FLORIDA TRAFFIC-RELATED APPELLATE OPINION SUMMARIES

July – September 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)

***Laws v. State*, ___ So. 3d ___, 2014 WL 4113091 (Fla. 2d DCA 2014)**

The defendant was in an accident and refused to take a legal blood, breath, or urine test. As he was injured, he was taken to the hospital, where a medical blood test was taken, and he was arrested. He filed a motion to suppress the blood test, arguing that, because he had refused to take a legal blood test and suffered the consequences, it would be a double jeopardy violation to allow the state to introduce his medical blood records into evidence. The trial court denied the motion, and the appellate court affirmed, expressing disagreement with several county court cases that supported the defendant's argument, and noting that the revocation of a driver license is a civil sanction, not a criminal punishment.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/August/August%2022,%202014/2D12-5955.pdf

***State v. Hankins*, 21 Fla. L. Weekly Supp. 1010a (Fla. 17th Cir. Ct. 2014)**

The trial court allowed the state to present evidence of the defendant's failed attempts to take a breath test. She appealed, arguing there was no evidence that her failure to blow hard or long enough was intentional. The circuit court, in its appellate capacity, affirmed, holding that the defendant "was properly instructed in the use of the Intoxilyzer, but she was still unable or unwilling to follow the instructions." It also found she was not prejudiced by the admission of the breath samples into evidence "because the consciousness of guilt argument was not mentioned by either side at trial, and the jury never discovered the result of [her] first accurate breath sample. The fact that [she] was properly instructed on use of the Intoxilyzer, but could not follow directions was probative of [her] guilt and outweighed any potential prejudice," and "the

overwhelming evidence of guilt revealed during trial would have assured that the result of the trial would not have been different had the evidence been excluded. ”

***State v. Lacaba*, 21 Fla. L. Weekly Supp. 1008a (Fla. 17th Cir. Ct. 2014)**

The defendant was arrested for DUI. The trial court granted his motion to suppress for lack of substantial compliance and held the breath test results were inadmissible. The issues in the motion to suppress had also been raised in many other DUI cases. A county court judge held an evidentiary hearing for one of those cases in his division, and “[i]t was agreed that more than thirty other cases would rely on the proceedings before [him] in reaching a decision in those cases.” In his case, that judge granted the motion to suppress. Another judge conducted hearings to determine if that other judge’s decision would apply to the defendant’s case and determined that it would. The circuit court, in its appellate capacity, affirmed, stating there was competent, substantial evidence to support the trial judge’s decision.

***Voelker v. State*, 21 Fla. L. Weekly Supp. 1003a (Fla. 17th Cir. Ct. 2014)**

The defendant turned his vehicle in front of a deputy so abruptly that the deputy’s antilock brakes engaged. When the deputy stopped the defendant, he noticed indicia of DUI. The defendant refused to perform field sobriety exercises and was arrested, and at the BAT facility he responded incoherently to some questions and refused to give a breath sample. At trial he moved for judgment of acquittal, which the trial court denied. He appealed, arguing that his conviction was not supported by competent, substantial evidence. But the circuit court, in its appellate capacity, found there was competent, substantial evidence, “[c]onsidering [his] driving, the observations . . . by the deputies, and [his] actions at the BAT facility.”

***Mannelly v. DHSMV*, 21 Fla. L. Weekly Supp. 995a (Fla. 15th Cir. Ct. 2014)**

See the summary of *Moya v. DHSMV*, 21 Fla. L. Weekly Supp. 995a (Fla. 15th Cir. Ct. 2014), *infra*.

***Moya v. DHSMV*, 21 Fla. L. Weekly Supp. 995a (Fla. 15th Cir. Ct. 2014)**

The defendant’s license was suspended for DUI. He appealed, claiming that the breathalyzer test technician’s permit had expired. But the only evidence he submitted to prove the claim was a copy of the technician’s original permit, and the circuit court, in its appellate capacity, noted that “[b]reathalyzer technician permits do not contain an expiration date. Instead, such permits expire approximately four years after issuance unless the technician takes certain continuing education courses.” The defendant argued that the department had the burden to prove the technician had taken the courses, which argument was “directly supported by precedent.” But the court in this case receded from that precedent. It stated that “burden shifting based *solely* upon the submission of an original permit is not appropriate because the validity of such permits can be definitively established by the driver simply subpoenaing the individual accused of possessing an invalid permit.” To avoid injustice to the defendant, since he had relied on precedent, the court remanded for another hearing, to give him the opportunity to “substantiate his allegations under the standard delineated in this opinion.”

***Gracia v. State*, 21 Fla. L. Weekly Supp. 875a (Fla. 15th Cir. Ct. 2014)**

The defendant was arrested for DUI and taken to a breath alcohol testing center. The officer did not request a urine test because he believed the defendant had to be medically cleared and "because impairment by alcohol was a concern." The defendant was taken to the hospital and cleared for a breath test, and the officer requested a blood test, to which the defendant agreed. The trial court denied his motion to suppress and he was convicted of DUI. He appealed, arguing the "blood sample was improperly taken because a breath or urine test was not impossible or impractical." The circuit court agreed and reversed the denial of the motion to suppress.

***State v. Mak*, 21 Fla. L. Weekly Supp. 756a (Fla. 17th Cir. Ct. 2014)**

The defendant was stopped after a trooper saw her driving 35 mph on the Florida Turnpike, weaving, and making an illegal lane change. She admitted she had taken prescription pain medication, and upon exiting the vehicle she was so unsteady that the trooper had to help her stand. She was arrested for DUI and filed a motion to suppress, claiming the trooper did not have reasonable suspicion to conduct a DUI investigation and therefore did not have probable cause to arrest her. She argued the trooper "'jumped the gun' by 'pulling her out of the car' and 'start[ing] a complete DUI investigation' based on 'his hunch.'" The trial court granted her motion, and the state appealed. The circuit court reversed, noting that under the facts, the trooper had reasonable suspicion to conduct the DUI investigation and probable cause for the arrest.

II. Criminal Traffic Offenses

***Lyons v. State*, ___ So. 3d ___, 2014 WL 4724470 (Fla. 2d DCA 2014)**

The defendant sought review of his conviction for, among other crimes, driving while license cancelled, suspended, or revoked (second offense). He entered negotiated pleas and reserved the right to appeal the denial of his motions to dismiss and suppress. The appellate court affirmed, stating: "The trial court orally pronounced sentences of 41.625 months in prison, but the written sentences impose 41.65 months in prison. Because the oral pronouncement controls, the written sentences are erroneous. . . . However, [the defendant] has not preserved this issue for review by filing a motion to correct sentencing error. . . . Accordingly, we affirm without prejudice to any right [he] may have to seek postconviction relief on this issue."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/September/September%2024,%202014/2D13-4245.pdf

***Chapman v. State*, ___ So. 3d ___, 2014 WL 4696273 (Fla. 1st DCA 2014)**

The defendant was arrested for driving without a license (habitual offender) and received a suspended sentence of five years' incarceration. He challenged the sentence, arguing that it was not a "nonstate prison sanction" and was therefore an upward departure from the sentencing guidelines. But the appellate court affirmed, holding that the argument had not been preserved for appeal because it was not raised during the sentencing hearing or by a rule 3.800(b)(2) motion.
https://edca.1dca.org/DCADocs/2014/1522/141522_DC05_09232014_104748_i.pdf

***Stewart v. State*, ___ So. 3d ___, 2014 WL 4435965 (Fla. 1st DCA 2014)**

The defendant was convicted of DUI manslaughter, DUI with bodily injury, and leaving the scene of an accident with property damage, and was sentenced to 25 years. He filed a motion for postconviction relief, claiming counsel was ineffective for advising him to reject a plea offer of 12–14 years' imprisonment and for "conceding all the elements of the DUI manslaughter and DUI with bodily injury." As the record did not contain evidence refuting the claim of ineffective counsel, or demonstrating that the defendant was not prejudiced, the appellate court reversed and remanded for an evidentiary hearing.
https://edca.1dca.org/DCADocs/2013/4115/134115_DC08_09102014_100148_i.pdf

***Cahours v. State*, ___ So. 3d ___, 2014 WL 4197387 (Fla. 1st DCA 2014)**

The defendant was convicted of leaving the scene of a crash involving death, and he appealed. The appellate court reversed the conviction, stating: "We find that the standard jury instruction for leaving the scene of a crash involving death misstates the law with regards to the requisite level of knowledge that a crash occurred." The instruction uses the phrase "knew or should have known" rather than requiring actual knowledge of the crash. The court also discussed the evidence of vehicular homicide in the case. The court certified the following question, as did the Fourth District:

> IN A PROSECUTION FOR VIOLATION OF 316.027, FLORIDA STATUTES (2011), SHOULD THE STANDARD JURY INSTRUCTIONS REQUIRE **ACTUAL** KNOWLEDGE OF THE ACCIDENT?
>
> We also feel this is an issue the Legislature may wish to address.

