FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

October-December 2011

[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)

Taylor v. State, 76 So. 3d 1047 (Fla. 5th DCA 2011).

The district court reversed the denial of the defendant's motion to withdraw his plea to driving under the influence with two prior convictions. The defendant was unrepresented at the hearing and was not offered counsel. The hearing on defendant's motion was a critical stage of the proceeding for which the defendant had a constitutional right to counsel.
http://www.5dca.org/Opinions/Opin2011/121211/5D10-3611.op.pdf

Florida v. Holland, 76 So. 3d 1032 (Fla. 4th DCA 2011).

The district court reversed a non-final order granting suppression of a DUI videotape. A *de novo* standard of review was applied because the appeal involved a mixed question of law and fact determining constitutional issues.

Prior to trial, the state announced it would not be calling the deputy who performed the field sobriety tests on the defendant. The defense moved to suppress all evidence of the deputy's involvement in the DUI investigation on the basis that failure to call the deputy violated the Confrontation Clause of the U.S. Constitution. The state argued that the videotape did not violate the Confrontation Clause because it was not hearsay; and, alternatively, even if it was hearsay, the videotape was non-testimonial. The state planned on calling the deputy who made the traffic stop as its primary witness. The trial court disagreed with the state's legal arguments and suppressed the videotape on the basis that the videotape and all statements made to or by the deputy on the videotape were in preparation for criminal prosecution and were testimonial.

The district court found that the defendant's refusal (on the videotape) to submit to sobriety testing was admissible under the law. The district court also found that the statements made by the defendant to the deputy administering the field sobriety tests were non-hearsay verbal acts, admitted not to prove the truth of the assertions therein, but to give sense to defendant's "otherwise ambiguous acts" on the videotape. The district court further found that because the statements on the videotape were not hearsay, the videotape would not violate the Confrontation Clause. The case was remanded for a hearing to be conducted on the authentication of the videotape as a condition precedent to its introduction.
http://www.4dca.org/opinions/Dec%202011/12-14-11/4D10-2415.op.pdf

State v. Kirchhof, 75 So. 3d 402 (Fla. 5th DCA 2011).

The district court affirmed the trial court's dismissal of the state's information charging the defendant with felony DUI based upon the expiration of the statute of limitations.

The defendant originally entered a plea and was sentenced for a misdemeanor DUI committed on March 1, 2004. The defendant was later allowed to withdraw his plea to the misdemeanor DUI, and the judgment and sentence were vacated. The state charged the defendant with felony DUI on February 5, 2010. The district court agreed with the trial court that once the initial plea was withdrawn, and the judgment and sentence to the misdemeanor DUI were vacated, the three-year statute of limitations applied. Therefore, the state's prosecution in this case was barred by the expiration of the statute of limitations.
http://www.5dca.org/Opinions/Opin2011/112811/5D10-1688.op.pdf

McCoskey v. State, 76 So. 3d 1012 (Fla. 1st DCA 2011).

The district court denied defendant's petition for writ of certiorari, requiring that during defendant's trial for DUI, the trial court allow the defendant to put on evidence of his subjective intent to drive. The district court found that the lower court (1) had not acted beyond its jurisdiction and (2) did not depart from the essential requirements of law, citing to Haines City Community Development v. Heggs, 658 So. 2d 523, 525 (Fla. 1995).

The defendant was arrested and charged with DUI. The state presented a motion in limine to preclude the defendant from testifying or eliciting testimony regarding his intention to drive. The trial court denied the state's motion. The state filed an appeal with the circuit court, acting in its appellate capacity. The circuit court reversed the trial court's denial of the state's motion, and the defendant filed his writ of certiorari.

The district court affirmed the circuit court's ruling that the state could preclude the defendant from testifying or eliciting testimony as to his intent to drive his car the night he was arrested for DUI. The district court noted that the intent to operate a motor

vehicle is not an element of DUI nor is the lack of intent a recognizable defense to DUI. http://opinions.1dca.org/written/opinions2011/12-02-2011/11-1035.pdf

Zuehlke v. State, 72 So. 3d 312 (Fla. 2d DCA 2011).

The district court reversed the trial court's summary denial of his motion for jail credit filed pursuant to rule 3.800(a), Florida Rules of Criminal Procedure.

