated is not an accident. In his pro se brief, appellant challenges the factual predicate for his blood alcohol level, but no objection was made that the state's statements were in error, and appellant did not offer any evidence to contradict the blood alcohol level. Thus, the issue is not preserved."
http://www.4dca.org/opinions/Dec%202014/12-17-14/4D13-3157.op.pdf

***Baron v. State*, ___ So. 3d ___, 2014 WL 6460850 (Fla. 4th DCA 2014)**

The trial court denied the defendant's motion for postconviction relief, based on ineffective assistance of counsel, from his convictions for vehicular manslaughter and DUI manslaughter. The appellate court affirmed, stating that most of the claims were unproven or were reasonable trial strategy decisions, and that evidence supported the trial court's conclusion that "even if all of [the defendant's] claims of ineffective assistance and failure to present evidence had been cured at trial, there was no reasonable probability that the results at trial would have been different, given the testimony and other evidence presented by the state[, including] eyewitness testimony of [the defendant's] swerving and weaving prior to striking the pedestrian victims, as well as his fleeing the scene, and his admissions, in recorded telephone calls at the jail, to drinking and driving."
http://www.4dca.org/opinions/Nov.%202014/11-19-14/4D12-3780.op.pdf

***James v. State*, ___ So. 3d ___, 2014 WL 5616507 (Fla. 4th DCA 2014)**

The defendant was convicted of, among other things, carjacking. On appeal he argued that fundamental error occurred when the trial court accepted a jury verdict that convicted him of lesser-included offenses, although he had not requested instructions on them. The appellate court affirmed, holding that the defendant failed to preserve the issue by timely objection and agreed with the state "that the verdict simply reflected a jury pardon, which was supported by the evidence."
http://www.4dca.org/opinions/Nov.%202014/11-05-14/4D12-3374.op.pdf

***A.H. v. State*, ___ So. 3d ___, 2014 WL 5614888 (Fla. 4th DCA 2014)**

The defendant, a minor, was a passenger in a vehicle that was reported stolen. When officers approached, the occupants fled. At trial the defendant was acquitted of resisting arrest without violence, but was convicted of trespass of a conveyance, adjudicated a delinquent, and sentenced to community service. He appealed, arguing that his motion for judgment of dismissal should have been granted. The appellate court agreed and reversed, stating: "There was no physical damage to the car indicating that it was stolen. . . . Additionally, [the defendant] testified that he did not know the car was stolen, and so did his co-defendant. In sum, the only

evidence tending to establish that [he] knew the car was stolen was the officer's testimony that [he] fled after being commanded to stop," which was insufficient to establish a required element of the charge: that the defendant knew the vehicle was stolen.
http://www.4dca.org/opinions/Nov.%202014/11-05-14/4D13-637.op.pdf

***Stephen v. State*, 150 So. 3d 268 (Fla. 2d DCA 2014)**

The defendant was convicted of DUI manslaughter and leaving the scene of a crash involving death. He appealed, arguing that the trial court erred in assessing court costs of $225, when the applicable statute authorized only $200. The appellate court agreed and reversed as to that issue.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/October/October%2029,%202014/2D10-4018.pdf

***Perry v. State*, ___ So. 3d ___, 2014 WL 5394503 (Fla. 2d DCA 2014)**

The defendant was convicted of driving while license suspended and drug offenses. The trial court allowed him "to proceed pro se in a suppression hearing without ensuring that his waiver of counsel was knowing, intelligent, and voluntary as required." Therefore, the appellate court reversed and remanded for a new trial, stating that a "proper waiver cannot be presumed. . . . And a suppression hearing is a critical stage of the proceedings."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/October/October%2024,%202014/2D11-6191.pdf

***Kopson v. State*, ___ So. 3d ___, 2014 WL 5149143 (Fla. 4th DCA 2014)**

The defendant was convicted of, among other things, DUI manslaughter. The trial court had mistakenly applied jail credit to each of his consecutive sentences, and correction of the error resulted in an increase in his original sentence. He argued that this was a double jeopardy violation, but the appellate court disagreed and affirmed. It noted that it had previously remanded to the trial court for a new sentencing proceeding, and "the court can correct an erroneous award of jail credit in a new sentencing proceeding without violating double jeopardy principles."
http://www.4dca.org/opinions/Oct%202014/10-15-14/4D13-1610.op.pdf

***Luzardo v. State*, 147 So. 3d 1083 (Fla. 3d DCA 2014)**

The defendant hit a car that turned left in front of him, killing a passenger in the other car. He was charged with vehicular manslaughter, as he was driving almost 30 mph over the speed limit. The appellate court held that under the facts of this case — "speeding on a straight road in sunny weather with clear visibility in combination with the attempt to avoid a vehicle which inexplicably turned and braked in the defendant's path" — the speeding "did not meet the level of recklessness required to convict him of vehicular homicide."
http://www.3dca.flcourts.org/Opinions/3D13-1678.pdf

***Brice v. State*, ___ So. 3d ___, 2014 WL 4840689 (Fla. 4th DCA 2014)**

The defendant lost control of her vehicle and struck two men who were at the side of an interstate highway by their motorcycles, killing them. On her attorney's advice, she rejected a

five-year plea bargain and received an 18½-year sentence, the lowest permissible sentence. The trial court summarily denied her rule 3.850 motion, but the appellate court reversed, stating that "an allegation that counsel was ineffective for misadvising the defendant to reject a plea offer could entitle a defendant to an evidentiary hearing," and that the defendant had alleged the necessary allegations to show she had been prejudiced.
http://www.4dca.org/opinions/Oct%202014/10-01-14/4D13-4192.op.pdf

***Harp v. State*, 22 Fla. L. Weekly Supp. 331a (Fla. 15th Cir. Ct. 2014)**

The defendant was found guilty of leaving the scene of a crash involving damage and reckless driving causing injury to property. She appealed, arguing that it was error for the trial court to overrule her hearsay objection to the testimony of a sheriff's office community service aide as to statements made by another driver. The circuit court, in its appellate capacity, agreed that the testimony was inadmissible hearsay and caused harmful error, and it reversed and remanded for a new trial.

***State v. Asemata*, 22 Fla. L. Weekly Supp. 203a (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with reckless driving. The trial court *sua sponte* dismissed the charge because there was no probable cause written on the traffic citation. The state appealed "because the trial court had no authority to dismiss a criminal charge without hearing a previous motion to dismiss." The circuit court, in its appellate capacity, reversed, finding that "the State was not an afforded adequate opportunity to controvert the motion to dismiss."

***Smith v. City of Davie*, 22 Fla. L. Weekly Supp. 201a (Fla. 17th Cir. Ct. 2014)**

On June 2, 2013, the defendant became impatient while driving in an area where police were directing traffic, and honked his horn twice. An officer issued him a citation for improper use of horn as "there was no need to do so to ensure safe operation of vehicular traffic." The trial court denied the defendant's motion for judgment of acquittal and found him guilty, and later denied his motion for rehearing and renewed motion for judgment of acquittal. He appealed, arguing that the part of the applicable statute prohibiting that conduct — "but shall not otherwise use such horn when upon a highway" — was repealed effective January 1, 2013. The circuit court, in its appellate capacity, agreed and reversed.

***Riebe v. State*, 22 Fla. L. Weekly Supp. 191a (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with resisting or obstructing a police officer without violence, DUI with injury or property damage, leaving the scene of a crash, and driving while license suspended. He pled no contest to some counts, the state nolle prossed some counts, and the defendant was sentenced to 12 months of probation with conditions and ordered to pay restitution. At the hearing on the restitution amount, one of the victims testified that her car was totaled, and that while her insurance company paid off most of what she owed on her car loan, she paid the remaining balance of $1,444.39. A bill from the loan company for the balance due after the insurance company paid its portion was admitted over the defendant's hearsay and relevance objections. That victim also testified that she bought another car with a down payment of $4,000, and the purchase order was also admitted over the defendant's objections. The

defendant agreed to other amounts of restitution but objected to the amounts of $1,444.39 and $4,000 being awarded to that victim, arguing that there was no competent evidence that she had paid the $1,444.39 balance, and that she was not entitled to the $4,000 down payment. The trial court disagreed and entered a restitution order that included the $1,444.39 and $4,000 to that victim. The defendant appealed, and the circuit court, in its appellate capacity, agreed that those awards were error and reversed and remanded. There was no documentary evidence to support the amount of the loan balance the victim claimed to have paid, and the award for her down payment on a new car was also error because it did not represent "'damage or loss caused directly or indirectly by the defendant's offense' as required by section 755.089(1)(a), Florida Statutes. The damage she suffered as the victim of [the defendant's] crime was the loss of her vehicle, for which she was presumably compensated (at fair market value) when her insurance company paid off most of her car loan."

***Samuels v. State*, 22 Fla. L. Weekly Supp. 63b (Fla. 15th Cir. Ct. 2014)**

The defendant had a "business purpose only" restriction on his license and an open warrant. He was driving to a movie when he was stopped by an officer for driving on a restricted driver license. At trial he moved for a judgment of acquittal, arguing that the state failed to prove the elements of the crime because the 2010 amendment of section 322.16, Florida Statutes, "created an ambiguity such that each subsection must be differentiated in order to impose criminal sanctions as opposed to traffic infractions." The trial court denied the motion, but the circuit court, in its appellate capacity, reversed. The court also suggested that a jury instruction requiring the state to prove which agency imposed the license restriction should be added, to comport with the statutory amendment.

III. Arrest, Search and Seizure

***Heien v. North Carolina*, ___ U.S. ___, 135 S.Ct. 530, ___ L.Ed.2d. ___ (2014)**

A deputy followed a car because he thought the driver looked "very stiff and nervous." When the driver braked, only the left brake light came on, and the deputy pulled him over. The deputy became suspicious because the driver "appeared nervous" and the defendant, a passenger, remained lying down on the back seat, and both men gave inconsistent answers about their destination. The deputy asked to search the car, and the driver told him to ask the defendant because the defendant owned the car. The defendant consented, and the deputy found a bag of cocaine and arrested the men. The defendant was charged with attempted trafficking in cocaine. He moved to suppress, arguing that the stop and search violated the Fourth Amendment. The trial court denied the motion, holding that the faulty brake light gave the deputy reasonable suspicion for the stop, and that the defendant's consent to the search was valid. The North Carolina Court of Appeals reversed, holding that "driving with only one working brake light was not actually a violation of North Carolina law. The relevant provision of the vehicle code provides that a car must be 'equipped with a stop lamp on the rear of the vehicle. The stop lamp shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps.'" The state appealed, and the North Carolina Supreme Court reversed, not on the basis that the faulty brake light was a violation, but because the deputy "could have reasonably, even if mistakenly, read the vehicle

code to require that both brake lights be in good working order. Most notably, a nearby code provision requires that 'all originally equipped rear lamps' be functional." I.e., because the deputy's mistaken understanding of the statute was reasonable, the stop was valid.

The United States Supreme Court affirmed, stating that a reasonable suspicion can be based on an officer's mistaken understanding of the law as well as of the facts. The Court acknowledged cases where it had "looked to the reasonableness of an officer's legal error in the course of considering the appropriate remedy for a constitutional violation," but stated:

> In those cases, . . . we had already found or assumed a Fourth Amendment violation. . . . Any consideration of the reasonableness of an officer's mistake was therefore limited to the separate matter of remedy. Here, by contrast, the mistake of law relates to the antecedent question of whether it was reasonable for an officer to suspect that the defendant's conduct was illegal. If so, there was no violation of the Fourth Amendment in the first place. . . .
>
> Contrary to the suggestion of [the defendant] and *amici*, our decision does not discourage officers from learning the law. The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable. We do not examine the subjective understanding of the particular officer involved.

http://www.supremecourt.gov/opinions/14pdf/13-604_ec8f.pdf

***Agreda v. State*, ___ So. 3d ___, 2014 WL 6778291 (Fla. 2d DCA 2014)**

A sheriff's detective was parked in the median in an unmarked car when he saw the car in which the defendant was a passenger in the curb lane going under the speed limit, but within the legally permissible range. The detective did not see the defendant's car drift or weave or see any indications of a mechanical or medical problem. Although traffic was light and other cars could pass the defendant, the detective testified that the defendant's slow speed was impeding the flow of traffic, so he conducted a traffic stop. The driver had a suspended license, and the defendant admitted that his license was also suspended. He also told the detective that he had a gun, which the detective retrieved, and when the detective searched the car he found crack cocaine and a pipe on the passenger side. The defendant filed a motion to suppress, arguing that there was no legal basis for the stop. The trial court denied the motion, and the defendant was convicted of being a felon in possession of a firearm, unlawful carrying of a concealed weapon, possession of cocaine, and possession of paraphernalia. But the appellate court reversed, stating: "In the absence of something more than simply driving more slowly than most motorists, the stop here was not justified."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/December/December%2003,%202014/2D13-3486.pdf

***Tracey v. State*, ___ So. 3d ___, 2014 WL 5285929 (Fla. 2014)**

The defendant was stopped based on a tip that he was involved in cocaine trafficking. Officers obtained a warrant to monitor his phone calls, but they used real-time cell site location information to locate him. The defendant was convicted of possession of cocaine, fleeing and

eluding, driving while his license was revoked as a habitual offender, and resisting arrest without violence. The supreme court held that the evidence obtained by the use of real-time cell site location information was subject to suppression, stating:

> [B]ecause cell phones are indispensable to so many people and are normally carried on one's person, cell phone tracking can easily invade the right to privacy in one's home or other private areas, a matter that the government cannot always anticipate and one which, when it occurs, is clearly a Fourth Amendment violation. . . . [The] real risk of "inadvertent" violation of Fourth Amendment rights is not a risk worth imposing on the citizenry when it is not an insurmountable task for the government to obtain a warrant based on probable cause when such tracking is truly justified. . . .
>
> Moreover, we conclude that such a subjective expectation of privacy of location as signaled by one's cell phone—even on public roads—is an expectation of privacy that society is now prepared to recognize as objectively reasonable under the *Katz* "reasonable expectation of privacy" test. . . . Therefore, we hold that regardless of [the defendant's] location on public roads, the use of his cell site location information emanating from his cell phone in order to track him in real time was a search within the purview of the Fourth Amendment for which probable cause was required. Because probable cause did not support the search in this case, and no warrant based on probable cause authorized the use of [the defendant's] real time cell site location information to track him, the evidence obtained as a result of that search was subject to suppression.

http://www.floridasupremecourt.org/decisions/2014/sc11-2254.pdf

***State v. English*, 148 So. 3d 529 (Fla. 5th DCA 2014)**

Police officers stopped the defendant's vehicle because his tag light and wires were hanging down in front of the license place, obscuring at least one letter on the plate. The trial court granted the defendant's motion to suppress because the tag was unobstructed temporarily when he made a turn. The appellate court reversed, noting that section 316.605(1), Florida Statutes, requires that the numbers on the plate be "plainly visible and legible at all times." http://www.5dca.org/Opinions/Opin2014/100614/5D13-3398.op.pdf

***State v. Ullery*, 22 Fla. L. Weekly Supp. 400a (Fla. 18th Cir. Ct. 2014)**

The court denied the defendant's motion to suppress, holding that detaining a defendant for ten minutes to wait for a backup officer to arrive to perform a DUI investigation "does not transform an investigatory stop into a custodial interrogation." The first officer "had reasonable suspicion of criminal activity when he approached the vehicle and observed the indicia of impairment" and "did not question the driver, did not write any citations and directed the Defendant to sit on the side of the road until backup arrived. The officer was concerned that the Defendant might fall down if he remained standing."

