FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

January-March 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)

Goldman v. State, 57 So. 3d 274 (Fla. 4th DCA 2011).

The district court reversed an order summarily denying defendant's rule 3.850 motion for postconviction relief.

Defendant was convicted of DUI manslaughter; unlawful blood alcohol/leaving the scene of an accident; DUI serious bodily injury; and leaving the scene of an accident with injury. On direct appeal, she raised seven issues, and the district court reversed on one point, agreeing that the convictions for DUI manslaughter/leaving the scene of an accident and leaving the scene of an accident involving injury violated the prohibition against double jeopardy. The conviction for leaving the scene of an accident involving injury was reversed, and the case was remanded for resentencing.

Defendant filed a 3.850 motion raising a total of eleven claims. The trial court initially granted an evidentiary hearing on ground eight and reserved ruling on her claim of cumulative error. The court granted the state's motion for rehearing and concluded claims eight through eleven were untimely and were insufficient or refuted by the record.

The district court held that defendant's claims regarding the failure to retain a toxicologist and to investigate the chain of custody of the blood evidence were legally sufficient and not refuted by the record. In claim six, defendant alleged her trial attorney provided ineffective assistance by failing to retain a toxicologist to challenge the blood alcohol analysis. When she was interviewed by an officer at the scene, defendant said she drank two and a half beers between 9 p.m. and midnight, and a blood test would prove it. According to a police report, the accident occurred around 2:48 a.m. The officer testified that she did not appear intoxicated. Her eyes appeared bloodshot, and she seemed unsteady, but officers agreed this would be typical of someone involved in an accident involving a death.

Regarding blood samples, the district court stated that there was a gap of 31 to 43 hours between the blood draw and the time the property receipt indicated samples were placed in refrigeration. One sample had clotted and was not usable. The other sample indicated a blood alcohol content (BAC) of 0.20. The state's expert testified that a person with this blood alcohol level would exhibit confusion, staggering, impaired cognitive function, and slurred speech. Defendant did not exhibit these signs. Officers noticed a faint odor of alcohol, and she appeared upset.

The supplemental motion alleged that defendant retained a toxicologist who would testify that improper handling of the blood samples, such as storing at high temperatures, can result in a higher BAC reading. Defendant argued that trial counsel should have presented expert testimony to refute that defendant was intoxicated at the time of the accident. Because defense counsel failed to call a toxicologist, defendant was unable to present to the jury scientific evidence about what happens if blood samples are not properly refrigerated. Defendant stated that she believed she could have successfully challenged the BAC evidence, and as a result, the state would have to prove intoxication through the officers' testimony. The officer who interviewed her indicated that she did not appear to be intoxicated, and no roadside sobriety tests were administered.

Defendant argued that if officers believed she was intoxicated, they would have arrested her at the scene. Absent BAC evidence, defendant believed the state did not have sufficient evidence of intoxication, and the jury would have acquitted her of the DUI manslaughter charges and DUI serious bodily injury.

Defendant amended this claim in reply to the state's response and attached a report from a toxicologist, which explained why he believed the blood results were unreliable.

The state argued this claim was refuted by the record because when the defense rested at trial, counsel indicated they had "blood people" and other experts available but had decided not to call these witnesses.

However, defense counsel did not file a witness list naming any toxicologist or blood expert. In addition, according to defendant's amended postconviction claim, her trial attorney had since admitted that he did not retain a toxicologist. If defense counsel never consulted a toxicologist and defendant did not know that there was a basis to challenge the blood results, the waiver of her right to present evidence was not knowing and voluntary. Even assuming defense counsel had investigated this issue, the failure to present evidence that could explain why the BAC results could be wrong when she otherwise had no good defense was not a reasonable strategy.

Based on the cross-examination of the state's toxicologist at trial, it appears defense counsel was not prepared to challenge the BAC results. Counsel asked the toxicologist just one question that addressed this issue, whether improper storage and handling could affect the reading, and the expert stated it was possible. Counsel had no

further questions for the expert, and it appears the jury did not hear any evidence that could explain why a sealed tube could yield unreliable test results.

The state also argued this claim was speculative. However, defendant pointed to factors that would support her belief that the blood may have been mishandled and the test results were inaccurate. Defendant's handwriting at the scene was inconsistent with a person having a blood alcohol level nearly three times the legal limit. In her statement to police, she said she wanted a blood test to prove she had only three beers.

The state's expert testified that a person defendant's size would have to drink six and a half beers to have a 0.20 BAC.

The district court stated that there were sufficient reasons in the record to question the BAC results. The district court stated that defendant showed a reasonable probability the outcome would have been different if the jury had received expert testimony about how temperature, contamination from the loss of vacuum in the tube, and other mishandling could increase the amount of alcohol in the sample. This testimony could create a reasonable doubt about whether the defendant's blood alcohol level exceeded the legal limit.