Defendant was arrested for DUI and released on bond on June 21, 2009. On September 2, 2009, he was arrested again for DUI and also for driving while license suspended. He remained in the county jail until he was sentenced on June 21, 2010. Defendant claimed that he was entitled to 296 days of jail credit because the trial court incorrectly used December 8, 2009, the day a capias issued in case number 2009-CF-017259, as his arrest date when awarding jail credit. He asserted that his actual arrest date was September 2, 2009. The postconviction court denied the claim. The district court agreed with defendant that the postconviction court erred in denying his motion for additional jail credit. The district court stated that defendant was entitled to credit from September 3, 2009, until sentencing on June 21, 2010. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/October/October%2021,%202011/2D11-277.pdf

Wheeler v. State, 87 So. 3d 5 (Fla. 5th DCA 2012).

The district court affirmed defendant's judgment and sentence after a jury found him guilty of DUI manslaughter. Among other claims, defendant contended that, during suppression hearings, trial courts must weigh evidence based on the totality of the circumstances. Defendant claimed error in the court's verbal ruling, in which the court stated that the standard for reviewing the suppression motion was:

> *The trial court must view the evidence in a light most favorable to the prosecution unless the testimony is implausible or incredible as a matter of law.*

In so ruling, the trial court cited State v. Johnson, 695 So. 2d 771 (Fla. 5th DCA 1997). To support his claim, defendant cited Lewis v. State, 979 So. 2d 1197, 1200 (Fla. 4th DCA 2008). The district court agreed that Lewis properly set forth the standard for trial courts ruling on motions to suppress. The district court receded from Johnson.

The district court rejected defendant's claim that the trial court's error constituted reversible error because defendant raised no objection regarding the trial court's reliance on Johnson and defendant did not raise a claim of fundamental error relating to this issue. http://www.5dca.org/Opinions/Opin2011/101711/5D10-2608.op.pdf

II. Criminal Traffic Offenses

Kline v. State, 78 So. 3d 641 (Fla. 5th DCA 2011).

The district court remanded the case to the trial court for correction of the written judgments. The defendant entered a plea on three separate matters: felony fleeing and attempting to elude, dealing in stolen property, and violation of probation. The oral pronouncement of sentence in open court differed from the written judgments making it an illegal sentence. Therefore, the case was remanded to correct the written judgments.
http://www.5dca.org/Opinions/Opin2011/122611/5D11-3537.op.pdf

Salter v. State, 77 So. 3d 760 (Fla. 4th DCA 2011).

The district court, utilizing a *de novo* standard of review, affirmed the trial court's denial of defendant's motion for acquittal on Count I of the information charging the defendant with robbery with a firearm. The evidence placed the defendant at the scene of the robbery and included a store video showing him entering the store, making a purchase, and leaving just before the robbery. Additional evidence included the defendant's "varying stories," his confession to driving the getaway vehicle, and physical evidence of the robbery confiscated from the vehicle in which the defendant was found during an independent vehicle stop.

The district court found no abuse of discretion by the trial court for the trial court's refusal to give a special jury instruction as to circumstantial evidence where the defendant failed to make any showing of abuse.

However, the district court remanded the case for resentencing before a new judge due to comments made by the trial judge at sentencing. The comments seemed to indicate that the trial judge would not consider youthful offender sentencing of the defendant based upon the defendant's exercise of his constitutional right to a jury trial. Therefore, the new judge was to determine whether youthful offender sentencing was appropriate.
http://www.4dca.org/opinions/Dec%202011/12-07-11/4D10-1397.op.pdf

Seabrooks v. State, 75 So. 3d 370 (Fla. 4th DCA 2011).

The defendant was convicted of carjacking in 2002 and claimed he found new evidence based on a newly-discovered witness he came across in prison whose testimony would possibly negate the carjacking charge. The defendant filed a 3.850 motion for new trial, which the trial court denied. The district court found the trial court's order to be without prejudice and allowed the defendant 60 days from the date of the district court's opinion to file a sufficient motion for a new trial before the trial judge. A cautionary note by the district court against bringing false information before the court was also provided.
http://www.4dca.org/opinions/Nov%202011/11-23-11/4D10-3363.op.pdf

Pinkney v. State, 74 So. 3d 572 (Fla. 2d DCA 2011).

The defendant was convicted of (1) aggravated assault on a law enforcement officer, (2) resisting or obstructing an officer without violence, and (3) fleeing or attempting to elude a law enforcement officer at a high speed or with wanton disregard for the safety of persons or property. The defendant only appealed his conviction for the aggravated assault charge on a law enforcement officer involving the use of the defendant's vehicle.