***Caraballo v. State*, 22 Fla. L. Weekly Supp. 337a (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with possession of cannabis after an officer saw him throw a bag into a vehicle and pour alcohol into a cup and saw a white plastic bag with some other bags in it, which field-tested positive for marijuana. The trial court denied the defendant's motion to suppress his statement that he owned the vehicle, finding the statement was not made pursuant to a custodial interrogation. The circuit court, in its appellate capacity, affirmed, finding "no error with the trial court's finding that [the defendant's] statement was not the result of questioning by the police during a custodial interrogation."

***State v. Rocha,* 22 Fla. L. Weekly Supp. 336b (Fla. 17th Cir. Ct. 2014)**

A deputy saw the defendant weaving repeatedly and stopped him. The deputy noticed the defendant smelled of alcohol, had bloodshot eyes and a flushed face, was unsteady, and was very emotional and crying, and the defendant said that his son had died. The defendant filed a motion to suppress, arguing that his bloodshot eyes and flushed face were caused by his crying, and that "he was arrested essentially because there was no Spanish interpreter available, since roadside sobriety exercises could have dispelled [the officer's] suspicion that he was impaired." The trial court granted the motion, stating that there was insufficient evidence to support probable cause for the arrest. The circuit court, in its appellate capacity, affirmed, noting that neither the odor of alcohol nor simply weaving alone was sufficient to establish probable cause.

***State v. Truman*, 22 Fla. L. Weekly Supp. 335a (Fla. 17th Cir. Ct. 2014)**

After being stopped for swerving once across a dashed lane marker and then back to his lane, the defendant was arrested for DUI and possession of cannabis and drug paraphernalia. He filed a motion to suppress, arguing the stop was illegal. The trial court granted his motion, stating that the deputy lacked probable cause because the defendant did not violate a traffic control device; he was allowed to cross over the dashed line. The trial court also found not credible the deputy's testimony that he believed the defendant was tired, ill, or impaired.

***Vasquez v. State*, 22 Fla. L. Weekly Supp. 326a (Fla. 11th Cir. Ct. 2014)**

A police officer responded to a call regarding a possible burglary in progress and saw the defendant driving into the property. The vehicle license plate had been reported stolen, and the defendant was arrested and charged with driving with a suspended license. The trial court denied his motion to suppress, he was convicted, and he appealed the denial of the motion to suppress. The circuit court, in its appellate capacity, reversed, stating that the defendant was seized "when he stopped his vehicle at the officer's direction and remained inside it while the officer ran his plates. Prior to learning of the stolen plates, the officer had no reasonable suspicion to believe that Mr. Vasquez had committed a crime. . . . Thus, the stop was illegal."

***Alcius v. State*, 22 Fla. L. Weekly Supp. 206b (Fla. 17th Cir. Ct. 2014)**

Three deputies saw the defendant in his vehicle parked in the middle of a road. After approaching, one officer opened a door and smelled marijuana and ordered the occupants out of the vehicle, and they were immediately handcuffed. The officer testified that "the occupants were not formally under arrest at that point, but they were being detained and were not free to leave." He did not read them their *Miranda* rights. After a quick search of the vehicle did not

turn up any marijuana, the officer said "I know there's marijuana in here[. . . .] Where is it?" The defendant replied that there was marijuana belonging to him under a panel in the center console. He was issued both a notice to appear for possession of marijuana and a traffic citation for obstructing the roadway, and was arrested. He filed motions to suppress evidence, including his statements to the officers, arguing that "he was subjected to custodial interrogation without being advised of his *Miranda* rights." The trial court denied the motion to suppress statements, stating "although [the defendant] was detained, he clearly wasn't under arrest or detained where *Miranda* had to be given at that point in time," found the defendant guilty, and withheld adjudication. He appealed, and the circuit court, in its appellate capacity, reversed and remanded, finding that the defendant

> was in custody for the purpose of *Miranda* at the time of questioning. Three uniformed officers were present and although their vehicle was unmarked, the lights and sirens were activated. [The defendant] was ordered out of the car, handcuffed, and forced to stand to the side while the car was searched. [An officer] insisted there had to be marijuana in the vehicle, even after searching the car and finding none. [He] admitted that [the defendant] was being detained and was not free to leave, even though he was not formally under arrest. The Court finds that any reasonable person in [the defendant's] position would find his freedom "curtailed to a degree associated with actual arrest" and would not believe he was free to end the encounter with law enforcement.
>
> As to the second aspect of custodial interrogation, an "interrogation" takes place for the purpose of *Miranda* when a person is subjected to questions, words, or actions on the part of police officers that a reasonable person would conclude are designed to elicit an incriminating response. . . . It is clear to this Court that [the defendant] was subjected to interrogation in this case.

The court also held that the error was not harmless.

***State v. Landin*, 22 Fla. L. Weekly Supp. 202a (Fla. 17th Cir. Ct. 2014)**

After a crash investigation and DUI investigation the defendant was charged with DUI, DUI with injury/property damage, and refusal to submit to testing. She filed a motion to suppress, arguing that the police officer "failed to advise her of her *Miranda* rights when he 'changed hats' and began the DUI investigation." The trial court granted the motion as to statements the defendant made at the crash scene after the officer "changed hats" and began the DUI investigation, and statements made at the BAT facility before she was advised of her *Miranda* rights (except answers to routine booking questions). The defendant also asked the trial court to rule on whether the officer had probable cause to arrest her, to which the trial court issued an order that stated: "The Defendant's arrest is hereby suppressed based on lack of probable cause. All statements were also suppressed." The state appealed, because the fact of an arrest is not subject to suppression. The defendant argued that the trial court's order "was simply shorthand, and the order should be affirmed to the extent it suppresses the fruit of [her] unlawful arrest." The circuit court, in its appellate capacity, agreed with the defendant and affirmed the trial court's order granting her motion to suppress, "to the extent it suppresses the fruit of [her]

unlawful arrest, not including the fact of the arrest itself." The defendant also argued that "the fruit of her unlawful arrest includes her identity as the person arrested." But the appellate court disagreed, as the officer learned her identity "through the accident investigation, not as a result of any unlawful stop or arrest."

***Oliveros v. State*, 22 Fla. L. Weekly Supp. 199a (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with DUI and sought to suppress, arguing the police officer did not have a reasonable suspicion to stop him. The trial court denied the motion, and the circuit court, in its appellate capacity, affirmed. The officer saw the defendant "screeching his tires, doing donuts with his vehicle, exit the parking lot onto the road at a high rate of speed, hit a curb on the side of the road, and drive in the wrong direction . . . , the totality of which would give any reasonable officer legal reason to make a stop."

***State v. Podwill*, 22 Fla. L. Weekly Supp. 197a (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with DUI with injury/property damage and filed a motion to suppress, "arguing that there was no reasonable suspicion to detain him for roadside sobriety exercises based solely on the odor of alcohol." The trial court granted the motion, based on a trooper's testimony that the "whole DUI arrest [was based] on the odor of alcohol." The circuit court, in its appellate capacity, affirmed, noting: "Courts consistently require more than the odor of alcohol to establish reasonable suspicion for a DUI investigation."

***Carter v. State*, 22 Fla. L. Weekly Supp. 195b (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with DUI, driving while license suspended or revoked with knowledge, DUI refusal, failure to maintain the lane, and refusal to submit to testing. He filed a motion to suppress, alleging that the stop was not justified, a motion in limine to exclude mention of the use of cannabis, and a motion in limine to exclude his refusal to submit to testing. The trial court denied the motion to suppress, holding that the stop and investigation were valid. The circuit court, in its appellate capacity, affirmed, stating: "A valid vehicle stop requires only a founded suspicion by the officer that the driver of the car, or the vehicle itself, is in violation of a traffic ordinance or statute" and that the officer "had probable cause to believe a traffic violation had occurred when he observed [the defendant] cross multiple lanes in an erratic fashion."

***Duncan v. State*, 22 Fla. L. Weekly Supp. 194a (Fla. 17th Cir. Ct. 2014)**

A police officer responded to a call after 2:30 a.m. and saw the defendant's vehicle in a residential area "driving in a weird pattern, swerving onto the grass on the side of the road and back onto the road several times over the course of around eight blocks." He thought the driver might be DUI or in need of medical attention and be a danger to others, and stopped the defendant. When he asked the defendant for his driver license and registration, the officer noticed the defendant's speech was "weird" and that his license was suspended. He requested a DUI investigation, told the defendant to step out of his vehicle, and found cannabis and an open container of alcohol. The defendant was charged with possession of cannabis and driving while license suspended. He filed a motion to suppress, arguing that the officer did not have a

reasonable suspicion to stop him based on his driving pattern. The trial court disagreed, as did the circuit court in its appellate capacity.

***State v. Phillips*, 22 Fla. L. Weekly Supp. 193b (Fla. 17th Cir. Ct. 2014)**

The defendant was arrested for DUI and DUI with property damage. The trial court granted her motion to suppress her refusal to take a breath test and the results of her field sobriety exercises, finding that "without ever changing his hats or issuing *Miranda*[,] . . . under the color of law, [the officer] was requiring the Defendant to do the field sobriety exercises." The circuit court, in its appellate capacity, reversed, stating that during the traffic stop the defendant was not in custody, and the officer could ask her to perform roadside sobriety exercises without warning her that she could refuse and without *Miranda* warnings.

***State v. Doskik*, 22 Fla. L. Weekly Supp. 190c (Fla. 17th Cir. Ct. 2014)**

An off-duty police officer saw the defendant speed around a bend and fishtail twice outside his lane. He stopped the defendant, smelled alcohol, and contacted an officer for a DUI investigation. The defendant was charged with DUI and resisting arrest without violence. The trial court granted his motion to suppress, holding that because the first officer was off duty, "his status was akin to a private citizen, who could only initiate a stop and pursue an arrest if the offense, committed in his presence, was a felony or a misdemeanor constituting a breach of peace." But the circuit court, in its appellate capacity, reversed and remanded, finding that the first officer's "off-duty status *while in his jurisdiction* did not remove his authority to make an arrest or to perform any other law enforcement functions he could perform while on duty," and his "relay to [the second officer] about his observations was within the fellow officer rule."

***State v. Rolle*, 22 Fla. L. Weekly Supp. 82a (Fla. 19th Cir. Ct. 2014)**

The defendant was stopped for speeding and charged with driving with license suspended. He filed a motion to suppress, arguing that the deputy did not have probable cause to stop him. The trial court denied the motion, but upon reconsideration granted it. The circuit court, in its appellate capacity, reversed, stating: "The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred," and it was undisputed that the deputy saw the defendant speeding.

***State v. Powell*, 22 Fla. L. Weekly Supp. 75b (Fla. 17th Cir. Ct. 2014)**

The defendant was a passenger in a vehicle that was stopped for having no functional rear lights. The vehicle occupants were ordered out of the vehicle, a K-9 dog alerted to drugs on the defendant, and the defendant was arrested for possession of cannabis. The trial court granted his motion to suppress, holding that the state had not established probable cause based on a Florida Supreme Court case. But the appellate court reversed, because that case was reversed by the U.S. Supreme Court after the trial court's ruling.

***State v. Burrows*, 22 Fla. L. Weekly Supp. 75a (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with DUI. He filed a motion to suppress, arguing that the stopping deputy lacked reasonable suspicion to detain him for a DUI investigation. The trial

court granted the motion, stating that "nothing in the record could lead it to the conclusion that [the deputy] had a well founded suspicion" that the defendant was DUI. The circuit court, in its appellate capacity, reversed, noting that "because this was a stop motion, [the deputy] did not have to possess a reasonable suspicion of DUI at the time he performed the stop in order for it to have been legal. The stop was performed for violation of a traffic statute, and [the deputy] gained a reasonable suspicion of DUI after he performed the stop and made contact."

***State v. Silva*, 22 Fla. L. Weekly Supp. 74b (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with DUI with property damage. The trial court granted her motion to suppress her refusal to submit to field sobriety exercises because the deputy had told her that he "needed her" to perform the exercises. The circuit court, in its appellate capacity, affirmed because the deputy's language clearly did not give the defendant any choice as to whether to perform the exercises.

***State v. Rodriguez*, 22 Fla. L. Weekly Supp. 72b (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with DUI. He filed a motion to suppress, arguing that the stopping officer lacked reasonable suspicion to detain him for a DUI investigation. The trial court granted the motion. The state appealed, arguing that the defendant's speeding, lane straddling, and physical appearance gave the police officer reason to believe he was DUI, warranting further investigatory detention, while the defendant argued that the officer's observations did not establish a reasonable suspicion that the defendant was engaged in criminal activity before the seizure. The circuit court, in its appellate capacity, reversed, stating that the officer had the right to perform a traffic stop, after which the indicia of impairment gave him reasonable suspicion to detain the defendant for a DUI investigation.

***State v. Schenck*, 22 Fla. L. Weekly Supp. 30a (Fla. 9th Cir. Ct. 2014)**

The defendant was arrested for DUI after an off-duty officer outside jurisdiction stopped her after seeing her weaving, driving significantly below the speed limit, driving off the roadway, crossing the centerline, and "snaking" at least ten times over about two miles. The trial court granted the defendant's motion to suppress evidence resulting from the stop, based on her argument that the off-duty officer had no authority to stop her. But the circuit court, in its appellate capacity, reversed, stating that "an off-duty officer outside . . . jurisdiction can conduct a citizen's arrest if the actions of the driver constituted a 'breach of the peace' and . . . DUI can be a breach of peace if the driver endangers or threatens to endanger the public," and that the totality of the officer's observations were sufficient to permit the stop.

