FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

April-June 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.]

Driving Under the Influence (DUI)

State v. Castaneda, __ So. 3d __, (Fla. 4th DCA 2011) 2011 WL 2462767, 4D10-1591.

The district court reversed an order granting defendant's motion to suppress results of his field sobriety exercises. The district court agreed with the state's argument that officers had reasonable suspicion to detain defendant.

Defendant was charged with one count of possession of cocaine and one count of driving under the influence (DUI). Defendant was pulled over for speeding after an officer followed defendant for four blocks and clocked him traveling 60 mph in a 40 mph zone. When the officer approached defendant, he smelled the odor of an alcoholic beverage on defendant's breath and noticed defendant had bloodshot eyes.

Defendant told the investigating officer he had not been drinking. The officer asked defendant to complete sobriety exercises. A trial court suppressed the results, concluding that the officer did not have reasonable suspicion to detain defendant, reasoning that defendant did not exhibit signs of impairment such as staggering.

A reasonable suspicion "'has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience.'" Origi v. State, 912 So. 2d 69, 71 (Fla. 4th DCA 2005). The district court stated that, here, the officer made the same observations that the Fourth District stated in Origi constituted reasonable suspicion to detain a driver for a DUI investigation—speeding, the odor of an alcoholic beverage on defendant's breath, and observation that defendant's eyes were bloodshot and watery. Consistent with Origi, the district court held that these observations provided sufficient reasonable suspicion to detain defendant for the purpose of conducting a DUI investigation.
http://www.4dca.org/opinions/June%202011/06-22-11/4D10-1591.op.pdf

State v. Geiss, __ So. 3d __ (Fla. 5th DCA 2011), 2011 WL 2097694, 36 Fla. L. Weekly D1132, 5D10-3292.

The district court reversed the trial court's order suppressing blood test results in a felony DUI case.

After defendant refused a breath test, police obtained a search warrant to draw a sample of his blood for testing. The trial court suppressed the blood results, concluding that obtaining a blood sample by search warrant violated: (1) defendant's constitutional right to privacy, (2) the implied consent statute, and (3) the search warrant statute.

The district court disagreed with the first two conclusions but agreed that the warrant should not have been issued under Florida's search warrant statute. The district court also found that the test results should not have been suppressed given good faith reliance by police on a judge's legal determination that the search was legally authorized. U.S. v. Leon, 468 U.S. 897 (1984).

Defendant was stopped for failing to maintain a single lane. He refused a request to perform field sobriety exercises. After being arrested for DUI and informed of Florida's implied consent law, he also refused to take a breath test. Police obtained a search warrant to take a sample of his blood. The affidavit sought authority to take him to a hospital to collect two blood samples. The affidavit described defendant's prior history as follows: "A computer check of Geiss's license status revealed four suspensions dating from 2006, including a 5-year revocation from 2008 for a DUI conviction with a BAC of [.]249. The computer check also showed Geiss had 1 prior DUI conviction from 2008 and a DUI Personal injury arrest from 2005 with a conviction of Leaving the Scene and Hit and Run Property Damage."

The affidavit alleged the pertinent facts of the arrest and concluded: "Your undersigned affiant states he has probable cause to believe that the blood samples being sought contain Alcohol or Controlled Substances and is property concealed in the body of the driver, Gregory G. Geiss, causing impairment, in violation of sections 316.193(1)(a) or 316.193(1)(b), Florida State Statutes, DUI 2nd."

A county judge issued the search warrant, noting that police were requesting blood samples "for the purpose of obtaining property that has been used as a means to commit the crime of Driving Under the Influence." Police obtained a blood sample from defendant. He was conscious throughout the process. There was no accident, injury, or death involved in the traffic incident.

Defendant was charged with felony DUI based on two DUI convictions in 2005 and 2008, and with driving while license suspended. He filed a motion to suppress the blood evidence, asserting it was illegally seized in violation of constitutional rights to privacy and against unreasonable search and seizure, as well as Florida's implied consent law. The trial court suppressed the blood results. The court concluded that obtaining

defendant's blood by search warrant violated his right to privacy, the implied consent statute, and the search warrant statute.

The district court held that the trial court erred in concluding that the search warrant violated defendant's state constitutional right to privacy. The district court also held that the trial court erred in finding that the search violated Florida's implied consent statute, section 316.1932, Florida Statutes (2009), because the search was conducted pursuant to a warrant, and the implied consent law deals only with warrantless searches. The district court agreed with the trial court's conclusion that the blood draw was not authorized by the warrant statute, section 933.02, Florida Statutes, because blood is not "property" used as a "means to commit" a crime. The district court agreed with the trial court that blood cannot be drawn based upon probable cause that a suspect has committed misdemeanor DUI in light of the plain language of section 933.02, Florida Statutes.

The good faith exception holds that the exclusionary rule need not be applied when the officer conducting the search acted in objectively reasonable reliance on an invalid warrant. State v. Watt, 946 So. 2d 108, 110 (Fla. 5th DCA 2007) (citing Leon). The test for good faith is "whether a reasonably trained officer would have known that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 923 n.23. Applying the Leon good faith exception, the district court reversed and remanded, finding that the blood test results should not have been suppressed.
http://www.5dca.org/Opinions/Opin2011/052311/5D10-3292.op.pdf

Bonilla v. State, __So. 3d __ (Fla. 5th DCA 2011), 2011 WL 2269059, 36 Fla. L. Weekly D1238, 5D11-738.

The district court denied defendant's petition for writ of prohibition based upon an alleged violation of the speedy trial rule in a felony DUI case.

Defendant alleged he was charged, by notice to appear, with a misdemeanor DUI violation on July 17, 2010. The state subsequently nolle prosequied the misdemeanor charge. On October 25, 2010, the state filed a felony charge of DUI with serious bodily injury, and, by amended information filed on November 12, 2010, added the felony charge of leaving the scene of an accident with injury. The felony charges arose from the same criminal episode as the nolle prosequied misdemeanor charge.

On January 21, 2011, defendant filed a notice of expiration of speedy trial and motion for discharge. Defendant asserted that speedy trial had expired and that no recapture period was available because the misdemeanor charges had been nolle prosequied, relying on rule 3.191(o), Florida Rules of Criminal Procedure. The trial court agreed with defendant regarding the leaving the scene charge filed on November 12, 2010, but denied his motion regarding the DUI with serious bodily injury charge.

The trial court reasoned that the DUI with serious bodily injury charge was filed within the misdemeanor speedy trial period (to which the trial judge added the recapture

period, which he included in his computation), but that the leaving the scene charge was untimely because it was outside this time period.

The district court held that, although the trial judge's reasoning was in error, he reached the right result on the charge that is the subject of this petition. The district court noted that, in fairness to the trial judge, the parties did not present dispositive authority on this point. In Nesworthy v. State, 648 So. 2d 259 (Fla. 5th DCA 1994), the district court held that a felony DUI with serious bodily injury charge may be filed within the felony speedy trial period, even though a misdemeanor DUI charge arising from the same criminal episode had been previously nolle prosequied.

The district court rejected the same contention made by defendant -- that rule 3.191(o) vitiated the recapture period. The district court noted that its decision in Nesworthy was expressly approved in State v. Woodruff, 676 So. 2d 975, 978 (Fla. 1996). Here, both felony charges were filed within 175 days of arrest. When defendant filed the notice of expiration of speedy trial, the state was entitled to the benefit of the recapture window. Because the trial court held a timely hearing on the notice and scheduled trial within the recapture period, defendant was not entitled to discharge. http://www.5dca.org/Opinions/Opin2011/060611/5D11-738.op.pdf

Shively v. State, __ So. 3d __ (Fla. 2d DCA 2011), 2011 WL 2029622, 36 Fla. L. Weekly D1111, 2D09-3149.

The district court affirmed defendant's judgment and sentence of probation, finding no error in the trial court's denial of defendant's motion to suppress evidence of field sobriety tests after defendant pleaded no contest to DUI, driving while license suspended, and cocaine possession. Defendant reserved the right to appeal the denial of his dispositive motion to suppress.

An off-duty sheriff's deputy was working as a security officer at a parking garage late at night. A garage employee called the officer to assist defendant, who was in his vehicle at the exit. The officer saw that defendant was having trouble putting a parking token into the machine to raise the gate. The officer suspected that defendant was impaired. He appeared confused, his eyes were bloodshot, and his speech was slurred. Vehicles coming down the garage exit ramp were backing up behind his vehicle.

The officer diverted other vehicles and directed defendant to back out of the exit lane and pull over against the garage wall where he would not block traffic. Defendant did so. He got out of his vehicle, staggered, and leaned against the vehicle. The officer smelled alcohol. The officer escorted defendant to the bottom of the ramp and requested assistance from a police DUI unit. After conducting field sobriety exercises, the police arrested defendant for DUI and driving with a suspended license.

They found cocaine in his pocket during a search incident to arrest. Defendant argued that the officer lacked reasonable suspicion to direct him to back out of the exit lane and pull over to the wall. He contended he was illegally seized because he did not

feel free to leave. The district court agreed with the trial court that the officer did not seize defendant.

The district court observed that the incident occurred late at night when nearby entertainment venues were closing, there was a mass exodus of cars from the parking garage, and the officer was providing security. Defendant's inability to operate a token machine and leave the garage impeded the traffic flow. This, alone, was a valid basis for the officer to direct him to move his vehicle. The court held that the officer properly exercised a "community caretaking function." Defendant voluntarily exited his vehicle, staggered, and smelled of alcohol. These conditions precipitated his arrest. The district court held that, even if the officer's direction to defendant to move his vehicle was deemed an investigative stop, the officer's actions were lawful.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/May/May%2025,%202011/2D09-3149.pdf

Guardardo v. State, __ So. 3d __ (Fla. 4th DCA 2011), 2011 WL 1877812, 4D07-4422.

The district court reversed defendant's conviction for DUI manslaughter and Unlawful Blood Alcohol Level (UBAL)) and remanded for a new trial.

Defendant was involved in a three-vehicle crash. The two passengers in his car were killed. A trooper saw defendant in the driver's seat with injuries to his face; the other two occupants did not appear to be alive. Defendant was extracted from the car and taken to a hospital, where the trooper requested that blood samples be taken. A six-count information was filed charging defendant with two counts of DUI manslaughter; two counts of DUI manslaughter (UBAL); and two counts of DUI property damage.

Defendant filed a written plea of not guilty to the two counts of DUI manslaughter (UBAL). The state notified defendant that it sought to subpoena his medical records. Defendant objected, but the trial court granted the state authority to subpoena the medical records based on the state's compelling interest. Defendant filed an amended motion to suppress, arguing that the state's motion to subpoena the records was based solely on the results of the blood draw done at the request of Florida Highway Patrol (FHP).