In claim seven, defendant argued that trial counsel provided ineffective assistance by failing to adequately investigate the chain of custody of the blood samples. The district court held that, to the extent this claim is related to claim six, it was legally sufficient and not refuted by the record.

Defendant raised a claim of cumulative error pointing to alleged deficiencies by trial counsel. The district court stated that defendant may not have satisfied the prejudice prong in each of these claims individually but that taken together in light of legally sufficient claims of ineffective assistance of counsel in grounds six and seven, it could not say that defendant was not prejudiced by cumulative errors.

The district court reversed and remanded for an evidentiary hearing on claims six and seven and defendant's claim of cumulative error.
http://www.4dca.org/opinions/Mar%202011/03-30-11/4D09-2782.op.pdf

DHSMV v. Meinken, 55 So. 3d 629 (Fla. 5th DCA 2011).

The district court granted the Department of Highway Safety and Motor Vehicles' petition for a writ of certiorari and quashed the decision of an appellate panel of the Ninth Judicial Circuit, citing DHSMV v. Berne, 49 So. 3d 779 (Fla. 5th DCA 2010).

The circuit court had issued an order granting defendant's petition for writ of certiorari and quashing a hearing officer's decision upholding suspension of his license for driving under the influence of alcohol. The circuit court appellate panel had held that defendant rebutted the presumption that the Intoxilyzer 8000 on which he performed his breath test was properly approved for use in Florida.

http://www.5dca.org/Opinions/Opin2011/013111/5D10-467.op.pdf

State v. Murray et al., 51 So. 3d 593 (Fla. 5th DCA 2011).

The district court reversed the trial court's order suppressing blood test results obtained from blood drawn from the two defendants because both voluntarily consented to the blood draw.

While allegedly street racing, two men were involved in a crash that killed another motorist. The state charged both as principals to vehicular homicide. The state appealed the order suppressing test results obtained from blood drawn from both men.

After the crash, defendants remained at the scene. State troopers testified that neither man appeared to be impaired or smelled of alcohol. Troopers concluded they had no probable cause to arrest either man for driving under the influence or to request a breath, urine, or blood sample. They asked both men to voluntarily provide blood samples. The troopers advised them that the blood would be tested for alcohol and drugs and that the potential for criminal charges existed. No implied consent warnings were given. Both men signed written consent forms.

The trial court denied defendants' first joint motion to suppress, finding that they had consented to the blood draw. The court granted their second joint motion to suppress. Relying on Chu v. State, 521 So. 2d 330 (Fla. 4th DCA 1988), the trial court concluded that despite defendants' voluntary consent to blood draws, suppression was required because they should have been informed that the implied consent law requires submission only to a breath or urine test and that a blood test is offered only as an alternative.

On appeal, the state did not dispute the trial court's factual findings; rather, it contended that Chu was either distinguishable or wrongly decided. The state argued that, because the implied consent laws were not implicated, the troopers were not required to inform defendants about provisions of implied consent.

The district court held that Chu could be easily distinguished, although its holding likely sweeps too broadly. The court further stated that the implied consent statute, 316.1932(1)(a)1.a., Florida Statutes (2007), and its exclusionary rule "apply only when blood is being taken from a person based on probable cause . . . as a result of a DUI offense." Likewise, section 316.1933(1)(a), Florida Statutes (2007), expressly authorizes blood tests when an officer has probable cause to believe an impaired driver has caused death or serious injury. Here, defendants were not under arrest and did not seek medical treatment, and the troopers did not have probable cause to believe they were impaired. Thus, the implied consent law was not implicated. Because both defendants voluntarily consented to the blood draw, the district court reversed the suppression order.
http://www.5dca.org/Opinions/Opin2011/010311/5D10-1376.op.pdf

Deras v. State, 54 So. 3d 1023 (Fla. 3d DCA 2011).

The district court reversed the trial court's order denying defendant's motion for postconviction relief under Florida Rule of Criminal Procedure 3.850.

Defendant was charged with one count of DUI manslaughter and one count of leaving the scene of an accident involving a death. Defendant pled guilty and was sentenced to eleven years in prison. The charges stemmed from two car accidents. The first involved property damage only. He fled the scene and five minutes later was involved in another accident, this time involving a death.

Defendant filed a motion for postconviction relief alleging ineffective assistance of counsel and insufficient evidence to sustain a conviction. The motion was summarily denied. Following three additional motions for postconviction relief, defendant filed the instant motion, again alleging that evidence was insufficient to support a conviction for the crimes to which he pled guilty. The trial court denied the motion as untimely.

The district court acknowledged that defendant made the same argument in a previous motion and that relief was denied. The court stated that, nonetheless, defendant's claim should be revisited under the manifest injustice exception in State v. McBride, 848 So. 2d 287, 291-92 (Fla. 2003).

The district court stated that if defendant fled the scene of the first accident, which involved only property damage, and he did not flee the scene of the second accident, which resulted in a death, then to deny defendant relief would result in manifest injustice. If defendant pled to a charge to which there was no factual basis, his trial counsel provided ineffective assistance of counsel resulting in manifest injustice.

