FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

October - December 2012

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

I. Driving Under the Influence (DUI)

***State v. Shumacher*, 99 So. 3d 632 (Fla. 1st DCA 2012).**

The district court granted the state's appeal from a sentence imposed on the defendant after his conviction of DUI manslaughter, as it did not include a minimum mandatory prison sentence of four years. The court cited section 316.193(3), Florida Statutes, which states "A person who is convicted of DUI manslaughter shall be sentenced to a mandatory minimum term of imprisonment for 4 years." http://opinions.1dca.org/written/opinions2012/10-31-2012/11-2301.pdf

***Pennington v. State*, 100 So. 3d 193 (Fla. 5th DCA 2012).**

The district court denied the state's motion for rehearing and affirmed its reversal of the defendant's conviction for DUI manslaughter, remanding for an amended judgment and sentence for DUI, and affirmed a conviction for leaving the scene of an accident with death. The defendant had appealed, arguing the trial court erred in denying his motion for judgment of acquittal because his reasonable hypothesis of innocence regarding the nature of the accident was unrebutted and in denying his motion for mistrial on the basis of juror misconduct. The court held there was no evidence to show that the defendant's intoxicated driving caused or contributed to the other driver's death as is required by section 316.193(3), Florida Statutes. http://www.5dca.org/Opinions/Opin2012/102212/5D11-1831.op.pdf

***State v. Schroff*, 103 So. 3d 225 (Fla. 1st DCA 2012).**

The district court granted the state's appeal and remanded to the trial court for resentencing. The defendant pleaded nolo contendere to the charge of DUI manslaughter. After a hearing, the defendant was sentenced to fifteen years in prison, with all but thirty months

suspended, to be followed by community control and probation. The state asserts that the trial court erred by failing to impose the statutorily required mandatory minimum prison sentence of four years. The district court agreed and remanded for resentencing to include the mandatory minimum term, citing *State v. Schumacher*, 99 So. 3d 632 (Fla. 1st DCA 2012). http://opinions.1dca.org/written/opinions2012/12-05-2012/11-2885.pdf

***Booker v. State*, 103 So. 3d 1035 (Fla. 2d DCA 2012).**

The district court granted the defendant's appeal for his conviction for leaving the scene of a crash involving injury and reversed this conviction, in a case stemming from one count of leaving the scene of a crash involving injury, two counts of DUI with property damage or personal injury, and one count of obstructing or opposing an officer without violence. The defendant did not appeal the other counts. The court held that to meet the intent requirement of section 316.027(1)(a), Florida Statutes, it is not enough for the state to prove that the defendant was involved in a crash that resulted in injury or death, that the defendant knew or should have known that he was involved in a crash, and that the defendant willfully failed to stop at the scene. *See State v. Mancuso*, 652 So. 2d 370, 371-72 (Fla. 1995). Instead, the state must also "establish that the driver 'either knew of the resulting injury or death or reasonably should have known from the nature of the accident,'" and that, when there are multiple impacts, the driver must know of the specific impact that actually resulted in the injury. *K.W. v. State*, 78 So. 3d 74, 75-76 (Fla. 2d DCA 2012). Thus the district court reversed the conviction on the count of leaving the scene of a crash involving injury, and affirmed all other counts. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/December/December%2028,%202012/2D11-355.pdf

II. Criminal Traffic Offenses

***Cantlon v. State*, 98 So. 3d 719 (Fla. 2d DCA 2012).**

The district court granted the defendant's appeal and reversed his sentence for one year in jail for reckless driving, as it exceeded the statutory maximum for a conviction of reckless driving under section 316.192(2), Florida Statutes. The defendant noted in his appeal that the jury verdict did not include any finding that he caused damage to the property or person of another, which would have supported a one year sentence under section 316.192(3). http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/October/Oct%2005,%202012/2D11-2533.pdf