At the hearing on the motion to suppress, the state stipulated that FHP did not have probable cause to take the legal blood. The state also admitted there was no information in the state's file that could have constituted independent probable cause at the time the medical blood subpoena was issued. The trial judge entered an order suppressing the legal blood draw and denying the suppression of the medical blood evidence, finding that the relevance of the medical blood evidence was obvious and that a compelling state interest existed to support its admission.

Defendant then entered a nolo contendere plea, reserving the right to appeal the denial of the dispositive motion to suppress. Defendant was sentenced to ten years' in

Florida State Prison, followed by five years' probation on each count, to be served concurrently.

On appeal, defendant argued that the trial court erred by failing to suppress the medical blood because the subpoena issued for the medical blood was based solely on the legal blood, which the state stipulated was unlawfully obtained. Defendant further argued that the state failed to establish the relevance of the medical blood because it failed to establish a nexus between the medical blood and the crash. The state argued that the lower court properly found that the medical blood was relevant because even if the medical blood evidence was initially released pursuant to a subpoena based solely on the unlawfully seized legal blood evidence, any error was harmless in that the other facts in the probable cause affidavit would have also justified the issuance of the subpoena. The state also argued that any crash plus a death always makes medical blood relevant.

The district court held that, aside from the unlawfully obtained legal blood evidence, the state failed to show a nexus between the medical records sought and the pending investigation. Instead, the state simply relied on the inadmissible legal blood to obtain the medical blood. The state did not rely on any lawful evidence which showed any nexus between defendant's medical blood and the traffic crash investigation, i.e., no police reports, arrest affidavits, or other documents were presented to the court.

The district court also stated that the state's theory, "a crash plus a death always makes medical blood relevant," was not the law and has been held to create only part of the basis to establish relevance. The district court stated that, although the state correctly contended it could rely upon the probable cause affidavit and argument to establish relevance, there was no evidence that the state actually relied on the probable cause affidavit at the hearing on defendant's objection to the issuance of the subpoena.

The district court reversed the trial court's order denying the suppression of the medical blood because the state failed to establish a nexus between the medical blood and the crash. The district court directed that, on remand, the state would not be precluded from again seeking medical records through a subpoena if it proffered evidence which demonstrated relevance of medical blood evidence, as the state's actions below did not rise to the level of bad faith.
http://www.4dca.org/opinions/May%202011/05-18-11/4D07-4422.op.pdf

State v. Fitzgerald, __ So. 3d __ (Fla. 2d DCA 2011), 2011 WL 1879427, 2D10-1689.

The district court reversed the trial court's dismissal of a felony DUI charge against defendant, concluding that the state may prove the charge with evidence that the defendant was physically in a vehicle with the capability to operate it, regardless of whether she was actually operating it at the time.

A police officer found defendant sitting, intoxicated, in the driver's seat of a parked car. Defendant readily produced the car keys upon the officer's request. She was charged with DUI, a third-degree felony pursuant to section 316.193(2)(b)(1), Florida

Statutes (2008), because she allegedly had two prior DUI convictions. The trial court granted her motion to dismiss.

The arresting officer testified that he saw a Pontiac stopped in an intersection around midnight. The officer testified that he saw "the [car] lights on pointing towards residential areas." The officer saw a pair of legs hanging out of an open passenger door. The officer approached, observing that the car's engine was not running. As he walked by the passenger side, the officer observed a male passenger's legs and saw that the passenger was breathing and that his hands were empty.

The officer then heard a voice say "I'm not driving" or "I wasn't driving." The voice came from the driver's side, and the officer then observed defendant sitting in the driver's seat. The officer testified that he saw the car keys in defendant's right hand. On cross-examination, the officer explained that he asked her for the keys and that defendant produced them in her right hand. His "assumption was that they were always in her right hand because [he] never saw them any other place." But he agreed that he did not know if the keys were in her hand the whole time or if they came from somewhere else.

The officer approached the driver's door, which was also open, and engaged defendant. He observed that her speech was slurred and that she smelled of alcohol. He conducted a DUI investigation and ultimately arrested Fitzgerald.

Section 316.193(1) makes it a crime for a person to be "driving or in actual physical control of a vehicle within this state" while under the influence of alcohol or drugs. Defendant was not driving the car, so the state proceeded on a theory of actual physical control. To prove this element, "the defendant must be physically in or on the vehicle and have the capability to operate the vehicle, regardless of whether [he] [she] is actually operating the vehicle at the time." Fla. Std. Jury Instr. (Crim.) 28.1.

Defendant was physically in the vehicle. The question is whether, as a matter of law, undisputed evidence fails to show she had the capability of operating the vehicle. In some cases, DUI convictions have turned on inferences from circumstantial evidence that defendants had driven motor vehicles to the locations at which they were arrested. Here, the circuit court was skeptical of that approach because there was a passenger present, leading to a possible inference that the passenger drove to the current location and then switched seats with Fitzgerald. The district court noted that a court should not grant a motion to dismiss "simply because it concludes that the case will not survive a motion for judgment of acquittal at trial." State v. Jaramillo, 951 So. 2d 97, 99 (Fla. 2d DCA 2007).

The district court found another problem with the circuit court's analysis. The circuit court's focus on whether the state could prove that defendant drove the car to the location of her encounter with the officer overlooked that the statute was just as concerned about the driver's ability to drive the car away from that location. The district court stated that the danger did exist, though it is less than a circumstance when an intoxicated person is actually driving a vehicle.

The district court stated there was a legitimate inference that defendant placed herself behind the wheel of the vehicle and could have at any time started the automobile and driven away. She therefore had "actual physical control" of the vehicle within the meaning of the statute. The district court concluded that the facts before the circuit court satisfied the state's burden to prima facie demonstrate that defendant was in actual physical control of a motor vehicle while under the influence of alcohol. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/May/May%2018,%202011/2D10-1689.pdf

Ginsberg v. Ryan, 60 So. 3d 475 (Fla. 3d DCA 2011).

The district court granted defendant's petition for habeas corpus and remanded to the trial court for a hearing as to pretrial detention.

On April 29, 2010, defendant was charged with DUI causing serious bodily injury; felony DUI (third or subsequent conviction); battery on a law enforcement officer; and resisting an officer with violence. At first appearance, the judge set bond of $25,000. Defendant, unable to post bond, requested an alternative pretrial release.

On June 18, 2010, the trial court granted pretrial release, conditioned on 24-hour, electronically monitored house arrest. Defendant was required, as a further condition of pretrial release, to remain at home and was permitted to leave only for scheduled and approved doctor appointments or to attend court. The trial court set an alternate bond of "no bond."

On June 29, 2010, an affidavit of monitored release violation was filed, alleging defendant left his residence without permission and that the GPS tracking device on defendant revealed he went to a residential area and was not near a doctor's office, hospital, or pharmacy. Defendant was taken into custody.

At each of three subsequent hearings, the trial court denied defendant's request to reinstate house arrest and denied defendant's multiple requests to reinstate the bond. On March 28, 2011, the state made an ore tenus motion with the court to deny any bond for defendant. The trial court allowed defendant to address the court on this issue and then denied pretrial release and the defendant's motion to set bond. The district court noted that defendant had been in custody for more than nine months.

The district court stated that, under the Florida Constitution, a defendant charged with a criminal offense is entitled to bond as a matter of right. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained. Article I, § 14, Fla. Const.

The state argued defendant met criteria for pretrial detention under section 907.041(4). The district court explained that a court is required to consider the requirements of section 907.041 and rules 3.131 and 3.132, Florida Rules of Criminal

Procedure before denying a request for pretrial release. Specifically, the state must file a motion seeking pretrial detention within twenty-four hours of the defendant's arrest. § 907.041(4)(e), (g); Fla. R. Crim. P. 3.132(c).

The district court explained that it is the state's burden to establish a need for pretrial detention, beyond a reasonable doubt. Fla. R. Crim. P. 3.132(c)(1). The state conceded that provisions of the pretrial detention statute and Rules of Criminal Procedure were not followed but urged the district court to affirm the trial court's decision to detain the defendant because the defendant was given "notice and an opportunity to be heard" on his request for pretrial release following the violation of his monitored release.

The district court found this argument without merit and stated that a defendant who violates a condition of his or her pretrial release forfeits the right to continued release under the original bond but does not forfeit altogether the constitutional right to pretrial release. A trial court's authority to hold a defendant without any bond is circumscribed by section 907.041, see State v. Paul, 783 So. 2d 1042 (Fla. 2001), and the trial court must follow the pretrial detention statute, as well as rules 3.131 and 3.132, Florida Rules of Criminal Procedure.

The district court held that the state and trial court failed to follow the statutory procedures and rules, and such a failure cannot be cured by the fact that defendant might have been given "notice and an opportunity to be heard" before being denied bond.

Thus, the district court granted the petition for habeas corpus and remanded to the trial court, directing that the state had three business days to file a legally sufficient motion for pretrial detention.
http://www.3dca.flcourts.org/Opinions/3D11-0924.pdf

Hayward v. State, 59 So. 3d 303 (Fla. 2d DCA 2011).

The district court reversed the judgment and sentence of defendant who was convicted of a single count of felony DUI.

Defendant testified in his own defense as to why he refused to take a breath alcohol test. The state argued, and the trial court agreed, that defendant's comments "opened the door" to impeachment with evidence of a prior unrelated DUI conviction.

The district court held that defendant's comments did not open the door and there was no legal basis to introduce prior crime evidence. During defendant's testimony, his counsel asked him why he refused the officer's requests that he take a breath alcohol test. He testified, "I've heard from people, and I've seen breath tests go wrong. You could have three Mountain Dews and blow a 0.01. I've seen it happen before, and—."

Later, the state sought to impeach defendant's comments with evidence regarding his 1992 DUI conviction, where he allegedly did take a breath test and the results were used against him. The defense objected, arguing that defendant's comments did not "open

the door" to prior crime testimony and that the potential for undue prejudice outweighed the evidence's minimal probative value. The trial court allowed the questions over the defense's objections, so the jury heard that defendant was previously convicted for DUI.

The district court stated that evidence of unconnected crimes is inadmissible, citing Nickels v. State, 90 Fla. 659, 685, 106 So. 479, 488 (1925), but that the Florida Evidence Code provides an exception so that certain prior convictions can be admitted as impeachment evidence. Section 90.610, Florida Statutes (2008), provides that a party may attack the credibility of a witness with evidence that the witness has been convicted of a crime punishable by a year or more in prison or a crime involving dishonesty or false statement. § 90.610(1), Fla. Stat. But the state cannot ask about specifics of the convictions unless the defendant is untruthful about whether he or she has prior convictions and how many of them there are. Livingston v. State, 682 So. 2d 591, 592 (Fla. 2d DCA 1996).