The district court stated that if defendant did not flee from the second accident, he should be permitted to withdraw his plea as to leaving the scene of the accident involving death, the charge should be reduced to leaving the scene of an accident involving property damage, the offenses should be rescored, and the sentences reconsidered. http://www.3dca.flcourts.org/Opinions/3D10-2933.pdf

Criminal Traffic Offenses

Stanley v. State, 57 So. 3d 944 (Fla. 4th DCA 2011).

The district court affirmed defendant's judgment and sentence for first-degree murder and leaving the scene of an accident resulting in death. Defendant was convicted of both counts and sentenced to life in prison.

The victim was general manager of a clothing manufacturer. While at work, he observed a truck driven by someone later identified as defendant enter the company parking lot and drive up to a metal container that held boxes of clothing. The victim became suspicious and attempted to close the parking lot gate. The truck's driver drove the truck through the gate, running over the victim, who later died of his injuries.

Testimony at trial revealed that the truck used in the crime had recently been reported stolen. It was found abandoned near the scene of the crime. Defendant's fingerprints were found in multiple places on the truck. A friend of defendant testified that defendant had confessed to him. This friend contacted the police.

On appeal, defendant argued that the trial court erred by: 1) instructing the jury that defendant could be convicted on either of two theories of first degree murder, to wit, premeditated murder and felony murder, despite the fact that the indictment charged only felony murder; 2) introducing 911 tapes that allegedly contained hearsay statements; and 3) admitting seventeen autopsy photographs into evidence. Defendant also argued that his conviction violated the double jeopardy clause of the Fifth Amendment.

Defendant contended that the grand jury indicted him for first-degree felony murder. However, when the court instructed the jury, it indicated that when a defendant is charged with first degree murder, he or she could be convicted on either a theory of premeditation or a theory of felony murder. In closing, the state repeated the claim that defendant could be convicted of first-degree murder on a premeditation theory. The jury found "defendant is [g]uilty of Murder in the First Degree, as charged in the indictment."

Defendant did not object at the time of the alleged errors. According to defendant, the trial court's jury instructions and the prosecutor's closing statement constructively amended the indictment, thus committing a due process violation that was fundamental error under Crain v. State, 894 So. 2d 59, 69 (Fla. 2004).

The district court held that the law did not support defendant's claim that the indictment was constructively amended. The court further held that, if a conviction under a felony murder theory is legal when the indictment charged premeditated murder, then a conviction under a premeditated murder theory is legal when the indictment charged felony murder, as was the case here.

Defendant next argued that the trial court erred by permitting introduction of recordings of 911 calls. At trial, the state moved to enter into evidence 911 calls made by witnesses to the crime. Some of the witnesses did not testify. Defense counsel objected on hearsay grounds to introduction of "any 911 calls that are not from a person who has testified in this case." The state argued that while the recordings were hearsay, they were nonetheless admissible as either excited utterances or present sense impressions. The district court stated that the 911 tapes qualified as excited utterances pursuant to section 90.803(2), Florida Statutes, and were properly admitted.

Defendant's third point on appeal was that the trial court erred by admitting into evidence seventeen autopsy photos of the victim. Defendant argued that the photographs were not relevant, as it was undisputed that the victim died as a result of being struck by the vehicle. At trial, the state called the assistant medical examiner to the stand to question him about the victim's injuries. While the medical examiner was on the stand, the state attempted to introduce seventeen autopsy photographs. The photographs displayed injuries sustained by the victim and pictures of his bloodstained clothes.

Defendant objected, arguing that the pictures "ha[d] no value except to inflame the jury." The state countered that the photographs were needed in order to establish that the defendant intentionally ran over the victim, causing injury and death. The trial court overruled the objection. The photographs were then used by the medical examiner to explain the victim's injuries and cause of death, which was crushed force chest injury.

The district court held that the photographs were relevant to establishing that defendant intentionally ran over the victim and that, moreover, the photographs were not unnecessarily disturbing, considering the subject matter.

Finally, defendant argued that his conviction violated double jeopardy under the Fifth Amendment of the U.S. Constitution. He contended that, because he was convicted of both leaving the scene of the accident resulting in death and first degree murder of the same victim, his constitutional rights were violated. The district court concluded that defendant's convictions on both counts did not constitute double jeopardy. http://www.4dca.org/opinions/Mar%202011/03-30-11/4D09-2819.op.pdf

Colon v. State, 53 So. 3d 376 (Fla. 5th DCA 2011).

The district court affirmed in part and reversed in part defendant's convictions of two counts of leaving the scene of an accident involving death and three counts of leaving the scene of an accident involving injury, based on a claim of double jeopardy.

Defendant was driving erratically at a high rate of speed when he lost control and collided with another car. His two best friends, who were passengers in his car, were killed, and the driver of the other vehicle was injured along with two other passengers.