IV. Torts/Accident Cases

***Buitrago v. Feaster*, ___ So. 3d ___, 2014 WL 7494831 (Fla. 2d DCA 2014)**

Zapata was driving a car owned by Buitrago, when he was involved in an accident that injured the plaintiff, Feaster. Feaster sued Zapata and Buitrago. The trial court granted Feaster's motion for a new trial on future noneconomic damages, based on her argument that "the jury's finding of a permanent injury automatically entitled her to recover future noneconomic damages

as a matter of law." But the appellate court reversed because "the court's decision was based on an erroneous view of the law and therefore constitutes an abuse of discretion." http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/December/December%2031,%202014/2D14-47.pdf

***Case v. Newman*, ___ So. 3d ___, 2014 WL 7202971 (Fla. 1st DCA 2014)**

The personal representatives of the decedent sued the17-year-old driver of the vehicle involved in the drunk-driving accident that killed the decedent, the driver's grandfather (who owned the vehicle), and the vendors who sold alcohol to the teenage driver. The trial court entered a summary final judgment in favor of the vendor defendants, and the personal representatives appealed. The appellate court reversed the judgment and the order denying leave to file an amended complaint to add a claim for punitive damages and remanded, holding that "there was sufficient evidence on the issue of willfulness of the alleged sale of alcohol to a minor to withstand a motion for summary judgment on the main claim" and "sufficient evidence of 'a reasonable basis for recovery' of punitive damages to submit to a jury the issue of punitive damages."
https://edca.1dca.org/DCADocs/2013/5856/135856_DC13_12172014_023855_i.pdf

***Paduru v. Klinkenberg*, ___ So. 3d ___, 2014 WL 7202828 (Fla. 1st DCA 2014)**

The appellate court reversed a judgment for attorney's fees and costs based on a proposal for settlement in a traffic accident case because the conditions of the proposal were unclear, and it is well settled that "offers of judgment must strictly comply with section 768.79 and rule 1.442, with any drafting deficiencies being construed against the drafter."
https://edca.1dca.org/DCADocs/2012/5712/125712_DC13_12172014_022941_i.pdf

***Witherell v. Larimer*, ___ So. 3d ___, 2014 WL 6990576 (Fla. 5th DCA 2014)**

While driving her mother's car, Natalie Witherell struck Larimer, a pedestrian. Larimer sued, and the jury found each party 50% at fault and awarded Larimer past medical expenses totaling $88,749.84 and $0 for noneconomic damages. Because the latter award was inconsistent with a finding of permanent injury and the medical-expense award, the trial court instructed the jury to award money for the noneconomic damages, and it awarded $1. Larimer moved for a new trial, and the trial court granted his motion. The Witherells appealed, arguing that "the trial court abused its discretion by limiting the new trial to only past noneconomic damages . . . because liability in the personal injury action was hotly contested and the damages award was legally inadequate, [and] the new trial should address both liability and past noneconomic damages." The appellate affirmed because the Witherells did not preserve their argument for review. Their response to Larimer's motion for additur or new trial argued only that the trial court should deny his motion, not that any new trial should address liability as well as noneconomic damages.
http://www.5dca.org/Opinions/Opin2014/120814/5D13-3508.op.pdf

***Millsaps v. Kaltenbach*, ___ So. 3d ___, 2014 WL 6910709 (Fla. 4th DCA 2014)**

Millsaps sued Kaltenbach and his insurer, State Farm, in an automobile accident case. Kaltenbach's affirmative defense was that he struck Millsaps' vehicle to avoid contact with a third, unidentified vehicle. Milsaps filed an amended complaint to add a "claim for

uninsured/underinsured motorist coverage against State Farm under the belief that Kaltenbach was underinsured for the damages claimed, but not under the theory that State Farm would stand in the shoes of the unidentified third vehicle to compensate appellant for any percentage of the damages attributable to that driver." At trial Millsaps was permitted to amend her pleadings to add the third vehicle to the uninsured motorist claim against State Farm. The trial court granted a directed verdict in favor of State Farm as to its liability on the uninsured motorist claim and denied Millsaps' motion for new trial. The appellate court affirmed, finding that Millsaps waived those claims at trial:

> During the charge conference, counsel for appellant abandoned the uninsured motorist claim against State Farm for the actions of the unidentified third vehicle, and advised the court "[w]e don't want to blame the [unidentified vehicle]." As a result, the court directed a verdict in favor of State Farm on the uninsured motorist claim for the actions of the unidentified third vehicle. Appellant did not object to the directed verdict. Thereafter, proposed jury instructions and the verdict form were drafted to include the question of the unidentified driver's negligence, but only as an affirmative defense to [Millsaps'] claim against Kaltenbach. After taking time to review the proposed jury instructions and verdict form, counsel for appellant stated that he had "no objection to either the jury instructions or the verdict form." The jury's verdict found that there was no negligence on the part of Kaltenbach which was a legal cause of injury or damages to appellant.

http://www.4dca.org/opinions/Dec%202014/12-10-14/4D13-2614.op.pdf

***Borden Dairy Co. of Alabama, LLC v. Kuhajda*, ___ So. 3d ___, 2014 WL 6851420 (Fla. 1st DCA 2014)**

A jury found Borden Dairy and Greenrock liable for injuries sustained by the plaintiff in a vehicle accident. They appealed, arguing that the trial court erred in allowing the plaintiff to play a portion of Greenrock's videotaped deposition during closing argument. The appellate court affirmed, reiterating that "the law supports using a party's deposition for any purpose, and once the videotaped deposition . . . had been admitted into evidence, it was fully available to the jury to be considered."
https://edca.1dca.org/DCADocs/2013/4896/134896_DC05_12052014_121405_i.pdf

***Butler v. Harter*, ___ So. 3d ___, 2014 WL 6755985 (Fla. 1st DCA 2014)**

Harter sued Butler for damages from a car accident. Butler made a proposal for settlement for $20,000, the jury awarded Harter $2,046, and after setoff the court entered a final judgment against Butler for $409. Butler filed a motion for attorney's fees and costs, and the trial court granted Harter's request to compel discovery of Butler's entire litigation file, ruling that Butler had waived the attorney-client privilege by filing an affidavit in support of her request for attorney's fees, and that "a party cannot claim work-product privilege in connection with a claim for recovery of attorney's fees." Butler sought certiorari review, and the appellate court reversed, stating that [Butler's litigation file was protected by work-product and attorney-client privileges.
https://edca.1dca.org/DCADocs/2014/1342/141342_DC03_12022014_113338_i.pdf

***Orthopedic Care Center v. Parks*, ___ So. 3d ___, 2014 WL 6679042 (Fla. 3d DCA 2014)**

Parks sued Gutierrez for injuries arising from a car accident. Gutierrez hired Dr. Garcia to conduct a compulsory medical examination of Parks. Parks' attorney sought information from Dr. Garcia concerning the percentages of work he performed as a retained expert for plaintiffs and for defendants. Dr. Garcia sought a protective order, claiming compliance would be overly burdensome and would violate section 456.057, Florida Statutes, which prohibits disclosure of nonparty CME data without prior notice to all affected nonparties. The trial court denied the motion for protective order and the appellate court affirmed, stating that Parks was entitled to the information and section 456.057 was not implicated.
http://www.3dca.flcourts.org/Opinions/3D14-0988.pdf

***Shaver v. Carpenter*, ___ So. 3d ___, 2014 WL 6675691 (Fla. 2d DCA 2014)**

Shaver was making a left turn through an intersection when a motorcycle driven by Carpenter, with his wife riding on the back, hit his car. The Carpenters were injured and sued Shaver for negligence. The jury awarded damages to the Carpenters, but the appellate court reversed, stating that evidence was allowed at trial that should have been excluded. "First, the court allowed a trooper to give an opinion about which driver violated the right of way; and second, it permitted the plaintiffs' counsel to read Shaver's answers to surveillance interrogatories to the jurors." The court stated further:

> The trial court permitted the Carpenters' counsel to publish to the jury Shaver's interrogatory answers concerning the defense's surveillance of the Carpenters. In the answers, Shaver disclosed that the two plaintiffs had been surveilled on eight days. . . . But defense counsel advised the court that he did not intend to introduce the surveillance videos at trial or present any testimony concerning surveillance. He argued that the interrogatory answers should not be permitted in evidence because they were not relevant or material to the Carpenters' case. The only purpose for doing so, he said, would be to disparage Shaver by showing that he was spying on the Carpenters or "something of that nature." And, as counsel predicted, in closing argument the Carpenters' attorney [did use the interrogatory answers] to denigrate Shaver, implying that the surveillance activity was unsavory and indicative of a dismissive attitude toward the plaintiffs. To the contrary, surveillance is a common practice in personal injury cases and is not improper. . . . [N]othing in our record indicates that the videos in this case were ever subject to discovery because Shaver did not intend to introduce them at trial. The issue here is whether the court properly permitted evidence simply that the surveillance was undertaken. Because that fact was not relevant to any issue, the court should not have done so.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/November/November%206,%202014/2D13-117.pdf

***Hurtado v. Desouza*, ___ So. 3d ___, 2014 WL 6674779 (Fla. 4th DCA 2014)**

A jury awarded the plaintiff $1,002,238.17 in a case arising from a minor rear-end auto accident. The trial court granted the defendant's post-trial motion for setoffs and set off $27,000 of unemployment compensation and $10,000 of PIP benefits the plaintiff had received. The plaintiff appealed, arguing that unemployment compensation benefits are not a collateral source subject to setoff under section 768.76, Florida Statutes. The appellate court agreed and reversed. http://www.4dca.org/opinions/Nov.%202014/11-26-14/4D12-1817.op.pdf

***Thompson v. Estate of Maurice*, ___ So. 3d ___, 2014 WL 5834601 (Fla. 4th DCA 2014)**

The personal representative of the decedent Thompson brought a wrongful death action against the estate of Maurice, the driver of the vehicle in which all occupants died in a crash, and the vehicle owners/lessors. The trial court granted the defendants' motion to enforce a presuit settlement and motion for partial summary judgment. But the appellate court reversed because "the evidence failed to support a finding that there was a meeting of the minds between the parties as to every essential element." The court remanded, noting that the release had not been signed and no checks had been cashed, and there was an issue as to whether the plaintiff had agreed to "every essential element of the agreement because [the insurer's] proposed release contained objectionable and unusual terms, including extensive indemnification language not bargained for and the release of [the driver], a non-insured, non-policy holder." http://www.4dca.org/opinions/Nov.%202014/11-12-14/4D13-2618.pdf

***Transportation Engineering, Inc. v. Cruz*, ___ So. 3d ___, 2014 WL 5782251 (Fla. 5th DCA 2014)**

The decedent of the plaintiff Cruz died when a vehicle she was in crashed into an uncushioned guardrail end at an emergency break in a turnpike median. The plaintiff sued the state DOT, Transportation Engineering, Inc. (TEI), and D.A.B. Constructors, Inc. (DAB). The trial court granted a summary final judgment for DAB but denied TEI's summary judgment motion on the same issue. The appellate court held that summary judgment should have been granted in TEI's favor, stating that "[i]t was undisputed at summary judgment that DOT accepted the project with bare (uncushioned) guardrail ends within the clear zone, and that this was an open and obvious condition." Under case law there is no liability for contractors, architects, and engineers for injuries to a third party that occur after they completed the work, the owner of the property accepted the work, and the defects causing the injury were patent. http://www.5dca.org/Opinions/Opin2014/110314/5D13-923.op.pdf

***Moody v. Dorsett*, 149 So. 3d 1182 (Fla. 2d DCA 2014)**

A jury verdict of $11,237.86 was returned against the defendant. On appeal she argued that the $5,484.96 in PIP coverage that the plaintiff's insurance carrier had paid him should have been applied as a setoff. The appellate court agreed and reversed. Although the plaintiff argued that case law required that the defendant present evidence of the amount of the payment, the defendant's failure to present evidence of the PIP payments was caused by a misunderstanding and an "erroneous midtrial ruling" about the matter being handled post-trial or post-verdict. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/October/October%2029,%202014/2D13-1010.pdf

***Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163 (Fla. 1st DCA 2014)**

In a wrongful death action arising from an automobile accident, the trial court allowed the defendant a limited inspection of the cell phone that the deceased was allegedly using at the time of the accident. The appellate court affirmed, stating:

> The order allowing the inspection recognized both [the defendants'] discovery rights and the privacy interest asserted by the [plaintiff]. It stressed the relevance of the requested information, citing cell phone records showing that the decedent had been texting in the minutes preceding the accident; testimony from two witnesses indicating that the decedent may have been utilizing her cell phone at the time of the accident; and testimony from the responding troopers supporting the assertion that the decedent was using her cell phone when the accident occurred.
>
> The order also recognized the decedent's privacy interests and set strict parameters for the expert's confidential inspection.

https://edca.1dca.org/DCADocs/2014/0277/140277_DC02_10132014_100531_i.pdf

***Alvarado-Fernandez v. Mazoff*, ___ So. 3d ___, 2014 WL 4988409 (Fla. 4th DCA 2014)**

The plaintiff sued the defendant, a Colombian citizen, for personal injuries sustained in an auto accident. The defendant moved to dismiss, alleging that (1) service of process was not made in compliance with the Inter-American Service Convention on Letters Rogatory and Additional Protocol (IASC) and the Hague Service Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; (2) the plaintiff did not comply with the substituted service statutes; (3) the plaintiff did not timely file his affidavit of compliance; and (4) service was not made within 120 days after filing of the initial pleading, as required by rule 1.070(j), Florida Rules of Civil Procedure. The trial court denied the motion to dismiss, and the appellate court affirmed. Colombia was not a party to the Hague Convention until after the accident occurred, and the IASC is not exclusive or mandatory. Further, although the trial court did not make findings of fact as to whether the plaintiff diligently complied with the substituted service statutes and was still unable to find the defendant, there were sufficient facts in the record to reflect due diligence. As to the late-filed affidavit of compliance, the appellate court stated that "a trial court may accept a late filing if good cause is shown."
http://www.4dca.org/opinions/Oct%202014/10-08-14/4D14-503.op.pdf

***Branch v. O'Selmo*, 147 So. 3d 1089 (Fla 3d DCA 2014)**

The plaintiff resided in, and worked for a bank in, Barbados. She was injured in an accident while riding in a car driven by a co-worker during a business trip. She sued the co-worker and employer in Barbados, and later in Florida, after which she did not pursue the Barbados action. The driver/defendant filed a forum non conveniens motion, which the trial court granted, abating the action for 30 days for the plaintiff to either dismiss the Barbados action with prejudice or provide documents that showed the Barbados case "has been abated [and] that any judgment . . . of the case in Florida would be res judicata in the action pending in Barbados." The plaintiff did not do so, and the defendants moved for dismissal with prejudice,

reasserting the forum non conveniens claim and arguing that the plaintiff's "failure to comply with the trial court's prior order warranted dismissal as a sanction" The trial court dismissed without prejudice, giving the plaintiff 20 days to move for leave to amend. The plaintiff timely filed such motion, alleging she had dismissed the Barbados action, but the driver/defendant argued that the dismissal order had dismissed the entire action, "depriving the trial court of jurisdiction to entertain an amendment to the complaint now that the appeal time from that order had run." The trial court denied the plaintiff's motion to amend her complaint, "effectively dismissing her personal injury action with prejudice" as the statute of limitations had run in Florida. The appellate court reversed, stating that "[w]hile the [dismissal] order was not a model of clarity, it was neither intended to dismiss, nor dismissed, the Florida action in such a manner as to amount to a final judgment, such that the trial judge would be divested of jurisdiction to allow the amendment sought."
http://www.3dca.flcourts.org/Opinions/3D13-2613.pdf

V. Drivers' Licenses

***DHSMV v. Clay*, ___ So. 3d ___, 2014 WL 7201849 (Fla. 5th DCA 2014)**

DHSMV affirmed the suspension of the defendant's driver license. The circuit court quashed the suspension because it violated the defendant's due process rights, but did not remand for further proceedings as it believed remand would be "futile and burdensome." The appellate court granted the department's petition for certiorari review and quashed the circuit court order, stating: "This court has consistently held that when a circuit court quashes an order issued by a hearing officer on due process grounds, the matter is to be remanded to the administrative agency for further proceedings."
http://www.5dca.org/Opinions/Opin2014/121514/5D14-2096.op.pdf

***Menchaca-Ramirez v. State*, ___ So. 3d ___, 2014 WL 7156788 (Fla. 2d DCA 2014)**

In 2008 the defendant entered a nolo contendere plea to, among other offenses, uttering a forged instrument and driving while license suspended (habitual offender). He was adjudicated guilty and sentenced to jail followed by two years' probation. In 2011 he admitted to violating probation, and his probation was revoked and he was sentenced to concurrent terms of 14 months' incarceration. He then sought to withdraw his admission to violating probation, stating is was involuntary, claiming that his attorney "did not advise him that under the Immigration and Nationality Act, a sentence exceeding one year would aggravate his two convictions for uttering a forged instrument making him deportable with no ability to seek relief." At a postconviction evidentiary hearing on his motion, no testimony was taken because he had been deported, and the court accepted his attorney's stipulation that she had advised him "that his admission 'may' have immigration consequences and that he should talk to an immigration lawyer if he was concerned." Further, at the original plea hearing the court had informed the defendant that "if you are not a United States citizen, this plea would subject you to deportation." The defendant filed a motion to vacate set aside the judgment and sentence, which the trial court denied. The appellate court reversed and remanded, holding that

> unlike his original plea, the defendant's admission to the probation violation resulted in his mandatory deportation and eliminated his eligibility for deportation

> relief. Under [the] circumstances, even if the trial court's deportation warning during the plea colloquy is considered sufficient, it does not cure the prejudice resulting from counsel's failure to advise [the defendant] of the 'truly clear' deportation consequences of his admission as required by *Padilla* [*v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, L.Ed.2d (2010)].