In this case, the state did not ask defendant whether he had prior qualifying convictions or how many. Instead, the prosecutor went straight to details of the 1992 DUI conviction, claiming that defendant's testimony "opened the door" to testimony regarding the breath alcohol test associated with the 1992 conviction.

The district court explained that defendant's testimony essentially was that he did not trust breath testing machines. The district court held that, even had defendant's limited testimony "opened the door," the potential for undue prejudice far exceeded the probative value of the testimony. § 90.403, Fla. Stat. (2008).

The district court stated that the issue of defendant's refusal to take a breath test was minimally relevant at best. Informing the jury that defendant had previously been convicted of the exact crime for which he was on trial was extremely prejudicial. Consequently, the trial court also abused its discretion by failing to exclude evidence on the basis that the potential for unfair prejudice outweighed its minimal probative value.

Finally, the state contended that even if admission of this testimony was error, it was harmless. The district court disagreed, stating that the improperly admitted evidence of defendant's prior DUI conviction gave the state, through the officer's testimony, an unfair advantage in that credibility contest.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2020,%202011/2D09-5198.pdf

Criminal Traffic Offenses

Sanner v. State, ___ So. 3d ___ (Fla. 4th DCA 2011), 2011 WL 2555393, 4D09-2179.

The district court granted defendant's motion for rehearing, withdrew its previous opinion, and substituted a new opinion reversing defendant's conviction for fleeing and eluding a law enforcement officer under section 316.1935(3)(a), Florida Statutes (2006).

Defendant claimed that the state failed to prove an essential element of the crime, that a patrol vehicle in the chase had "agency insignia and other jurisdictional markings prominently displayed on the vehicle . . . ." The district court agreed that the state failed to prove this statutory element. The district court reversed with directions to reduce the conviction to a third-degree felony under section 316.1935(1), Florida Statutes (2006).

The district court affirmed as to defendant's challenge to his habitual offender qualification offenses, finding that the state proved them and that defendant's attorney conceded that defendant qualified for habitual offender status.
http://www.4dca.org/opinions/June%202011/06-29-11/4D09-2179rhg.op.pdf

Goldberg v. State, ___ So. 3d ___ (Fla. 3d DCA 2011), 2011 WL 2555706, 3D10-815.

The district court reversed and remanded defendant's sentence imposed upon violation of probation. The district court found that the trial court improperly excluded relevant evidence offered by defendant to rebut testimony by one victim and by the parent of another victim.

In 2008, defendant was charged with three counts of driving under the influence of prescription drugs and causing an accident with serious bodily injury. He struck three motorcycle riders with his car. The state, victims, and defendant agreed to a plea of guilty in exchange for a sentence of four years on probation and substantial restitution.

In January 2010, an affidavit of violation of probation was filed against defendant for smoking marijuana. Defendant admitted the violation, and a sentencing hearing before a different judge followed. Defendant presented expert testimony and provided testimony and letters of support. The state presented the testimony of one of the victims and of another victim's father. They accused the defendant of being uncaring and of staying in his car after the accident, instead of offering help.

Thereafter, the judge adjourned because he wanted to allocate more time to the case. When the hearing was reconvened, nineteen days later, defendant sought to rebut testimony the state had introduced. He asked the court to view a videotape of the accident scene filmed by the first patrol car that arrived on the scene, because the defendant said it would show remorse and his efforts to aid the victims. He proffered the videotape to rebut the state's testimony. The state objected, arguing it would be improper for the court to consider defendant's evidence because the underlying case was closed. The court did not allow defendant to present further evidence. The court sentenced defendant to 11.75 years in prison on each count, to be served concurrently.

The district court held that the trial court improperly denied defendant the opportunity to rebut state's evidence. The sentencing judge was new to the case and not familiar with the facts. The court considered evidence from the state and victims and defendant's alleged lack of remorse. The district court stated that, particularly before a new judge, defendant was entitled to present evidence on these points. The district court directed that, on remand, defendant be permitted to present the proffered evidence.

http://www.3dca.flcourts.org/Opinions/3D10-0815.pdf

Dortch v. State, __ So. 3d __ (Fla. 1st DCA 2011), 2011 WL 2437411, 1D10-2121.

The district court reversed and remanded for a new trial the conviction of defendant on charges of fleeing a law enforcement officer, resisting an officer without violence, driving while license suspended, and leaving the scene of an accident.

The district court agreed with defendant's argument that the trial court erred by denying a motion in limine to exclude evidence that the car he was driving before his arrest had been reported stolen nearly three months earlier.

On October 22, 2009, the state charged defendant with fleeing a law enforcement officer (count I), resisting an officer with violence (count II), driving while license suspended (count III), possession of cannabis (count IV), and two counts of leaving the scene of an accident (counts V and VI). Defendant moved to exclude any mention that the car he had been driving when the alleged events occurred was reported stolen.

The prosecutor informed the court that she intended to call the manager of the rental car agency, the owner of the stolen vehicle, to testify that the car was stolen and to establish the arresting officer's need to make a felony arrest. Citing inadmissible hearsay and relevance grounds, defense counsel expressed concern that the jury would believe the appellant had been fleeing because he stole the car. Finding evidence that the car was stolen "highly relevant," the court denied the motion.

The manager of a rental agency testified at trial that a red Chevy Cobalt was stolen from the lot on June 29, 2009. On September 16, 2009, police advised Avis that the car had been recovered. That afternoon, a sheriff's officer observed a red Chevrolet Cobalt approaching him. The officer testified that he made a U-turn to follow the car and ran the vehicle's license plate number, learning that the vehicle had been stolen.

The officer further testified that he followed the car until it stopped abruptly in the middle of the street. The officer exited his patrol car, drew his service revolver, and told the suspect (defendant in this case) to turn off the engine. Instead, defendant sped off and the officer pursued with lights and sirens activated. The officer terminated the chase after only a minute. Almost immediately after the chase ended, defendant's vehicle was involved in multiple collisions. The officer tracked defendant into an open field, where he located him in some tall weeds and bushes. Assisted by another officer, the officer pulled Dortch out of the bushes and tried to handcuff him. Defendant rolled over on his back and began flailing his arms. After apprehension, a subsequent search revealed a plastic bag of marijuana on the floor of the front passenger side.

A jury found defendant guilty on counts I, III, V, and VI; guilty of the lesser-included offense of resisting an officer without violence on count II; and not guilty on count IV.

The district court noted that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." See § 90.801(1)(c), Fla. Stat. (2009). The district court stated that the officer's testimony that defendant's car had been stolen was rank hearsay that did not fall within any of the exceptions to the hearsay rule.

The district court explained that evidence about the car's being stolen was not necessary to describe events after the car was stopped and defendant fled. The jury was called on to determine whether defendant resisted with violence, had driven while his license was suspended and had left the scene of an accident, and had possessed marijuana. It did not matter that the car had been stolen three months earlier. http://opinions.1dca.org/written/opinions2011/06-20-2011/10-2121.pdf

Santarelli v. State, ___ So. 3d __ (Fla. 5th DCA 2011), 2011 WL 2268959, 36 Fla. L. Weekly D1243, 5D10-2607.

The district court affirmed defendant's convictions and sentences on misdemeanor counts of allowing an open house party and contributing to the delinquency of a minor in a case involving a vehicle crash that killed two minors.

Defendant contended the trial court erred by denying her pretrial motion to dismiss two felony counts of manslaughter, claiming the indictment related thereto was legally defective. She maintained that, had the court properly dismissed the two felony manslaughter counts, the circuit court would not have possessed jurisdiction over the two remaining misdemeanor counts and, therefore, the judgments and sentences entered on the misdemeanor counts were void.

The issue on appeal was whether the trial court erred by denying defendant's motion to dismiss manslaughter counts. Defendant maintained that the only allegations of culpable negligence supporting the manslaughter counts were allegations that she had violated section 856.0154 and that a violation of section 856.015 cannot legally constitute culpable negligence. Defendant contended that a violation of section 856.015 constitutes only simple negligence because, in a civil prosecution under section 856.015, a defendant cannot be sued for punitive damages.

Defendant also contended that the trial court erred in denying her motion to dismiss because causation alleged by the state in the charging document was insufficient to support the charge of manslaughter. She argued that the proximate cause of the victims' deaths was the minor's operation of a motor vehicle and, therefore, the deaths would not have occurred but for his decision to drive. In a related claim, defendant maintained that the trial court erred in denying her motion to dismiss because a social host has no duty to prevent an intoxicated person from operating a motor vehicle and, therefore, the manslaughter counts did not adequately allege conduct of a gross and flagrant character evincing reckless disregard of human life.

The district court rejected all of defendant's arguments and held that the trial court properly denied the defendant's motion to dismiss. It was alleged that defendant in this case set in motion a chain of events resulting in death to the victims. It was alleged that defendant allowed and/or provided and/or encouraged the victims, both under the age of 21, to consume alcoholic beverages and/or controlled substances to the extent their normal faculties were impaired and did not prevent the victim from operating a motor vehicle in said impaired state. The district court held that such result was foreseeable as a direct result of defendant's alleged conduct, and it was not unfair or unjust to hold defendant criminally responsible for the prohibited result. Such alleged action was sufficient to establish causation.

The district court noted that the Florida legislature extended criminal liability to a social host through the enactment of section 856.015, Florida Statutes. See Newsome v. Haffner, 710 So. 2d 184, 185-86 (Fla. 1st DCA 1998) (noting that the statute is clearly designed to protect minors from harm that could result from consumption of alcohol or drugs by those too immature to appreciate potential consequences).

Defendant argued that she was entitled to dismissal since section 856.015 could not support a charge of manslaughter because serving alcohol to a minor was not sufficiently willful or wanton to support an award of punitive damages. JocMar Pacific Pizza Corp. v. Huston, 502 So. 2d 91 (Fla. 5th DCA 1987). The district court stated that the case predated passage of section 856.015, which defines conduct alleged in this case to be criminal conduct. The manslaughter counts were based upon defendant's intentional and culpably negligent acts in addition to her violation of section 856.015. Therefore, even if section 856.015 could not support manslaughter charges, defendant could still be guilty of manslaughter based upon other negligent and intentional acts alleged.
http://www.5dca.org/Opinions/Opin2011/060611/5D10-2607.op.pdf

Dean v. State, ___ So. 3d ___ (Fla. 4th DCA 2011), 2011 WL 1775046, 36 Fla. L. Weekly D1006, 4D09-1317.

The district court affirmed defendant's conviction and sentence for second degree felony murder and burglary. The victim in this case committed the burglary along with defendant. He was killed when he was hit by an SUV driven by one of the residents of the burgled apartment during a high speed chase after defendant and the victim fled the scene of the burglary.