***Pena v. State*, __ So. 3d ___ (Fla. 4th DCA 2012), 37 Fla. L. Weekly D2823, December 12, 2012, 4D12-1187.**

The district court denied the defendant's motion for post conviction relief contending that his dual convictions for driving with a canceled, suspended, or revoked license causing serious bodily injury or death and leaving the scene of crash causing death violate double jeopardy. The court held the denial of his motion to correct illegal sentence filed pursuant to rule 3.800(a), Florida Rules of Criminal Procedure, was proper. The district court

affirmed the order of denial, but did so without prejudice to the defendant filing a timely motion for post-conviction relief under rule 3.850, Florida Rules of Criminal Procedure, that raises this issue. *See Abbate v. State*, 82 So. 3d 886, 888 (Fla. 4th DCA 2011). http://www.4dca.org/opinions/Dec%202012/12-12-12/4D12-1187.op.pdf

***State v. Catalano*, 104 So. 3d 1069 (Fla. 2012).**

The supreme court denied the state's appeal and affirmed the district court's holding that section 316.3045, Florida Statutes, was invalid because it was an unreasonable restriction on the freedom of expression. The court also held the statute was unconstitutionally overbroad, but not unconstitutionally vague. The court also held that section 316.3045(3) was not severable from the remainder of the statute. The defendants in this case had been cited by law enforcement officers in separate incidents in Pinellas County, Florida, for violating the sound standards of section 316.3045(1)(a), Florida Statutes (2007). Both defendants entered not guilty pleas and moved to dismiss their citations in county court, arguing that section 316.3045 was facially unconstitutional. The county court denied their respective motions based on the Fifth District's decision in *Davis v. State*, 710 So. 2d 635 (Fla. 5th DCA 1998), which found section 316.3045, as originally written prior to the 2005 amendment, constitutional. After switching their pleas to nolo contendre, both defendants appealed to the circuit court of Pinellas County, arguing that section 316.3045 was facially unconstitutional because the "plainly audible" standard was vague, overbroad, invited arbitrary enforcement, and impinged on their free speech rights. The supreme court held that the statute was not unconstitutionally vague, but was unconstitutionally overbroad and an impermissible content-based restriction. Additionally, the supreme court found that severance of section 316.3045(3) was not an appropriate remedy to preserve the constitutionality of section 316.3045, Florida Statutes. http://www.floridasupremecourt.org/decisions/2012/sc11-1166.pdf

III. Arrest, Search and Seizure

***State v. Hinman*, 100 So. 3d 220 (Fla. 3d DCA 2012).**

The district court reversed the circuit court order granting the defendant's motion to suppress physical evidence and statements. The defendant had been pulled over after committing a traffic violation. Without administering a Miranda warning, the officers initiating the traffic stop went to the defendant's vehicle, and one of them asked the defendant whether she had any weapons or drugs in the car. The defendant answered that she had a bag of pills, alleged to be hydrocodone. During the evidentiary hearing on the motion to suppress, the officer testified that he asked the question as a matter of safety and as a customary policy. The district court held in the case of a lawful traffic stop such as this, "persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda." *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). The circuit court held, citing *State v. Sherrod*, 893 So. 2d 654, 655 (Fla. 4th DCA 2005), that a preliminary question asked of the defendant "by the deputy whether he had weapons or drugs on him," followed by the defendant's admission that he had drug paraphernalia, and a voluntary surrender of them to the deputy, did not transform it into a custodial interrogation. As such, the district court reversed the circuit court's order to suppress evidence. http://www.3dca.flcourts.org/Opinions/3D11-2748.pdf