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/December/December%2017,%202014/2D13-3152.pdf

***DHSMV v. Wiggen*, ___ So. 3d ___, 2014 WL 6831666 (Fla. 5th DCA 2014)**

A deputy saw the defendant's vehicle parked with its headlights off at an intersection, with the defendant asleep in the driver's seat and the ignition turned on. After a breath test, the deputy arrested the defendant for DUI and the defendant's license was suspended. The circuit court quashed the suspension order, ruling that the defendant had produced evidence that the breath test machine failed inspection four days after his test, which shifted the burden to the department to show the test was accurate. The department sought review, and the appellate court quashed the circuit court order, noting that the breath test affidavit showed that the device passed its previous monthly inspection and that tests performed before and after the defendant's test indicated it was functioning properly. The burden then shifted to the defendant "to overcome the presumption of impairment," and the burden did not shift back to the department to reestablish the machine's accuracy. Further, the machine inspector testified that the machine failed the later inspection because of his own user error and that it was functioning properly.
http://www.5dca.org/Opinions/Opin2014/120114/5D14-1811.op.pdf

***DHSMV v. Hartzog*, 148 So. 2d 816 (Fla. 1st DCA 2014)**

The defendant's license was permanently revoked. She requested reinstatement, but the hearing officer denied it because she drove within five years of her reinstatement hearing. The circuit court quashed the denial order, finding that "the hearing officer did not make any determination with respect to [the defendant's] qualifications, fitness, or need to drive." The department filed a petition for second-tier certiorari review. The appellate court granted the petition and reversed because the circuit court failed to apply the correct law; its "focus upon subsection (5)(b) of [section 322.271(5), Florida Statutes,] was improper given that [the defendant] failed to demonstrate all of the requirements provided for in subsection (5)(a)."
https://edca.1dca.org/DCADocs/2014/2341/142341_DC03_10092014_110308_i.pdf

***Cawley v. DHSMV*, 22 Fla. L. Weekly Supp. 334b (Fla. 16th Cir. Ct. 2014)**

The circuit court, in its appellate capacity, denied review, noting that the hearing officer may conduct the administrative hearing telephonically without the driver's consent.

***Middleton v. DHSMV*, 22 Fla. L. Weekly Supp. 329a (Fla. 14th Cir. Ct. 2014)**

The defendant's license was suspended for his refusal to submit to a breath test. He sought review, arguing that while the stop for the welfare check was valid, there was insufficient basis for an investigatory stop as the officer did not smell alcohol until after the defendant got

out of his vehicle. The circuit court, in its appellate capacity, held that the evidence supported the finding that the stop and arrest were lawful, and it denied review.

***Clemente v. DHSMV*, 22 Fla. L. Weekly Supp. 328a (Fla. 13th Cir. Ct. 2014)**

The defendant's license was suspended for refusal to submit to a breath test. The hearing officer upheld the suspension, and the defendant sought review, arguing that her due process rights were violated because the hearing officer (1) did not let her question the agency inspector or present evidence that the Intoxilyzer's last inspection was not in compliance with administrative rules, and (2) departed from the appearance of neutrality. The circuit court quashed the suspension, stating that "the hearing officer violated [the defendant's] right to create a full record for appellate review and to have a fair hearing [and] by releasing the witness from his subpoena under the circumstances, the hearing officer violated [the defendant's] due process rights to present a defense."

***Riggio v. DHSMV*, 22 Fla. L. Weekly Supp. 327a (Fla. 13th Cir. Ct. 2014)**

The defendant's license was suspended for refusal to submit to a breath test. He sought review, contending that the (1) there was no competent substantial evidence that the officer advised him that his license would be suspended for refusing the breath test after his second refusal; and (2) the hearing officer's final order upholding the suspension did not include findings and analysis to allow the appellate court to determine whether the correct law was applied. As to the first argument, the officer gave the implied consent warning after the defendant's first refusal to submit to the breath test. But the defendant argued that after he recanted that refusal and then later refused a second test, the officer had to read him the implied consent warning again. He also argued that "he was confused" while at the breath test center, which also necessitated a second warning after the second refusal. The circuit court, in its appellate capacity, found no legal authority to support that argument.

As to the defendant's second argument, the court held that the hearing officer is not required to "specifically address every argument or piece of testimony provided at the administrative hearing," and that there was competent substantial evidence that law enforcement had probable cause to believe that the defendant was DUI, that he refused to submit to a breath-alcohol test, and that implied consent warnings were read to him after his lawful arrest.

***Fitzgerald v. DHSMV*, 22 Fla. L. Weekly Supp. 326b (Fla. 12th Cir. Ct. 2014)**

The defendant had two DUI arrests in a little over two years, and her license was revoked. She sought review, arguing that revocation is triggered only when an offense occurs within the five- year period following the date of a prior conviction, yet her two convictions occurred on the same date. But the circuit court, in its appellate capacity, denied review, noting that effective July 1, 2013 (the date the defendant's license was revoked), subsection (e) was added to section 322.28(2), Florida Statutes, providing that convictions occurring on the same date resulting from separate offense dates will be treated as separate convictions, and the earlier offense will be deemed a prior conviction.

***Fischer v. DHSMV*, 22 Fla. L. Weekly Supp. 316a (Fla. 11th Cir. Ct. 2014)**

The defendant's license was suspended for his refusal to submit to a breath test. He sought review, contending that the arrest affidavit offered at the administrative hearing was invalid because the officer wrote his hand-printed name, rather than cursive signature, in the signature block. The circuit court, in its appellate capacity, upheld the suspension, stating: "There is no Florida authority that dictates the form that a signature must take, and certainly no authority that a signature be in cursive and not in hand-printed form. Moreover, even assuming there were any authority dictating what constitutes a 'proper' signature, possible technical defects do not vitiate the validity of an otherwise proper affidavit." Also, another officer swore in and attested to that officer's affidavit, and in other refusal documents the officer wrote his name in both cursive and print, so there was no factual dispute as to whether the officer wrote and swore to the affidavit's contents.

***Tran v. DHSMV,* 22 Fla. L. Weekly Supp. 313b (Fla. 9th Cir. Ct. 2014)**

A trooper stopped the defendant after clocking him at 17 mph over the speed limit. He smelled alcohol in the vehicle and on the defendant and noticed the defendant's eyes were bloodshot and watery. The defendant performed poorly on field sobriety exercises and exhibited other signs of impairment, and the trooper arrested him and took him to a DUI testing center, after which his license was suspended for DUI and he was cited speeding. He sought review, arguing that (1) the trooper did not have reasonable suspicion that he was operating a motor vehicle while impaired, (2) the hearing officer "failed to comply with due process by not considering properly cited case law in the timely filed motion to validate the license suspension based upon an unlawful arrest for DUI and by rendering a nebulous order that does not identify what case he considered or [found] controlling," and (3) the finding that his documented leg injury did not contribute to his poor performance on the field sobriety exercises was not supported by competent substantial evidence. The circuit court, in its appellate capacity, denied review, holding that (1) there was competent substantial evidence that the trooper had reasonable suspicion to detain the defendant for the DUI investigation, (2) "a failure to follow governing case law would more appropriately be argued as a failure to follow the essential requirements of the law" than a due process violation, and the hearing officer did follow the requirements of applicable statutes and case law, and (3) the hearing officer as the fact-finder was responsible for determining the weight, credibility, and reliability of the evidence "and was not required to believe [the defendant's] testimony, even if unrebutted," and there were other indicia of impairment.

***Lutzi v. DHSMV,* 22 Fla. L. Weekly Supp. 313a (Fla. 9th Cir. Ct. 2014)**

The defendant, who claimed to have a New York driver license, called the sheriff's office because he was too drunk to drive back to his hotel. When the deputy arrived, the defendant refused to perform field sobriety tests or a breath test and was arrested for DUI, and his license was suspended. His attorney filed a motion to invalidate the arrest and charge based on a New York statute that "provides for 'immunity for [a] person who [is] experienc[ing] a drug or alcohol overdose and, in good faith, seeks health care for himself or herself,'" asking the court to apply the New York statute. The hearing officer denied the motion because New York law was not binding or applicable, and upheld the license suspension.

The circuit court, in its appellate capacity, denied review, stating that "the full faith and credit clause does not require a state to enforce a statute that contravenes its own statutes or policy," and the New York statute differs from the similar Florida statute because the latter excludes alcohol overdose, and "there is a valid public policy reason to exclude alcohol from the statute as drinking and driving is a very dangerous activity." And even if the New York statute applied, the defendant did not request medical attention but stated that he needed help to get back to his hotel.

***Kelly v. DHSMV*, 22 Fla. L. Weekly Supp. 310a (Fla. 9th Cir. Ct. 2014)**

The defendant's license was suspended for his refusal to submit to a breath test. He sought review, claiming that the record lacked competent substantial evidence that he was lawfully stopped for speeding, that there was no evidence that the officer had reasonable suspicion to detain him for a DUI investigation or ask him to perform field sobriety exercises, and that there was not competent evidence that he was lawfully arrested for DUI. But the circuit court, in its appellate capacity, denied his petition for writ of certiorari, noting that "the facts contained within the arrest affidavit, the officers' testimonies about [the defendant's] driving pattern, their observations after he was stopped, and his poor performance on the field sobriety exercises [constituted] competent substantial evidence to support the hearing officer's decision that [he] was lawfully arrested for driving under the influence even without considering the HGN test results." Officers had seen the defendant speed, make a sharp turn and almost hit a curb, drive six to eight inches into the bike lane, and straddle the median lane. After stopping him, officers noticed indicia of impairment.

***Strouse v. DHSMV*, 22 Fla. L. Weekly Supp. 309a (Fla. 9th Cir. Ct. 2014)**

A trooper stopped the defendant after seeing him swerving. The defendant agreed to take field sobriety tests and passed the HGN test, but stopped during the one-leg test. The trooper arrested him for DUI and took him to a breath test center, where two breath tests showed 0.0000 alcohol. The trooper asked the defendant to provide a urine sample, which he agreed to but was unable to provide, and his license was suspended. He appealed. At the hearing the trooper testified that he suspected the defendant was on medication. The trooper testified that before the urine test the defendant complied with the trooper's requests and was polite, and that he did not state that he refused to give a urine sample. The trooper also testified that the defendant asked for water but he refused to give him any. The hearing officer sustained the suspension stating that the defendant refused to submit to a urine test and that she did not consider authorities cited by the defendant's attorney because "they lack jurisdiction." The defendant sought review, and the circuit court, in its appellate capacity, quashed the suspension, stating that while there was competent substantial evidence to support the probable cause finding that the defendant was under the influence of a controlled substance, there was not competent substantial evidence to support the finding that he refused to submit to a urine test. The court also noted that although the Ninth Circuit had not formally adopted the holding in the cited authority, it had used that authority to distinguish other refusal cases.

***Muroski v. DHSMV*, 22 Fla. L. Weekly Supp. 306a (Fla. 9th Cir. Ct. 2014)**

The defendant's license was permanently revoked because of four DUI convictions. His request for a hardship license was denied, and he sought review. The circuit court, in its appellate capacity, denied review, stating:

> [The defendant] argues that the hearing officer incorrectly denied his request for reinstatement because he operated a motor vehicle less than 5 years prior to the hearing. He asserts that he was not timely notified that his license was permanently revoked, and therefore was driving with a valid license until he received notice of the revocation in September 2010. . . .
>
> Based on the record, [the defendant] testified that he last consumed alcohol in September 2012 at his nephew's wedding. The hearing officer's decision that an applicant must be alcohol-free [not just drug-free] for five years prior to the hearing is a reasonable interpretation of the statute. . . . Therefore, even if [the defendant] had not operated a motor vehicle without a license for five years prior to the hearing, there was competent substantial evidence that [he] consumed alcohol less than five years prior to the hearing. Accordingly, the hearing officer did not depart from the essential requirements of the law by denying [his] request for a hardship license.

***Deak v. DHSMV*, 22 Fla. L. Weekly Supp. 298b (Fla. 6th Cir. Ct. 2014)**

The defendant was convicted of several traffic offenses between 2008 and 2010. She was designated a habitual traffic offender, and her license was revoked for five years. While her license was suspended, she was cited for failing to display her driver license. After paying her traffic fines and completing a driver improvement course, she applied for early reinstatement of her license for employment purposes. The department denied the request and she sought review, contending that at her administrative hearing "she mistakenly testified that she had last driven a motor vehicle in December of 2013, when she meant to testify that she had last driven in December of 2012." The circuit court, in its appellate capacity, denied review, stating: "Even if [the defendant] had testified at the hearing that the last time she drove was in 2012, the hearing officer's rationale for denying her application would have been equally applicable."

***Patel v. DHSMV*, 22 Fla. L. Weekly Supp. 290b (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended for refusal to submit to a breath test. The hearing officer upheld the suspension, and the defendant sought review, arguing that there was not competent substantial evidence that he was lawfully arrested. The circuit court, in its appellate capacity, disagreed, noting that the stopping officer was justified in conducting a brief investigatory stop for safety reasons, and the arresting officer was not outside jurisdiction.

The defendant also argued that the hearing officer departed from the essential requirements of law and denied him due process by (1) denying his subpoena for the breath test operator to provide a copy of his certification and proof of completion of all continuing education requirements, (2) using unpromulgated forms, and (3) submitting into evidence an uncertified, unauthenticated driver record transcript. The circuit court disagreed, stating that the hearing officer allowed limited-scope subpoenas, but they were never served. It also held that

even if the use of unpromulgated forms was improper, the defendant did not show that it resulted in any material injury. Lastly, the court held that there was no evidence that the hearing officer unilaterally submitted the uncertified, unauthenticated transcript of the defendant's driving record into evidence or an allegation that the defendant suffered any injury as a result.

***Thompson v. DHSMV*, 22 Fla. L. Weekly Supp. 289a (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended for DUI, and he sought review. The circuit court, in its appellate capacity, denied review. The defendant had argued that the breath test operator did not comply with administrative rules because there was a seven-year gap between her approved renewal courses, but the circuit court did not agree with the defendant's interpretation of the certification renewal cycle timing. The defendant also argued that he was denied due process "when the Hearing Officer did not introduce into evidence a profile sheet of all the training [the] correctional Officer . . . had received that was requested in [his] Subpoena Duces Tecum. Although the Officer testified that he took the renewal course training for breath test operator while renewing his agency inspector training, he did not want the profile sheet introduced into evidence because it included other testing, including firearm training. . . . The [defendant] objected but was overruled," and he did not file a motion to invalidate the suspension based on the profile sheet not being introduced into evidence, thereby waiving his opportunity to cross-examine the officer and preserve the issue on appeal. He did not contend that the breath test was not valid or that the machine was not operating or maintained properly.