The district court affirmed the defendant's conviction for aggravated assault on a law enforcement officer, discussing the crime of assault and the need for "proof of an intentional threat that creates a fear of imminent violence," distinguishing from acts done accidently or negligently. The district court distinguished a similar case, Swift v. State, 973 So. 2d 1196 (Fla. 2d DCA 2008), on its facts. Additionally, the district court receded from a position it previously held in State v. Shorette, 404 So. 2d 816 (Fla. 2d DCA 1981) requiring the state to prove the intent of the defendant in committing the crime of aggravated assault.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/November/November%2018,%202011/2D07-6022.pdf

Wilson v. State, 76 So. 3d 332 (Fla. 2d DCA 2011).

The district court reversed the postconviction court's denial of the defendant's motion for a new trial and remanded the case to the trial court for resentencing, striking the prison release reoffender (PRR) enhancement.

The defendant was convicted of (1) burglary of a conveyance with assault or battery, (2) carjacking, and (3) felony fleeing or attempting to elude, receiving the PRR sentencing enhancement on counts (1) and (2). The district court noted that at the time the defendant committed the crimes in 2001, burglary of a conveyance was not a "specifically enumerated offense" under the PRR statute. In addition, the modifier "with assault or battery" did not bring the matter with the statutory qualification for PRR under the catch-all provision.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/November/November%2016,%202011/2D10-5810.pdf

Lott v. State, 74 So. 3d 556 (Fla. 5th DCA 2011).

The district court affirmed all the defendant's sentences and convictions, disagreeing with the defendant's argument that his convictions for driving while license suspended (DWLS) causing serious bodily injury and reckless driving (RD) causing serious injury constituted double jeopardy because they arose out of the same transaction and involved the same victim.

After concluding that there was no clear statement of legislative intent regarding the authorization or prohibition of punishment for the above two crimes arising out of the

same transaction, the district court reviewed the test for double jeopardy set forth in Blockburger v. United States, 284 U.S. 299 (1932). The district court also discussed the application of Valdes v. State, 3 So. 3d 1067, 1069 (Fla. 2009) to this case. Based on its analysis, the district court affirmed all convictions and sentences. http://www.5dca.org/Opinions/Opin2011/110711/5D10-1260%20op.pdf

Jones v. State, 74 So. 3d 149 (Fla. 2d DCA 2011).

The district court reversed the defendant's conviction for felony fleeing and attempting to elude. The conviction was reversed because the initial trial judge failed to follow the procedural steps required and make a preliminary inquiry regarding the defendant's requests on the morning of trial to dismiss his court-appointed attorney. The judge denied the defendant's request without sufficient inquiry. The jury was then selected and sworn.

The trial was heard by a different judge the following day, who allowed a new attorney to represent the defendant but did not allow a continuance for the new defense attorney to prepare, although the trial judge did allow some time for the new defense attorney and the defendant to discuss the case. During the trial, the defendant absented himself from the proceedings and did not return, even for sentencing. By the time the defendant was arrested, the defendant was found to be incompetent. Regardless, without the preliminary inquiry regarding the defendant's requests to dismiss his attorney, the conviction would not stand, and the case was remanded for a new trial. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/November/November%2009,%202011/2D08-3392.pdf

Sowerby v. State, 73 So. 3d 329 (Fla. 5th DCA 2011).

The district court reversed an order denying defendant's motion to suppress all evidence and statements made during a traffic stop, concluding that the vehicle stop was unjustified because the license plate was lawfully mounted and within the statutory limits. The district court review was *de novo* because the appeal involved the application of law to the facts.

The arresting officer observed defendant driving a car with a license plate which the officer believed was improperly mounted. After approaching the vehicle and observing that the license plate was a dealer plate and lawfully mounted, the district court found that the officer should have terminated his stop and detention of the defendant. However, the officer approached the defendant and learned the defendant was driving on a permanently revoked driver's license. The defendant was arrested and charged with driving while license was permanently suspended.

Upon denial of his motion to suppress, the defendant was convicted and sentenced, and filed this appeal on the trial court's denial of his motion to suppress. http://www.5dca.org/Opinions/Opin2011/102411/5D11-1132.op.pdf

III. Arrest, Search and Seizure

D.O. v. State, 77 So. 3d 787 (Fla. 3d DCA 2011).