Defendant was charged with two counts of vehicular homicide enhanced to first-degree felonies for failure to render aid, two counts of leaving the scene of an accident with death, and three counts of leaving the scene of an accident with injuries. The jury found defendant guilty, and the trial court adjudicated him guilty of all seven counts.

Defendant was sentenced to concurrent five year terms for the three counts of leaving the scene of an accident with injury. Defendant was sentenced to ten-year terms for the two counts of leaving the scene of an accident with death. The prosecutor informed the court that it would violate double jeopardy to impose sentences for the two counts of leaving the scene of an accident with death when they were charged in the alternative to the vehicular homicide counts. The trial court adjudicated him on the two counts and sentenced him to time served.

Defendant contended that his sentence must be vacated because the trial court impermissibly considered his protestation of innocence. While defendant was testifying at sentencing, the trial court asked him about his protestations that he was not driving the car. While announcing statutory maximum sentences of thirty years for the two vehicular homicide counts, the trial court stated:

"As to Count 1 and 2, based upon the totality of the circumstances, [defendant's] continued denial of the fact that he is responsible for this accident, he is a danger to society . . . . Put him in an automobile and he is a guided missile. And there is just no excuse. I mean, he wasn't under the influence of any drugs or alcohol that day. He was just under the influence of doing whatever the hell he wanted to do, irrespective of all those other people on the highway."

Appellate counsel filed a motion to correct illegal sentence, claiming double jeopardy violations. The trial court did not rule on the motion.

On appeal, defendant asserted two double jeopardy violations. First, he argued that a conviction for vehicular homicide failure to render aid or give information and a conviction for leaving the scene of an accident with death for the same victim violates double jeopardy. Second, he contended that a defendant can be charged with only one count of leaving the scene of an accident involving death or injury when only one accident occurs. The state disputed his first point but agreed with the second.

The state contended that defendant's convictions for vehicular homicide and one count of leaving the scene of an accident with death no longer violated double jeopardy based on Valdes v. State, 3 So. 3d 1067 (Fla. 2009). The district court disagreed.

The district court held that defendant was correct that elements of leaving the scene of an accident with death were subsumed in elements of vehicular homicide. In sum, the district court affirmed defendant's two convictions for vehicular homicide and one conviction for leaving the scene of an accident with injuries. The court vacated the remaining convictions. The court agreed that defendant was entitled to a new sentencing hearing because of the trial court's reliance on defendant's refusal to admit his culpability. The court stated that the trial judge's questions to defendant and remarks immediately before imposing two maximum consecutive sentences suggested that the trial court considered this impermissible factor.
http://www.5dca.org/Opinions/Opin2011/012411/5D09-3131.op.pdf

T.L.T., a child, v. State, 53 So. 3d 1100 (Fla. 4th DCA 2011).

The district court reversed an order withholding adjudication but ordering probation on two counts of throwing a deadly missile into two vehicles. The district court concluded that evidence was legally insufficient to support one of the charges.

The charges arose from two separate incidents in which two women reported that their vehicles were struck by objects thrown from a school bus. In the first incident, a witness was in her mother's vehicle and stopped at a red light next to a school bus on her right. She heard two sounds and saw two hands snatched back through bus windows. She did not see faces, nor did she see what was thrown, but the vehicle had a new small dent.

The bus driver had observed defendant throw something from the window but did not see what was thrown. She was about to call her dispatch when the witness whose car

was hit pulled up and stopped the bus. The bus driver called the police, who arrived and tried to determine who had thrown the object. The driver identified defendant and the child sitting with him. The witness testified that when the officer removed defendant from the bus, defendant and another student cursed at and threatened her.

In the second incident, which occurred immediately after the first, a second witness was at a red light, going in the opposite direction from the bus. As the bus passed to her left, a small object hit her window. She looked down to see a Gatorade bottle bouncing on the ground.

At trial, another child testified that he had handed defendant a small, empty Gatorade bottle. He did not see what defendant did with the bottle. The state presented a video taken inside the bus. Defendant could be identified in the back, and the court indicated that it observed defendant turning to the bus window twice and laughing, although defendant could not be seen throwing anything.

After the state presented its case, the defense moved for a judgment of dismissal, contending that the state's evidence did not meet a prima facie case. The trial court denied the motion. The defense did not present evidence, and the trial court found that the state had proved its case. In making its findings, the court stated that the Gatorade bottle was full, when in fact the evidence showed that the bottle was empty. From the court's discussion, it appears that the court concluded that the Gatorade bottle was involved in both incidents. However, it withheld adjudication and placed defendant on probation.

The district court concluded that there was sufficient evidence to satisfy the state's burden as to the second incident, although evidence showed that the bottle was empty, not full. The court found no evidence to support the state's case that the defendant threw anything out of the window to dent the first vehicle. No one saw anything thrown from the bus other than the Gatorade bottle that hit the second vehicle. No evidence placed anything but the bottle in defendant's hand. Thus, evidence was legally insufficient to support this charge.