***Santivanez v. DHSMV*, 22 Fla. L. Weekly Supp. 187a (Fla. 11th Cir. Ct. 2014)**

The defendant's license was suspended for person under 21 driving with blood or breath alcohol level of .02 or higher. The hearing officer made some findings for which there was no record evidence; e.g., that the stopping officer "detected an odor of an unknown alcoholic beverage emitting from his person, bloodshot watery eyes" and that the defendant performed poorly on field sobriety exercises. The circuit court, in its appellate capacity, therefore quashed the suspension.

***Reynolds v. DHSMV*, 22 Fla. L. Weekly Supp. 182a (Fla. 9th Cir. Ct. 2014)**

The defendant's licenses was suspended for DUI. Five days before the hearing, one of the subpoenaed deputies requested a continuance because of a court conflict. Instead of scheduling a continuance, the hearing officer told the defendant's attorney about the conflict and suggested taking the testimony of the other deputy, who was present, and then continuing the hearing so the other deputy could be questioned later. The defendant's attorney declined a continuance and argued that the defendant was entitled to dismissal of the suspension because of the deputy's failure to appear, based on section 322.2615(11), Florida Statutes (2013). The hearing officer refused to invalidate the suspension. The circuit court, in its appellate capacity, denied review, holding that the deputy did not "fail to appear" because subsection (d) of the statutes provides: "Notification to the department of a witness's non-appearance with just cause prior to the start of a scheduled formal review shall not be deemed a failure to appear." Subsection (b) "defines 'just cause' as 'extraordinary circumstances beyond the control of . . . the witness which prevent that person from attending the hearing,' and states that if just cause is shown, the hearing *shall* be continued."

The court also held that there was competent substantial evidence to support the hearing officer's finding that the traffic stop and subsequent arrest were lawful. The deputy testified that the vehicle's tag light was not illuminated, which was a violation on which a stop could be based. After the stop, the deputy had a reasonable suspicion of impairment to support a request that the defendant perform field sobriety exercises.

***Hallman v. DHSMV*, 22 Fla. L. Weekly Supp. 181a (Fla. 6th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. She sought review, claiming that the hearing officer relied on improper or unsworn documents, as the arrest date typed on the probable cause affidavit showed November 9 but the date of the arrest was November 1, there was no date listed next to the deputy's signature, and it was not an affidavit because it did not show that the deputy was placed under oath by a person authorized to administer oaths. The circuit court, in its appellate capacity, denied review, finding that "reliance on the affidavits did not constitute a departure from essential requirements of law," and noting that the arrest date on the affidavit was corrected by hand, the affidavit contained sufficient language to meet statutory requirements, and another affidavit was submitted that stated the basis for probable cause to arrest and was signed by the deputy and an attesting officer.

The defendant also argued that there was not competent substantial evidence that she was in actual physical control of the vehicle. But the appellate court found that the sworn narrative from the responding fire department and the deputy's affidavit were sufficient to establish probable cause.

***Herrera v. DHSMV*, 22 Fla. L. Weekly Supp. 177a (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. He sought review, arguing that his arrest was unlawful because the police officer was outside his jurisdiction and had no authority to conduct a stop or detention, and could not have effected a citizen arrest because he did not personally see the felony being committed. But the circuit court, in its appellate capacity, denied review, stating: "An officer outside his jurisdiction may make a legal stop and arrest as a private citizen for breach of peace based on the driver's erratic driving and unsafe driving. . . . Moreover, . . . the legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine if the driver is ill, tired, or impaired in situations less suspicious than that required for other types of criminal behavior." The officer saw the defendant asleep at the wheel with the keys in the ignition, and when the defendant woke up the officer observed signs of impairment, and thus he had reasonable suspicion of DUI. "The fact that [the officer] was outside his jurisdiction does not affect the legality of the investigatory stop as even private citizens under those circumstances may make an arrest. Furthermore, the actual arrest was made by an officer within the jurisdiction who conducted the DUI investigation."

The defendant also claimed he was denied due process as the department did not follow its own rules and statutory guidelines, because the hearing officer (1) denied his subpoena for the breath test operator to provide a copy of his certification and proof of his completion of all continuing education requirements, (2) used unpromulgated forms, and (3) submitted into evidence an uncertified, unauthenticated transcript of the defendant's driving record. The appellate court stated that the defendant was entitled to a subpoena only for the breath test

operator's current certification, and that, since the operator was subpoenaed and testified, the defendant was not entitled to other proof of his continuing education. As to the hearing officer's use of unpromulgated forms, the court stated that even if it was error, the defendant did not demonstrate any material injury. The court also found no evidence that the hearing officer unilaterally submitted the uncertified, unauthenticated transcript of the defendant's driving record into evidence, nor did the defendant allege that he suffered injury as a result.

***Roldan v. DHSMV*, 22 Fla. L. Weekly Supp. 175a (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended after he refused to submit to a breath, blood, or urine test. He claimed his arrest was unlawful, but the circuit court, in its appellate capacity, denied review, noting that a stop for careless driving may be lawful even if no other traffic was affected by the driver's actions. "[T]he correct analysis is whether the officer who initiated the traffic stop had an objectively reasonable basis to make the stop," and the officer did in this case, after seeing the defendant swerve in the center lane and strike the right and left lane dividers six times, slow down to 35 mph at an intersection, and then accelerate through the intersection. "The [defendant's] actions endangered his own life, limb and property and therefore fell within the parameters of the careless driving statute."

***Tackett v. DHSMV*, 22 Fla. L. Weekly Supp. 174a (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended after she refused to submit to a breath test. She argued that her arrest was unlawful because there was no evidence to support the finding that she was driving or in actual physical control of the vehicle. The circuit court, in its appellate capacity, disagreed, noting that the defendant twice admitted she was driving the vehicle, and there was also circumstantial evidence. "Where an accident is involved and the vehicle is inoperable, actual physical control of the vehicle can be proven by circumstantial evidence that the accused operated the vehicle prior to the accident." The trooper's car camera video clearly showed that the defendant was the only person at the accident scene when the trooper arrived and that she had her keys. And the trooper testified about physical indications that made it "apparent" that [the defendant's] vehicle hit the barrier and slid across the roadway."

The defendant also argued that the trooper did not have reasonable suspicion to conduct a DUI investigation, but the court noted the evidence clearly indicated otherwise. The defendant further argued that the information obtained during the accident investigation was inadmissible because of the accident report privilege. The appellate court noted that the privilege "does not apply to the administrative review of a license suspension pursuant to section 322.2615, Florida Statutes," and even if it did, it "does not exclude evidence of the arresting officer's observations of the suspect's physical appearance, general demeanor, slurred speech, or breath scent."

***Weeks v. DHSMV*, 22 Fla. L. Weekly Supp. 171a (Fla. 4th Cir. Ct. 2014)**

The defendant was determined to be at fault for a traffic crash and refused a breath test, and his license was suspended. He argued his arrest was unlawful because a deputy placed him "under *de facto* arrest when he transported him from the crash scene to the nearby parking lot and that, at that time, [the officer] did not have the requisite probable cause to make a lawful arrest," and that therefore anything that happened after that should have been suppressed. The

circuit court, in its appellate capacity, affirmed the suspension, stating that there was competent substantial evidence to support the hearing officer's finding that the defendant was not placed under de facto arrest at that time. He was not handcuffed, and one of the officers told him he was not under arrest at that time, and it was reasonable of the officers to take him away from the crash scene to a nearby well-lit parking lot to perform field sobriety tests. Nor was he under de facto arrest while waiting in the police car for the DUI investigator to arrive, as this was for only eight minutes, which "is not an unreasonable length of time to temporarily detain an individual during an investigatory stop."

The defendant also argued that the department "failed to follow its own rules and statutory guidelines by using "unpromulgated forms in direct contravention of the law." But the appellate court held that the defendant did not show "that using these forms resulted in some material injury" to him.

The defendant further argued that the hearing officer erred in unilaterally submitting into evidence an uncertified, unauthenticated transcript of the defendant's driving record. But the appellate court held there was no evidence of that, and moreover the defendant "failed to allege that he suffered injury as a result of the driving record."

***Sutton v. DHSMV*, 22 Fla. L. Weekly Supp. 170a (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. He sought review, claiming there was not competent substantial evidence of probable cause for the stop, because he did not place other vehicles in danger, and therefore no traffic violation occurred. But the circuit court, in its appellate capacity, denied review, noting that "a stop may be justified even in the absence of a traffic infraction when the vehicle is being operated in an unusual manner," and that a "vehicle traveling considerably slower than the normal speed of traffic on an interstate highway, weaving in and out of his traffic lane, late on a Friday night" justified the traffic stop.

***Justice v. DHSMV*, 22 Fla. L. Weekly Supp. 169b (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. The officer had seen the defendant veer across three lanes of traffic and jump a concrete median while speeding. He intended to stop the defendant and a car she was following, but initially was able to stop only the other car, at which point the defendant voluntarily stopped nearby, within sight of the officer. The defendant argued that because the officer was not facing her while talking with the other driver, he did not have reasonable suspicion to stop her. The court did not agree: "The court assumes her argument to be that someone else could have been driving the vehicle and left the scene during that 1 to 1.5 minutes. She claims this possibility voids the reasonable suspicion to stop her vehicle, or as was done in this case, direct her to move the vehicle into a nearby parking lot. Under these facts, the arresting officer never lost reasonable suspicion to stop [her] vehicle."

The defendant also argued that the hearing officer's denial of her request to issue subpoenas duces tecum denied her due process, and cited *Hedley v. DHSMV*, 19 Fla. L. Weekly Supp. 515a (Fla. 4th Cir. Ct. Mar. 19, 2012) and *Patel v. DHSMV* (Fla. 4th Cir. Ct. June 27, 2012). But the circuit court, in its appellate capacity, distinguished those cases because in this case the hearing officer granted the issuance of subpoenas duces tecum for the officers' initial

breath test operator permit, initial agency inspector certification, and certificate of completion from the last successfully completed renewal course. The defendant sought to contest whether the officers were properly certified as an agency inspector and a breath test operator, and "[t]he modified subpoena duces tecum authorized by the hearing officer properly and fully allowed her to do so." The court denied review. However, the court did state that

> the court questions whether these subpoenas are properly issued. All of this information sought by subpoena duces tecum is available by public records request. The request could be made to the true source of these records and not from agencies, i.e. the . . . Sheriff's Office, which only have copies of records issued by the Department. At oral argument in *Hedley*, the court raised this concern with counsel for Petitioner, . . . who acknowledged that this information was available by public records request, but expressed concern that records obtained this way might not be admitted into evidence by hearing officers. However, certified records of the state of Florida are self-authenticating [See *Fla. Stat.* §90.902], and admissible. Further, these are the true or original records from the proper custodian.
>
> After further reflection and for these reasons, the court recedes from its earlier rulings in *Hedley* and *Patel, supra*.

***Maples v. DHSMV,* 22 Fla. L. Weekly Supp. 169a (Fla. 2d Cir. Ct. 2014)**

The defendant argued that his due process rights were violated at the administrative suspension hearing after the police officer who had received a subpoena duces tecum appeared at the hearing without the requested audio or video tapes. Although the officer testified that he did not have any tapes, another officer later testified in a deposition in a criminal case that the tapes did exist and provided a videotape to the defendant. Therefore the appellate court remanded.

***Scanlon v. DHSMV,* 22 Fla. L. Weekly Supp. 83a (Fla. 9th Cir. Ct. 2014)**

After being stopped for speeding, the defendant was arrested for DUI and his license was suspended. He filed a petition for writ of certiorari, arguing that "he was denied due process because the hearing officer refused to issue subpoenas for the arresting officer and custodian of records for the in-car video." But the circuit court, in its appellate capacity, denied the petition, noting that the subpoenas were not issued because the defendant's attorney failed to make corrections to them as instructed by the hearing officer.

The defendant also argued that the arrest was not lawful because it was not supported by competent substantial evidence, and that the hearing officer should not have considered the horizontal gaze nystagmus (HGN) exercise because there was no evidence that the trooper was a drug recognition expert. But the court noted that even without the HGN test, based on the totality of the facts contained in the charging affidavit, there was competent substantial evidence to support the hearing officer's decision.

Further, the defendant argued that under the *Daubert*, the state must show "that the breath test result[s] are based on sufficient facts or data, are a product of reliable principles and

methods, and the principles and methods were reliably applied to the facts of the case. . . . He claims that because there was no testimony about the length of time [he] blew into the machine, the volume of his breath, or the slope of his breath[,] there was not competent substantial evidence that the breath test results were reliable." But the breath test technician gave rebutting testimony, and the test "was performed substantially according to the methods approved by the Department as reflected in the administrative rules and statutes."

***Repple v. DHSMV*, 22 Fla. L. Weekly Supp. 81a (Fla. 18th Cir. Ct. 2014)**

The defendant was arrested for DUI, and his license was suspended for refusal to perform a breath or blood alcohol test. The circuit court, in its appellate capacity, affirmed, holding that his due process rights were not violated when a subpoenaed witness failed to appear twice for hearings, where the defendant "failed to seek assistance from the circuit court to issue a subpoena for his attendance."

***Weissbein v. DHSMV*, 22 Fla. L. Weekly Supp. 78a (Fla. 17th Cir. Ct. 2014)**

After a car accident, the defendant was arrested for DUI and failure to submit to a breath test. He filed a petition for writ of certiorari, arguing that the only evidence that he was in actual physical control of a vehicle — his pre-*Miranda* warning admission to a trooper— was inadmissible, and therefore the troopers lacked probable cause to arrest him. But the circuit court, in its appellate capacity, denied the petition, stating that

> a formal review may be conducted without any witnesses at all, and a hearing officer's decision may be based solely upon the documents submitted by the arresting agency. . . . [B]oth the arrest and traffic reports were . . . admitted into evidence at the formal administrative hearing [and] must be considered by a hearing officer. Moreover, to the extent [the defendant] is arguing that the accident report privilege bars the Hearing Officer's consideration of statements made by the [defendant], such argument lacks merit.

Further, the only persons at the accident scene were the defendant and the other driver, which would lead a reasonable person to believe that the defendant was driving one of the cars.

***Dees v. DHSMV*, 22 Fla. L. Weekly Supp. 61a (Fla. 13th Cir. Ct. 2014)**

The defendant's license was suspended for failure to pass a driving test. She sought review, arguing that she was denied due process because she did not have the opportunity to review and refute certain documents, and that DHSMV failed to present evidence in support of the suspension. The circuit court denied review, noting that it was the defendant's burden to present evidence to show why her license should not have been suspended. The defendant also cited a lack of competent substantial evidence, but the circuit court noted that she "candidly state[d] the issues identified by the driving test administrators as the reasons for her failing the driving examination. Although [she] offered justification for the actions she identified as problematic to the driving examiners, the Court does not find that it was unreasonable for the Field Hearing Officer to consider this testimony and find that it supported the suspension of [her] driving privilege."

***Depaz-Urtaza v. DHSMV*, 22 Fla. L. Weekly Supp. 60a (Fla. 13th Cir. Ct. 2014)**

The defendant's license was suspended for her refusal to submit to a breath test. She sought review, but the circuit court denied it. Regarding the defendant's argument that the stop was unlawful, the court noted that there was evidence that the defendant "was driving over lane markers, almost came to a complete stop at a highway on-ramp, then continued back into the roadway, continuing to drive over lane markers. [She] then accelerated far beyond the posted speed." The defendant pointed out that the officer had not shown "that the speed measuring device was properly approved, calibrated, tested, and operated by a certified operator," but the court noted that

> although speed calibration and other predicates are necessary in a citation hearing, where evidence of speeding must be proven beyond a reasonable doubt and the actual issue is whether the defendant was speeding, in an administrative suspension hearing, the issue is only whether the officer had probable cause to believe that the driver was speeding, not whether the driver was actually speeding. . . . Further, a pattern of erratic driving can be a basis for reasonable suspicion of impairment justifying a stop, even if a driver's actions, taken individually, may not provide such basis.