***State v. Lockett*, 101 So. 3d 1275 (Fla. 4th DCA 2012).**

The district court granted the state's appeal of the county court's order granting the defendant's motion to suppress evidence obtained when his vehicle was stopped for violating section 316.3045(1)(a), Florida Statutes. The district court noted the trial judge granted the motion based on a ruling that the statute was unconstitutional. Almost three years after the defendant was stopped, the Second District decided in *State v. Catalano*, 60 So. 3d 1139, 1146 (Fla. 2d DCA 2011), that section 316.3045 "is a content-based restriction on free expression which violates the First Amendment" because its provisions do not apply to motor vehicles used for business or political purposes. The *Catalano* court also approved the decision of the lower court that the statute's "plainly audible" standard was unconstitutionally vague and overbroad. *Id*. at 1142-44. The district court in the instant case decided that when the defendant was stopped in 2008, almost three years before the decision in *Catalano*, a reasonable police officer would not have known that the noise statute was unconstitutional, and that the officer acted in an objectively reasonable manner. Therefore, the district court reversed the order granting the defendant's motion to suppress and remanded for further proceedings.
http://www.4dca.org/opinions/Dec%202012/12-05-12/4D12-321.op.pdf

***Jenkins v. State*, 102 So. 3d 739 (Fla. 2d DCA 2012).**

The district court granted the defendant's appeal which challenged his convictions after pleas to cocaine possession with intent to sell, drug paraphernalia possession, and altering a license tag, and remanded for further proceedings. The court concluded that the defendant's arrests for altering a license tag were unlawful because he did not commit the offense in the presence of police officers. *See* § 901.15(1), Fla. Stat. (2009); *Baymon v. State*, 933 So. 2d 1269, 1270 (Fla. 2d DCA 2006). The facts of this case were that police officers stopped the defendant's car because he was playing loud music, had a tinted plastic cover over his license tag, and failed to make a complete stop at a red light. The officers arrested the defendant for altering a license tag, a second-degree misdemeanor. *See* § 320.061, Fla. Stat. (2009). Incident to arrest, they searched him and the car. The officers found cocaine in the defendant's wallet and baggies with cocaine residue and a digital scale in the car trunk. Less than a month later, police officers again spotted Mr. Jenkins' car still having the tinted plastic license tag cover. They conducted a traffic stop and arrested him again for obscuring a license tag. An inventory search of the car uncovered seven hundred counterfeit music and video CDs and DVDs. Mr. Jenkins filed motions to suppress in all cases. He argued that his arrests were unlawful because altering a license tag was a misdemeanor that must be committed within the presence of a law enforcement officer for an arrest to be lawful. The district court agreed holding that because the arrests were unlawful, "the law mandated suppression of the evidence seized in any search performed incident to that arrest." *See Baymon*, 933 So. 2d at 1270 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)). The district court reversed the defendant's convictions for possession of cocaine with intent to sell and possession of drug paraphernalia, his conviction for possession of counterfeit private labels, and remanded those cases for resentencing on his convictions for altering a license tag. The district court also reversed the defendant's revocation of probation and remanded for consideration of whether to revoke, modify, or continue probation based only on altering a license tag. *See Paterson v. State*, 612 So. 2d 692, 694 (Fla. 1st DCA1993).

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/December/December%2014,%202012/2D10-5322.pdf

IV. Torts/Accident Cases

***Lenhart v. Basora*, 100 So. 3d 1177 (Fla. 4th DCA 2012).**

The district court reversed the circuit court's final judgment in a personal injury action stemming from a motor vehicle accident. The plaintiff is the guardian for her daughter, who suffered a permanent brain injury due to a collision caused by the defendant. The defendant had filed a motion in limine to exclude certain evidence pertaining to his negligence, including that he had never been issued a driver's license, had driven a car only once before the accident, and did not know if he was wearing his glasses at the time of the accident, as the defendant had already admitted to negligence in causing the accident. The lower court granted the defendant's motion. The district court disagreed, finding that as Florida is a comparative negligence state, and the exclusion of this evidence would prevent the jury from fully evaluating the parties' comparative negligence. As the defendant could not demonstrate the failure to allow this evidence did not influence the trier of fact and contribute to the verdict, as was required under *Special v. Baux*, 79 So. 3d 755, 771 (Fla. 4th DCA 2011), *rev. granted sub nom. Special v. W. Boca Med. Ctr.*, 90 So. 3d 273 (Fla. 2012), the district court reversed the verdict and remanded for a new trial on liability and damages. http://www.4dca.org/opinions/Oct%202012/10-17-12/4D10-2835.op.pdf