The district court affirmed the trial court's denial of a motion to suppress, without opinion. However, Judge Emas wrote a "specially concurring" opinion setting forth the primary issue and his reasons for concurring. The issue presented was "upon lawfully taking a juvenile truant into custody pursuant to its (sic) duty under section 984.13, Florida Statutes, may a police officer conduct a limited pat-down search for weapons, even in the absence of reasonable suspicion to believe the juvenile is armed, before placing the juvenile in a police vehicle for the purpose of delivering the juvenile without unreasonable delay to the appropriate school system site?"

In this case, a police officer observed a group of juveniles on a school day during school hours walking down the street. The officer made contact with the juveniles, found out that one of the juveniles was of school age, and intended to transport the juvenile to school in the officer's patrol car. Prior to placing the juvenile into the patrol car, the officer patted the juvenile down for safety reasons, felt a "bulge" that the juvenile stated was a firearm, removed it, and arrested the juvenile for carrying a concealed firearm.

Judge Emas opined that while truancy is not a crime and the juvenile was not (initially) being arrested, the officer was acting as a "community caretaker" and by his actions, was upholding the compulsory education laws of the state of Florida in transporting the school-age juvenile to school in the officer's patrol car. "Therefore, the first rationale for justifying searches incident to arrest—officer safety—is fully applicable to our case." Judge Emas relied on the analysis in Terry v. Ohio, 392 U.S. 1 (1968) to further discuss the reasonableness of the officer's actions in this matter. http://www.3dca.flcourts.org/Opinions/3D10-3001.pdf

Reinlein v. State, 75 So. 3d 853 (Fla. 2d DCA 2011).

The district court, in a *de novo* review, reversed the trial court denial of defendant's motion for judgment of acquittal. The district court agreed with the defendant that his admissions to having purchased cocaine, which he then swallowed as he was being pulled over for a traffic violation, were not admissible to prove the crime of tampering with evidence without the state first proving the corpus delicti of the crime.

The district court acknowledged a supreme court ruling in the State v. Jennings, 666 So. 2d 131, 133 (Fla. 1995), that "swallowing an object clearly constitutes altering, destroying, concealing, or removing a 'thing' within the meaning of section 918.13." However, the district court noted that in this case, the facts differentiated themselves including the lack of any observation of narcotics or cash being exchanged between the defendant and a male in an alley who had waved over and leaned into the defendant's truck. When the defendant's truck was later pulled over several blocks away for a traffic infraction, the defendant put something into his mouth. After being mirandized, the

defendant admitted to having just purchased cocaine and then swallowed it as the officer approached.

Absent the defendant's admissions, the state did not prove that the defendant swallowed an object he knew was the focus of a police investigation. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/December/December%2016,%202011/2D10-2705.pdf

State v. Carry, 75 So. 3d 803 (Fla. 5th DCA 2011).

The district court, under a *de novo* review, reversed the trial court's ruling on a motion to dismiss the state's information charging the defendant with possession of more than 20 grams of cannabis. In order to defeat the dismissal of a criminal charge, the defendant must show either (1) that the undisputed facts do not "establish a prima facie case, or (2) establish a valid defense."

The district court pointed to several pieces of evidence that together would support the jury's finding of guilt regarding the defendant's constructive possession of the cannabis found in his trunk, including: the defendant driving the vehicle, owning the firearms in the vehicle, possessing the key to the trunk of the vehicle, and the "strong odor of cannabis" coming from the rear of the vehicle. Therefore, the district court reversed the dismissal of the case and remanded it to the trial court. http://www.5dca.org/Opinions/Opin2011/112811/5D10-3838.op.pdf

State v. Blaylock, 76 So. 3d 13 (Fla. 4th DCA 2011).

The district court reversed the trial court order granting a motion to suppress. The trial court ruled that the police officer did not have reasonable suspicion to stop the defendant.

The police officer was part of a special enforcement team targeting narcotics. He observed the defendant in a parked car inhaling smoke in what appeared to be a "makeshift crack pipe." Based on his observations, the officer seized the suspected drug paraphernalia, field tested it for cocaine, and ultimately arrested the defendant for possession of cocaine.