https://edca.1dca.org/DCADocs/2013/1562/131562_DC08_08262014_111231_i.pdf

***Wood v. State*, 143 So. 3d 493 (Fla. 1st DCA 2014)**

The defendant was convicted of DUI-manslaughter, felony driving while license suspended or revoked, and aggravated fleeing to elude a law enforcement officer causing death. The trial court summarily denying his rule 3.850 motion for postconviction relief and to vacate judgment and sentence. The appellate court affirmed in part, but reversed for an evidentiary hearing on his claim of ineffective assistance of counsel because he alleged a facially sufficient claim and thus the record did not conclusively establish that he was not entitled to relief.
https://edca.1dca.org/DCADocs/2014/0095/140095_DC08_08072014_085656_i.pdf

***Oliva v. State*, 142 So. 3d 973 (Fla. 4th DCA 2014)**

The defendant appealed the summary denial of his rule 3.850 motion. He was charged with DUI manslaughter/unlawful blood alcohol level, DUI manslaughter/impairment, vehicular homicide, DUI with property damage, and failure to obey a law enforcement officer. He entered into negotiated no-contest pleas to some of the charges, with a cap of 124.65 months, but the court sentenced him to 124.65 months' imprisonment and four-and-a half years' probation. He claimed his attorney did not advise him that he could get probation in addition to the prison sentence. The state argued that the agreement was an "open plea," but the defendant claimed it

was "a hybrid plea based upon the agreed sentencing cap, his opportunity to file a downward departure motion, and the state's having nolle prossed two charges." The district court reversed and remanded for an evidentiary hearing because the record did not refute the defendant's "understanding that his maximum sentencing exposure, including probation, could not exceed 124.65 months."
http://www.4dca.org/opinions/July%202014/07-23-14/4D13-3789.op.pdf

***Rodriquez v. State*, 21 Fla. L. Weekly Supp. 1012a (Fla. 17th Cir. Ct. 2014)**

The defendant pled no contest to leaving the scene of an accident with property damage and was adjudicated guilty and ordered to pay court costs, prosecution costs, and restitution. On appeal she argued it was improper for the court to order restitution, but the state argued it was valid as part of the negotiated plea and the defendant did not move to withdraw the plea based on that order. The circuit court, in its appellate capacity, reversed the order of restitution, stating that, while restitution may be ordered if there is a significant relationship between the damages and the offense, or as part of a plea agreement, in this case it was not clear

> that the Defendant understood that restitution would be ordered for an offense that usually does not allow restitution to be ordered absent a showing of a causal relationship. . . . Additionally, nothing in the record establishes that there was any basis for finding that the Defendant was at fault for causing any of the damages resulting from the accident. Finally, the trial court's order of restitution is not supported by substantial and competent evidence, as is required for an order of restitution absent an agreement as to the amount.

On remand the defendant could either withdraw her plea if she chose not to pay restitution, or keep her plea, with the trial court conducting another restitution hearing.

***Arafat v. Broward Sheriff's Office*, 21 Fla. L. Weekly Supp. 1008b (Fla. 17th Cir. Ct. 2014)**

The defendant was issued a citation for failure to have properly functioning headlights. Adjudication was withheld and fines and court costs imposed. When the defendant failed to pay the fine and costs by the deadline, her license was suspended. She appealed, arguing that the vehicle was vandalized and trashed shortly after the citation was issued, and nearly a year before the deadline to pay the fines and costs. But the circuit court, in its appellate capacity affirmed, stating that the statutes give vehicle owners 30 days after issuance of the citation to correct the defect and show proof of repair, and that even if the defendant's allegations were true, her vehicle was destroyed 38 days after the citation was issued. It also stated that "for this traffic violation to be committed, the statute does not require continued ownership of the vehicle. At the time of the stop, it is alleged that [the defendant] was driving the vehicle in an unsafe condition" — without headlights at 12:55 a.m. The appellate court further noted that the defendant failed to provide an adequate record of the traffic court proceeding on appeal, without which the court could not resolve factual issues or determine whether any objections were raised and preserved based on the defendant's claims.

***O'Brien v. State*, 21 Fla. L. Weekly Supp. 997a (Fla. 15th Cir. Ct. 2014)**

The defendant appealed his conviction of driving without a valid license, arguing "knowingly" should be an element of the crime, as it is with driving while license suspended. But the circuit court, in its appellate capacity, did not agree, stating that "since driving without a valid license is necessarily a lesser included offense of driving with a suspended license, the State is not required to prove knowledge as an element."

***Bucell v. State*, 21 Fla. L. Weekly Supp. 762b (Fla. 17th Cir. Ct. 2014)**

The defendant was arrested for DUI with injury and property damage. He claimed that he was not DUI but rather "was suffering from hypoglycemia because of his diabetic condition." His medical records obtained two or three hours after the incident were "the heart of his defense" as they referred to hypoglycemia, but the trial court held they were inadmissible "because they would confuse the jury, and they were more prejudicial than probative." The circuit court affirmed, noting that

> [t]he records stated hypoglycemia could be caused by alcohol use. There was no indication [the defendant] was given medicine, but hoped ". . . the jury would thumb through the records and see what they contain." Unfortunately, [the defendant's] medical intake questionnaire, where [he] would answer if he had been drinking, was not there. Also, [his] trial counsel could not say whether [his] blood was tested for alcohol impairment. Lastly, there was no nurse or doctor to explain the medical records.

***State v. Schwartz*, 21 Fla. L. Weekly Supp. 756b (Fla. 17th Cir. Ct. 2014)**

The defendant was arrested for DUI and DUI with injury and property damage. He filed a motion to dismiss because the arresting deputy failed to make sure the video recorder was operating properly, which "destroyed" the evidence of the field sobriety exercises and deprived him of the chance to perform the exercises again after his arrest. The trial court granted the motion to dismiss, despite finding that there was no destruction of evidence and that the police did not act in bad faith, but the circuit court reversed and remanded, holding that dismissal was too severe a sanction.

***Wyatt v. State*, 21 Fla. L. Weekly Supp. 755a (Fla. 17th Cir. Ct. 2014)**

After the close of the defendant's case at trial for driving while license suspended with knowledge, his attorney "moved for a 'first' judgment of acquittal, which the trial court clarified would actually be a 'second motion for judgment of acquittal, since no motion had been made after the State rested. The trial court did not respond to the 'second' motion, and other arguments by counsel ensued. Thereafter, without ever ruling on the 'second' motion, the trial court found the [defendant] guilty." He appealed, arguing that "the trial court erred by 'denying' his 'second' motion for judgment of acquittal." But the circuit court agreed with the state that because the trial court never ruled on the "second" motion for judgment of acquittal, it was not preserved for appeal.

***Johnson v. State*, 21 Fla. L. Weekly Supp. 754a (Fla. 17th Cir. Ct. 2014)**

The defendant was stopped for a window tint violation, and he told the officer his license was suspended. The officer gave him a verbal warning about the window tint and issued a citation for driving while license suspended with knowledge. The defendant was convicted and appealed, arguing the trial court erred in denying his motions for judgment of acquittal and to suppress as there was no evidence that he was driving or in actual physical control of the vehicle when stopped, and that because the officer did not use a tint meter he did not have reasonable suspicion to conduct the stop. The circuit court, in its appellate capacity, affirmed, stating that the officer testified that the defendant was operating the vehicle, and the officer was not required to use a tint meter in order to have "reasonable suspicion" that someone committed a crime.