The district court addressed defendant's claim that the trial court erred in denying his motion for judgment of acquittal on the felony murder charge. In affirming, the district court held that the death occurred during the perpetration of a burglary within the meaning of the felony murder statute. The district court held that the death was causally related to the burglary because the burglary and death occurred close in time and geographically near each other.
http://www.4dca.org/opinions/May%202011/05-11-11/4D09-1317.op.pdf

Catalano v. State, 60 So. 3d 1139 (Fla. 2d DCA 2011).

The district court denied the state's petition for certiorari review of two defendants' traffic citations under section 316.3045, Florida Statutes (2007), which restricts volume at which a car stereo system may be played on a public street, but exempts vehicles used for business or political purposes, which in the normal course of conducting such business use sound making devices.

In county court, defendants pleaded not guilty and moved to dismiss their citations on grounds that section 316.3045(1) was unconstitutionally vague and overbroad, invited arbitrary enforcement, and impinged free speech rights. The trial judge denied the motions, whereupon defendants changed their pleas to nolo contendere and reserved the right to appeal denial of their motions to dismiss.

The trial judge accepted the pleas, withheld adjudication, and imposed court costs. On appeal, the circuit court focused on two Florida decisions that discuss the term "plainly audible" in the context of whether that phrase was vague and invited arbitrary enforcement. Easy Way of Lee County, Inc. v. Lee County, 674 So. 2d 863, 867 (Fla. 2d DCA 1996) ("plainly audible" standard in a county noise ordinance was unconstitutionally vague, overbroad, and invited arbitrary enforcement); Davis v. State, 710 So. 2d 635 (Fla. 5th DCA 1998) (previous version of section 316.3045, Florida Statutes, was deemed to be constitutional against a vagueness and overbreadth challenge).

(The district court noted that, in 2005, after Davis, the legislature amended section 316.3045 to change the distance of the plainly audible standard from 100 feet to 25 feet, and that a least one federal case had found Davis nonbinding due to this amendment. Cannon v. City of Sarasota, No. 8:09-CV-739-T-33TBM, 2010 WL 962934, at *3 (M.D. Fla. March 16, 2010)).

The circuit court concluded that the issue ruled on by the two district courts was essentially the same, i.e., whether the "plainly audible" standard was too vague and overbroad to pass constitutional scrutiny. The court concluded that Davis conflicted with Easy Way. The court reasoned that the different purposes of the ordinance and the statute (one addressing general county noise ordinance standards and the other addressing safe operation of motor vehicles on highways) did not change the fact that the test to determine facial constitutionality of nearly identical language was the same.

Since the Second District had decided the issue in Easy Way, the circuit court held the statute must fail because the court was "obliged to follow the ruling of the Second District." The state filed its petition for certiorari review arguing that the circuit court departed from the essential requirements of the law because section 316.3045 did not invite arbitrary enforcement, it comported with free speech rights, and binding precedent found this section constitutional.

The state asserted that Easy Way was decided based on a county's subjective enforcement of a general noise ordinance and the challenge in this case was based on a facial challenge of a statute that addressed safety on the highways. The state reasoned that Davis was binding because it addressed the specific statute under attack in this case. The state asserted that the circuit court's holding was due to subjective application and arbitrary enforcement of the "plainly audible" standard in the ordinance.

The district court disagreed with the state's position, stating that the challenge in Easy Way was a facial challenge. The district court held that the circuit court did not depart from essential requirements of law in applying binding precedent from Easy Way, because the present case presented a facial challenge to the term "plainly audible" and because both Easy Way and Davis dealt with the issue of whether the term "plainly audible" was constitutional.

The district court agreed with the circuit court that whether the "plainly audible" standard was applied in a noise ordinance or in a traffic statute, the test for constitutionality was the same. The district court denied the state's petition, finding that the circuit court afforded procedural due process and did not violate clearly established principles of law.

The district court certified to the supreme court this question of great public importance: *"Is the 'plainly audible' language in section 316.3045(1)(a), Florida Statutes, unconstitutionally [sic] vague, overbroad, arbitrarily enforceable, or impinging on free speech rights?"*

Following a content-based analysis, the district court held that the statute was a content-based restriction on free expression which violated the First Amendment because there was no compelling governmental interest requiring disparate treatment of commercial or political speech versus amplified music.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/May/May%2011,%202011/2D10-973.pdf

Zamora v. State, 60 So. 3d 510 (Fla. 3d DCA 2011).

The district court affirmed defendant's judgments and convictions for first-degree murder, carjacking, and burglary with an assault. The district court found no merit to defendant's argument that the trial court erred in permitting a detective's testimony regarding the citation issued to defendant for driving with a suspended license.

The district court stated that, since the charge of driving with a suspended license was part of the episode that led to the charges at issue in the trial, no impermissible Williams rule evidence was presented to the jury. See Williams v. State, 110 So. 2d 654 (Fla. 1959). The suspended license violation was a charged offense, albeit an offense not being tried at that juncture.
http://www.3dca.flcourts.org/Opinions/3D09-3445.pdf

Browning v. State, 60 So. 3d 471 (Fla. 1st DCA 2011).

The district court affirmed defendant's convictions for kidnapping, resisting an officer without violence, and possession of a firearm and wrote only to address defendant's contention that the trial court erred by denying his motion for judgment of acquittal on the kidnapping count.

Two men arranged to buy a controlled substance from defendant for $20.00. When they drove to his home to pick it up, defendant got in the back seat behind the driver, who handed defendant $20.00. Defendant acted agitated, repeatedly saying, "you are trying me," then told the driver to give him his money, even though he had not given the driver any narcotics. The passenger "felt the presence" of a gun because he heard a cocking noise, saw a "glint of light" in the back, and saw that defendant's hands were pointed forward behind the passenger seat. He thought this might be a robbery.

Because the driver had only a few dollars, he suggested driving to an ATM machine. The passenger did not ask to be let out because he didn't know whether it was a robbery and was afraid to argue with defendant. When the driver said he would go to the ATM at a grocery store, defendant said, "you think you're slick, there is a lot of police up there," and told the driver to drive to a convenience store.

Defendant told the passenger to see what was taking the driver so long, so the passenger got out and saw the driver on his phone by the ATM machine. The passenger got back in the car with defendant, who had turned the car around to face the street.

The driver testified that defendant demanded money and ordered him to do something against his will. He felt the presence of a gun, although he never saw one, but then defendant yelled that "he was going to make me touch the gun so my fingerprints would be on it." At the ATM, the driver withdrew some money, but his whole objective was just to get out of the car and not get back in. He called the police and saw the passenger through the window, but then he saw the passenger get back in the car.

The driver heard sirens and went outside, but the car was gone. The passenger said that when he began seeing police lights coming toward the convenience store, defendant sped out of the parking lot with the passenger in the car, followed by the police. Defendant had told the passenger that he was high on pills, so the passenger was afraid for his life. Soon after they sped out of the store, defendant threw something out the passenger window that the passenger believed was a gun.

When defendant turned a corner and came to a brief stop, the passenger tried to get out but couldn't. When the car slowed, the passenger threw it into park, whereupon the men were apprehended.

In Faison v. State, 426 So. 2d 963 (Fla. 1983), the court set forth a test for determining whether detention of a victim during commission of a crime constitutes the separate crime of kidnapping. The taking, movement, or confinement: (a) must not be

slight, inconsequential and merely incidental to the other crime; (b) must not be of the kind inherent in the nature of the other crime; and (c) must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detention. Id. at 965.

Defendant claimed these facts did not satisfy any of the three prongs because the passenger was already a passenger when the two men picked defendant up; the passenger got back into the car voluntarily at the convenience store; and when the police arrived, defendant panicked and sped off simply to avoid being arrested. He claimed that the passenger's presence in the car was merely incidental to the aggravated fleeing and eluding offense and ended naturally with the end of defendant's flight; his presence had nothing to do with the crimes of grand theft or aggravated fleeing and eluding; and his presence in the car did not make the high-speed chase easier to commit.

The district court explained that, in the case at bar, forcibly keeping the passenger in the car against his will by driving off in an attempt to escape from the police was not incidental or inherent to the crime of fleeing and eluding, in which the presence of a passenger is not a naturally occurring component; the asportation was consequential and substantial because the passenger was forcibly removed from the convenience store and from the company of the driver; and fleeing with the passenger still in the car made defendant's flight more likely to succeed as opposed to ordering him to get out and waiting a few seconds for him to do it, which might have resulted in defendant's immediate capture.
http://opinions.1dca.org/written/opinions2011/04-14-2011/09-5395.pdf

Arrest, Search and Seizure

Gizaw v. State, __ So. 3d __ (Fla. 2d DCA 2011), 2011 WL 2342024, 2D10-428.

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. The district court reversed and remanded with instructions to discharge defendant because the state failed to establish defendant's knowledge of the presence of cannabis or her dominion and control over a suitcase containing cannabis.

The evidence established that a deputy pulled over an automobile 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 radioed for backup and a second deputy responded. The first deputy asked defendant for permission to search the car for illegal narcotics. The deputy told defendant he had information that the passenger was on probation for drug-related offenses. Defendant told the deputy there were no drugs in the vehicle but gave him permission to search, which he did. He testified he detected a faint odor of raw cannabis that appeared to be residual, but found no drugs.

The second deputy searched the trunk, where he also detected a faint odor of raw cannabis. When he opened the trunk, the odor became strong. Inside the trunk he found a black suitcase containing two bundles of cannabis wrapped in duct tape. The suitcase contained three pairs of men's jeans. Next to the suitcase, the deputy found other clothing items and a box of sandwich bags. Behind the suitcase, he found college textbooks. No fingerprints were found on the suitcase or the duct tape, and nothing belonging to defendant was found in the suitcase.

At some point during the encounter, the passenger admitted that he had given a false identification, admitted his real name, and said he was defendant's boyfriend. The driver and passenger were arrested for trafficking in cannabis and transported to the police station. Defendant was visibly upset and crying, and the passenger was not.

After arriving at the station, defendant gave a statement to police. Defendant insisted she did not know anything about the cannabis in the suitcase. She said she and the passenger were returning from Miami after having driven there earlier that day to visit the passenger's grandmother. Defendant did not know the passenger's grandmother's actual name or address, but she had the grandmother's telephone number on her cell phone. When a detective asked for permission to call the number, defendant refused.

Upon arrest, defendant had $939 in cash on her person and the money was loose and 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 for her next semester at community college. The passenger, who refused to speak to detectives, had $640 in cash and a razor knife on his person.