The district court reiterated the three levels of police-citizen encounters noting that this encounter fell within the third level of an arrest based upon probable cause. The district court cited to League v. State, 778 So. 2d 1086, 1087 (Fla. 4th DCA 2001), finding that a police officer's knowledge coupled with the totality of the circumstances may establish probable cause that a crime is being committed in the officer's presence. http://www.4dca.org/opinions/Nov%202011/11-16-11/4D11-1754.op.pdf

Jackson v. State, 74 So. 3d 563 (Fla. 4th DCA 2011).

The district court reversed defendant's conviction and sentence for conspiracy to traffic in oxycodone, finding that the state failed to establish any evidence of an agreement, express or implied, between defendant and the co-conspirators to traffic in oxycodone.

At trial the state proved that the defendant was present during a pre-arranged, undercover drug transaction with the co-conspirators and may have acted as a lookout. But the district court found this was not sufficient to establish an implied agreement with the co-conspirators to traffic in oxycodone.
http://www.4dca.org/opinions/Nov%202011/11-16-11/4D10-2764.op.pdf

Reynolds v. State, 74 So. 3d 541 (Fla. 4th DCA 2011).

The district court, applying a *de novo* standard of review, affirmed the trial court denial of defendant's motion for judgment of acquittal. The general rule is that "an appellate court will not reverse a conviction that is supported by competent, substantial evidence," citing Donaldson v. State, 722 So. 2d 177 (Fla. 1998); Terry v. State, 668 So. 2d 954 (Fla. 1996). However, the court reversed and remanded the case for a new trial based on reversible error of the trial court in allowing a police officer to testify "regarding general criminal behavior as evidence of the defendant's guilt."

Officers observed a suspected drug transaction between the defendant and co-defendant Valente after observing the defendant leaning into a car occupied by Valente in a known drug area. The defendant and co-defendant were arrested, and cocaine was found in Valente's possession. Valente later testified he bought cocaine from a person he could not identify, but whom officers identified as the defendant.

The error in this case occurred when one of the officers was allowed to testify during defendant's trial that the action of defendant approaching and leaning into co-defendant Valente's car was consistent with someone engaging in a drug transaction. Citing to Baskin v. State, 732 So. 2d 1179, 1180 (Fla. 1st DCA 1999), the district court found that a conviction must be based on evidence against the accused, "not on the characteristics or general criminal behavior of certain classes of criminals in general." A similar 4th DCA case relied upon by the defendant, i.e., Williams v. State, 976 So. 2d 1210 (Fla. 4th DCA 2008), was distinguished by the district court.
http://www.4dca.org/opinions/Nov%202011/11-09-11/4D10-72.op.pdf

State v. Price, 74 So. 3d 528 (Fla. 2d DCA 2011).

The district court reversed an order granting defendant's motion to suppress, concluding that his car was lawfully stopped even though the officer making the stop was outside his jurisdiction.

Defendant was charged with possession of a firearm by a convicted felon,

possession of ammunition by a convicted felon, and DUI. The officer making the stop, from the North Port Police Department, testified he had been working at the Sarasota County Jail when he saw defendant's car on his way home. The officer was wearing his uniform and was driving an unmarked patrol car. He noticed defendant's car on a ramp for I-75 making a wide turn, drifting to the left. The car sped up to 80 mph, then began to slow down, speed up, and slow down. When lanes narrowed, defendant changed lanes in front of a semi-truck, causing the truck driver to take evasive action. Defendant's vehicle swerved and came within a foot of striking a bridge. Since no highway patrol officer or sheriff's deputy was available, the officer decided to stop the car to prevent an accident. The car was stopped about five miles from North Port.

The district court stated that the trial court misapplied the "under color of office" doctrine, noting that in Phoenix v. State, 455 So. 2d 1024, 1025 (Fla. 1984), the supreme court held that a law enforcement officer has the same ability to make an arrest as does a private citizen, but officers outside their jurisdiction do not have power of arrest superior to that of private citizens. The "under color of office" doctrine pertains "only to prevent law enforcement officials from using the powers of their office to observe unlawful activity or gain access to evidence not available to a private citizen." *Id*.

The district court stated that activity observed by the officer (defendant's driving) could be observed by any private citizen on the interstate. Thus, the "under color of office" doctrine did not apply. The officer could make a citizen's stop using the patrol car's lights and he could properly detain Price while wearing his police uniform, as neither of these actions violated the "color of office" doctrine.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/October/October%2021,%202011/2D11-1646.pdf

Cox v. State, 75 So. 3d 325 (Fla. 1st DCA 2011).