As to her argument that "because her driver's license record was not certified, it did not provide competent substantial evidence of prior refusals to justify the extended suspension she received," the court stated that the length of the suspension was not an issue at the administrative review hearing but rather could be addressed in the criminal citation case.

The defendant also argued that there was no competent substantial evidence to support the finding that her refusal to submit to a breath test occurred after her arrest, because the refusal affidavit left out the time of arrest and refusal. But the court disagreed, stating that the officer's narrative provided competent substantial evidence that the refusal occurred after the arrest, and the court could not reweigh the evidence.

***Thompson v. DHSMV*, 22 Fla. L. Weekly Supp. 58b (Fla. 13th Cir. Ct. 2014)**

The defendant's license was suspended for his refusal to submit to a breath or blood alcohol test. He sought review, claiming there was not competent, substantial evidence that a lawful traffic stop and lawful arrest occurred, but the circuit court denied review. The defendant had argued that the record failed to show "with requisite specificity" how the officer determined he was speeding. But the court noted that a laser speed measurement instrument calculated his speed at 20 mph over the posted speed limit. The defendant also argued that the evidence establishing his speed was inadmissible because the documents were authored by an officer who did not operate the laser instrument and therefore the documents were "hearsay within hearsay." But the court noted that "under the fellow officer rule, one law enforcement officer may develop probable cause to arrest based in part on facts known to another officer." The defendant further contended "that that the observations of law enforcement established in the record indicate only that [he] had consumed alcohol, but do not establish that he was impaired by alcohol" and therefore the officers lacked probable cause to arrest him for DUI." But the court noted that the defendant's speeding and other conduct and indicia of impairment established probable cause.

***Medlin v. DHSMV*, 22 Fla. L. Weekly Supp. 58a (Fla. 13th Cir. Ct. 2014)**

The defendant's license was suspended for six months for DUI. He requested a formal review hearing, but the department refused to issue a subpoena duces tecum to the breath test agency inspector, and the inspector was not present at the hearing. The defendant sought certiorari, arguing that the department's refusal to issue that subpoena was a due process violation and therefore the final order should be quashed. The circuit court, in its appellate capacity, agreed and quashed without remanding, stating that "where a suspension has expired during certiorari review, it is not necessary, and is in fact improper, to remand after quashing because the suspension issue is moot."

***Jervis v. DHSMV*, 22 Fla. L. Weekly Supp. 55b (Fla. 12th Cir. Ct. 2014)**

After being stopped for erratic driving, the defendant failed some sobriety tests and was arrested and taken to jail. Her license was suspended for refusal to submit to a breath, blood, or urine test. The subpoenaed breath-test trooper failed to appear at the first hearing because he was on sick leave. He failed to appear at the second, continued hearing, and defense counsel moved to invalidate the suspension based on the trooper's failure to appear at that hearing and his continued unavailability. The hearing officer then told defense counsel that the trooper was having surgery and would be unavailable for a couple of months, reserved ruling on the defendant's motion, proceeded with the hearing, and denied the motion to invalidate the suspension. The defendant filed a petition for writ of certiorari, but the circuit court, in its appellate capacity, denied it because the defendant failed to preserve any procedural due process claim by failing — after being told the trooper would not be present — to move for a continuance and file a petition to enforce the subpoena but rather choosing to proceed with the hearing and move to invalidate the suspension. "Notably, the [defendant's] attorney made this decision despite the fact that the [the defendant] was not present at the [second] hearing . . . and would therefore be unable to offer any testimony to contradict" the officers' reports.

***Sepulveda v. DHSMV*, 22 Fla. L. Weekly Supp. 50b (Fla. 11th Cir. Ct. 2014)**

The defendant was arrested after a car accident, and her license was suspended for refusal to take breath test. The circuit court, in its appellate capacity, quashed the suspension order. The defendant and her cousin had testified that she was a passenger and the cousin was driving, and "[n]either the officer's report nor any witness at the scene or at the hearing reference observing [her] as the driver or in actual physical control of the vehicle. All of the testimony presented at the hearing was to the contrary."

***Fulmer v. DHSMV*, 22 Fla. L. Weekly Supp. 43a (Fla. 9th Cir. Ct. 2014)**

The defendant was asleep in his parked car at 2 a.m. on the shoulder of a highway when he was approached by police officers. One officer opened the unlocked car door and roused the defendant, and a DUI investigation ensued, after which the defendant's license was suspended for his refusal to submit to breath test. He filed a petition for certiorari review, contending that the officer illegally seized him by opening his car door without reasonable suspicion of illegal activity. But the circuit court, in its appellate capacity, denied the writ, finding "sufficient indicia of possible impairment to initiate a DUI investigation." It also held that "the defendant appeared

to be unlawfully parked on the shoulder of the interstate. . . . It was certainly lawful for the officer to approach the car to find out whether it was disabled and whether the driver was in need of assistance or was simply illegally parked. Although [the officer] did not cite the possible traffic infraction as the basis for initiating his investigation, where the testimony and 'the facts contained in the arrest report provide any objective basis to justify the stop, even if it is not the same basis stated by the officer,' the stop is lawful." Further, the officer could not get the defendant's attention without opening the car door, after which he smelled alcohol and burnt cannabis, and the latter being illegal allowed the officer to detain him to investigate that crime.

***Sapienza v. DHSMV*, 22 Fla. L. Weekly Supp. 42a (Fla. 9th Cir. Ct. 2014)**

The defendant filed a petition for certiorari review of his license suspension for driving under the age of 21 with an unlawful breath alcohol level, arguing that there was no proof that the breath tests were administered on a U.S. DOT-approved device. But the circuit court, in its appellate capacity, denied the writ, noting the trooper's breath test affidavit stated that the device used is listed in the U.S. DOT's "conforming products list, and has been calibrated and checked in accordance with the manufacture's and/or agency's procedures" and the officer administered the breath test in compliance with statutes, and the defendant did not rebut the evidence and demonstrate noncompliance.

The defendant also argued that the evidence did not support a finding that the traffic stop was lawful. The department argued that the hearing officer was not required to make a determination as to the lawfulness of the stop under section 322.2616, Florida Statutes (underage drinkers), which provides that being detained for a violation of that statute does not constitute an arrest. But the court held that "even in the absence of an actual arrest, the lawfulness of a traffic stop remains an issue for a person accused of underage drinking and driving. The only opportunity that person has to contest the constitutional validity of the stop is at the administrative hearing and it would be a denial of due process to allow license suspensions to be imposed in the absence of evidence that the traffic stop which resulted in the suspension was lawful." Nevertheless, the court found that the stop was lawful because the trooper had reasonable suspicion to conduct a stop, as the drifting and weaving showed the vehicle was "being operated in an unusual manner."

The defendant also argued that there was no record evidence that the trooper had reason to believe he was under 21. But the court stated that he did not have to know the driver's age before stopping him. "That he then discovered the driver's age by looking at [the defendant's] license is obvious from the record."

***Torrence v. DHSMV*, 22 Fla. L. Weekly Supp. 37a (Fla. 9th Cir. Ct. 2014)**

A deputy was dispatched to where a vehicle was parked partly on the road and partly on the curb, with its headlights on. The defendant was slumped in the driver's seat and the engine was running. Her license was suspended for DUI, and she sought certiorari review, arguing that she was deprived of due process because the hearing officer did not allow her attorney to ask relevant questions about the breath test machine, and that the suspension was not supported by competent substantial evidence that her detention and arrest were lawful or that she had a breath-alcohol level of 0.08 or higher. The circuit court, in its appellate capacity, denied her petition,

stating that the approval process and scientific reliability of the breath test machine and results were beyond the scope of the hearing, and that her detention and arrest were based on well-founded, reasonable suspicion.

***Medina v. DHSMV*, 22 Fla. L. Weekly Supp. 33a (Fla. 9th Cir. Ct. 2014)**

The defendant sought review of his license suspension for DUI, challenging the lawfulness of his detention and arrest. He argued that the deputy did not have probable cause, but the circuit court, in its appellate capacity, noted that the indicia of impairment and errors on field sobriety exercises were sufficient to support a finding of probable cause. The defendant also argued that "the Intoxilyzer was not shown to be accurate since the testing officer testified that the machine had a standard deviation level. Because the testing revealed [the defendant's] blood alcohol level to be right at the legal limit of .08, he argues that variation in the machine readings could well have meant his level was actually below .08." But the court held that when an affidavit shows that a breath test was conducted by an approved and tested machine operated by an authorized individual, it is in compliance with the law, and the burden then shifts to the defendant to demonstrate error. In this case the defendant's attorney "failed to present any evidence that the standard deviation numbers meant what he is claiming they do -- that the machine is inherently inaccurate and gives readings that may vary up or down from the subject's actual blood alcohol content. . . . Therefore, the hearing officer's finding that the machine was correctly calibrated and operated is supported by the record and was not rebutted."

***Scoma v. DHSMV*, 22 Fla. L. Weekly Supp. 31a (Fla. 9th Cir. Ct. 2014)**

The defendant, who was found by a police officer in his vehicle with the keys in the ignition but the engine not running, sought certiorari review of his license suspension for DUI, arguing that

> 1) There was no well-founded suspicion of criminal activity or probable cause for the investigatory stop; 2) The Hearing Officer improperly admitted into evidence the breath test results without a proper predicate showing that [they complied with] section 90.702[,] Florida Statutes (2013) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*; and 3) The Hearing Officer deprived him of due process by preventing him from asking relevant questions about the scientific reliability of the breath test results and the Intoxilyzer 8000 breath testin[g] machine, by failing to consider or allow him to proffer for appellate purposes various documents showing the scientific unreliability of the Intoxilyzer 8000 and the breath test results, and by failing to allow the issuance of subpoenas for relevant witnesses.

The circuit court, in its appellate capacity, denied the petition, stating that (1) the facts supported a well-founded, reasonable suspicion that the defendant has committed, was committing, or was about to commit a violation of the law; (2) the breath test affidavit and the agency inspection report contained all the statutorily required information to establish that the machine used for the defendant's test was properly inspected and maintained, performed appropriately, and produced accurate and reliable test results, therefore constituting "presumptive proof of results of an authorized test and that the Department complied with the applicable statutes and rules"; (3) "challenges to the approval process of the Intoxilyzer machine are beyond the scope of a formal

driver's license review proceeding and the Intoxilyzer 8000 is approved for evidentiary use in Florida"; and (4) "the documents [the defendant's] counsel attempted to proffer and the questions he attempted to ask regarding the approval process and the scientific reliability of the lntoxilyzer 8000 and breath test results were beyond the scope of the hearing."

***Gallaher v. DHSMV*, 22 Fla. L. Weekly Supp. 29a (Fla. 9th Cir. Ct. 2014)**

The defendant refused to submit to a breath test, and his license was suspended. In his petition for certiorari review he argued that "the hearing officer did not have a record basis" to determine that the traffic stop was lawful. But the circuit court, in its appellate capacity, denied the petition, noting:

> Probable cause is not required for a traffic stop, only reasonable suspicion, a less demanding standard. . . . Petitioner is probably correct that the bike rack obscuring the license plate is not a traffic infraction and thus not basis for a stop. The wide, slow turn also would not be a traffic infraction. . . . However, the officer's description of the drifting from lane to lane, touching lane lines, and the car coming to a complete stop on the roadway is sufficient for the hearing officer to find that there was an objective, articulable basis for the stop because the vehicle was being operated in an unusual manner."

***Seybold v. DHSMV*, 22 Fla. L. Weekly Supp. 28a (Fla. 9th Cir. Ct. 2014)**

An officer on routine patrol saw the defendant's vehicle parked on the side of a street with the lights on and the engine running. The defendant was the sole occupant, and his head was slumped down to the front of his chest. The officer approached to check on the driver's well-being, and after noticing indicia of impairment arrested the defendant for DUI. The defendant refused to submit to a breath test, and his license was suspended. He sought review, arguing that "(1) there was no founded suspicion of criminal activity or probable cause to order him to open his door and exit his vehicle because he was lawfully sleeping in a legally parked vehicle, and (2) there was no probable cause to arrest him because the surveillance and booking videos shows no signs of impairment prior to and after his arrest." But the circuit court, in its appellate capacity, disagreed and denied review.

***Peele v. DHSMV*, 22 Fla. L. Weekly Supp. 26a (Fla. 9th Cir. Ct. 2014)**

The defendant sought certiorari review of his license suspension for DUI, arguing that he was denied due process because of his inability to cross-examine the arresting officer regarding his arrest affidavit within 30 days of his request for a hearing, and challenging the lawfulness of his detention and arrest. The circuit court, in its appellate capacity, denied the petition, noting that the while there was no evidence as to when the defendant requested the formal review hearing, it was reasonable to conclude that the first hearing was held within 30 days from his request. As to the lawfulness of the detention and arrest, the court cited evidence from witnesses who saw the defendant back into a parked car, the officer's observation of indicia of impairment, statements made by the defendant, and his poor performance on field sobriety exercises.

***Andrade v. DHSMV*, 22 Fla. L. Weekly Supp. 24b (Fla. 9th Cir. Ct. 2014)**

The defendant sought review of his license suspension for DUI, challenging the lawfulness of his detention and arrest. He argued that the deputy did not have reasonable suspicion that he was driving or in actual physical control of the vehicle. But the circuit court, in its appellate capacity, did not agree, noting many indicia of impairment and other factors that gave the deputy probable cause, and held the arrest was lawful. The defendant also argued that the deputy did not have reasonable suspicion that he had committed a DUI in connection with a traffic crash, because there was no evidence of damage to any vehicles. The court called that argument misplaced, as the hearing officer did not mention a "traffic crash" when determining that the deputy had probable cause to believe the defendant was driving or in actual physical control of the vehicle. Also, section 322.2615(7)(b)1, Florida Statutes, does not require a finding that a crash occurred; only that "[t]he law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances." Further, "it would be reasonable to find that the subject vehicle being stuck on the railroad tracks and hindering the passing of the train was an imminent danger to the public safety and warranted the immediate dispatch of law enforcement to the scene."

The court also denied the department's motion to tax attorney's fees and sanctions that asserted the defendant's petition and appendix were improper and frivolous.

***Gamble v. DHSMV*, 22 Fla. L. Weekly Supp. 24a (Fla. 9th Cir. Ct. 2014)**

The defendant filed a petition for certiorari review of his license suspension for DUI, arguing that "the arresting officer's probable cause affidavit was not sufficient competent evidence to support the hearing officer's decision[;] that the affidavit contained only conclusions without supporting facts, and that it did not establish that the officer was acting within his territorial jurisdiction." The court disagreed and denied the petition. It held that the defendant's driver license and the probable cause affidavit were sufficient evidence and noted that when a driver under 21 is charged with DUI, appellate review of the hearing officer's final order is confined to three issues: "age, control of a vehicle and alcohol level. The hearing officer is not authorized to determine whether the officer was acting within his territorial jurisdiction."