III. Arrest, Search and Seizure

***Navarette v. California*, ___ U.S. ___, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014)**

A motorist called 911 to report that a pickup truck had run her off the road. A highway patrol officer spotted the truck and pulled it over. Another officer arrived, and as they approached the truck they smelled marijuana. They searched the truck bed, found 30 pounds of marijuana, and arrested the defendants. The defendants moved to suppress the evidence "arguing that the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity." Their motion was denied, and they pleaded guilty to transporting marijuana. The state appellate court affirmed, holding that the officer had reasonable suspicion to conduct an investigative stop. The United States Supreme Court, although calling it a "close case," affirmed, noting that "under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.'" The Court found "the call bore adequate indicia of reliability," as it was contemporaneous with the event witnessed, and the use of the 911 system was itself an "indicator of [the caller's] veracity," and therefore the officer had "reasonable suspicion of an ongoing crime" such as DUI. http://www.supremecourt.gov/opinions/13pdf/12-9490_3fb4.pdf

***State v. Teamer*, ___ So. 3d ___, 2014 WL 2979378 (Fla. 2014)**

A deputy ran a routine search on the tag of the green vehicle the defendant was driving, which listed the car as blue. The deputy pulled the car over and, although the occupants explained the inconsistency by stating the vehicle had been painted, the deputy noticed a strong of odor of marijuana and performed a search, uncovering marijuana, crack cocaine, and about $1,100 in cash. In his trial on drug charges, the defendant filed a motion to suppress the evidence as "products of an unlawful, warrantless search." The trial court denied the motion, holding that the deputy had a legal right to conduct the investigatory stop, and the odor of marijuana then gave him probable cause to conduct a search. The First District Court of Appeal reversed, stating that any concern based on the discrepancy between a vehicle tag and the registration must be balanced "against a citizen's right under the Fourth Amendment to travel on the roads free from governmental intrusions," but it certified conflict with a Fourth District case. The supreme court agreed with the First District, stating: "To warrant an investigatory stop, the law requires not just a mere suspicion of criminal activity, but a reasonable, well-founded one," and in this case the only unusual thing the deputy observed was that the vehicle color differed from that in the registration, which, standing alone, did not rise to the level of a reasonable suspicion. The supreme court also found that none of the exceptions to the exclusionary rule applied.

http://www.floridasupremecourt.org/decisions/2014/sc13-318.pdf

***Willis v. State*, ___ So. 3d ___, 2014 WL 4656484 (Fla. 2d DCA 2014)**

During a traffic stop for a broken tag light, officers discovered the defendant's license was suspended, arrested him, and conducted an inventory search, which uncovered pill boxes containing drugs. The defendant was then also arrested on drug charges. He asked for his cell phone, and the officer who retrieved it looked through it for evidence related to drug dealing, and found over 3,000 child pornography images. The officers applied for a search warrant as to the phone, which the magistrate granted. The defendant filed a motion to suppress the evidence obtained from his cell phone. After the motion was denied, he agreed to plead nolo contendere to 20 counts of possession of child pornography and reserved the right to appeal the denial of his motion to suppress. The appellate court reversed because the police searched the phone's contents without a warrant. It noted that at the time of the arrest, the warrantless search of a cell phone was permitted by case law in the First District (which was later reversed), and that "when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." But it also stated that

> [t]he case law is still developing on the type of precedent that qualifies as 'binding appellate precedent' that is sufficient to permit "objectively reasonable reliance." . . . [W]e are not convinced that our supreme court intends for one recent decision from another Florida district court of appeal on such a controversial issue to create "binding precedent," at least in other districts, for purposes of the good-faith exception.

The appellate court further stated:

> Concerning the evidence obtained under the warrant, there is an obvious problem with the fruit of the poisonous tree. . . . The statements in the affidavit for this search warrant relating to the initial search of the cell phone cannot be considered in the determination of whether probable cause existed to obtain the search warrant. . . . If the information in the affidavit used to obtain the warrant is edited to eliminate all reference to the knowledge obtained by the unauthorized search of the cell phone, the magistrate would have been informed only that the cell phone belonged to [the defendant], whose vehicle contained a limited quantity of drugs, and that the police had not done any prior or subsequent investigation to establish his involvement with the drugs. In that revised situation, we assume that the officers would also have included within the affidavit that the drugs were found inside a locked glove compartment in pill bottles bearing the name of one of [the] passengers. We seriously doubt that such information would be sufficient even to obtain a preliminary warrant to search the record of recent telephone calls or text messages to seek out buyers or sellers of drugs. Such an affidavit clearly would not have provided probable cause to search the personal photographs on [the defendant's] cell phone. Accordingly, to the extent that the evidence includes photographs discovered after the issuance of the warrant, those photos must also be suppressed.

The appellate court certified the following as a question of great public importance:

IN LIGHT OF *PARDO V. STATE*, 596 SO. 2D 665, 666 (FLA.1992), IS A SINGLE RECENT CASE FROM A DISTRICT COURT OF APPEAL, WHICH IS PENDING ON REVIEW IN THE SUPREME COURT, "BINDING APPELLATE PRECEDENT" UPON WHICH OFFICERS MAY OBJECTIVELY RELY FOR PURPOSES OF THE GOOD FAITH EXCEPTION DISCUSSED IN *DAVIS V. UNITED STATES*, 131 S. CT. 2419, 2434 (2011)?

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/September/September%2019,%202014/2D13-3981.pdf

***State v. Clarke*, ___ So. 3d ___, 2014 WL 4648817 (Fla. 5th DCA 2014)**

The trial court granted the defendant's motion to suppress, holding that the officer did not have probable cause to stop him. The appellate court reversed and remanded "for consideration of the actual issues raised by the parties," noting that "[t]he trial court's ruling that the initial stop was not warranted is erroneous as a matter of law, and not supported by its own findings of fact."
http://www.5dca.org/Opinions/Opin2014/091514/5D13-1034.op.pdf

***Vinci v. State*, ___ So. 3d ___, 2014 WL 4494237 (Fla. 2d DCA 2014)**

After seeing the defendant weaving for about a mile, and believing him to be DUI, a deputy stopped him. The defendant gave him permission to search the vehicle. The deputy found a Xanax in a pill bottle labeled Suboxone and therefore suspected the defendant had committed possession of a controlled substance, and eventually arrested him for possession of oxycodone and alprazolam. The trial court "suppressed the evidence on the basis that when the deputy observed the Xanax in the prescription bottle the illicit nature of the substance was not immediately apparent," which it must be to permit seizure of evidence in plain view, "because a person could legally possess Xanax, as opposed to an item like cocaine." But the appellate court reversed, holding that the deputy had probable cause to seize the evidence: "[P]ossession of Xanax in a container that is not for a Xanax prescription provides prima facie evidence that the possession is unlawful. . . . A valid prescription would have been a defense, but the deputy was not required to anticipate . . . defenses." Further, "the trial court did not err in determining that the deputy had a reasonable suspicion to make an investigatory stop to determine whether Vinci was impaired."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/September/September%2012,%202014/2D13-4638.pdf

***Lomax v. State*, ___ So. 3d ___, 2014 WL 4435978 (Fla. 1st DCA 2014)**

The defendant was convicted of second-degree murder and possession of a firearm by a juvenile delinquent found to have committed a felony act. The trial court denied his motion to suppress evidence found during a traffic stop, arguing that "an officer's observation of his car swerving over solid double yellow lines was not probable cause that he committed a traffic violation" because he was ticketed for violating a traffic control device as prohibited by section 316.047, Florida Statutes, and he argued "the purpose of the double yellow lines was to prohibit passing, not brief swerving," and he was not attempting to pass a vehicle. But the appellate court

affirmed, stating that section 316.0875, Florida Statutes, "prohibits both passing and driving to the left of the pavement striping in no-passing zones. Thus, the officer's observation of [the defendant] crossing the solid double yellow lines here constituted probable cause, regardless of the fact the officer testified that appellant did not create a safety hazard." https://edca.1dca.org/DCADocs/2013/4271/134271_DC05_09102014_100411_i.pdf

***Thomas v. State*, 144 So. 3d 660 (Fla. 2d DCA 2014)**

The defendant pled no contest to possession of methamphetamine and drug paraphernalia and resisting an officer without violence, reserving the right to appeal the denial of his motion to suppress evidence. The appellate court reversed, holding that the evidence was obtained during an illegal traffic stop. Two police officers parked in an unmarked vehicle behind a closed business saw a car with its parking lights on and people with flashlights walking between a dumpster and a truck. The people left after about ten minutes, after which the officers, although they had not seen any criminal or illegal conduct, radioed a patrol officer to stop the car to determine whether the occupants had stolen anything. The patrol officer testified that the officer who radioed told her the defendant, a passenger in the car, "was with someone involved in the drug trade and that another person in the car had been seen leaving a drug house." Although the patrol officer did not see a traffic infraction, she stopped the car and reported that the defendant was uncooperative when she asked him to step out of the car. She then tried to arrest him, but as he pulled away his shirt rode up and the officer saw plastic baggies, which contained drugs, in his trousers. The appellate court held the officers did not have "a well-founded, articulable, suspicion of criminal activity to justify a legal stop. . . . The courts have consistently and repeatedly held that a person's mere presence in an area known for past criminal activity or near a closed business during late-night hours does not provide the founded or reasonable suspicion necessary to stop a car." The court also reversed the obstruction without violence charge "because the patrol officer did not have an objective basis for detaining [the defendant]. Therefore, she was not engaged in the lawful execution of a legal duty at the time of the charged obstruction, an essential element of that crime." http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/August/August%2008,%202014/2D13-488.pdf

***Saint-Hilaire v. State*, 143 So. 3d 1147 (Fla. 3d DCA 2014)**

During a routine traffic stop, an officer noticed suspicious debit cards in the defendant's wallet, patted him down incident to arrest, and searched his cell phone, discovering 24–25 names and social security numbers. The state charged the defendant with possession of personal ID information with intent to defraud. The trial court denied the defendant's motion to suppress the evidence obtained from the cell phone search, but the appellate court reversed, stating that the search of the cell phone was unauthorized because "a warrantless search of a cell phone incident to a lawful arrest exceeds the boundaries of a proper search of a person incident to a lawful arrest in the absence of a reasonable belief that the cell phone contains evidence of a crime." http://www.3dca.flcourts.org/Opinions/3D12-1730.pdf

***State v. Ragoo*, 21 Fla. L. Weekly Supp. 1014b (Fla. 17th Cir. Ct. 2014)**

The defendant was charged with DUI. The police officer testified that he saw the defendant speeding and that he "observed the vehicle slightly crossing the lane marker, but not changing lanes and not affecting traffic; and he observed the vehicle stopping at a red light and then making a left turn while the light remained red." The officer pulled the defendant over for a traffic stop, smelled alcohol, and began a DUI investigation. On direct examination he testified that he also saw the defendant had red, glassy, and watery eyes. But on cross-examination, "after being refreshed with his previous deposition testimony stating otherwise, he recanted his earlier testimony." The trial court granted the defendant's motion to suppress because "the officer had reasonable suspicion to make a *traffic stop*, but not to conduct a *DUI investigation* due to insufficient indicia." The circuit court, in its appellate capacity, affirmed.