Defendant testified that she was a twenty-four-year- old student planning to enroll for summer semester. She explained that the passenger was her boyfriend. Defendant testified that she went to Miami with the passenger to visit his grandmother. Defendant stated that she had never before seen the black suitcase. The suitcase was not in her car when they left for Miami, and she did not access the trunk of the car before they left to return home. When she and the passenger arrived in Miami they visited with the grandmother. The passenger kept the keys while they were in Miami.

Defendant and the passenger left for home late in the evening. Defendant claimed she did not smell anything in the car. She stated that she did not smoke cannabis and did not know what it smells like. Defendant admitted that she was speeding when the deputy stopped her and that she had agreed to a search of her car.

Defendant explained that she knew the grandmother only as "Mama" and did not know her address. The passenger drove to his grandmother's house and defendant had not previously been there. Although she had a phone number for the grandmother, she did not want to call at 4:00 a.m. to say that she had been arrested.

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.

Defendant argued that the trial court erred in denying her motion for judgment of acquittal because the state failed to establish her constructive possession of the cannabis. She contended that the state failed to prove that she had knowledge of the presence of cannabis or that she had dominion and control over the cannabis.

Defendant also argued that the trial court erred in allowing the deputy and detectives to testify regarding patterns of behavior related to drug trafficking. She asserted that such testimony about generalized patterns of criminal behavior presented as proof of guilt is improper. Her final argument was that she should have been granted a new trial due to newly-discovered evidence. The district court stated that its disposition of the case on the constructive possession issue rendered the other two issues moot.

The district court stated that, in order to prove the felony charges, the state was required to establish that defendant knowingly possessed the cannabis. Because defendant was not in actual possession of cannabis, the state was required to prove her constructive possession of the suitcase. See Culver v. State, 990 So. 2d 1206, 1208 (Fla. 2d DCA 2008). The state had to prove that defendant knew of the presence of the suitcase and was able to exercise dominion and control over it. Id. If the area in which the drugs were found had been in defendant's exclusive possession, knowledge and control could have been inferred. See Earle v. State, 745 So. 2d 1087, 1089 (Fla. 4th DCA 1999). However, defendant and the passenger were traveling in her car, and the passenger had access to the trunk. The state had to establish defendant's knowledge of the cannabis and dominion and control over it by independent proof.

Following an analysis of similar cases, 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. The district court held that the trial court erred in denying defendant's motion for judgment of acquittal.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/June/June%2015,%202011/2D10-428.pdf

Triplett v. State, ___ So. 3d ___ (Fla. 4th DCA 2011), 2011 WL 2135541, 4D09-3912.

The district court reversed the trial court's order granting a motion to suppress evidence of prescription-drug trafficking obtained after a traffic stop for littering.

A sheriff's deputy testified that he observed an object being tossed out of a minivan. The deputy initiated a stop for a violation of Florida's litter law. The deputy asked the driver for identification. The driver did not have her license but told the deputy she had a valid Kentucky license, which the deputy confirmed. The deputy approached again and warned the occupants to keep their garbage in the car. At that point, according to the deputy, the traffic stop was over and the occupants were free to go. However, he

asked if they were willing to talk to him. The deputy was in uniform, but he did not draw his weapon, make threats, or promise them anything to speak with him.

All six occupants agreed and handed over identification—Kentucky licenses or ID cards. The deputy asked if there were narcotics or weapons in the car. The occupants all responded that they had prescriptions in a lock box. The front passenger said she had the lock box in her backpack. The deputy asked for consent to search the lock box. The front passenger responded, "no problem . . . I have the key for it." She got out of the passenger side and took the lockbox to the trunk of the deputy's patrol car and opened it. None of the occupants objected to the deputy's looking inside the box.

Inside the lock box, the deputy saw numerous bottles of oxycodone with label prescriptions in everyone's name except for the driver and one passenger. The quantities of pills in these bottles appeared to be inconsistent with personal use. No one other than the front passenger appeared to be in possession of the box, and she had a key to the lockbox. She was also in possession of $1500 in cash. The prescriptions were filled at a local pharmacy, a known source for persons from out of state to obtain such drugs and transport them for illegal sale.

The deputy testified that he had encountered a large number of people from Midwestern states—particularly Kentucky, Ohio, and West Virginia—who came to Florida to obtain large amounts of oxycodone from the same pharmacy named on the bottles in the lock box. Based on his observations, he believed the defendants were in Florida for the same purpose.

The deputy removed all occupants from the minivan and separated them. A detective and his partner arrived in about ten minutes and took over the investigation. After the defendants were given Miranda warnings, they provided statements admitting involvement in an oxycodone trafficking ring. The detective testified at the suppression hearing about his knowledge of interstate drug deals.

The trial court found that the initial traffic stop for littering was valid and that the traffic stop was followed by a consensual citizen's encounter. The trial court also found that when the deputy detained defendants for further investigation by the detective, defendants were not free to leave and the encounter evolved into a stop and detention. The trial court concluded that the deputy lacked a reasonable or articulable suspicion for the detention, because all he had was a large quantity of prescription medications with what appeared to be valid prescription labels. The court further noted that the deputy never verified whether the prescriptions were, in fact, issued by a doctor. In its order granting the joint motion to suppress, the trial court stated that "[t]he officer did not have probable cause to detain the defendants past the initial stop for littering or seize the prescription medicine." The state appealed the order of suppression.

The district court agreed with the state's argument on appeal that the trial court's legal conclusions were incorrect because the deputy, based on his training, experience, and observations, had sufficient reasonable suspicion to conduct an investigatory stop.

The district court concluded that the totality of circumstances, viewed through the lens of the deputy's training and experience, gave the deputy reasonable suspicion to believe that the defendants were engaged in trafficking in oxycodone. His temporary detention of the defendants was therefore justified.
http://www.4dca.org/opinions/June%202011/06-01-11/4D09-3912.op.pdf

Blanchard v. State, __ So. 3d __ (Fla. 4th DCA 2011), 2011 WL 2135506, 4D09-2841.

The district court affirmed defendant's judgment convicting him of trafficking in cocaine, possession of cannabis, and possession of drug paraphernalia based on evidence obtained in a traffic stop.

While driving, defendant and his passenger were stopped by a police detective. The detective testified that he initiated the stop because he recognized the passenger as a known drug dealer with an outstanding warrant and a history of possession with intent to deliver narcotics. The detective did not know defendant. The detective further testified that as he approached the car, he noticed defendant "manipulate" the center console. He did not see defendant lift open the console or put anything in it but saw defendant slam the console shut. The passenger did not touch the center console. When the detective approached the vehicle, he noticed two small baggies of marijuana in the driver-side door. The detective escorted defendant out of the vehicle and retrieved the marijuana. The detective then searched the vehicle and found a bag of cocaine in the center console, along with a sock containing smaller baggies and a digital scale.

Photographs of the center console, admitted into evidence, showed a sock on top of a large bag of cocaine; however, the sock did not cover the entire bag. Thus, the cocaine was visible upon opening the center console. Defendant was the registered owner of the vehicle. After the defense rested, defendant renewed his previous motion for judgment of acquittal, arguing that the drugs in the console could have been put there by his passenger, a known drug dealer. The trial court denied the motion.

"To convict a defendant for possession of a controlled substance under a constructive possession theory, the State must prove that 'the defendant had knowledge of the presence of the drug and the ability to exercise dominion and control over the same." Brown v. State, 8 So. 3d 1187, 1188 (Fla. 4th DCA 2009). Knowledge of and ability to control contraband cannot be inferred solely from a defendant's proximity to contraband in a jointly-occupied vehicle; the state must present independent proof of defendant's knowledge and ability to control the contraband, which may consist of "evidence of incriminating statements or actions, or other circumstances from which a jury might lawfully infer the defendant's actual knowledge of the presence of contraband." Id. at 1189.

On appeal, defendant relied on Brown and argued that the trial court erred in denying his motion for judgment of acquittal because his closing of the console is insufficient evidence to prove he had knowledge of, and dominion and control over,

drugs and paraphernalia in the console. The district court agreed with the state that Brown was distinguishable from the facts of the present case.

The district court explained that in Brown the evidence was found inside a closed jewelry box inside the center console. It could be reasonably inferred that the defendant in Brown was not aware of the contents of the jewelry box even if he was aware that the box was in the console. Here, the district court stated, the cocaine was not similarly situated; instead, it was found partially underneath a sock, with some of the bag not being covered by the sock. Thus, unlike Brown, the evidence was immediately visible upon opening the console. In other words, the cocaine was in plain view before the console was closed by defendant. Thus, it could be inferred that defendant had knowledge of the cocaine. See Corker v. State, 31 So. 3d 958, 961 (Fla. 1st DCA 2010) (holding that "[t]he fact that drugs were openly within appellant's line of sight is evidence from which appellant's knowledge of the presence of the [drugs] may be inferred.").

The district court held that it could be reasonably inferred that defendant was exercising control over the cocaine by concealing it from plain view of the officer. Thus, evidence presented by the state was sufficient to overcome defendant's reasonable hypothesis of innocence. The district court held that the trial court correctly denied defendant's motion for judgment of acquittal.
http://www.4dca.org/opinions/June%202011/06-01-11/4D09-2841.op.pdf

Wheeler v. State, __ So. 3d __ (Fla. 5th DCA 2011), 2011 WL 2268952, 36 Fla. L. Weekly D1239, 5D10-1994.

The district court reversed the trial court's order denying the dispositive motion to suppress and remanded with instructions to vacate the judgment and sentence.

The sole issue presented was whether defendant's vehicle was located within the curtilage of a residence that was the target of a search warrant. The trial court concluded that it was because the vehicle was partially overlapping a portion of the driveway to the residence, and accordingly, denied defendant's motion to suppress evidence of a firearm and drugs within the vehicle. The district court concluded that the vehicle was not within the curtilage of the residence,

After conducting a controlled purchase of drugs, the police obtained a search warrant for the single family residence. The warrant authorized the search of any vehicle located within the residence's "curtilage." Defendant, who had no connection to the investigation or the residence that was the target of the search, was in his car in front of the residence with a female companion when the warrant was executed. The residence was on a city street adjacent to a paved road. It was surrounded by a chain-link fence with an opening through a dirt driveway. Defendant was parked outside the fence, parallel to the road within the city right-of-way close to the paved portion of the right-of-way. Part of his vehicle was parked over the driveway portion of the right-of-way impeding, but not blocking, ingress and egress through the opening in the fence. Defendant's sole

argument was that his vehicle was not within the scope of the warrant because it was not within the curtilage of the residence.

The district court disagreed with the trial court's conclusion that, because part of defendant's vehicle extended into the driveway portion of the right-of-way, the vehicle was within the curtilage. Defendant did not argue (and the district court did not consider) the lack of any connection between defendant's vehicle and the suspected illegal activities or persons that were the target of the warrant. The term "curtilage" in the Fourth Amendment context describes the area around a home that is "intimately tied to the home itself." United States v. Dunn, 480 U.S. 294 (1987). "[T]he extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." Id. at 300.