The district court reversed and remanded to vacate the sentence on the count of throwing a deadly missile into the first vehicle. As to the second charge, the court affirmed and directed the trial court to reconsider the sentence, as elimination of the first charge might affect the court's judgment as to the sentence, since the trial court had erroneously concluded that evidence showed that defendant had thrown a full bottle. http://www.4dca.org/opinions/Jan%202011/01-26-11/4D09-1907.op.pdf

Sinclair v. State, 50 So. 3d 1223 (Fla. 4th DCA 2011).

The district court reversed two firearm-related convictions and sentences because of a prejudicial evidentiary error in a case in which defendant was convicted of possession of a firearm by a convicted felon, carrying a concealed firearm, felony driving while license suspended, and unlawful use of a false name.

A police detective noticed a car with a missing tag light. The detective followed the car until it came to a complete stop in the middle of the road. The detective asked defendant for his license, registration, and proof of insurance. Defendant did not have these items and gave the detective a false name. During a consensual search, the detective discovered a loaded handgun under a flap connected to the armrest. The detective found a document containing defendant's true name. The detective discovered that defendant had been convicted three times for driving with a revoked license.

During trial, defendant argued that the firearm belonged to a man who had left it in the vehicle and that he had no knowledge that the firearm was there. The detective testified that the owner had contacted him and stated that he believed defendant had stolen the firearm. The testimony was found to be hearsay and stricken from the record.

Since the state presented no evidence that a firearm was found on defendant's person, the state had to present evidence of constructive possession. Constructive possession requires the state to prove that defendant had knowledge of the presence of the contraband and the ability to exercise dominion and control over it.

The district court explained that the state presented evidence that defendant was the sole occupant and in exclusive possession of the vehicle and that this evidence was enough to establish a prima facie case of possession. However, the district court agreed with defendant that the trial court erred in admitting the statement from the firearm's owner that defendant had stolen the gun from him. The district court rejected the state's contention that defendant "opened the door" to this testimony.

The district court held that admission of this evidence was not harmless. The district court explained that it could not say, beyond a reasonable doubt, that the accusation that defendant stole the firearm later found in defendant's vehicle did not contribute to the guilty verdict. The district reversed the convictions and sentences for the charges of possession of a firearm by a convicted felon and carrying a concealed firearm. http://www.4dca.org/opinions/Jan%202011/01-05-11/4D08-5065.op.pdf

McKinney v. State, 51 So. 3d 645 (Fla. 1st DCA 2011).

The district court affirmed defendant's convictions and sentences for third-degree murder and fleeing or attempting to elude a law enforcement officer causing death. The district court rejected defendant's argument that the convictions and sentences violated double jeopardy protections because, even though the offenses contain different elements, he was being punished twice for the death of a single victim.

The district court concluded that fleeing or eluding is not a homicide offense, and, thus, double jeopardy does not bar the convictions and sentences for both felony murder and the underlying felony of fleeing or eluding.

Evidence presented at trial reflected that defendant approached a woman at a gas station with a gun and stole her van. Officers pursued defendant and attempted to initiate

a traffic stop. Defendant drove erratically in excess of the speed limit, eventually causing an accident with another vehicle. The driver of the other vehicle died.

The state charged defendant with vehicular homicide, third-degree murder, fleeing or eluding, and carjacking. The fleeing or eluding charge served as the underlying felony for the third-degree murder charge.

The jury returned a verdict of guilty as charged on all counts. The trial court vacated defendant's vehicular homicide conviction on double jeopardy grounds and sentenced defendant for the other offenses. Defendant was sentenced as an habitual felony offender to 30 years in prison on the third-degree murder charge, with a concurrent 30-year term on the fleeing or eluding charge and a consecutive 20-year term on the carjacking charge.

After a double jeopardy analysis, the district court concluded that none of the statutory double jeopardy exceptions under section 775.021(4)(b)1.-3., Florida Statutes (2008), applied. The district court stated that, because fleeing or eluding was not a homicide offense, double jeopardy did not bar defendant's convictions for both third-degree murder and the underlying felony of fleeing or eluding. The court held that defendant's dual convictions were not precluded by the "notions of fundamental fairness" underlying the principle that multiple homicide punishments cannot be based upon a single death.
http://opinions.1dca.org/written/opinions2011/01-24-2011/09-6322.pdf

Arrest, Search and Seizure

State v. Gilson, 56 So. 3d 146 (Fla. 2d DCA 2011).

The district court reversed an order granting defendant's motion to dismiss the charge of attempted first-degree murder of a law enforcement officer due to the state's destruction of certain evidence.

The state alleged that during a traffic stop, defendant shot a sheriff's deputy. Defendant was convicted of attempted first-degree murder of a law enforcement officer. The trial court sentenced defendant to 40 years in prison with a 25 year minimum mandatory. The district court affirmed the conviction and sentence.