***State v. Marsano*, 21 Fla. L. Weekly Supp. 1013c (Fla. 17th Cir. Ct. 2014)**

The defendant's vehicle collided with a pole. When a deputy arrived, the defendant was being treated for injuries inside an EMS vehicle. An EMS technician told the deputy that when EMS arrived, the defendant was the only person in the vehicle and he smelled of alcohol. The EMS technician gave the keys of the crashed vehicle to the deputy, and EMS took the defendant to the hospital. Another deputy followed and asked the defendant to perform field sobriety exercises. After failing the exercises, the defendant was arrested for DUI. He filed a motion to suppress. The trial court granted it, and the circuit court, in its appellate capacity, affirmed, stating "there was no testimony presented of active or constructive possession of the vehicle's ignition key by the [defendant] and no testimony presented that [he] was ever in the driver's seat."

***State v. Fok*, 21 Fla. L. Weekly Supp. 1012b (Fla. 17th Cir. Ct. 2014)**

The defendant pulled into a parking lot after being in a traffic accident where the other driver fled the scene. A traffic accident investigator service aide arrived just as the defendant was leaving the parking lot. The aide stopped the defendant and told her to remove her keys from the ignition. He then observed indicia of impairment, and when police arrived they charged her with DUI, DUI with property damage, and refusing to submit to testing. The trial court granted the defendant's motion to suppress, holding that there was no reasonable suspicion to stop her. The circuit court, in its appellate capacity, affirmed, noting that the officers admitted the defendant was not suspected of a traffic offense, and "it is possible the trial court may have surmised that [she] could have been the victim of the hit and run driver."

***State v. Livingston*, 21 Fla. L. Weekly Supp. 1011a (Fla. 17th Cir. Ct. 2014)**

The trial court granted the defendant's motion to suppress evidence obtained after his DUI arrest. The circuit court, in its appellate capacity, reversed, stating that there was sufficient evidence to prove the deputy had probable cause to believe the defendant "committed a traffic infraction when he made a left turn too wide causing the other car to slow down. . . . 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." In this case, the defendant failed to obey traffic control devices by crossing over three or four lanes of traffic, including the lines dividing the turn lanes. "The Court need not address the sufficiency of the violation of Section

316.074, Florida Statute, for . . . crossing multiple lanes of traffic because only one traffic violation is required to justify a stop."

***State v. Garcia*, 21 Fla. L. Weekly Supp. 1007a (Fla. 17th Cir. Ct. 2014)**

A trooper conducting a crash investigation noticed indicia of impairment on the defendant, and another trooper conducted a DUI investigation. The second trooper testified that he asked the defendant if he would mind getting in the trooper's vehicle to be taken to a drier better-lit location to perform "voluntary" sobriety exercises, and that the defendant agreed. At a nearby parking lot the defendant performed the exercises and was arrested. The trial court granted his motion to suppress, noting inconsistencies between the troopers' testimony and the video recording of part of the incident, and stating, among other things, that the original area was well lit; the heavy rain lasted for less than four minutes; the trooper did not testify that he had probable cause prior to the de facto arrest; the sobriety tests were conducted out in the open, contrary to one of the reasons given by the trooper for the transport; and the only indicia of DUI were the odor of alcohol, pacing or slight swaying by the defendant, and an accident on a wet road. The circuit court, in its appellate capacity, affirmed.

***State v. Galindo*, 21 Fla. L. Weekly Supp. 1005a (Fla. 17th Cir. Ct. 2014)**

A police officer activated his lights for a traffic stop, and the defendant, mistakenly believing the officer meant to stop him, pulled over. The officer recognized him as someone he had previously stopped for driving with a suspended license, asked him whether he had a license, and, upon the defendant saying his license was still suspended, issued him a citation. At trial the defendant moved to suppress as there was "no reason to ask [him] for his driver's license." The trial court denied the motion, and the circuit court, in its appellate capacity, affirmed. While the state argued the officer did not actually "stop" the defendant, the circuit court, in its appellate capacity, stated that "[a]pplying principles of common sense and road knowledge, it would seem likely that [he] may have thought the officer was stopping *him* and/or demanding his license on a show of authority. . . . Even assuming the encounter had been happenstance and acknowledging the officer had personal knowledge from a previous encounter that [the defendant] had driven with a suspended license, this personal knowledge must not be stale."

***State v. Brown*, 21 Fla. L. Weekly Supp. 989b (Fla. 11th Cir. Ct. 2014)**

A police officer saw a couple having sex in a truck parked in a residential area known for prostitution and interrupted them. The officer saw open containers in the truck and noticed the defendant smelled of alcohol and that his eyes were bloodshot and his speech slurred. After a breath test, the defendant was arrested for DUI and also charged with indecent exposure and soliciting a prostitute. He moved to suppress the evidence, arguing that there was no basis for an investigative stop. The trial court granted the motion, but the circuit court, in its appellate capacity, reversed, stating that the officer had a well-founded reasonable suspicion that the defendant committed, or was about to commit, a crime. He "was able to observe the sexual activity from a public vantage point," and upon the defendant exiting the vehicle was able to detect that he was impaired.

***Crabtree v. State*, 21 Fla. L. Weekly Supp. 985c (Fla. 7th Cir. Ct. 2014)**

A police officer was parked in the median of a roadway, each side of which was in a different city, when he clocked the defendant's truck speeding. With lights and sirens on he pursued the defendant, who appeared not to notice him, for about two blocks. When the defendant turned into a parking lot, the officer approached him and asked him to perform field sobriety tests. The defendant agreed, performed poorly, and was arrested on DUI and other charges. He moved to suppress the evidence obtained during the stop, arguing that the officer was outside his jurisdiction when he saw the truck speeding, pursued it, and made the arrest. The trial court denied the motion, finding the officer was in "fresh pursuit." The circuit court, in its appellate capacity, affirmed, stating that the "fresh pursuit" doctrine was not rendered inapplicable by the officer being outside his jurisdiction when he first saw the speeding truck. The defendant "was observed speeding in Daytona Beach by a Daytona Beach police officer. Had [the defendant] made a left when he came off the bridge and continued within Daytona Beach, unquestionably [the officer] could have legally pursued and apprehended him. But [he] continued straight off the bridge into Holly Hill, directly in front of [the officer]. Logically, the perpetrator's selection of escape route shouldn't negate the resulting traffic stop and the accompanying search and seizure."

***State v. Robinson*, 21 Fla. L. Weekly Supp. 864a (Fla. 9th Cir. Ct. 2014)**

Deputies investigating a car accident were told by one of the drivers that the other driver struck him from behind at a stop light, and that he saw the defendant sitting alone behind the wheel of the other car. One deputy conducted a DUI investigation, noticed indicia of impairment, administered field sobriety tests, which the defendant performed poorly, and arrested the defendant. The trial court granted his motion to suppress because the other driver did not testify at trial, stating "nobody can put the Defendant behind the wheel of the car." But the circuit court reversed, stating: "There is an undisturbed line of Florida Supreme Court and District Courts of Appeal cases which hold that hearsay evidence is admissible in motion to suppress hearings on the issues of reasonable suspicion and probable cause [and in this case the hearsay was] obtained face-to-face from a civilian witness." It also stated that the right to confront witnesses does not apply to suppression hearings.