The district court affirmed defendant's convictions and sentences stating that evidence supported the trial court's order denying his motion to suppress.

While executing a valid arrest warrant for defendant's 2006 offenses, police stopped defendant's truck and read him his rights. Defendant admitted he had Dilaudid in his gym bag. Dilaudid is a Schedule II controlled substance. A search of the gym bag disclosed drug paraphernalia and a bottle containing Dilaudid, on which the state based new charges. Because defendant admitted the presence of contraband in the bag inside his truck, the warrantless search was proper and no basis existed to suppress the fruits of the search. The trial court correctly denied the motion to suppress, accepted the valid plea, and sentenced defendant for the 2006 crimes as well as new offenses.
http://opinions.1dca.org/written/opinions2011/10-17-2011/10-2104.pdf

Meme v. State, 75 So. 3d 254 (Fla. 4th DCA 2011).

The district court affirmed defendant's conviction for possession of cocaine.

Defendant argued that the trial court erred in failing to grant a motion for judgment of acquittal, because the state presented insufficient proof that defendant had actual or constructive possession of cocaine.

A police officer observed a vehicle with an expired license tag. He activated his lights and had a clear view of the car's interior. He observed the driver bend down and toward the right side of the floorboard. The driver stopped the vehicle and the officer approached, smelling marijuana. Defendant (the driver) appeared nervous and sweating and uttered statements such as "I'm going to jail."

The officer went back to his vehicle to write a citation for driving with an expired tag. When he re-approached, he asked to search based upon the smell of marijuana, and defendant consented. The officer located a tube containing cocaine under the seat in the same area where the officer had observed defendant bend down before the stop. The cylinder was under the seat. When the officer placed defendant under arrest, defendant continued to make statements, such as "I'm going to jail. My life is over."

The trial court found that the state had proved constructive possession of cocaine by defendant. Defendant was in close proximity to the tube and prior to the stop had reached in the area where the cocaine was located.

The district court stated that, in this circumstantial evidence case, the state was not required to rebut every possible variation of events that could be inferred from the evidence, but only to introduce competent evidence inconsistent with defendant's theory. The district court concluded that the state presented sufficient evidence to withstand the motion for judgment of acquittal. The circumstantial evidence was inconsistent with defendant's hypothesis of innocence that he did not know that cocaine was in the vehicle. The district court noted that, although the court mistakenly stated that there were only two passengers in the vehicle, the motion for judgment of acquittal was still correctly denied. The totality of evidence was sufficient to prove possession by defendant. http://www.4dca.org/opinions/Oct%202011/10-12-11/4D08-3594.op.pdf

State v. Gardner, Jr., 72 So. 3d 218 (Fla. 2d DCA 2011).

The district court reversed the trial court's order granting defendant's motion to suppress cocaine found in his car, concluding that the trial court erred in granting the motion to suppress because there was probable cause to search the car.

Defendant was charged with resisting arrest without violence and possession of cocaine with intent to sell. A detective met with the victim who stated that at about 4 p.m. on that day, defendant and another man surrounded him, and the other suspect pointed a gun at him. Although the victim tried to knock the gun away, it fired and the bullet hit the ground. Both defendant and the shooter got into a red Chrysler and left the area. Defendant, with whom the detective was familiar, drove the getaway car, and the victim did not state that the shooter discarded the gun before getting into defendant's car.

Another person in the area heard the gunshot, saw defendant in the area, and saw him get in his car and leave. When the detective was leaving the victim's home about two hours later, he saw the red Chrysler and followed it. When the car stopped, defendant was the only person in the car and was the registered owner. The detective told defendant he was going to be arrested for attempted murder. Defendant resisted arrest.

After police officers were able to place defendant under arrest, they had a K-9 walk around his car. The dog alerted to drugs and, although officers searched the passenger area of the car, they could not search the locked trunk. The car was placed in a secure area at the police department, and the detective searched the car the following morning and found cocaine in a cigar tube in the pocket of the driver's side door.

The district court concluded the trial court mistakenly believed that even when probable cause exists, exigent circumstances are required before police can search a vehicle. Thus, the issue was whether police had probable cause to search defendant's car, irrespective of the fact that the search was at the police station.