The district court's analysis of the four factors in Dunn led the court to conclude that the area outside the chain link enclosure was outside the curtilage of the residence . http://www.5dca.org/Opinions/Opin2011/060611/5D10-1994.op.pdf

Dillon-Watson v. State, ___ So. 3d ___ (Fla. 4th DCA 2011), 2011 WL 1877817, 4D09-2845.

The district court reversed defendant's convictions for possession of methylenedioxymethamphetamine ("ecstasy") and possession of cannabis holding that the trial court erred in denying her motion to suppress. The district court concluded that the arresting officer conducted an investigatory stop without founded suspicion.

At the suppression hearing, the arresting deputy sheriff testified that he was dispatched after police received an anonymous call regarding a female selling ecstasy to her ex-boyfriend seated in a gold Maxima in a Wal-Mart parking lot. The deputy found a gold Maxima in the lot with a female in the driver's seat and approached the vehicle. Defendant was seated in the car with her ex-husband. The deputy, who was in full uniform, asked what they were doing. Defendant stated that she and her ex-husband were exchanging their child, because the parking lot was a neutral spot. There was a child in a car seat in the back. The deputy then told them about the anonymous tip, and the couple laughed. The deputy called for backup and told them, "I'd like to see your ID's and I'll just take a quick look at your vehicles and if everything checks out okay, you guys will be good to go." Both of them provided the officer with identification. He went to the teletype and checked their backgrounds.

It took between five and ten minutes to get results. When he finished, the deputy told them that "you guys came back [with no warrants]." He then said, "Let me just take a quick look at your vehicles, and then if you guys are good, you'll be on your way." They said, "Okay, yeah, go ahead."

The deputy found drugs in a clear bag under the driver's front seat where defendant was seated, and she was charged with possession. The deputy testified that he believed he was performing an investigative stop when he approached the vehicle.

Because the tipster's description matched defendant, she would not have been free to leave. If defendant had attempted to leave the scene, he would have issued a BOLO for her. And while he could not state how defendant expressed assent to search her vehicle, he maintained that he had consent.

The state admitted at the hearing on the motion to suppress that it could not justify an investigatory stop based upon the anonymous tip. It argued that the stop constituted a consensual encounter, and defendant consented to the search. The defense maintained that the stop was investigatory, and defendant did not voluntarily consent to the search. The trial court denied the motion to suppress, finding the motion dispositive of the case. After entering her plea to the offense and being convicted, defendant appealed.

Defendant contended that the state failed to show that this was either a consensual encounter or a valid investigatory stop and thus the trial court erred in denying her motion to suppress. The district court agreed and stated that, based upon totality of the circumstances, it could not conclude that defendant would have felt free to leave during the encounter.

The district court concluded that any reasonable person would consider that the officer would not let her go until the officer had searched the vehicle. The consent, such as it was, was not voluntary but an acquiescence to a show of authority. As the state conceded at the hearing before the trial court that it could not uphold the stop and search based upon the anonymous tip, the district court stated that it need not discuss further whether the search could be justified on that basis. See Maldonado v. State, 992 So. 2d 839, 842 (Fla. 2d DCA 2008)("On appeal, the State cannot avoid the effect of its concession in the trial court of a fact material to the disposition of [the defendant's] motion [to suppress].").

Holding that the search violated defendant's Fourth Amendment rights, the district court reversed and remanded with directions to vacate defendant's convictions and discharge her.
http://www.4dca.org/opinions/May%202011/05-18-11/4D09-2845.pdf

State v. Exantus, 59 So. 3d 359 (Fla. 2d DCA 2011).

The district court reversed the trial court's order suppressing evidence obtained during a vehicle search and affirmed, without discussion, the trial court's ruling with respect to the initial search of the vehicle.

Defendant was charged with unauthorized acting as a money transmitter and money laundering in excess of $20,000 and less than $100,000 under sections 560.125(5)(b) and 896.101(3), Florida Statutes (2008).

In support of these charges, a sheriff's deputy sought a search warrant to conduct an ion scan of the interior of a vehicle driven by defendant. The deputy pulled the vehicle

over during a routine traffic stop and, after observing defendant's irregular behavior, had a trained narcotics detection dog conduct an air sniff around the vehicle. The dog alerted near the trunk. Defendant consented to a vehicle search, and law enforcement discovered a shopping bag containing approximately $83,220 in U.S. currency wrapped in rubber-banded bundles hidden in the rear of the vehicle. The dog also alerted to the currency during a controlled box test. Based on these circumstances, law enforcement wanted to conduct an ion scan to determine whether additional testing for the presence of drugs would link defendant to the charges.

The search warrant contained a sworn affidavit from the deputy attesting to circumstances surrounding the stop and his search of the vehicle. The ion scan detected trace elements of MDMA and cocaine. Defendant moved to suppress results of the scan, arguing, inter alia, the search warrant was deficient because the deputy's affidavit did not contain sufficient information linking defendant to the suspected narcotics.

The trial court agreed, summarily concluding that the supporting affidavit omitted material information and could not support the magistrate's finding of probable cause. The district court explained that the issuing magistrate was required to rely solely on the affidavit when considering, under the totality of the circumstances, whether there was probable cause that defendant acted unlawfully under sections 560.125 and 896.101 and whether a nexus to these offenses existed.

The district court stated that the affidavit contained information that defendant behaved erratically during the traffic stop, the dog alerted during an air sniff and a controlled box test, and $83,220 in U.S. currency was discovered in a plastic bag hidden in the rear of the vehicle. The district court concluded that the totality of these factors established a factual basis for the magistrate to find probable cause to issue the search warrant to conduct an ion scan of the vehicle.

The district court also stated that the trial court, when it reviewed the magistrate's findings, appeared to focus on sufficiency of the affidavit as to whether there was probable cause to find that defendant committed a drug offense, rather than whether there was probable cause to find that he committed offenses of acting as a money transmitter and money laundering. The trial court failed to afford great deference to the magistrate's decision and appeared to apply an improper de novo standard of review.

The district court stated that the trial court should have addressed defendant's claims that omitted material, if added, would have defeated probable cause and that the omissions resulted from intentional or reckless police conduct that amounted to deception. The district court concluded the addition of most omitted material would have strengthened, not defeated, a finding of probable cause. Likewise, there was no indication that the deputy purposefully misled the magistrate in his affidavit. Thus, the defendant failed to meet his burden.

The district court reversed, in part, the trial court's order granting defendant's motion to suppress evidence obtained from the ion scan and remand for further proceedings. The district court affirmed the trial court's order in all other respects. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2029,%202011/2D10-1385.pdf

Butera v. State, 58 So. 3d 940 (Fla. 2d DCA 2011).

The district court reversed an order revoking defendant's probation after the trial court found that he had violated his probation by possessing cocaine and marijuana.

Shortly after being placed on probation, defendant was arrested for possession of cocaine and possession of marijuana, which led to the filing of an affidavit of violation of probation. The affidavit alleged that defendant had possessed cocaine and cannabis, thereby resulting in two violations of the condition of defendant's probation that required him to live without violating the law. The matter proceeded to a revocation hearing.

Evidence at the hearing revealed that defendant was sole backseat passenger of a vehicle that was stopped for a traffic violation. The other occupants of the vehicle included the driver and a female passenger in the front seat.

At the revocation hearing, the driver and the female passenger were called as witnesses but invoked their right to remain silent. The arresting detective testified that he stopped the vehicle for running a red light and that as he talked to the driver he smelled marijuana. The detective testified that he asked the driver about the odor that the driver indicated that he had previously smoked in the vehicle but that he was not "currently smoking in it."

The detective testified that he conversed with the front-seat passenger. He testified that she told him that there were drugs in the back of the car, that defendant had hidden something under her seat, and that defendant had given her drug paraphernalia to hide from the police when they were pulled over. The female passenger gave the drug paraphernalia to the detective. The detective testified that he conducted a search of defendant's person but that he did not find any contraband. The detective then searched the vehicle. During his search, the detective found a "small bag" containing crushed pills, a "small baggie" containing marijuana, and a "small baggie" containing cocaine. The detective found these items in a compartment on the back of the passenger side front seat.

Defendant was sitting directly behind the passenger-side front seat when the vehicle was stopped. The detective arrested defendant for possession of cocaine and possession of marijuana, but he did not arrest the driver or the female passenger. The detective testified that the main reason he arrested defendant and not the others was the proximity of drugs in relation to where defendant had been sitting.

The trial court found that defendant committed the two violations alleged in the affidavit and revoked defendant's probation. The revocation was predicated upon his commission of two offenses — possession of cocaine and possession of cannabis.

The district court held that the greater weight or preponderance of the evidence did not demonstrate that defendant committed either offense alleged. Because cocaine and cannabis were not found on defendant's person or in his exclusive possession, evidence had to establish constructive possession by demonstrating (1) that defendant knew of presence of contraband and (2) that he or she had the ability to maintain dominion and control over the controlled substance. See Links v. State, 927 So. 2d 241, 243 (Fla. 2d DCA 2006).

The district court held that, even in a probation revocation proceeding, a defendant's knowledge of presence of contraband and ability to control it cannot be inferred from defendant's proximity if contraband is found in a location that is in joint, rather than exclusive, possession of defendant. These elements must be established by independent proof, albeit only by a mere preponderance of the evidence. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2027,%202011/2D09-4401.pdf

J.W.E. v. State, 58 So. 3d 376 (Fla. 2d DCA 2011).

The district court reversed a juvenile order withholding adjudication and placing defendant on probation, holding that the trial court erred in denying defendant's motion to suppress evidence that he possessed not more than 20 grams of marijuana.

Defendant was riding his bicycle when he was stopped by law enforcement because his bicycle did not have lights. During the stop, the officer sought his consent to search. Apparently believing he had obtained consent, the officer conducted a search of his person. The search revealed marijuana. Defendant was charged with committing the delinquent act of possession of not more than 20 grams of marijuana based on evidence obtained during the search.

Defendant filed a motion to suppress the physical evidence obtained during the search, arguing that he had been illegally detained and searched. At the hearing on the motion to suppress, the officer who searched defendant initially testified that "he asked permission to search [defendant] and [defendant] replied in the affirmative yes." The officer thereafter explained: "I said 'Do you mind if I search you?' And he said yes." The court denied the motion to suppress.