Defendant was granted a new trial. As the state prepared to retry defendant, both parties learned that certain evidence from the first trial had been destroyed, despite the fact that it had been the subject of a protective order entered in 1997.

Defendant moved to dismiss the charge on the basis that the destroyed evidence, which included defendant's car and clothing he wore the night of the incident, was exculpatory and had been destroyed by the state in bad faith. The trial court granted defendant's motion to dismiss. The state appealed the trial court's order dismissing the charge based on destruction of evidence.

The charges against defendant arose from a traffic stop that resulted in gunfire between an occupant of defendant's vehicle and a deputy. At the first trial, the deputy testified that he had pulled his patrol car alongside defendant's vehicle. The deputy further testified that he observed that the driver was the only occupant of the vehicle. After he effectuated the traffic stop, the deputy exited his vehicle, but before he could approach the other car, a man exited the driver's side of that vehicle and shot at the deputy, striking him in the leg. The deputy returned fire, and as the car sped off, he fired shots into the vehicle. Defendant was apprehended, wounded and hiding under a house.

Defendant asserted at the first trial that although he was the driver, a passenger was riding in his back seat on the driver's side. Defendant maintained that when the deputy stopped him that night, the passenger pushed his way out of the back seat and out the driver's side door and began firing at the deputy. Defendant asserted that he then drove off as the officer fired at his vehicle.

Although all 33 items of evidence that were subject to the protective order after the first trial were destroyed, defendant's motion to dismiss addressed only the evidentiary value of clothing he was wearing the night of the incident and the car he drove. Defendant maintained that further forensic examination of his shirt and car would have impeached the state's evidence and that destruction of these items deprived him of ability to obtain a fair trial. Defendant argued that, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), the attempted first-degree murder charge must be dismissed.

The trial court agreed, concluding that because the evidence at issue was favorable to defendant as impeachment evidence, defendant had established a Brady violation. On appeal, the state argued that the trial court erred in granting defendant's motion to dismiss because defendant failed to establish both that the evidence was destroyed in bad faith and that he would be unable to obtain comparable evidence by other reasonably available means.

At the first trial, defendant presented the misidentification defense, testifying that a second person exited the car and began shooting at the deputy. According to defendant, when the shooting began, he drove off, and as he was leaving the scene, he was shot in the back by the deputy, who was firing into his car from the rear.

Asserting that he would pursue the same line of defense at his second trial, defendant argued that after the incident, the deputy three times described the shooter as wearing a white, off-white, or "lighter colored" short-sleeved shirt, possibly a button-down. The shirt that defendant was wearing at the time he was apprehended on the night of the shooting—the same shirt that was destroyed by the state—was a dark blue, long-sleeved shirt. He claimed he needed the shirt to impeach the deputy’s testimony that he was the shooter.

The district court disagreed, stating that, for impeachment purposes, a photograph of the shirt is comparable evidence. The court noted that defendant introduced a photo of the shirt for this purpose at his first trial during cross-examination of the officer who first

interviewed defendant on the night of the shooting. That officer confirmed that the photograph accurately depicted what defendant was wearing when he was apprehended.

Subsequent to the hearing on the motion to dismiss, the state informed the trial court that photos of defendant's clothing were still available to defendant. Defendant claimed he needed the shirt to refute the victim's testimony that defendant was the only occupant of the car. Defendant presented the sworn statement of a bouncer at a nearby club who made a statement that, on the night of the shooting, two men attempted to enter the club about an hour prior to the shooting. According to the bouncer's statement, one man had on a black jersey-type shirt, and the other "had on a white shirt on [sic] button-down . . . it was opened and it was sloppy looking."

Defendant maintained that the shirt, along with the bouncer's statement and deputy's description, would establish that he was with another man and that, because defendant was the one wearing a dark colored shirt, the other man, who was wearing the light-colored shirt, was the individual the deputy saw shooting at him.

The district court concluded that defendant could make the same argument with a photograph of the shirt coupled with the officer's testimony confirming that the photograph accurately depicted what defendant was wearing on the night of the shooting.

Finally, with regard to the shirt, defendant argued that he needed it to impeach the deputy's testimony that he shot defendant in the abdomen. Defendant argued at the dismissal hearing that the deputy said he shot the driver of the vehicle in the stomach. Accordingly, defendant argued, if there was no bullet hole in the front of the shirt that he was wearing when he was arrested, it would prove his claim that although he may have been the driver of the stopped vehicle, he was not the person who exited the vehicle, started shooting at the deputy, and was shot in the stomach by the deputy.

Defendant alleged that "medical" testimony presented at the first trial was inconsistent as to whether defendant was shot in the abdomen or the back. Defendant asserted that the shirt was necessary to establish that he was shot only in the back. The state did not dispute defendant's claim that photos of his clothes did not show any bullet holes. The district court stated that this argument failed since it was premised on a misstatement of the deputy's testimony.