***State v. Jones*, 21 Fla. L. Weekly Supp. 860a (Fla. 9th Cir. Ct. 2014)**

An officer noticed the sticker on the defendant's license tag had expired and stopped him. When the officer ran the defendant's driver license, he discovered the license was suspended and arrested the defendant for driving while license suspended, with knowledge. The defendant filed a motion to suppress, which the trial court granted, but the circuit court reversed, stating: "Where a driver is lawfully stopped, police may detain him long enough to run a computer check and may arrest him based on the information that the computer reveals." Further, the officer's "testimony regarding the information he received from the computer system was not inadmissible hearsay at the suppression hearing. It was not being offered to prove the truth of the matter asserted but to demonstrate what information [he] had when making the arrest."

***State v. Widing*, 21 Fla. L. Weekly Supp. 762a (Fla. 17th Cir. Ct. 2014)**

The defendant was arrested for DUI. He conceded there was probable cause for a traffic stop and reasonable suspicion to conduct a DUI investigation, but he filed a motion to suppress,

arguing there was no probable cause to arrest him for DUI. At the hearing on the motion there was no testimony that a DUI investigation was initiated or that the defendant was asked to submit to a field sobriety test. The trial court gave great weight to that lack of evidence and granted the motion, and the circuit court affirmed.

***State v. McIntosh*, 21 Fla. L. Weekly Supp. 759a (Fla. 17th Cir. Ct. 2014)**

The defendant was arrested for DUI and filed a motion to suppress, claiming that when the police officer reached into his vehicle and put it in park, he took the defendant into custody without probable cause. The trial court granted the motion, but the circuit court reversed, noting that even before observing that the defendant was unconscious, the police saw his vehicle stopped at a green traffic light over the stop line, initial contact "revealed that he was unconscious behind the wheel of a running vehicle that posed a danger to others in the area," and the detention was very brief before the officers became aware a DUI investigation was appropriate. "[T]he taking of the keys from the ignition did not transform the police interaction . . . into an arrest which would have required probable cause."

IV. Torts/Accident Cases

***Boyles v. A & G Concrete Pools*, ___ So. 3d ___, 2014 WL 2957473 (Fla. 4th DCA 2014)**

The district court affirmed the lower court's final judgment in a personal injury action stemming from an automobile accident. The plaintiff had challenged the judgment on the ground that the court erred in admitting testimony from a physician that surgery performed on the plaintiff was unnecessary. He also appealed the court's denial of a motion for a new trial, as the defendant had admitted liability and "all experts agreed that plaintiff had suffered at least some injury from the accident." The district court held that the issue of admission of evidence was not properly preserved. Moreover, it held that the trial court did not err in denying a motion for new trial, as "the evidence on liability and damages was not uncontradicted, and the expert's opinions on the plaintiff's injuries were discredited by plaintiff's own lack of credibility."
http://www.4dca.org/opinions/July%202014/07-02-14/4D12-3334.op.conc-dis.pdf

***Gray v. Richbell*, 144 So. 3d 573 (Fla. 4th DCA 2014)**

The district court granted the defendant's petition for writ of certiorari to prevent a compulsory neurological medical examination in an auto accident case. The plaintiffs' decedent died when, while passing a tractor trailer, she was rear-ended by the car behind her. This caused her to veer into oncoming traffic, where she collided with the defendant's truck. The plaintiffs' theory of negligence was based on the claim that the defendant failed to avoid the accident, and that his age and physical condition contributed to the accident, even though their accident reconstruction expert opined as to the defendant's fault without having reviewed his medical records. The court held that it was not the defendant's mental or physical health that was at issue, but his conduct: "whether he was negligent in failing to avoid a car that veered into his lane of traffic."
http://www.4dca.org/opinions/July%202014/07-09-14/4D14-1920.op.pdf

V. Drivers' Licenses

***Tobin v. State*, ___ So. 3d ___, 2014 WL 4435941 (Fla. 1st DCA 2014)**

The sheriff's office received two anonymous calls about a disturbance on a privately maintained road. A responding deputy saw the defendant leaving the site and, recognizing the defendant and knowing he was on community control and driving with a suspended license, arrested him, which led to the defendant being found in violation of community control. The trial court denied his motion to suppress evidence that he was driving with a suspended or revoked license, but the appellate court reversed, holding that the deputy who stopped him did not have "the reasonable, articulable suspicion of criminal activity necessary to justify . . . an investigatory stop." The anonymous calls were "bereft of any details indicating the information given was reliable. Indeed, the first call proved to be unfounded [and the second call] still did not provide any specific, articulable facts indicating that [the defendant] was engaged in criminal activity. . . . If the [arresting] deputy's action could be characterized as attempting a consensual encounter . . . , we could affirm," but "under the circumstances, a reasonable person would conclude that he or she is not free to end the encounter and depart." The appellate court also directed the trial court to reinstate the defendant's community control.
https://edca.1dca.org/DCADocs/2013/2293/132293_DC13_09102014_094204_i.pdf

***Hosey v. DHSMV*, ___ So. 3d ___, 2014 WL 4258307 (Fla. 2d DCA 2014)**

The circuit court reversed the defendant's license suspension but remanded for additional administrative proceedings. The defendant filed a petition for writ of certiorari to quash the remand. The appellate court granted the petition, holding the suspension was moot because the suspension term had expired.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/August/August%2029,%202014/2D13-5061.pdf

***Pankau v. DHSMV*, ___ So. 3d ___, 2014 WL 3887855 (Fla. 2d DCA 2014)**

The defendant's license was suspended. The circuit court denied her certiorari relief, but the appellate court "directed the circuit court to consider whether an adequate mechanism existed for [the defendant] to challenge the lawfulness of the underlying traffic stop." Upon reconsideration the circuit court quashed the license suspension and remanded to the department for further proceedings. Because the suspension period expired during the review period, the defendant filed a motion for clarification, which the circuit court denied. The defendant then filed a petition for certiorari review of the denial, and the appellate court granted it and quashed the circuit court order to the extent that it remanded the case. "[W]hen the Department administratively suspends a driver's license, and the suspension period expires while a matter is under review but the department seeks further formal administrative hearings, the circuit court should quash the administrative order, rather than quash and remand for further proceedings. 'No further proceedings are necessary on remand because the issue of the validity of the suspension of [the] driver's license is moot.'"
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/August/August%2008,%202014/2D13-5373.pdf

***Ferrei v. DHSMV*, ___ So. 3d ___, 2014 WL 3882418 (Fla. 1st DCA 2014)**

The appellate court granted the defendant's petition for certiorari review of a circuit court order denying his motion for clarification. Previously it quashed a circuit court order that denied him certiorari relief from an administrative decision upholding his driver license suspension, and "directed the circuit court to consider whether an adequate mechanism existed for [him] to challenge the lawfulness of the underlying traffic stop. . . . The circuit court then reconsidered [his] certiorari petition, quashed the Department's final order upholding his license suspension, and remanded the cause to the Department for further proceedings." The license suspension period expired during the review period, and the defendant moved for clarification of the order in the circuit court. The circuit court denied his motion, but the appellate court stated that "when the Department administratively suspends a driver's license, and the suspension period expires while a matter is under review but the department seeks further formal administrative hearings, the circuit court should quash the administrative order, rather than quash and remand for further proceedings. '[N]o further proceedings are necessary on remand because the issue of the validity of the suspension of [the] driver's license is moot.' . . . The circuit court failed to apply the correct law when it remanded the moot issue to the administrative tribunal."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/August/August%2008,%202014/2D13-5378.pdf

***DHSMV v. Gaputis*, ___ So. 3d ___, 2014 WL 3882411 (Fla. 2d DCA 2014)**

The circuit court quashed the license suspension order, holding that the department denied the defendant due process. Although the circuit court did not remand, the department proceeded with another formal administrative review hearing. Because his suspension period had expired, the defendant filed a petition for writ of prohibition, which the circuit court granted. The department filed a certiorari petition, asserting the circuit court applied the wrong law, but the appellate court denied the petition.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2014/August/August%2008,%202014/2D13-4258.pdf

***DHSMV v. Wiggins*, ___ So. 3d ___, 2014 WL 4358472 (Fla. 1st DCA 2014)**

The defendant's license was suspended for his refusal to submit to a sobriety test. The circuit court overturned the hearing officer's order upholding the suspension, holding it was "unreasonable as a matter of law" because of discrepancies between the deputy's report and the video of the incident. The department sought review, and the district court quashed the circuit court's order and remanded, stating that the circuit court erred by essentially conducting a de novo review of, and re-weighing, the evidence. It also certified the following question:

> WHETHER A CIRCUIT COURT FAILS TO APPLY THE CORRECT LAW BY REJECTING AS NON-CREDIBLE THE ENTIRETY OF AN ARRESTING OFFICER'S TESTIMONY AND REPORT CONCERNING A TRAFFIC STOP, UPON WHICH THE HEARING OFFICER'S FACTUAL FINDINGS RELIED, BASED SOLELY ON THE CIRCUIT COURT'S OWN INDEPENDENT REVIEW AND ASSESSMENT OF EVENTS ON THE VIDEO OF A TRAFFIC STOP?