The district court stated that justification for the search was the consent exception to the warrant requirement. But, as in V.H. v. State, 903 So. 2d 321 (Fla. 2d DCA 2005), the officer's testimony did not unequivocally establish that defendant consented to the warrantless search. Indeed, the officer's testimony that defendant answered "yes" when asked "Do you mind if I search you" tended to establish that he did not consent. The

district court held that, because the evidence did not unequivocally establish defendant's consent, the motion to suppress should have been granted. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/April/April%2008,%202011/2D10-1171.pdf

State v. Harris, 58 So. 3d 408 (Fla. 1st DCA 2011).

The district court reversed the trial court's order that granted a motion to suppress evidence from a search because the police officers had relied in good faith on well-settled case law when they conducted the search.

Police had defendant under surveillance for suspected drug activity but stopped her vehicle because they knew she was driving with a suspended license. After the officers handcuffed defendant and secured her in a patrol car, they searched her purse, which had been in the passenger compartment of her vehicle, and found methamphetamines, marijuana, and ecstasy.

The district court stated that the search was valid under the bright-line rule in New York v. Belton, 453 U.S. 454 (1981), the controlling precedent at the time. Several weeks later, however, in Arizona v. Gant, 129 S.Ct. 1710 (2009), the U.S. Supreme Court disavowed the common interpretation of Belton.

The Supreme Court held in Gant that police officers are authorized to "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" Id. at 1719 (quotation omitted).

The district court stated that, in the present case, the trial court correctly determined that the search of defendant's purse was invalid under Gant because she was handcuffed and in a patrol car when her purse was seized. The court was also correct in holding that Gant applied retroactively because the decision in this case was not final when Gant was decided. However, the district court held that trial court erred by rejecting the state's argument that the search was valid under the good-faith exception of U.S. v. Leon, 468 U.S. 897 (1984).

The district court noted that there were few opinions on the subject at the time the motion to suppress was considered. The trial court adopted the view expressed by the Middle District of Tennessee that the good-faith exception of Leon does not apply to reliance on Supreme Court precedent. See U.S. v. Buford, 623 F. Supp. 2d (M.D. Tenn. 2009). Since then, however, courts from numerous state and federal jurisdictions, including Florida's Fifth District Court of Appeal and the federal Eleventh Circuit Court of Appeals, have decided that the good-faith exception does apply to pre-Gant searches incident to arrest that were in the pipeline when Gant was decided,

The district court explained that the rule in Belton was quite clear and thus did not require individual police interpretation and that the U.S. Supreme Court has made it clear that the exclusionary rule is intended to deter police misconduct, not to remedy the prior invasion of a defendant's constitutional rights. Illinois v. Krull, 480 U.S. 340, 347 (1987). The district court stated that application of the exclusionary rule in the case at bar would not deter future police misconduct, nor would it deter appellate courts from issuing erroneous rulings or lower courts from following the lead of higher courts.

Instead, the officers who relied on Belton, and society which benefits from apprehension of law-breakers, would be punished for the Supreme Court's decision that a prior ruling was error, according to the district court. "Particularly when law enforcement officers have acted in objective good faith . . . the magnitude of the benefit conferred on such guilty defendants [by the exclusionary rule] offends basic concepts of the criminal justice system." Leon, 468 U.S. at 907-08.

Thus, the district court concluded that the motion to suppress should have been denied and certified the following question as a question of great public importance:

Does the good-faith exception to the exclusionary rule apply to evidence seized by the police in contravention of Arizona v. Gant, 129 S. Ct. 1710 (2009)?
http://opinions.1dca.org/written/opinions2011/04-14-2011/09-4520.pdf

Torts/Accident Cases

McGill v. Perez, 59 So. 3d 388 (Fla. 2d DCA 2011).

The district court reversed final summary judgment in favor of defendants in a personal injury lawsuit for damages suffered in a traffic accident.

The accident involved two commercial truck drivers. Plaintiff was driving a tractor-trailer with a full load, and defendant was driving a truck pulling a trailer loaded with mulch for his employer, a plant nursery. Plaintiff was driving south in the right-hand lane of U.S. 27 and had the right of way. Defendant was at a stop sign on a side road from which he intended to turn right and proceed south on U.S. 27. In his deposition defendant acknowledged seeing the headlights of a vehicle driving south on U.S. 27. But he believed that he had time to safely pull onto the main road. Defendant turned right into the merge lane and then moved into the right-hand, southbound lane of U.S. 27. Plaintiff's truck rear-ended him.

Defendant and his codefendant (employer) moved for summary judgment as a matter of law based on a rebuttable presumption that, in a rear-end collision, the following driver is negligent. See Gulle v. Boggs, 174 So. 2d 26 (Fla. 1965). They claimed that the plaintiffs could present no facts that would overcome this presumption. Plaintiff filed a response disputing some of the facts recited in the defendants' motion and asserting facts that might establish defendant's negligence.

The issue before the district court was whether the magistrate and the circuit court below erred in determining that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. As is proper on a motion for summary judgment, the magistrate's recommendation was based solely on depositions and affidavits filed in support of and in opposition to the motion. It was undisputed that this accident occurred in the early morning hours and that it was dark. The parties differed about whether fog was present and about whether the road was wet.

Plaintiff claimed that the lights were not working on defendant's truck; defendant insisted that they were. Defendant admitted that he saw the lights of plaintiff's truck both when defendant was at the stop sign and during the time he was driving in the merge lane. Plaintiff raised facts that may call into question whether defendant failed to properly yield when he merged onto the main roadway and whether defendant was able to attain a safe and reasonable speed once he merged onto U.S. 27.

In his deposition, defendant testified that he began flashing his rear lights when he realized plaintiff's truck was coming up behind him. Plaintiff claims this fact could demonstrate that defendant realized he had erred by entering the roadway before allowing plaintiff's truck to pass by.

The district court explained that the presumption that the following driver is negligent can be rebutted when that driver "produces evidence which fairly and reasonably tends to show that the real fact is not as presumed." Gulle, 174 So. 2d at 28-29. The court held that, in this case, disputed issues of material fact should have precluded entry of a summary judgment based on the presumption of negligence. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/May/May%2006,%202011/2D10-1162.pdf

Schmidt v. Van, __ So. 3d __ (Fla. 1st DCA 2011), 2011 WL 1449653, 36 Fla. L. Weekly D812, 1D10-4206.

The district court reversed the trial court's order, which had determined that the jury verdict in defendant's favor was against the manifest weight of the evidence and awarded the plaintiff a new trial. The district court remanded for the trial court to reinstate the jury verdict in favor of the defendant.

Plaintiff brought suit against the defendant, seeking recovery for personal injuries allegedly sustained in an automobile accident, requiring plaintiff to undergo a cervical spinal fusion surgery. Defendant did not contest his liability for causing the automobile accident but instead argued that the accident was not the cause of plaintiff's injury or need for medical treatment. Defendant's defense centered on the minor nature of the automobile accident and plaintiff's medical history, which included a prior cervical spinal fusion surgery, a prior automobile accident in which plaintiff was ejected from the vehicle, and diagnoses of emphysema and spinal degenerative disease.

After a three-day trial, the jury returned a verdict in favor of defendant, finding that plaintiff had not suffered an injury as a result of the accident at issue. Thereafter, the plaintiff filed a motion for a new trial and the trial court granted the motion. The trial court concluded that the jury's verdict finding no causation was contrary to manifest weight of the evidence in light of testimony of three expert medical witnesses, one of whom was a defense witness, who opined that plaintiff's injury and resulting surgery was caused at least in part by the accident at issue.

The district court stated that it was bound to reverse because the legal premises on which the trial court proceeded to find the verdict to be against the manifest weight of the evidence were erroneous. The district court stated that, specifically, the court concluded that based on the evidence introduced through testimony of expert witnesses relative to causation, the jury could not determine that the accident caused no injury to plaintiff.

The district court held that it is well-established that a jury may reject any testimony, including testimony of experts, even if not contradicted. Accordingly, the jury was free to weigh and reject the testimony of the medical experts who opined that plaintiff's injuries were caused, at least in part, by the automobile accident.

The district court stated also that expert testimony conflicted with much of the lay testimony presented to the jury. Where expert testimony conflicts with lay testimony, the trial judge should defer to the jury to weigh the evidence. Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993).

The district court held that, based on evidence and testimony at trial and the instructions presented to it, the jury could conclude that plaintiff suffered no injury as a result of the accident at issue. By failing to recognize the jury's prerogative to reject the expert testimony on causation, particularly in light of lay testimony which conflicted with expert testimony, the trial court erred in concluding that the manifest weight of the evidence was contrary to the jury verdict. Thus, the district court found that the trial court abused its discretion in granting plaintiff's motion for new trial.
http://opinions.1dca.org/written/opinions2011/04-15-2011/10-4206.pdf

Drivers' Licenses

Neary v. State, __ So. 3d __ (Fla. 3d DCA 2011), 2011 WL 2415776, 5D09-1144.

The district court reversed defendant's judgment and sentence for driving with a revoked license—habitual traffic offender.

The trooper who stopped defendant for speeding discovered that his Georgia driver's license had been revoked after he was classified in that state as a habitual traffic violator. The trooper arrested him and charged him with "driving while license revoked—habitual offender," a third-degree felony.

At the nonjury trial, defendant asserted that because his license had been revoked by Georgia, not Florida, and Florida did not maintain his traffic record, he did not meet Florida's statutory definition of "habitual traffic offender." The trial court disagreed, found him guilty of driving with a revoked license—habitual traffic offender, and sentenced him to 24 months' probation.

The district court noted that defendant was convicted of violating section 322.34(5), which states:

> Any person whose driver's license has been revoked pursuant to s. 322.264 (habitual offender) and who drives any motor vehicle upon the highways of this state while such license is revoked is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

In order to be convicted under this statute, the defendant's driver's license must have been revoked pursuant to section 322.264 of the Florida Statutes, which provides in pertinent part:

> A "habitual traffic offender" is any person whose record, as maintained by the Department of Highway Safety and Motor Vehicles, shows that such person has accumulated the specified number of convictions for offenses described in subsection (1) or subsection (2) within a 5-year period . . . .

The district court explained that because the Department of Highway Safety and Motor Vehicles ("department") did not maintain defendant's Georgia traffic records, no records maintained by the department were used to establish that defendant was a habitual traffic offender, and the state did not contend otherwise. The district court agreed with defendant's argument that he did not qualify as a "habitual traffic offender" under section 322.264 and could not be convicted under section 322.34(5).

The district court concluded that if the records maintained by the department pursuant to section 322.264 show that a person is a habitual traffic offender, the habitual offender status may be used to elevate the offense of driving with a revoked license to a felony under section 322.34(5). However, Florida may not rely upon a Georgia habitual traffic violator designation to enhance the Georgia resident's Florida traffic offense to a criminal offense where the department does not maintain the Georgia traffic records. http://www.5dca.org/Opinions/Opin2011/061311/5D09-1144.op.pdf

DHSMV v. Freeman, __ So. 3d __ (Fla. 3d DCA 2011), 2011 WL 1485968, 36 Fla. L. Weekly D834, 3D11-107.