With regard to the destruction of defendant's automobile, defendant argued in his motion to dismiss that he had hired a reconstructionist to recreate the shooting incident to show that [he] was shot in the back and not in the front as the deputy testified. The expert would need to examine the automobile to measure angles for trajectory purposes, and that avenue of defense was foreclosed due to actions of the police.

At the hearing on the motion to dismiss, defendant's expert testified that he would need to examine the car to determine trajectories, "if there were any." The district court noted that this argument failed because it was based on the inaccurate premise that the deputy testified that he shot defendant in the abdomen.

The district court stated that, at the first trial, only photographs of the car were introduced by either party, and defendant made no attempt to have the car inspected by an expert at that time. Furthermore, even if defendant's expert were able to examine the car and concluded that a bullet that struck defendant was fired from behind the car through the driver's seat, such evidence would only confirm the deputy's testimony that he continued to shoot toward the car as the car drove away.

Photographs of the car showed blood on the upright backrest of the driver's seat, as well as a hole in the driver's seat. Because the photographs supported defendant's claim that he was shot in the back as he drove away, the actual car was not necessary to make this point. The district court stated that it could not say that the exculpatory nature of defendant's car should have been apparent to the state or the sheriff's office at the time the evidence was destroyed. Thus, the court held that the evidence did not support the trial court's conclusion that defendant had met his burden of establishing a Brady violation.

Therefore, the district court held that, because defendant did not satisfy his burden below, it was an abuse of discretion for the trial court to grant his motion to dismiss.

State v. Gentry, 57 So. 3d 245 (Fla. 5th DCA 2011).

The district court reversed the trial court's order granting defendant's motion to suppress evidence seized pursuant to a vehicle stop.

Defendant was charged with grand theft of a motor vehicle, possession of a schedule IV substance, and driving without a driver's license. He filed a motion to suppress evidence seized pursuant to a vehicle stop and search, arguing that suppression was warranted because the investigating officer did not have a well-founded suspicion that defendant, who was operating the vehicle, was committing, had committed, or was going to commit a crime, and, thus, the stop of the vehicle was illegal.

An officer testified that, while he was on patrol at 4:00 a.m., his attention was drawn to defendant's vehicle because the vehicle was stopped at a four-way stop with brake lights on for twenty minutes. The officer contacted an officer from the jurisdiction in which the vehicle was located. The other officer arrived and pulled behind defendant's vehicle. He observed that defendant had his head down. Defendant finally proceeded from the stop sign followed by the second officer, who conducted a traffic stop. Defendant was secured in the patrol car after it was determined that he did not have a valid driver's license. The two officers searched the vehicle and seized several items from within. The officers also discovered that the vehicle was stolen.

At hearing, the state argued that suppression of the items seized pursuant to the search of the vehicle was not warranted because defendant lacked standing to contest the search since the vehicle was stolen. The trial court rejected this argument and granted the suppression motion.

On appeal, the state challenged the suppression order, arguing that the trial court erred in concluding that defendant possessed standing to challenge the legality of the search of the vehicle since it was stolen. The district court agreed, stating that a driver of a stolen vehicle does not possess standing to challenge the search of the vehicle. State v. Singleton, 595 So. 2d 44, 45 (Fla. 1992), citing Rakas v. Illinois, 439 U.S. 128 (1978).

Defendant contended that the suppression order should be affirmed because the officer lacked the requisite reasonable suspicion to stop the vehicle. The district court disagreed, citing Bailey v. State, 319 So. 2d 22, 26 (Fla. 1975) and Ndow v. State, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004). The district court explained that, under the totality of circumstances, the officer's suspicion that defendant may have been impaired or ill was reasonable and, thus, justified the investigatory stop.
http://www.5dca.org/Opinions/Opin2011/030711/5D10-2250.op.pdf

Walker v. State, 55 So. 3d 718 (Fla. 1st DCA 2011).

The district court granted defendant's petition for writ of certiorari to review an order of the circuit court which, while sitting in its appellate capacity, affirmed a county court order denying her motion to suppress and affirming her DUI conviction. Defendant argued that denial of her motion to suppress was error because it was based on evidence that was not presented to the trial court until after the evidentiary hearing; thus, her due process rights were violated because she was not afforded the opportunity to challenge the authenticity, continued validity, or statutory compliance of the evidence.

Defendant was arrested for DUI. The arrest was precipitated by a traffic stop conducted by an off-duty officer driving home in a marked patrol vehicle after his shift ended. The officer was outside city limits from the time he first observed defendant up through the time he pulled her over. Upon stopping defendant, the officer called for back-up from the sheriff's office and conducted the traffic stop based on his suspicion that defendant was driving under the influence. The officer detained defendant until a sheriff's deputy arrived. The officer informed the deputy of his observations and left the scene. The deputy conducted an investigation, which led to defendant's arrest.