https://edca.1dca.org/DCADocs/2013/2471/132471_1282_09122014_042217_i.pdf

***DHSMV v. Futch*, 142 So. 3d 910 (Fla. 5th DCA 2014)**

The district court granted DHSMV's petition for second tier certiorari review of the circuit court's order granting the defendant's petition for writ of certiorari and quashing of DHSMV's administrative order affirming the suspension of the defendant's driver license. The district court agreed with DHSMV that the circuit court departed from the essential requirements of the law when it reinstated the defendant's license, rather than just remanding for further proceedings. The defendant's license was suspended when he refused to submit to a breath test during a DUI investigation. The suspension was upheld at the hearing, but was quashed by the circuit court, which held that the hearing officer violated the defendant's due process rights by not allowing his expert to testify. The district court, however, held that the circuit court should have remanded the case to the hearing officer for a new hearing rather than quashing the suspension.
http://www.5dca.org/Opinions/Opin2014/063014/5D13-3457.op.pdf

***Borom v. State*, 21 Fla. L. Weekly Supp. 1017e (Fla. 2d Cir. Ct. 2014)**

The defendant received a citation for running a red light, captured by a red light camera. The circuit court, in its appellate capacity, reversed, stating that section 316.0083(1)(e), Florida Statutes, "allows for the State to prove a red light violation without proving the identity of the driver, by creating a rebuttable presumption that the owner of the vehicle was responsible. The State must, however, tie the vehicle to the ticketed individual." But in this case the state failed to do so with competent substantial evidence. "No documentary evidence was entered at the hearing linking [the defendant] with the vehicle in question. The officer's hearsay statement alone was insufficient as a matter of law."

***Calabrese v. State*, 21 Fla. L. Weekly Supp. 1006b (Fla. 17th Cir. Ct. 2014)**

The defendant appealed the lifetime revocation of her license for DUI, arguing that section 316.655(2), Florida Statutes (under which revocation or suspension is "based upon the totality of the circumstances"), required only a ten-year suspension. But the circuit court, in its appellate capacity, affirmed, stating that the more specific statute — section 322.28(2)(a)2 (which "specifically addresses periods of revocation or suspension of driving privileges resulting from DUI convictions") — applied, and it does not provide a mandatory maximum period.

***Winters v. State*, 21 Fla. L. Weekly Supp. 994a (Fla. 13th Cir. Ct. 2014)**

The circuit court, in its appellate capacity, quashed the defendant's license suspension for DUI and remanded for a de novo hearing. The hearing officer violated the defendant's due process rights and the essential requirements of the law "by preventing defense counsel from proffering evidence and perfecting the appellate record" and "closing the evidentiary portion of the administrative hearing, and refusing to reopen the hearing to allow defense counsel to present additional defenses and motions."

***Hendry v. State*, 21 Fla. L. Weekly Supp. 992b (Fla. 13th Cir. Ct. 2014)**

At about 2 a.m., an officer was notified of a black 4-door vehicle travelling without headlights. The officer stopped the defendant's black 2-door vehicle, which the dashboard camera video showed did have its lights on. The officer stopped the defendant and ultimately arrested him for DUI, and misinformed him "that the request to take a breath test was civil testing and had no criminal implications." The defendant refused to take a breath test and asked to talk to counsel. His license was suspended for refusal to submit to a breath test. He argued that the traffic stop was unlawful and that his refusal was not willful because he was provided wrong information. The circuit court, in its appellate capacity, quashed the suspension because the stop was unlawful and the officer misinformed the defendant "that he would not suffer any criminal consequences but then charged him with the crime of refusing the breath test."

***Wells v. DHSMV*, 21 Fla. L. Weekly Supp. 983a (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. He sought to have the suspension quashed, but the circuit court, in its appellate capacity, denied his request. The defendant argued that there was not competent substantial evidence that he was lawfully arrested, and that the hearing officer's denial of subpoenas duces tecum for two officers denied him due process. But the circuit held stated that his traffic offense and the indicia of impairment provided "the necessary factual foundation upon which to lawfully stop, detain, and subsequently arrest" him and probable cause to believe he was DUI. The defendant also argued that his refusal to perform in field sobriety exercises should not have been used against him for the probable cause determination because it did not indicate any consciousness of guilt, and that he repeatedly asked to speak to his attorney before refusing to perform the exercises. But the court noted that the defendant was informed of his rights and the fact that his refusal to submit to the tests could be used against him. As to the subpoenas, the documents requested were overly broad, and the hearing officer properly modified their scope.

***Verducci v. State*, 21 Fla. L. Weekly Supp. 981a (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. She filed a petition for certiorari review, arguing that the hearing officer's determination that the arresting officer had probable cause to arrest her was not supported by the evidence because the arresting officer was not the officer who conducted the crash investigation at the scene, and that her due process rights were violated when the hearing officer denied her request for subpoenas duces tecum. The circuit court, in its appellate capacity, denied the petition, noting that the arresting officer's questioning of the defendant during the DUI investigation and her answer, "which places her behind the wheel of her car," were sufficient to support the determination that the arresting officer "had conducted a sufficient personal investigation to have probable cause to arrest" her. As to the due process arguments, the circuit court noted that some of the subpoenas were duplicative, and, although the hearing officer did not require the department to produce the test device operator's initial breath test operator permit, the hearing officer did allow consideration of his most recently completed renewal course, from which it could be inferred he must have been initially certified.

***Munoz v. State*, 21 Fla. L. Weekly Supp. 979b (Fla. 4th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. He filed a petition for certiorari review, arguing that (1) his lack of notice of the suspension invalidated the suspension and "deprived the

hearing officer of jurisdiction to conduct a formal review hearing"; (2) the police officer did not have reasonable suspicion to detain him for a DUI investigation; (3) the hearing officer erroneously relied on an uncertified transcript of his driving record to enhance the suspension from six to 12 months; and (4) the hearing officer should have recused herself, based on "a memorandum circulated to all hearing officers by the Chief of the Bureau of Administrative Reviews which directed [them] to apply an arguably erroneous interpretation of Florida law." The circuit court, in its appellate capacity, denied the petition, noting that (1) in his motion to recuse, the defendant stated under oath that he was given notice; (2) the police officer saw the defendant asleep behind the wheel at a major intersection at 3 a.m., smelling of alcohol, with bloodshot eyes, and therefore had reasonable suspicion to detain him for a DUI investigation; (3) the defendant did not object, at the hearing, to the entry of the uncertified driving transcript into the record; and (4) the motion to recuse asserted only "a generalized fear that hearing officers are incapable of correctly following the law" and was thus legally insufficient.

***Barnard v. DHSMV*, 21 Fla. L. Weekly Supp. 867a (Fla. 9th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. He argued that his due process rights were violated when the hearing officer refused to issue subpoenas for the Florida Highway Patrol records custodian (to get the video of the traffic stop) and the arresting officer. The circuit court denied his petition for writ of certiorari. The hearing officer noted that the subpoena requests did not meet DHSMV criteria, in that the subpoena for the officer "did not limit the subpoenaed materials to those used during the stop," and the one for the records custodian "was not specific enough." The defendant could have corrected the defects but did not, nor did he challenge the hearing officer's interpretation of the subpoena rule or argue that the rule was invalid.

***Ellis v. DHSMV*, 21 Fla. L. Weekly Supp. 862a (Fla. 9th Cir. Ct. 2014)**

The defendant was arrested for DUI. At the DUI center, he performed the breath tests by blowing through his nose rather than his mouth. The officer considered this a refusal and issued a notice of license suspension. The defendant contended he was not given 15 minutes to provide the breath samples. The circuit court, in its appellate capacity agreed with the hearing officer and DHSMV that "there is no requirement that a person submitting to a breath test be given 15 minutes before a refusal may be called. The time frame only pertains to the requirement that a minimum of 2 breath-alcohol samples be taken within 15 minutes of each other. Further, the testimony provided by the breath test operator . . . confirmed that." The defendant also argued that he recanted his refusal when he asked "Do I get another chance?" But the circuit court stated that his question was "subject to several interpretations," and whether it constituted a recanting of his refusal was a question of fact for the hearing officer, whose decision was supported by competent substantial evidence.

***State v. Tolos*, 21 Fla. L. Weekly Supp. 860b (Fla. 9th Cir. Ct. 2014)**

The defendant was issued a traffic citation for running a red light. The trial court held that the red light camera photographs and video were admissible only upon proper authentication, and it dismissed the citation, "as it found that the State failed to prove the identity of the driver who went through the red light, along with the fact that the driver would receive a fixed four points on his or her driving record as a result of the citation." The circuit court reversed, stating:

"[T]he statute does not require the State to prove the identity of the driver; rather, it merely indicates that the registered owner of the vehicle shall be responsible for paying the citation. Additionally, because identity need not be proven, there is nothing in the statute that allows points to be charged against the registered owner's driver's license. Because it appears from the record that the trial court misconstrued the statute at issue, reversal is warranted."