***Rooker v. Ford,* 100 So. 3d 1229 (Fla. 2d DCA 2012).**

The district court granted plaintiff's motion and reversed the trial court's final summary judgment disposition, finding the defendant failed to establish that no genuine issues of material fact exist. The plaintiff was involved in a single-car, roll-over crash while driving a 1999 Ford Explorer. The plaintiff sued the defendant alleging strict liability, negligence, and other claims stemming from alleged defects in the vehicle that either caused the accident or furthered her injuries. The district court held that even if the plaintiff's negligence caused the accident that resulted in the vehicle's rolling over, the allegations that the defective design of the roof structure and the occupant restraint devices caused the injuries she suffered in the accident remained to be decided. As such the circuit court reversed the order for summary judgment and remanded the case for further proceedings.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/November/November%2014,%202012/2D11-5168.pdf

***Birge v. Charron,* 107 So. 3d 350 (Fla. 2012).**

The supreme court affirmed the district court's ruling and dismissed the defendant's appeal. This case arises from a motor vehicle accident wherein the plaintiff, a passenger on a motorcycle was involved in a "flip-over" when the driver of the motorcycle unsuccessfully attempted to avoid a collision with the rear of an automobile driven by the defendant. The defendant moved for and was granted final summary judgment in his favor on the basis that the plaintiff could not rebut the presumption of negligence that attached to the driver of the

motorcycle as the rear driver in a rear-end collision case. The Fifth District reversed because it concluded that the plaintiff could produce evidence from which a jury could find that the defendant was negligent and at least comparatively at fault in causing the collision.

The supreme court held that rear-end motor vehicle collision cases are substantively governed by the principles of comparative negligence. Accordingly, the supreme court also held that where evidence is produced from which a jury could conclude that the front driver in a rear-end collision was negligent in bringing about the collision, or that the negligence of the rear driver was not the sole proximate cause of the accident, the presumption that the rear driver's negligence was the sole proximate cause of the collision is rebutted, and all issues of disputed fact regarding comparative fault and causation should be submitted to the jury. As such, the supreme court affirmed the district court's opinion. The supreme court also noted that based on this holding, it disapproved of the Fourth District's decision in *Cevallos v. Rideout*, 18 So. 3d 661 (Fla. 4th DCA 2009). The court issued a separate opinion in *Cevallos v. Rideout* (discussed infra). http://www.floridasupremecourt.org/decisions/2012/sc10-1755.pdf

***Cevallos v. Rideout,* 107 So. 3d 348 (Fla. 2012).**

The supreme court quashed the district court's opinion and remanded the case back to the district court. In the case at bar, the trial court entered a directed verdict against the plaintiff on the basis that she could not overcome the presumption of negligence that attached to her as a rear driver in a rear-end collision case. However, the evidence introduced at trial, when viewed in the light most favorable to the plaintiff, provided a basis for a jury to conclude that the front driver defendant was talking on a cellular phone while driving forty-five miles per hour over a hill in heavy to moderate traffic, and while doing so, she "slammed" her car into the rear of a vehicle stopped on the downhill slope of the overpass, causing her vehicle to come to an abrupt stop on the roadway. The supreme court held that the facts introduced into evidence at trial provided a sufficient basis for the jury to conclude that the defendant failed to use ordinary care in operating her vehicle, and that this failure was at least one of the proximate causes of the collision between the plaintiff's vehicle and the defendant's vehicle. The evidence was sufficient for a jury to conclude that the rear driver's presumed negligence was not the sole proximate cause of the collision, and thus, under the supreme court's holding in *Birge v. Charon* (supra), a directed verdict should not have been entered against the plaintiff on the basis of the rear-end presumption.