***Nichols v. DHSMV*, 21 Fla. L. Weekly Supp. 23b (Fla. 7th Cir. Ct. 2014)**

The defendant's license was suspended for refusal to submit to a breath alcohol test. He filed a petition for writ of certiorari, but the circuit court denied it. Although the affidavit of refusal had been excluded at the formal administrative hearing, the charging affidavit of the arresting officer established that the defendant was read the implied consent notice twice and refused the breath test. "The burden then shifted to [the defendant] to offer contrary evidence and [he] failed to offer any." The defendant also argued that because the charging affidavit "does not recite the specific language of the implied consent notice," it was insufficient and the suspension was improper. But the court noted that "Florida law does not require that the specific text of the spoken warning be spelled out in the Affidavit."

***Karvelsson v. DHSMV*, 22 Fla. L. Weekly Supp. 23a (Fla. 7th Cir. Ct. 2014)**

The circuit court denied the defendant's petition for writ of certiorari. It stated that the record was "complicated by the fact that one of the citations issued was voided. Despite the confusion in the record the question before the court is not what it would have done under the circumstances but whether there is competent substantial evidence believed by the Hearing Officer that can support the decision that was made." It concluded that there was.

***Tomberlin v. DHSMV*, 22 Fla. L. Weekly Supp. 22a (Fla. 7th Cir. Ct. 2014)**

The court previously issued a final order quashing the defendant's license suspension, finding the loss or destruction of his videotaped breath test violated his due process. The department filed a motion for rehearing, and the court granted the motion and issued a revised final order, quashing its previous order that granted certiorari review. It stated that the police department "was not required to submit a copy of the videotape to the [DHSMV] to support the administrative suspension. . . . Further, there is competent substantial evidence to support the hearing officer's findings."

***Vogel v. DHSMV*, 22 Fla. L. Weekly Supp. 19a (Fla. 6th Cir. Ct. 2014)**

The defendant sought review of his license suspension for DUI, arguing that the DVD of his driving contradicted the arresting officer's written report and arrest affidavit and the initial stop was not lawful. But the court reviewed the DVD and held that there was competent, substantial evidence to support the hearing officer's decision that the stop was lawful.

***Swindle v. DHSMV*, 22 Fla. L. Weekly Supp. 13a (Fla. 6th Cir. Ct. 2014)**

The defendant challenged his license suspension for DUI, alleging that the attestation in the probable cause affidavit was inadequate; that the attesting officer was not properly identified "because his signature was not legible, his name not printed, his police identification number not given and, further, because he was not a notary." The circuit court, in its appellate capacity denied review: "Both the arresting officer and the attesting officer signed the form. The absence of [the attesting officer's] printed name and ID number is not significant. As to the attestation itself, 'law enforcement officers . . . are authorized to administer oaths when engaged in the performance of official duties' making the signature of a notary unnecessary."

***Guarino v. DHSMV*, 22 Fla. L. Weekly Supp. 10a (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. He argued that because alleged FDLE documents showed that the breath testing machine operator's last certification was more than six years before he gave the breath test to the defendant, the results of the test could not be relied on to support the suspension. However, the FDLE records were offered into evidence without an authenticating witness to confirm or explain the information in them, and the machine operator testified that FDLE and the Office of the State Attorney considered him to be certified. The circuit court, in its appellate capacity, held that it could not re-weigh the evidence and substitute its judgment for that of the hearing officer, whose prerogative it was "to accept the testimony of [the machine operator] that he was properly certified over an unauthenticated record of FDLE."

***Wilcox v. DHSMV*, 22 Fla. L. Weekly Supp. 8a (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. The circuit court, in its appellate capacity, quashed the suspension, holding that the hearing officer denied him due process by rejecting his request that the Intoxilyzer maintenance and inspection documents provided by the machine's agency inspector and custodian of breath test documents be placed in the record. That officer provided copies, but at the hearing he said he did not want them admitted into the record, and the hearing officer refused to admit them. This was error, because they "were relevant, admissible, and properly authenticated," and the decision "that the [defendant] could not have the documents placed into the record if law enforcement chose not to offer them shows a misunderstanding of the key rule of law" that was "off target" and "arbitrary." The hearing officer also erred by failing to issue the proper subpoenas duces tecum for breath test operator certification and renewal documents. "Notwithstanding the three (3) month limitation contained in the administrative rules related to subpoenas duces tecum, because the validity of the breath test operator's certification at the time of the breath test in this case is dependent on when various courses were completed, this historical information is relevant."

***Smith v. DHSMV*, 22 Fla. L. Weekly Supp. 6a (Fla. 4th Cir. Ct. 2014)**

A deputy was told of a vehicle driving erratically. He saw the vehicle speeding and crossing lines, and then driving about 20 mph below the speed limit, and stopped the defendant for suspicion of impaired driving. The defendant was arrested for DUI and his license was suspended. He sought review, arguing his arrest was invalid because the initial stop and arrest were not supported by probable cause. But the circuit court, in its appellate capacity, stated: "The correct standard for a stop based on suspicion of DUI, is a founded suspicion, not probable cause. . . . [and] a display of erratic driving, can give rise to reasonable suspicion and therefore validate a DUI stop." The defendant also argued that "the officer must still have reasonable suspicion that the driver was impaired in order to make the stop valid." But the court stated that based on the tip and the deputy's own observations, there was "an objectively reasonable basis for the stop." The court also disagreed that the defendant was denied due process when his initial subpoena duces tecum request, seeking the breath test operator's initial certification as well as the most recent renewal, was denied. The hearing officer approved a second subpoena request, for the deputy's most recent certification renewal, but the defendant did not serve it.

***Higginbotham v. DHSMV*, 21 Fla. L. Weekly Supp. 4a (Fla. 4th Cir. Ct. 2014)**

A deputy investigating a possible carjacking saw the suspected vehicle in a parking lot and asked the defendant to help get the vehicle's tag number. As the defendant approached the carjacked vehicle, the deputy heard on his radio that the suspect was the defendant's boyfriend. When the defendant drove back to the deputy, he noticed indicia of DUI and detained her for suspected DUI and to prevent her from going back to the suspected carjacked car and warning her boyfriend of the deputies' presence. A DUI officer arrived, noticed indicia of DUI, and, after field sobriety exercises, arrested her. She refused to submit to a breath test, and her license was suspended. She argued that a license suspension can be based on refusal to take a breath test only if the refusal is incident to a lawful arrest, that she was placed under de facto arrest without probable cause when placed in a deputy's car while waiting for the DUI officer to arrive, and that there was no probable cause to arrest her. The circuit court, in its appellate capacity, disagreed, and held that there was probable cause for the detention and arrest.

***Huls v. DHSMV*, 22 Fla. L. Weekly Supp. 2a (Fla. 4th Cir. Ct. 2014)**

A police officer stopped the defendant after seeing him run off the road, run over two sidewalks, drive across a parking lot to evade a stop sign, and drive the wrong way on a one-way street. The defendant's license was suspended for refusal to take a breath test. He sought review, which the circuit court, in its appellate capacity, denied. He had argued that his driving record was improperly entered into evidence because the department relied on an uncertified, unauthenticated transcript of it, but the court cited cases that upheld the use of uncertified DHSMV internal records in administrative hearings. The defendant also argued that because the hearing officer relied on, and was rendered partial by, a memorandum from the chief of the Bureau of Administrative Reviews to all bureau staff advising "that the hearing officers should not consider the lawfulness of an arrest when a driver had submitted to a breath test," the hearing officer should not have denied his motion to recuse. But the court stated the memorandum "had no effect on the Hearing Officer's ability to remain impartial, because it merely reiterated the scope of review that a hearing officer has when a suspect submits to a breath test. In the present case, the [defendant] refused a breath test, which forces the hearing officer to consider the lawfulness of the arrest prior to rendering a decision," which the hearing officer did.

***Pittman v. DHSMV*, 22 Fla. L. Weekly Supp. 1b (Fla. 4th Cir. Ct. 2014)**

The defendant was arrested for DUI and her license was suspended based on breath test results. She appealed, arguing that the arrest was not lawful because the stop, DUI investigation, and arrest were conducted by officers outside their jurisdiction; the hearing officer ignored her and another witness's testimony, showing partiality; and the hearing officer failed to issue a requested subpoenas duces tecum regarding the breath test operator's permit. She also raised issues about the mutual aid agreement. The circuit court, in its appellate capacity, denied review, holding that the "fresh pursuit" exception permitted the officer to arrest her, rendering immaterial any mutual aid agreement arguments; there was no evidence that the hearing officer was not impartial; and the subpoenas she originally sought were properly denied as overbroad: "Any error as to issuance of subpoenas was either not preserved or waived or was harmless."

***Parker v. DHSMV*, 22 Fla. L. Weekly Supp. 1a (Fla. 4th Cir. Ct. 2014)**

The defendant filed an amended petition for writ of certiorari after her driver license was suspended. The circuit court, in its appellate capacity, denied the petition. The defendant argued that witnesses should not have been allowed to be presented and testify by telephone, but the court stated that the law is clear that administrative hearings "may be conducted by telephone conference calls and thus, witnesses may testify by telephone." She also argued that the hearing officered erred by considering statements in the crash report. But the court noted that the crash report privilege is not applicable in administrative license suspension hearings.

VI. Red-Light Camera Cases

***City of Fort Lauderdale v. Dhar*, ___ So. 3d ___, 2014 WL 5343530 (Fla. 4th DCA 2014)**

A vehicle registered to a car rental company was captured on an automated traffic camera running a red light, and the company received a notice of violation. The company sent an

affidavit identifying the defendant as "the person having care, custody, or control of the vehicle at the time of the violation," and she was issued a traffic citation. She filed a motion to dismiss, arguing that "as a short-term renter of the motor vehicle, she was treated unequally as compared to a vehicle's registered owner or lessee because she was not initially issued a notice of violation . . . and therefore could not avoid the payment of added court costs by simply paying the statutory penalty of $158.00." The trial court agreed and granted her motion to dismiss. The city appealed, but the appellate court affirmed, and noted that 2013 amendments to the statute have corrected the issue.
http://www.4dca.org/opinions/Oct%202014/10-22-14/4D13-1187.op.pdf

***City of Hollywood v. Arem*, ___ So. 3d ___, 2014 WL 5149159 (Fla. 4th DCA 2014)**

The defendant received a red-light camera citation and filed a motion to dismiss. The county court granted his motion and certified questions to the appellate court:

1. Does Florida Statute 316.0083(1)(a) authorize a municipality to delegate and have a private vendor actually issue Florida Uniform Traffic Citations, when notices of violation, (also issued by the vendor), are not complied with, where the only involvement of the traffic infraction enforcement officer in the entire process is to push a button saying "Accept" after having viewed the image of an alleged violation electronically transmitted by the vendor?

2. Does Florida Statute 316.650(3)(c) permit a traffic infraction enforcement officer to delegate to a non-governmental entity, such as a private vendor of a municipality, his or her statutory duty to electronically transmit a replica of traffic citation data to a court having jurisdiction over the alleged offense or its traffic violations bureau?

3. And if the answer is in the negative to either question, is dismissal the appropriate remedy?

The appellate court answered the first question in the negative and stated that "we answer 'Yes' to the third . . . question, and find that dismissal of the citation is the appropriate remedy where a private third party effectively decides whether a traffic violation has occurred and a citation should be issued. We decline to answer the second question posed by the county court because the City's improper delegation of authority in this case renders the citation void at its inception." It stated further that "In Florida, only law enforcement officers and traffic enforcement officers have the legal authority to issue citations for traffic infractions, which means only law enforcement officers and traffic enforcement officers are entitled to determine who gets prosecuted for a red light violation."
http://www.4dca.org/opinions/Oct%202014/10-15-14/4D12-1312.rhg.pdf

***Acosta v. County of Palm Beach, Palm Beach County Sheriff's Office*, 22 Fla. Law Weekly Supp. 332a (Fla. 15th Cir. Ct. 2014)**

The circuit court, in its appellate capacity, affirmed the order finding the defendant guilty of violating section 316.075(1)(c)(1), Florida Statutes. It did address the defendant's argument that section 316.0083(1)(e), Florida Statutes, is facially unconstitutional "because it infringes

upon the Supreme Court's exclusive authority to promulgate procedural laws" since the "statutory language that images and video are 'admissible' means that such evidence is *automatically* admissible, thus creating a conflict with section 90.901, Florida Statutes, which provides that '[a]uthentication or identification of evidence is required as a condition precedent to its admissibility.'" But the court held that the statute did not "dispense with the authentication requirement of section 90.901, Florida Statutes [and] therefore does not conflict with any rule promulgated by the Florida Supreme Court and is not facially unconstitutional."

***State v. Clark et al.*, 22 Fla. Law Weekly Supp. 307a (Fla. 9th Cir. Ct. 2014)**

The state charged the defendants with red-light camera violations. The trial court dismissed the citations, holding that the state failed to prove that the defendants committed the infractions. It found that the photographs and video evidence were not self-authenticating, and also determined there was a lack of evidence regarding the Selective Traffic Enforcement Program. The state appealed, arguing

> (1) that the trial court erred by not receiving the electronic images, video, and violation evidence report into evidence because all of these are admissible under the act and because the trial court did not rule on [the county's] motions to admit its exhibits into evidence; (2) that the trial court erred by requiring after the fact all exhibits be filed in June even for witnesses called in the August hearing; (3) that the trial court erred by dismissing the State's cases based upon evidence presented in the City's cases; and (4) that the trial court erred by dismissing the red light camera citations based upon the State's failure to show that [the traffic infraction enforcement officer's] training was through a program that was similar to the STEP program.

The circuit court, in its appellate capacity, reversed based on the state's first and third arguments. That is, it held that photographic or electronic images or streaming video evidence is self-authenticating, and it was error for the trial court not to automatically admit it. And it held that the trial court erred by dismissing the state's cases based on evidence presented in the city's cases. The trial court based its decision to dismiss the state's cases on the testimony of the city's witness but did not allow the state to cross-examine the witness.

The appellate court found no error regarding the state's second claim, concerning the requirement that all exhibits be submitted in June for an August hearing. And as to the state's fourth argument, that it was error for the trial court to dismiss the citations based on the state's failure to show that the TIEO's training was through a program similar to the STEP program, there was a lack of evidence as to her comparable training.

The appellate court also found it was error for the trial court to dismiss the citations based on the state's failure to establish that the traffic infraction detector met established specifications and testing requirements, since the defendants had not raise the argument at trial.

***State v. Atiles*, 22 Fla. Law Weekly Supp. 304b (Fla. 9th Cir. Ct. 2014)**

The hearing officer dismissed the red-light camera citation because the TIEO who issued it "was determined to be unqualified by a judge in another red-light camera case." The state

argued that it had information that was not presented in the previous case, including the officer's certification in the new STEP and testimony that her previous training was similar to STEP. The circuit court, in its appellate capacity, affirmed, stating that

> the State attempted to demonstrate that [the officer] was qualified to issue the citations through [her] testimony. [Her] training in the new STEP in December 2012 cannot be applied retroactively to establish that she was authorized to issue the citation on October 18, 2012. In order to establish that [she] was authorized to issue the citation, the State must demonstrate that the March 2011 training was similar to instruction in traffic enforcement procedures and court presentation through the STEP applicable when the citation was issued on October 18, 2012, which was the June 2000 STEP. Instead, the State compared [her] March 2011 training to the new STEP effective November 1, 2012, after the citation was issued. The State acknowledged that the only applicable module for the June 2000 STEP was court presentation. However, section 316.640(5)(a) requires training in traffic enforcement procedures and court presentation through STEP or a similar program. The fact that the State could not establish that [the officer's] March 2011 training was similar to training in traffic enforcement procedures through STEP because the June 2000 STEP may not include training in traffic enforcement procedures does create a problem for the State. However, this Court cannot cure that problem by interpreting the statute contrary to its plain and unambiguous meaning. . . .
>
> While the hearing officer erred in excluding [the officer's] testimony based simply upon the failure of the State to establish her qualifications, the hearing officer properly found that she was not qualified to issue the citation and therefore properly dismissed the citation, albeit for the wrong reason.