***Zinaich v. DHSMV*, 21 Fla. L. Weekly Supp. 856a (Fla. 6th Cir. Ct. 2014)**

The defendant was convicted of DUI and his license was revoked. After five years he was eligible to apply for reinstatement, and DHSMV issued a letter permitting him to apply for Suncoast Safety Council's Special Supervision Services (SSS) program. Suncoast denied his application, stating that medical records showed he did not go five years without using drugs or alcohol; that he took a Provigil pill that was prescribed to his cousin. DHSMV entered a final order denying early reinstatement because he did not meet the SSS program requirements, and DUI Counterattack upheld Suncoast's denial. The circuit court denied the defendant's petition for writ of certiorari. While the defendant presented a letter from his doctor stating that the medical record was not accurate, and an affidavit from his cousin stating that he did not give the defendant Provigil, the court could not re-weigh the evidence, and there was substantial competent evidence to support the DHSMV decision.

***Bynum v. DHSMV*, 21 Fla. L. Weekly Supp. 855a (Fla. 4th Cir. Ct. 2014)**

The defendant was arrested for DUI and refused to take a breath test, and his license was suspended. He claimed his due process rights were violated when the hearing officer denied a subpoena duces tecum for the trooper who stopped him to provide proof that he completed a training course on the use of radar. The circuit court disagreed, noting that the trooper had submitted a written affidavit stating he saw the defendant speeding before he used the radar, and thus the hearing officer properly considered the speeding ticket, which was self-authenticating. But the defendant also argued that he was not lawfully requested to provide a breath sample, and on this ground the circuit court quashed the license suspension. The arresting officer did not check the box above his signature to indicate that he observed impairment and asked the defendant to submit to a breath alcohol test. "Since he did not, this Court cannot assume a fact not in evidence." And "[t]here is no evidence . . . to indicate [the testing officer] had the reasonable cause to believe [the defendant] was driving or in actual control of a motor vehicle under the influence at the time [he] requested the breath test, as required by [statute]. Also, there is no evidence that the arresting officer's beliefs were communicated to the testing officer prior to the administration of the test to the [defendant]."

***Gill v. DHSMV*, 21 Fla. L. Weekly Supp. 766a (Fla. 18th Cir. Ct. 2014)**

The defendant was stopped for not having a tag light, and a DUI investigation was initiated. After he refused to take a breath or urine test, his license was suspended. He filed a petition for writ of certiorari, arguing that the stop was not valid because the violation had two elements — no tag light and tag not visible from 50 feet away — and there was no evidence as to tag visibility. But the circuit court denied the petition, stating that "'[f]ailure to have any rear tag light visible at all constitutes a traffic violation.' The visibility requirement comes into play only when one tag light is inoperative, but there is another, operative tag light."

***Marez v. DHSMV*, 21 Fla. L. Weekly Supp. 752a (Fla. 13th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. He sought review, claiming (1) there was a lack of evidence to establish the stop was lawful, (2) the hearing officer should have stricken evidence regarding the "Safe Harbor" refusal to perform field sobriety exercises, and (3) there was no explanation in the suspension order regarding the decision to deny his motions to strike evidence or invalidate the suspension. The circuit court denied review, stating (1) there was competent substantial evidence the stop was legal based on the defendant speeding, drifting, and failing to stop at a red light, the officer's observation of the defendant's bloodshot and glassy eyes and the smell of alcohol on his breath, and poor performance on field sobriety tests; (2) the defendant's refusal to continue the field sobriety exercises was not relevant and was not mentioned in the final order; and (3) the defendant offered "no controlling case law which requires a hearing officer to explain his denial of motions brought at the administrative hearing."

***Winters v. DHSMV*, 21 Fla. L. Weekly Supp. 746a (Fla. 9th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. He sought review, claiming lack of competent substantial evidence, because the hearing officer ignored "discrepancies in the Arrest Affidavit where the deputy copied and pasted whole passages from another Arrest Affidavit" and incorrectly ruled that it was the defendant's burden to explain them. The circuit court denied review, stating that determining the weight and credibility of the evidence was the responsibility of the hearing officer, and that the discrepancies — which were not "within a document or between documents in evidence" — did not alone "automatically negate the truth of [the deputy's] account of the events that occurred and his observations."

***Colangelo v. DHSMV*, 21 Fla. L. Weekly Supp. 743a (Fla. 7th Cir. Ct. 2013)**

The defendant's license was suspended for refusal to take a breath-alcohol test. He sought review, claiming the suspension order was not supported by competent substantial evidence; specifically, that "the only evidence in the record regarding the issuance of the notice of suspension is evidence that the notice was not issued to [him] by [the deputy] as required by section 322.2615 [and] that his driver's license is missing from the record of the formal review." The circuit court denied his petition for review, noting that the department stated the defendant was given the suspension notice, and that even if the deputy gave it to the jail rather than directly to the defendant, that would not have caused prejudice to the defendant or deprived him of due process. Regarding the license not being in the record, the court stated that the defendant "did not challenge the correctness of his identification, and his physical driver's license was not necessary to determine the issues before the hearing officer and would have no bearing on such issues."

***Henley v. DHSMV*, 21 Fla. L. Weekly Supp. 742a (Fla. 7th Cir. Ct. 2014)**

The defendant's license was suspended for refusal to take a breath-alcohol test. He sought review, claiming the hearing officer's finding of probable cause for his arrest was not supported by competent substantial evidence. But the circuit court noted that the evidence showed that the defendant was driving 20 mph over the speed limit, the trooper smelled a strong odor of alcohol on the defendant's breath and noticed that he had a flushed face, watery bloodshot eyes, and slurred speech, and the defendant had admitted that he was drinking alcohol earlier. The court

also rejected the defendant's argument that his refusal to perform field sobriety exercises was not a permissible factor to be considered in determined probable cause. He "had experience" with the exercises and was told he was required by law to submit to them.

***Kaymen v. DHSMV*, 21 Fla. L. Weekly Supp. 737a (Fla. 6th Cir. Ct. 2014)**

The defendant's license was suspended for refusal to take a breath-alcohol test. He sought review, arguing that the arresting officer did not have probable cause to believe he was DUI, as he did not admit to drinking and the officer stated in the DUI supplement report that "the odor of alcohol was 'undetected.'" The circuit court denied the petition, as the officer's observations at the stop and the defendant's performance on field tests were "clear indications of intoxication."

***Ihasz-Jentsch v. DHSMV*, 21 Fla. L. Weekly Supp. 735a (Fla. 6th Cir. Ct. 2014)**

The defendant's license was suspended for DUI. She argued that the hearing officer erred by not continuing the hearing because of the arresting deputy's failure to appear or show cause, and that she was denied due process because she was not able to cross-examine the deputy. However, the circuit court found no merit in these arguments because the arresting deputy had died before the hearing, and in any case the right to confront a witness does not apply to a noncriminal, administrative proceeding.

***Zareas v. DHSMV*, 21 Fla. L. Weekly Supp. 731a (Fla. 6th Cir. Ct. 2014)**

The defendant's license was revoked for five years, with six months' probation, for DUI. His application for early reinstatement was denied because he had had an alcoholic drink and for early reinstatement the applicant must not have consumed alcohol or drugs or driven for one year before the reinstatement hearing. The defendant sought certiorari review, as he interpreted his probation form to provide that his probation, including no alcohol or bars, ended after six months. But the circuit court denied the petition, stating: "The early termination of probation does not affect the requirements that must be met by an individual seeking early reinstatement of his driver's license."

***Feliciano v. DHSMV*, 21 Fla. L. Weekly Supp. 726a (Fla. 4th Cir. Ct. 2014)**

Witnesses saw the defendant's vehicle make a fast, unsafe turn, and, after following it for several miles, saw it swerve over a curb, causing two tires to blow out. The driver/owner of the vehicle stopped and switched seats with the defendant. The defendant drove for ½ mile before a front tire fell off, and drove a short distance more after that. A witness called the police, and two officers arrived. They noticed the damage to the car and the road, and the DUI officer noticed indicia of impairment in the defendant. After field sobriety exercises, the defendant's license was suspended. She filed a petition for writ of certiorari, claiming there was no evidence that she was driving or in actual physical control of the vehicle, as the vehicle had been rendered inoperable. The circuit court denied the writ, stating that the gouge in the road caused by the vehicle's exposed rim supported that the vehicle was operable, the vehicle was in the road, and the defendant was in the driver's seat. And in any case, "circumstantial evidence that a vehicle was operated prior to becoming inoperable may be sufficient to find that a driver is in actual physical control of a vehicle."