The supreme court, based on its holding in *Birge v. Charon*, (supra), held that rear-end motor vehicle collision cases are substantively governed by the principles of comparative negligence. Accordingly, the supreme court also held that where evidence is produced from which a jury could conclude that the front driver in a rear-end collision was negligent in bringing about the collision, or that the negligence of the rear driver was not the sole proximate cause of the accident, the presumption that the rear driver's negligence was the sole proximate cause of the collision is rebutted, and all issues of disputed fact regarding comparative fault and causation should be submitted to the jury. As such, the supreme court quashed the district court's opinion and remanded the case for disposition consistent the supreme court's opinion. http://www.floridasupremecourt.org/decisions/2012/sc09-2238.pdf

***Geico v. DeGrandchamp,* 102 So. 3d 685 (Fla. 2d DCA 2012).**

The district court granted the defendant's appeal, reversed final judgment and remanded the case to the trial court. This case arises out of a verdict for the plaintiff for injuries she suffered when her car was struck from behind by another car. The defendant, which provided uninsured/underinsured motorists' coverage to the plaintiff, raised three issues on appeal however, this district court found merit only in the defendant's argument that the trial court abused its discretion when it denied its motion for remittitur or a new trial.

The district court held that where a plaintiff seeks damages for future medical expenses, only medical expenses that are reasonably certain to be incurred in the future are recoverable. The court affirmed a prior ruling that "When a jury award of damages is clearly excessive or inadequate in actions arising out of the operation of motor vehicles, the trial court shall, upon proper motion, order a remittitur or additur of the jury's award." *Truelove v. Blount*, 954 So. 2d 1284, 1287 (Fla. 2d DCA 2007). As such, the district court reversed final judgment and remanded the case to the circuit court to enter an order of remittitur or alternatively an order granting a new trial on the issue of damages for future medical expenses. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/November/November%2028,%202012/2D10-6097.pdf

***Gay v. Association Casualty Insurance,* 103 So. 3d 1028 (Fla. 5th DCA 2012).**

The district court denied the defendant's motion for rehearing, but substituted the following opinion. The district court reversed the lower court's ruling and remanded this case, finding there was a remaining issue of material fact as to whether there was uninsured motorist coverage available. The plaintiff had been in an automobile accident with an underinsured motorist. At the time, his vehicle was insured by the defendant; the policy had been purchased through an agent. The plaintiff had received a check from the other driver's insurance company, along with a release of all claims. Prior to cashing the check and signing the release, the plaintiff contacted his agent and asked if it was okay to cash this check. He was advised he could cash the check, but not to sign the release as this could affect his ability to receive underinsured motorist benefits. The defendant denied the plaintiff's claim for underinsured motorist benefits on the basis he settled his claim contrary to his policy language. The court held that notice to an agent was notice to the principal, citing *Johnson v. Life Ins. Co. of Ga.*, 52 So. 2d 813 (Fla. 1951). The court remanded the case to determine if the plaintiff had indeed received the advice he claimed from his agent, as the agent disputed this statement of fact, and the agent that sold the policy on behalf of the defendant was an agent or apparent agent for the defendant. http://www.5dca.org/Opinions/Opin2012/122412/5D10-1906.op.pdf

***Kanengiser v. Rodriguez,* 103 So. 3d 988 (Fla. 4th DCA 2012).**

The district court denied the defendant's appeal and affirmed the trial court's final judgment awarding damages to the plaintiffs. The defendant admitted fault in striking the rear of the plaintiffs' car in a low-impact crash. After trial on the issues of causation, apportionment of the injuries, and damages, a jury awarded the husband-plaintiff $638,128.60. The defendant raised a number of issues on appeal; the primary issue presented concerned the

cumulative effect of alleged errors throughout the trial. The district court reviewed the entire record, and did not find any impropriety that infected the trial to such an extent as to deny the defendant a fair trial. *See Intramed, Inc. v. Guider*, 93 So. 3d 503, 505 (Fla. 4th DCA 2012). http://www.4dca.org/opinions/Dec%202012/12-19-12/4D10-2908.op.pdf