The district court agreed with the trial court that the K-9 alert did not provide probable cause to search, because the state did not meet the requirements outlined in Harris v. State, 71 So. 3d 756 (Fla. 2011). However, the district court concluded that regardless of the K-9 alert, police had probable cause to search the car based on the attempted shooting that occurred two hours earlier, for evidence related to the shooting. Even though the person who carried the gun was not in the car when it was stopped, according to the victim, defendant was working with the shooter during the incident and both men left the scene in defendant's car. The district court reversed the order granting the motion to suppress, holding that police could search the car because there was probable cause to believe evidence relating to the shooting would be in the car. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/October/October%2005,%202011/2D10-1776.pdf

Gizaw v. State, 71 So. 3d 214 (Fla. 2d DCA 2011).

The district court reversed defendant's convictions for possession of a conveyance used for trafficking, sale, or manufacturing of controlled substances and possession of drug paraphernalia, holding that the state failed to establish defendant's knowledge of the presence of cannabis or her dominion and control over a suitcase containing cannabis.

A deputy pulled over a Toyota Corolla for speeding. Defendant, the driver, produced her driver's license. The passenger produced identification and a records check showed he was on probation for drug offenses. The deputy told defendant he had information that the passenger was on probation for drug-related offenses. Defendant gave the deputy permission to search, which he did. He detected a faint odor of raw cannabis, but found no drugs. A second deputy searched the trunk, where he detected a faint odor of raw cannabis which became strong upon opening the trunk. Inside the trunk he found a black suitcase containing two bundles of cannabis wrapped in duct tape. The suitcase also contained men's jeans. No fingerprints were found, and nothing belonging

to defendant was in the suitcase. The passenger admitted he had given a false identification, admitted his real name, and said he was defendant's boyfriend. Defendant and her passenger were arrested for trafficking in cannabis.

Defendant insisted she did not know about the cannabis in the suitcase. She said she and the passenger were returning from Miami after having driven there to visit the passenger's grandmother. Upon arrest, defendant had $939 in cash not bundled in the manner commonly used by drug dealers. The detective acknowledged that defendant may have told him that the money was for tuition at community college. The passenger, who refused to speak to detectives, had $640 in cash and a razor knife on his person. Defendant stated she had never seen the suitcase. The passenger kept the car keys while they were in Miami. Defendant claimed she did not smell anything in the car.

The jury returned a verdict of guilty on each count. The trial court sentenced defendant to forty-two months and three days in prison with a three-year minimum mandatory on count one. On count two, the court imposed a concurrent sentence of forty-two months and three days. The court sentenced defendant to time served on count three.

The district court concluded that the state did not present independent proof of defendant's knowledge or dominion and control over cannabis found in the car. Although the car was defendant's, the passenger had the keys and in Miami. The district court stated that no evidence tied defendant's cash to drug purchases or sales, and no evidence refuted her testimony that the money was for her tuition. The district court held that the state failed to establish that defendant had knowledge of the presence of the cannabis or dominion and control over the suitcase containing the cannabis.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/June/June%2015,%202011/2D10-428.pdf

[On October 5, 2011, the district court granted in part and denied in part the state/appellee's request for rehearing. The substituted opinion clarified the facts contained in the record, but the result and analysis were unchanged.]
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/October/October%2005,%202011/2D10-428rh.pdf]

IV. Torts/Accident Cases

City of Tampa v. Companioni, Jr., 74 So. 3d 585 (Fla. 2d DCA 2011).

The district court in the current case [following the supreme court's ruling in Companioni v. City of Tampa, 51 So. 3d 452 (Fla. 2010), to quash the Second District Court's ruling in City of Tampa v. Companioni, 26 So. 3d 598 (Fla. 2d DCA 2009)] affirmed the trial court's order denying defendant's motion for new trial.

A crash occurred in 1996 between plaintiff's (Companioni) motorcycle and the defendant's (City of Tampa) water truck resulting in a substantial jury verdict for the plaintiff. The following cites track the long legal history of this case:

Companioni v. City of Tampa, 51 So. 3d 452 (Fla. 2010)
Companioni v. City of Tampa, 23 So. 3d 711 (Fla. 2010)
City of Tampa v. Companioni, 26 So. 3d 598 (Fla. 2d DCA 2009)
Companioni v. City of Tampa, 958 So. 2d 404 (Fla. 2d DCA 2007)

The district court analyzed the case following the dictates of the supreme court decision in Companioni, 51 So. 3d 452 (Fla. 2010). Although the defendant objected to the misconduct of opposing counsel, which objections were sustained, the defendant failed to preserve the issue for the purposes of a motion for new trial. Therefore, the fundamental error analysis set forth in Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000), must be applied to the conduct in order to determine whether the trial court abused its discretion in denying the motion for a new trial. The district court found there was no abuse of discretion by the trial court in denying the motion for new trial nor was there any abuse of discretion in the trial court's evidence assessment or in the award for injuries.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/November/November%2023,%202011/2D08-921.pdf

V. Drivers' Licenses

Winkel v. Department of Highway Safety and Motor Vehicles, 74 So. 3d 585 (Fla. 5th DCA 2011).