***Stanford v. State,* 22 Fla. Law Weekly Supp. 45a (Fla. 9th Cir. Ct. 2014)**

The defendant appealed the hearing officer's determination that she failed to stop at a red traffic signal caught on a red-light camera, arguing, among other things, that the state failed to establish that she was the driver, "there was no admissible evidence that she had custody or control of the vehicle at the time of the violation," and there was no evidence to support the hearing officer's finding because the video and affidavit were not admitted into evidence. The circuit court, in its appellate capacity, reversed and remanded, stating: "It is unclear from the record whether the hearing officer reviewed the [car rental company's] affidavit and therefore had evidence before him that [the defendant] was the person named in the affidavit as having care, custody, or control of the vehicle at the time of the violation. Therefore, we cannot determine whether there was competent substantial evidence before the hearing officer to support" his finding that the defendant committed the infraction.

***Wells v. State,* 22 Fla. L. Weekly Supp. 44a (Fla. 9th Cir. Ct. 2014)**

The defendant was cited for making a left turn on a red light and, after a hearing, was found guilty with adjudication withheld, and was assessed fines and court costs. She appealed, arguing that the lower court abused its discretion by: (1) allowing documents into evidence

without them first being qualified, and (2) not allowing her witness to testify in person rather than by affidavit. The circuit court, in its appellate capacity, held that the defendant did not preserve her first argument for appeal. But it reversed based on her second argument and remanded for further proceedings, holding that while "the statute allows for the use of an affidavit in lieu of live testimony[, it] does not appear to exclude a live presentation of the evidence."

***State v. Brewer*, 22 Fla. L. Weekly Supp. 36a (Fla. 9th Cir. Ct. 2014)**

The defendants received citations for failing to stop at a red traffic signal. They moved to dismiss the citations, arguing that the TIEO who issued them "was found to be unqualified by a judge in another red-light camera case." The county had new testimony and exhibits regarding the officer's training that were not available to the judge in the other red-light camera case, but the hearing officer nevertheless dismissed the citations. The county appealed, arguing that (1) the hearing officer violated its due process rights by not allowing it to present the new testimony and evidence; (2) "the training received by a TIEO is not an element of the infraction, but instead goes to the weight and credibility of the TIEO's testimony"; and (3) section 316.640(5)(a), Florida Statutes, does not require the TIEO to complete the entire STEP "but only instruction on traffic enforcement procedures and court presentation through STEP or a similar program." The circuit court, in its appellate capacity, agreed and reversed.

VII. County Court Orders

***State v. Chambliss*, 22 Fla. L. Weekly Supp. 402a (Brevard Cty. Ct. 2014)**

A deputy saw the defendant turn off his headlights while driving into a parking lot, hit a parked vehicle, and flee. The deputy told the defendant to stop, but he kept running. The deputy and other officers found the defendant in a field. The deputy smelled marijuana and alcohol on the defendant and burnt marijuana in the vehicle. A breath sample did not show alcohol impairment, so the deputy asked the defendant to provide a urine specimen, which the defendant refused to do. The defendant filed a motion to suppress, but the court denied it, stating: "The defendant's driving, behavior, odor and breath test results were sufficient to provide [the deputy] with the requisite reasonable cause to request the urine test."

***State v. Rangel*, 22 Fla. L. Weekly Supp. 401a (Brevard Cty. Ct. 2014)**

A probationary officer saw the defendant "cut the corner" while making a left turn. The defendant was arrested for DUI and filed a motion to suppress, arguing that the officer did not have probable cause to believe that a traffic violation had occurred. The court denied the motion, holding that the stop was authorized because the statute that was the basis for the stop is clear that "you must move from a lane to a lane when a left turn is made" and "because coming within ten feet of the officer, when turning crossing the line[,] is objectively unusual, and would be alarming to the officer and therefore the stop is authorized."

***State v. Walden*, 22 Fla. L. Weekly Supp. 400b (Brevard Cty. Ct. 2014)**

An officer saw the defendant driving 7–10 mph in a 45 mph zone, in the middle of three lanes, swerve twice over lane markers, and stop in the lane for no apparent reason. The officer stopped the vehicle for a welfare check and smelled alcohol in the vehicle and on the defendant's breath, and noticed the defendant's eyes were bloodshot. After field sobriety exercises the defendant was arrested for DUI. An open bottle of alcohol and marijuana were found in the console. The defendant filed a motion to suppress, but the court denied it, stating that the defendant's driving pattern was unusual and the stop was proper to see whether the defendant was ill, injured, or impaired, and after the stop the officer had reasonable suspicion of DUI.

***State v. Deslauriers*, 22 Fla. L. Weekly Supp. 398b (Brevard Cty. Ct. 2014)**

In a refusal-to-submit-to-breath-test case, the defendant had gone to the bathroom before his field sobriety exercises and before being read his implied consent warning. He filed a motion in limine, arguing that he should have been given the implied consent warning again after a second trip to the bathroom. The court denied the motion, stating the argument was not supported by any authority. A video also clearly showed that the defendant refused to submit to the test.

***State v. Cherry*, 22 Fla. L. Weekly Supp. 387b (Palm Beach Cty. Ct. 2014)**

The defendant was charged with DUI. He filed a motion to suppress stop, seizure, and arrest, contending that the officer "was without jurisdiction to commence a DUI investigation" because the incident occurred on private property and there is no written agreement between the between the property owner and the police department authorizing the latter to enforce traffic laws on the property. But the court listed several reasons why it rejected the defendant's argument, among them "a clear legislative intent that all DUI investigations and prosecutions should be treated differently from those other traffic offenses." The court also stated that "the defendant's interpretation would necessarily mean that all law enforcement agencies throughout Florida which have no written agreements with private property owners would effectively have their hands tied from investigating and arresting individuals suspected of DUI causing property damage, serious bodily injury, even the death of another person, where these offense[s] all occur on those private lands."

***State v. Pola*, 22 Fla. L. Weekly Supp. 386b (Palm Beach Cty. Ct. 2014)**

The court granted the defendant's motion to suppress all evidence, holding that the officer seized the defendant without a warrant based on an allegation that he had made an improper turn. Two other drivers testified that the turn was "unremarkable." The court also noted that the deputy "had not had proper sleep prior to the hearing and had difficulty remember specific facts." The state also asserted that the seizure was lawful based on the defendant's weaving within his lane, nearly striking a curb, failing to properly stop for a red light, and making an improperly wide turn. After watching the video, the court held that the defendant's driving "did not exhibit a driving pattern that would cause a reasonable officer to be concerned that the driver was ill or impaired." And the lane changes, whether sharp or not, were lawful.

***State v. Milhorn*, 22 Fla. L. Weekly Supp. 381a (Sarasota Cty. Ct. 2014)**

The defendant filed a motion in limine to exclude statements he made, including "fuck off" and that the officers were "a bunch of faggots." The court stated that while a defendant's statements in a DUI investigation may be relevant, they must be more probative than prejudicial to be admissible. It denied the motion as to "fuck off," finding the phrase "not so prejudicial as to render it inadmissible." But it granted it as to "faggots," which it called "tantamount to a racial epithet."

***State v. Verdin*, 22 Fla. L. Weekly Supp. 371a (Volusia Cty. Ct. 2014)**

The defendant was arrested for DUI. The court granted his motion to exclude the breath test results because the test operator left the room the defendant was in five times, for a total of over five minutes, during the 20-minute observation period before administering the breath test.

***State v. Tompkins*, 22 Fla. L. Weekly Supp. 364a (Pasco Cty. Ct. 2014)**

A deputy found the defendant asleep in the driver's seat of a vehicle in a parking lot. He asked the defendant to get out and perform field sobriety exercises, and the defendant said "no" and tried to close the door. The deputy prevented the door from closing and he reopened it, and again asked the defendant to get out and perform field sobriety exercises, at which time the defendant did so. He was arrested for DUI and filed a motion to suppress coerced field sobriety exercises. The court granted the motion, holding further steps by the officer after the defendant's refusal "constituted a show of force and resulted in an involuntary consent."

***State v. Merchant*, 22 Fla. L. Weekly Supp. 277a (Sarasota Cty. Ct. 2014)**

A deputy saw the defendant leave an area with several bars at about 2 a.m. and followed her for about half a mile. He saw her cross a fog line twice and then overcorrect and cross the center line, and he stopped her and gave her a citation for careless driving. She filed a motion to suppress, claiming there was no reasonable suspicion of criminal activity or probable cause that a traffic infraction was committed. But the court denied the motion. It agreed that, because no pedestrians or other traffic was affected, there was no probable cause that a traffic violation had occurred. But it held that the facts supported a reasonable suspicion that the defendant was ill, tired, or impaired.

***State v. Schmitt*, 22 Fla. L. Weekly Supp. 265a (Duval Cty. Ct. 2014)**

The defendant was driving in a vacant university parking lot when campus officers heard his tires squeal and stopped him. He filed a motion to suppress, which the court granted, noting that the officers "did not observe any driving pattern sufficient for a traffic infraction. There was no evidence presented that the squealing of tires constituted a danger to public safety."

***State v. Petty*, 22 Fla. L. Weekly Supp. 264b (Nassau Cty. Ct. 2014)**

A deputy performed a breath alcohol test on the defendant, who had been arrested for and charged with DUI. The court granted the defendant's motion to suppress because only 17, rather than 20, minutes passed between the start of the continuous observation period and the start of the test. "The State argues that because the first sample was invalid, the Court should deem that

the test did not commence until the second sample was taken. However, the State has not provided any authority for this argument and the Court has not been able to locate any."

***State v. Garcia*, 22 Fla. L. Weekly Supp. 209d (Sarasota Cty. Ct. 2014)**

The defendant filed a motion for issuance of certificate to summon out-of-state witness (CMI, Inc.) to produce the source code or codes of the Intoxilyzer 8000. The court denied the motion because the defendants did not make "the requisite 'particularized showing demonstrating that observed discrepancies of the operation of the machine necessitate access to the source code.'" The court stated it was not ignoring precedent of two earlier cases upholding the lower court's decision that the source code was material. But it stated that "materiality of evidence is fluid in nature and the facts and circumstances that have been argued as of today are different than those which were argued six years ago. . . . Furthermore, based upon the facts at that time, . . . these orders were not 'on the merits' for purposes of res judicata."

***State v. Jones*, 22 Fla. L. Weekly Supp. 130c (Palm Beach Cty. Ct. 2014)**

A police officer responded to an accident scene and suspected the defendant was DUI. The defendant was taken to a hospital, where the officer was told it would be at least two hours before she would be released. He arrested her for DUI and asked her to submit to a blood test, as the hospital did not have an approved Breathalyzer, and a urine test was not indicated since only alcohol was suspected, but the defendant refused. She later filed a motion to suppress her refusal, but the court denied it, noting that "a person is deemed to have consented to submit to a blood test by operating a motor vehicle in this state if there is reasonable cause to believe the person was driving a motor vehicle while under the influence of alcoholic beverages and the person appears at a hospital, and administering a breath or urine test is impractical or impossible."

***State v. Osheim*, 22 Fla. L. Weekly Supp. 115a (Volusia Cty. Ct. 2014)**

A witness called the police to report that a reckless driver had hit a guardrail and then parked in a parking lot. The witness gave a description of the vehicle and the tag number but could not identify the driver, even by gender. A responding police officer testified that the defendant admitted to being the driver of the vehicle and to having had a few drinks, and that there were dents on the passenger side of the vehicle. The defendant was arrested and charged with leaving the scene of crash involving damage and DUI with property damage. He filed a motion in limine to exclude statements/dismiss for lack of corpus delicti, and the court granted it. While the accident report privilege does not apply to the charge of leaving the scene of a crash, without evidence of an investigation at the scene of the alleged crash or damage to other property there was no evidence of leaving the scene of a crash. Therefore,

> all elements of [DUI] must have taken place in the presence of an officer. It is undisputed that no one can place [the defendant] in actual physical control of the vehicle. Because there was no evidence of Leaving the Scene of a Crash Involving Damage, no investigation was warranted at the apartment and because no one can place the defendant in actual physical control of the vehicle, Defendant's statements made during the accident and DUI investigation are

excluded. Because of the ruling by the court to the issue whether there was a crash, the issue of Corpus Delicti does not need to be addressed.

***State v. Kanter,* 22 Fla. L. Weekly Supp. 114a (Volusia Cty. Ct. 2014)**

The court granted the defendant's motions to suppress unlawfully obtained evidence and refusal to submit to a urine test. The deputy had stopped the defendant for following too closely, but the defendant's companion motorcyclist testified otherwise. "Given the conflict in the testimony and the deputy's poor vantage point (behind Defendant in the same lane with another vehicle in between them), the Court is not persuaded that there was probable cause to stop Defendant for following too closely." Nor did the court agree with the state's alternative argument of a reasonable suspicion of impairment based on the overall driving pattern, as the testimony was in dispute.

***State v. Sadlier*, 22 Fla. L. Weekly Supp. 107a (Marion Cty. Ct. 2014)**

A deputy stopped the defendant for speeding, conducted a DUI investigation, and arrested the defendant. She filed a motion to suppress, claiming the breath test was not conducted in substantial compliance with administrative rules. The court agreed and granted the motion, as the time between when the deputy first began the required 20-minute observation of the defendant and the time he started administering the breath tests could not have been 20 minutes.

***State v. Stansbury*, 22 Fla. L. Weekly Supp. 105b (Duval Cty. Ct. 2014)**

Atlantic Beach police officers saw the defendant speeding in Neptune Beach, testified later that they believed he hit another car, notified the Neptune Beach police department of an alleged hit and run crash, and pursued him. After reaching the defendant, one of the Atlantic Beach officers noticed indicia of impairment and detained him to investigate for suspicion of DUI with property damage, continuing the investigation after a Neptune Beach officer told him there was no damage to the other vehicle. The defendant filed a motion to suppress, claiming the stop was extra-judicial. The court agreed, stating that the defendant did not drive in Atlantic Beach until "after the alleged speeding, hit and run, and improper stop at the traffic light," and that there was no evidence of a mutual aid agreement that would allow the Atlantic Beach officers to make the stop based on offenses they alleged occurred in Neptune Beach. The court also found that no crash had occurred "and therefore no criminal violation for leaving the scene of a crash was committed," and that the officers' mistaken belief that a crash had occurred was unreasonable and therefore could not support the stop case. The state argued that the defendant drove down a beach access road that had a sign that said "Authorized Vehicles Only," which would itself justify the stop. But the court noted that the defendant was not cited for a violation "related to driving down the beach access road." Further, there was no evidence that the sign was in Atlantic Beach or as to what law the sign purported to enforce.

***State v. Rodriguez-DePaula*, 22 Fla. L. Weekly Supp. 101a (Escambia Cty. Ct. 2014)**

The defendant was in a car accident. The DUI investigation did not begin until an hour and 41 minutes after the first deputy arrived. The court granted the defendant's motion to suppress, because her detention "constituted an unreasonable delay."