V. Drivers' Licenses

***Department of Highway Safety and Motor Vehicles v. Dellacava*, 100 So. 3d 234 (Fla. 5th DCA 2012).**

The district court granted the Department of Highway Safety and Motor Vehicles' (DHSMV) appeal and granted the petition to quash the circuit court's order quashing the administrative hearing officer's decision affirming the defendant's driver's license suspension. In 2010, the defendant was arrested for driving under the influence of alcohol and submitted to a breath test on the Intoxilyzer 8000 utilizing software version 8100.27. The test results revealed that the defendant's breath-alcohol level was 0.08 or higher. Resulting in a driver's license suspension pursuant to section 322.2615(1)(a), Florida Statutes. The defendant requested a formal administrative review. The defendant alleged that the Intoxilyzer 8000 utilizing software version 8100.27 was not properly approved for use in Florida. The hearing officer determined by a preponderance of the evidence that sufficient cause existed to sustain the defendant's suspension. The defendant argued for the first time in his reply that the record did not establish that the breathalyzer software version 8100.27 had been evaluated. The circuit court granted the petition. The district court reversed the circuit court, finding the DHSMV was denied due process when the circuit court granted certiorari relief on an issue raised for the first time in the defendant's reply, as the DHSMV lacked an opportunity to respond to the new argument. *J.A.B. Enters. v. Gibbons*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992). http://www.5dca.org/Opinions/Opin2012/102912/5D12-2313.op.pdf

***Department of Highway Safety and Motor Vehicles v. Rose*, 105 So. 3d 22 (Fla. 2d DCA 2012).**

The district court granted the Department of Highway Safety and Motor Vehicles' (DHSMV) appeal and granted the petition to quash the circuit court's order quashing DHSMV's order affirming the defendant's driver's license suspension. The defendant's license was suspended pursuant to section 322.2615(1), Florida Statutes, for failure to submit to a breath test. The suspension was affirmed at the defendants requested a formal hearing. The defendant sought certiorari review in the circuit court, and the circuit court quashed the hearing officer's order, concluding that the hearing officer departed from the essential requirements of law in deciding that probable cause existed that the defendant was under the influence of alcohol. The district court held that the circuit court exceeded its scope of review by reweighing the evidence and granted DHSMV's petition for writ of certiorari to quash the circuit court's order. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/November/November%2002,%202012/2D12-636.pdf

***Department of Highway Safety and Motor Vehicles v. Ramnarine*, 104 So. 3d 1144 (Fla. 2d DCA 2012).**

The district court granted plaintiff's motion for a rehearing. The district court denied the petition for writ of certiorari, citing *Dep't of Highway Safety & Motor Vehicles v. Robinson*, 93 So. 3d 1090 (Fla. 2d DCA 2012), *petition for review filed*, No. SC12-1874 (Fla. Sept. 5, 2012). As in *Robinson*, the district court certified the following question of great public importance to the Supreme Court pursuant to rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure: "When a suspendee seeks formal review of a driver's license suspension pursuant to section 322.2615(a), Florida Statutes, is it a violation of due process to suspend the license after a subpoenaed witness fails to appear and the suspendee cannot enforce the subpoena within the statutorily mandated thirty-day period for formal administrative review?" http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/November/November%2028,%202012/2D12-1842rh.pdf

***Barker v. State*, 102 So. 3d 756 (Fla. 4th DCA 2012).**

The district court granted the defendant's appeal of a conviction for fleeing or attempting to elude a law enforcement officer, misdemeanor possession of cannabis, and driving without a license and remanded the case for a new trial. The defendant argued that the trial court erred by refusing to instruct the jury on a permissible lesser included offense of fleeing or attempting to elude a law enforcement officer, and that the trial court erred by permitting the state to question him about the nature of his prior arrests. The district court reversed because the trial court admitted evidence that the defendant was previously arrested for failing to appear in court and for possession of marijuana when the defense had not opened the door to such testimony. http://www.4dca.org/opinions/Dec%202012/12-19-12/4D11-2593.op.pdf