The district court granted defendant's writ of certiorari regarding a circuit court decision vacating suspension of defendant's driver's license following his refusal to consent to a breath test incident to his arrest for driving under the influence (DUI).

The district court found the circuit court's reliance on an earlier circuit court decision regarding Florida's implied consent law, Trauth v. Department of Highway Safety & Motor Vehicles, 15 Fla. L. Weekly Supp. C871a (Fla. 11th Cir. Ct. July 3, 2008) ("Trauth I"), was overtaken by district court precedent—specifically, DHSMV v. Nader, 4 So. 3d 705 (Fla. 2d DCA 2009), review granted, 36 So. 3d 84 (Fla. 2009). (The Supreme Court of Florida accepted jurisdiction. Nader v. DHSMV, 36 So. 3d 84 (Fla. 2010)).

Around 2:40 a.m., a police sergeant observed defendant driving in an erratic fashion, drifting and jerking from one side of the lane to the other. A traffic stop followed. The police officer's report and later testimony included observations that the defendant had an odor of alcoholic beverages on his breath, a flushed face, slurred speech, and poor responses to the field sobriety test. The officer asked defendant to take a breath test, and defendant refused to do so. The officer gave implied consent warnings, but the defendant continued to refuse to take the test.

After submission of DUI arrest paperwork, including the officer's sworn affidavit regarding defendant's refusal to submit to a breath test, DHSMV suspended his driver's license. Defendant was afforded an administrative hearing. Defendant testified that the implied consent warning was not properly administered and that it left him with the impression that he was being asked to consent to all three tests (breath, urine, and blood). Defendant said he refused the tests because "I don't do needles at all."

The police officer had initially marked one of the implied consent forms to indicate that defendant agreed to take a breath test, but the respondent refused to sign that form. The officer's affidavit and testimony at the administrative hearing established that ultimately defendant refused a breath test. Defendant also moved to invalidate the suspension based on circuit court interpretations of implied consent law as in Trauth I. The DHSMV's field hearing officer sustained the license suspension under the implied consent statute. Defendant sought review by the circuit court appellate division.

The circuit court followed Trauth I, noted the Third District's opinion in "Trauth II", DHSMV v. Trauth, 41 So. 3d 916 (Fla. 3d DCA 2010) to the effect that propriety of warnings under the implied consent law "involves a close question of law," and quashed the order suspending defendant's license. DHSMV petitioned the Third District.

The district court stated that conflicting circuit court decisions within the Third District were further complicated because of conflicting district court decisions among the Second, Fourth, and Fifth Districts. (As noted, the conflict in decisions is presently pending before the Supreme Court of Florida.) The district stated that, in the interim, DUI arrests will continue and the circuit court is entitled to know which analysis to follow.

The district court explained that the threshold question is whether this case is appropriate for "second-tier" certiorari under the standards articulated in Custer Medical Center v. United Automobile Insurance Co., 35 Fla. L. Weekly S640 (Fla. Nov. 4, 2010). In Custer, the supreme court held that when a district court considers a petition for second-tier certiorari review, the "inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law," or, as otherwise stated, departed from the essential requirements of law and violated a clearly established principle of law resulting in a miscarriage of justice

The district court concluded that the error in this case (the same error rectified in DHSMV v. Nader, 4 So. 3d at 710) involved "clearly established law" and an interpretation which "disobeyed the plain language of the statute," authorizing the district court's issuance of the writ in this case.

The district court found the Second District's analysis in Nader persuasive for purposes of section 322.2615, Florida Statutes, when a driver is warned that driving privileges will be suspended if he or she refuses to submit to a "breath, blood, or urine test" under circumstances in which a request for a blood test is not authorized. The district court declined to apply or endorse the Fourth District's invalidation of such a warning in DHSMV v. Clark, 974 So. 2d 416 (Fla. 4th DCA 2007). The district court recognized that the Supreme Court of Florida might reach a different conclusion in the conflict case presently pending in Nader.

The district court held that, in the interim, the circuit courts within the Third District should follow Nader rather than Trauth I when only a breath test is authorized but it is refused after a disjunctive warning of the kind involved here. The district court granted the DHSMV's petition and quashed the circuit court's order denying rehearing. http://www.3dca.flcourts.org/Opinions/3D11-0107.pdf

Dep't of Highway Safety and Motor Vehicles v. Hernandez, ___ So. 3d __ (Fla. 2011), 2011 WL 2224791, 36 Fla. L. Weekly S243, SC08-2330, SC08-2394.

The Florida Supreme Court, addressing certified questions from the First and Fifth Districts, held that a driver's license suspension can be predicated upon refusal to take a breath test, but only if the refusal is incident to lawful arrest. Resolving a conflict between the First and Second Districts, the court also held that a driver whose license was suspended should be able to challenge whether refusal was incident to lawful arrest in proceedings before a hearing officer, who is reviewing the legality of the suspension.

The supreme court approved Hernandez v. Department of Highway Safety & Motor Vehicles, 995 So. 2d 1077 (Fla. 1st DCA 2008); approved of the reasoning in Department of Highway Safety & Motor Vehicles v. Pelham, 979 So. 2d 304, 305-08 (Fla. 5th DCA 2008), review denied, 984 So. 2d 519 (Fla. 2008); and quashed McLaughlin v. Department of Highway Safety & Motor Vehicles, 2 So. 3d 988 (Fla. 2d DCA 2008).

The court rephrased the certified questions as follows:

> (1) 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?
>
> Answer: No.
>
> (2) Is 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?
>
> Answer: Yes.

The supreme court majority opinion presented the following analysis of the questions:

(1) Florida law does not require an individual to submit to a breath alcohol-detection test simply because that person possesses a driver's license. The obligation to submit to breath-alcohol testing emanates from section 316.1932, Florida Statutes (2006), commonly known as the implied consent law. The statute provides that the test "must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages." Id. Accordingly, the legislature authorized administration of a breath test only if it is incident to a lawful arrest and based on probable cause to believe that the person driving was under the influence of alcoholic beverages.

(A separate statute, not presently before the court, requires an individual under 21 to submit to a breath test if an officer has probable cause to believe the individual is driving under the influence and provides for its own separate scheme of license procedures and review by a hearing officer. See § 322.2616, Fla. Stat. (2010)).

Under the implied consent law, the person must be advised of punishment (license suspension) for refusing to submit to a test. § 316.1932(1)(a)1.a., Fla. Stat. Section 322.2615, Florida Statutes, the statute before the court in this case governing suspension of an individual's driver's license and the right to review of such a suspension, authorizes a law enforcement officer, on behalf of DHSMV, to suspend the license of any person who refuses to submit to a "lawful" breath test. § 322.2615(1)(b)1.a., Fla. Stat..

The only definition of a lawful breath test under section 322.2615 is found in section 316.1932(1)(a). The statutes must be read *in pari materia*. Section 316.1932 is the only statute that defines parameters of a lawful breath-alcohol test in section 322.2615. If the statutes are not read *in pari materia*, then there is no notice as to when citizens are

required to submit to the test or else face suspension of their driver's licenses. Accordingly, a "lawful test" under section 322.2615, Florida Statutes, is one that is requested incident to a lawful arrest, as specified in section 316.1932, Florida Statutes.

(2) The second rephrased certified question is related to the first question and concerns the method of challenging a suspension for refusal to submit to a breath test. The court explained that, after an individual's license is suspended under section 322.2615 for refusing to submit to a breath test under section 316.1932, that section entitles the driver to request a formal or informal review of validity of the suspension. § 322.2615(1)(b)3., Fla. Stat.; see also §§ 322.2615(4), (6), Fla. Stat. In the prior version of the statute, the hearing officer's scope of review included consideration of the additional issue of "[w]hether the person was placed under lawful arrest for a violation of s. 316.193." § 322.2615(7)(b)(2), Fla. Stat. (2005), amended by ch. 2006-290, § 45, Laws of Fla. Because the legislature deleted this statutory language and made other deletions in the amended statute, the DHSMV contends that the issue of whether a person was placed under a lawful arrest is no longer a consideration in the suspension process.

As noted by the circuit court in McLaughlin, although the legislature's removal of the "lawful arrest" requirement from section 322.2615(7) may seem clear, the legislature left that requirement in the implied consent law. McLaughlin v. Fla. Dep't of Highway Safety & Motor Vehicles, No. 2007-CA-001672, order at 4 (Fla. 10th Cir. Ct. Sept. 18, 2007) (order denying petition for writ of certiorari) (stating that the legislature had created an "unnerving quagmire"). Section 322.2615 cannot be read in isolation but must be read in concert with section 316.1932, which defines the scope of the driver's obligation to submit to a breath test. Section 322.2615 does not establish any obligation on the part of a driver to take a test upon the request of law enforcement; it only establishes consequences for refusal. Section 316.1932 is what creates and defines the scope of the obligation, and its mandate is certain: the test must be incident to a lawful arrest. These statutes must be considered *in pari materia.*

Subsection 322.2615(7) purports to "limit" the scope of review to three issues. The first issue, probable cause, is a concept that is often inextricably intertwined with the lawfulness of the detention as it is in this case. The second issue directs the hearing officer to address whether the driver "refused to submit to any such test." § 322.2615(7)(b)2., Fla. Stat. "Any such test" refers to the "lawful" test that the suspension must be "pursuant to."

The final issue, the provision of notice, relates to the form of notice mandated by the same statute, which too refers to a "lawful" test. This so-called limitation on the hearing officer's scope of review does not nullify the statute's directive that the hearing officer "determine . . . whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. (2007). A driver whose license is unlawfully suspended must have a means to challenge that suspension, and the only means by which a driver can challenge suspension of his or her license for failure to submit to a breath test is through section 322.2615. Whether denominated a "right" or a "privilege," the loss of a driver's license is an extreme hardship.

The interpretation urged by DHSMV would allow DHSMV to suspend a driver's license without reasonable notice and no possibility of a meaningful process to review the lawfulness of the suspension. The only reading of the statute that avoids an unreasonable and unconstitutional result is to construe sections 322.2615 and 322.1932 *in pari materia* and allow the hearing officer to review whether the test was administered incident to a lawful arrest. Once section 322.2615 and section 316.1932 are read together, it becomes clear that under the statutory scheme, "sufficient cause" to sustain the suspension under section 322.2615(7) and "whether the person whose license was suspended refused to submit to any such test" require that the hearing officer make the determination of whether the test was administered incident to a lawful arrest, as required by section 316.1932, Florida Statutes.