The district court granted defendant's petition for writ of certiorari and quashed the circuit court order dismissing defendant's appeal of the suspension of his driver's license for refusing to submit to a breath test. The district court found that the defendant's failure to comply with a court order to show cause did not justify dismissal and therefore the circuit court action "departed from the essential requirements of the law." See Krebs v. State, 588 So. 2d 38 (Fla. 5th DCA 1991).
http://www.5dca.org/Opinions/Opin2011/111411/5D11-1876.op.pdf

Department of Highway Safety and Motor Vehicles v. Ivey, 73 So. 3d 877 (Fla. 5th DCA 2011).

Defendant petitioned the circuit court to quash an order of the Department of Highway Safety and Motor Vehicles (DHSMV) suspending defendant's driving privileges for failure to lawfully submit to a breath test after she was arrested for DUI. The circuit court reinstated defendant's driving privileges on the basis that the law enforcement officer did not have probable cause or reasonable suspicion that defendant was impaired or in physical control of a vehicle while impaired.

The sole question reviewed by the district court was whether the correct law was applied to the facts by the circuit court.

A witness called 9-1-1 stating that another witness was at a convenience store observing that the defendant was impaired and was trying to drive away from the convenience store. The witnesses provided the dispatcher with a description of the location and defendant as well as the make, color, and tag number of defendant's vehicle. This information was imputed by dispatch to the law enforcement officers who arrived on the scene and observed the defendant as described. The defendant was ultimately given field sobriety tests which she failed. The defendant later refused to complete a breath test, and her driving privileges were suspended.

The district court reversed the decision of the circuit court stating that the circuit court did not apply the correct law. Only a founded suspicion is required to make a DUI traffic stop. The law enforcement officers had founded suspicion based on information they received from dispatch. The cases relied on by the circuit court involved anonymous informants. The district court noted that the witnesses in this case were citizen-informants, able to be located later for statements, whose information was presumed reliable because they were not motivated "by pecuniary gain but by the desire to further justice," citing to State v. Evans, 692 So. 2d 216 (Fla. 4th DCA 1997). http://www.5dca.org/Opinions/Opin2011/110711/filings110711.html

Florida Department of Highway Safety and Motor Vehicles v. Hernandez, 74 So. 3d 1070 (Fla. 2011).

Florida Department of Highway Safety and Motor Vehicles v. McLaughlin, 74 So. 3d 1070 (Fla. 2011).

The above two cases both involved suspension of a driver's license under section 322.2615, Florida Statutes, and the limitation of a DHSMV hearing officer's scope of review. The First District Court and the Second District Court reached opposite conclusions through their separate analyses. The supreme court rephrased the certified questions presented and answered the following two related questions under a *de novo* review:

First, "can the DHSMV suspend a driver's license under section 322.2615, Florida Statutes, for refusal to submit to a breath test if the refusal is not incident to a lawful arrest?" The supreme court, in a 4-3 decision, ruled that the DHSMV cannot suspend a driver's license for refusal to take the breath test if the refusal is not incident to a lawful arrest. The supreme court relied on the language of section 322.1625, Florida Statutes, calling for the administration of a breath test only if it is incident to a lawful arrest, (emphasis added), and the implied consent law set forth in section 316.1932(1)(a)1.a., Florida Statutes, referring to any lawful test of his or her breath (emphasis added).

Second, "[i]s the issue of whether the refusal was incident to a lawful arrest within the allowable scope of review of a DHSMV hearing officer in a proceeding to determine if sufficient cause exists to sustain the suspension of a driver's license under section 322.2615, Florida Statutes, for refusal to submit to a breath test?" The supreme court, in a 4-3 decision, ruled that a driver must be able to challenge whether the refusal

was incident to a lawful arrest, requiring the hearing officer to make the determination of whether the arrest was lawful.
http://www.floridasupremecourt.org/decisions/2011/sc08-2330.pdf