***McDonald v. DHSMV*, 21 Fla. L. Weekly Supp. 725a (Fla. 4th Cir. Ct. 2013)**

The defendant was stopped because he was crossing lane dividers and driving 10 mph in a 35-mph zone. His license was suspended under section 322.2616, Florida Statutes, because he was under 21 and driving with a breath-alcohol level of 0.02 or higher. He claimed the stop was not incident to a lawful arrest. The circuit court, in its appellate capacity, stated that a stop under that statute "is not itself an arrest. Moreover, the statute states that an under-21 driver who accepts the privilege of holding and using a driver's license in the state of Florida consents to the provisions of the statute. Section 322.2616(16). The hearing officer who made the findings was therefore not required to find that the stop was incident to a lawful arrest."

***Dausa v. DHSMV*, 21 Fla. L. Weekly Supp. 724a (Fla. 4th Cir. Ct. 2013)**

The defendant's license was suspended for DUI, and the circuit court denied his petition for writ of certiorari. The defendant argued that the officer did not issue a notice of suspension, but the court found no evidence to contradict the officer's testimony that he did. The defendant also argued that the officer did not have probable cause for a traffic stop or to do field sobriety exercises, but the court held that the officer observing that the defendant ran a red light and smelled of alcohol created probable cause for the stop and exercises. The defendant further argued that the officer did not have reasonable suspicion to detain him for a DUI investigation — that he "kept him too long after issuing the citation" — but the court disagreed, noting that the officer smelled alcohol at the start of the encounter and then noticed that the defendant's eyes were bloodshot and watery, and the defendant admitted to drinking earlier.

***Bitteker v. DHSMV*, 21 Fla. L. Weekly Supp. 723a (Fla. 4th Cir. Ct. 2014)**

A trooper stopped the defendant for speeding and, after a DUI investigation and field sobriety exercises, arrested him. Based on breath test results, the defendant's license was suspended. He appealed, claiming (1) there was not competent substantial evidence to show he was driving with an unlawful breath alcohol level, as the control test of the machine read higher than it should have, and (2) he was denied due process when the hearing officer denied a subpoena duces tecum for the trooper to provide copies of his original breath test operator certification. The circuit court stated that the defendant did not submit evidence of his claim about the test machine. But it did quash the suspension and remanded because the denial of the subpoena duces tecum denied the defendant of "his right to rebut the evidence against him."

VI. County Court Orders

***State v. Porter*, 21 Fla. L. Weekly Supp. 1099b (Brevard Cty. 2014)**

A deputy saw a vehicle in a parking lot. A store clerk said the vehicle had been there awhile, so the deputy looked through the window and noticed the person in the driver's seat appeared to be passed out. Thinking the driver might need medical assistance or be intoxicated, the deputy knocked on the window, but the driver lifted his head and fell back asleep. The deputy knocked again while yelling, "are you OK?" The driver woke up, shook his head, and said he was a police officer. The deputy asked if he needed medical assistance. The driver declined but eventually opened his door. Based on the deputy's contact with the driver, a DUI

investigation ensued. The court denied the defendant's motion to suppress, stating that "[a]n officer does not need a founded suspicion of criminal activity to approach and talk to someone"; that the initial contact was consensual and the officer approached the defendant to see if he needed assistance.

***State v. Thomas*, 21 Fla. L. Weekly Supp. 1099a (Brevard Cty. 2014)**

A deputy stopped the defendant after seeing him cross over or onto the center line four times, and over the fog line three times, while driving 10-15 mph below the speed limit. She pulled him over and a DUI investigation followed. The court denied the defendant's motion to suppress based on illegal stop, stating that, although "a failure to maintain single lane alone does not amount to a violation unless other drivers are impacted," the deputy stopped the defendant to determine whether he was ill, injured, or impaired, not to ticket him for failing to maintain a single lane.

***State v. Jones*, 21 Fla. L. Weekly Supp. 1098b (Brevard Cty. 2014)**

A police officer saw the defendant park his jeep in front of a closed restaurant and turn off the lights. He approached the jeep, saw the keys in the ignition, "made contact" with the defendant, and began a DUI investigation. The defendant filed a motion to suppress, which the court denied, stating the encounter was consensual and the defendant was free to leave.

***State v. Ullery*, 21 Fla. L. Weekly Supp. 1096a (Brevard Cty. 2014)**

The defendant was arrested for DUI and argued that, with the enactment of the *Daubert* standard in section 90.702, Florida Statutes, breath test results are not admissible. But the court held that the *Daubert* standard is not applicable to breath alcohol test results: "A result generated by a diagnostic instrument, such as the Intoxilyzer 8000, is not expert testimony, nor is it the equivalent of expert testimony." The court also discussed a federal case in which the court held that, even under a *Daubert* analysis, admitting the test results of a device similar to the Intoxilyzer 8000 was not an abuse of discretion based on its reliability.

***State v. Nickell*, 21 Fla. L. Weekly Supp. 933a (Volusia Cty. 2014)**

The defendant was lawfully stopped for having an inoperable headlight. The officer noticed indicia of impairment and discovered the defendant's driver license had been suspended for refusing to submit to a breath, blood, or urine test over seven years earlier. The defendant refused to submit to field sobriety exercises or a breath test in this case and was charged with DUI and "one count of prior refusal to submit to testing by amended information." He argued that the prior refusal statute is unconstitutional because it violates his right to refuse to consent to a warrantless search. The court held the search falls within a recognized exception to the warrant requirement – the implied consent statute – and certified the following question:

> IF THE IMPLIED CONSENT STATUTE PROVIDES CONSENT TO SEARCH AS AN EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT, THEN CAN THAT CONSENT BE WITHDRAWN BY REFUSAL TO SUBMIT TO AN OTHERWISE LAWFUL TEST OF BREATH, BLOOD OR URINE AND CAN THE SECOND SUCH REFUSAL BE A CRIMINAL OFFENSE?

***State v. Caporuscio et al.*, 21 Fla. L. Weekly Supp. 930b (Volusia Cty. 2014)**

The defendants were arrested for DUI, refused to take breath tests, and were charged with refusal to submit to testing. They filed motions to dismiss, arguing the charge was unconstitutional as applied; that any consent that could be implied when they drove a motor vehicle was withdrawn when they refused to take a breath test. But the court held that while a breath test is a search, and there was no warrant, "a motorist's implied consent to a breath test falls within the consent exception to the warrant requirement." Further, refusal of a breath test is an option, not a right, and there is no constitutional right to withdraw that implied consent. The court distinguished this case from cases where a blood draw was compelled and certified the following question:

> DOES SECTION 316.1939, FLORIDA STATUTES (2013), THE UNLAWFUL REFUSAL STATUTE, VIOLATE THE FOURTH AMENDMENT?

***State v. Shier*, 21 Fla. L. Weekly Supp. 843a (Brevard Cty. Ct. 2014)**

A citizen informant gave the police a description and the tag number of a vehicle that was being driven erratically and almost hit a pedestrian. A police officer found out the name and address of the vehicle owner, and went to the parking lot of the apartment complex where the owner lived. About ten minutes after the tip, the officer saw the defendant parked in the lot and saw him exit the vehicle, detained him in the patrol car, and noticed indicia of impairment. The officer searched his car and saw the key in the ignition. The defendant refused to perform field sobriety exercises and was arrested for DUI. He also refused to take a breath test. Challenging the legality of the detention, search, and arrest, the defendant filed a motion to suppress evidence obtained as a result of those actions, including his alleged refusal to take a breath test.

The court held the detention was lawful because the officer had reasonable suspicion to believe the man exiting the vehicle was driving it when the tip was called in. Regarding the search, the court found that while it was not justified based on either probable cause to suspect criminal activity or fulfillment of a community caretaking function, it was reasonable as incident to arrest, because DUI is "an offense which, by its nature is likely to leave physical evidence in the vehicle." However, as to the arrest, the court held that while the officer had probable cause to believe the defendant was impaired, he did not see the defendant drive the vehicle and could not use the information from the citizen informant to establish the necessary DUI element of "driving" or "actual physical control." Nor could the court consider the keys found in the ignition during the search to find the defendant was in actual physical control of the vehicle in the presence of the officer, because there was not probable cause to arrest the defendant at the time of the vehicle search. Therefore, the court granted the motion to suppress in part and denied it in part, holding that the arrest, and all evidence obtained as a result of it, is suppressed, unless the defendant refers to the arrest or any other suppressed evidence in the jury's presence.

***State v. Harkins*, 21 Fla. L. Weekly Supp. 789a (Leon Cty. Ct. 2014)**

The defendant was arrested for DUI and moved to suppress his breath test results, arguing that the maintenance inspection affidavit for the breath test machine was testimonial hearsay, and therefore testimony from a substitute agency inspector, rather than the inspector

who performed the inspection and created the affidavit, rendered the affidavit inadmissible. The court agreed and granted the motion to suppress.