In the county court proceedings, defendant sought to suppress all evidence flowing from the traffic stop, asserting that the traffic stop was conducted by an off-duty police officer acting outside of his jurisdiction, rendering the stop illegal. Near the conclusion of the evidentiary hearing, the state announced its belief of a Mutual Assistance Agreement (Agreement) between the police department and the sheriff's office which authorized the officer to conduct the traffic stop. The state requested leave to "supplement the evidence" and submit the Agreement.

The county court expressed reservations because it entailed presenting post-hearing evidence and asked the state what it wanted; the state responded that it would "like to be able to submit the case law to you . . . ." The court agreed and gave defendant leave to supplement a memorandum of law. The court made no explicit ruling on whether the state could submit the Agreement.

The State submitted its memorandum to the county court and attached the Agreement. Defendant's response included a motion to strike the Agreement because it was not presented at the hearing and was not properly entered into evidence. In its order denying defendant's motion, the county court noted that although the Agreement was not presented at the time of the hearing, the Agreement was considered in reaching its decision. The trial court also denied the motion based on the state's argument that the officer's actions were akin to a citizen's arrest. Subsequently, defendant entered a no contest plea subject to her right to appeal.

Defendant appealed the trial court's denial of her motion to suppress to the circuit court. In its order, the circuit court rejected the county court's findings with respect to a citizen's arrest but affirmed the denial of defendant's motion to suppress based on the Agreement. The circuit court addressed defendant's argument that the county court erred by considering the Agreement, finding:

"While the State's actions were procedurally improper . . . this error was harmless . . . because this court conducts a de novo review of the meaning of the terms in the mutual aid agreement, as it would whenever the terms of an agreement are at issue. Thus, this court has had the opportunity to consider Appellant's arguments fully and does not have to . . . defer to the trial court's ruling on the scope of the mutual aid agreement and its effect on the legality of Appellant's arrest."

The circuit court found that the state was not required to authenticate the document because "the same rules of evidence governing criminal jury trials are not generally thought to govern hearings before a judge to determine evidentiary questions." The court further found that the county court was free to accept the Agreement, examine it, and give it such weight as he thought it deserved. The circuit court affirmed the county court's denial of defendant's motion to suppress.

The circuit court acknowledged that the state's submission of the Agreement after the close of evidence was improper because it "foreclosed Appellant's counsel at the trial level from meaningfully considering its legal effect on the officer's jurisdiction and making substantive arguments to the trial court . . . ."

The district court stated: "This amounts to an acknowledgment that Petitioner was denied due process, yet the circuit court ruled that the error was harmless."

The district court cited State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). The district court stated that, considering the circuit court's rejection of the state's citizen's arrest theory, and the dispositive nature of all the evidence that flowed from the traffic stop, it is clear that defendant would not have been adjudicated guilty were it not for the improper consideration of the Agreement. Thus, the court held that the denial of due process resulted in a miscarriage of justice.

The district court stated that the county court's actions deprived defendant of her due process right to challenge the Agreement's authenticity, continued operational effect,

and statutory compliance, and therefore defendant was entitled to the extraordinary relief of certiorari. Thus, the district court granted the petition for writ of certiorari, quashed the order denying defendant's motion to suppress, and remanded for further proceedings. http://opinions.1dca.org/written/opinions2011/03-03-2011/10-5419.pdf

Kilburn v. State, 54 So. 3d 625 (Fla. 1st DCA 2011).

The district court affirmed the trial court's denial of one of two dispositive motions to suppress. The court reversed the trial court's order denying the second motion to suppress because the state failed to establish that a post-arrest "inventory search" of defendant's vehicle was conducted in accordance with standardized criteria.

A deputy observed defendant's pick-up truck weaving and crossing the center line of a road several times over the course of about two and one-half miles. The deputy suspected that the driver was under the influence so initiated a traffic stop. Defendant was arrested for driving under the influence (DUI), and the state charged the offense as a felony based upon defendant's three prior DUI convictions.

Defendant's truck had to be towed because it was in an unsafe location beside a busy road, and as part of the impoundment process, the deputy conducted an "inventory search" of the truck. The deputy testified that sheriff's policy required an inventory search to be done whenever a vehicle is towed but that there were no standardized criteria or procedures for such a search. During the search, the deputy found marijuana (less than 20 grams) and alprazolam and hydrocodone pills. Defendant was charged with possession of these drugs in addition to the felony DUI charge.

Defendant filed a motion to suppress the drugs and all evidence related to the accusation that he was DUI on grounds that the traffic stop was an unlawful seizure. The trial court denied the motion, finding that the stop was justified because the deputy had a reasonable suspicion that defendant was impaired based upon his observations of defendant's driving. Subsequently, defendant filed a motion to suppress the drugs found during the inventory search upon the grounds that the search was conducted without a warrant and no exception to the warrant requirement applied. The trial court denied the motion after an evidentiary hearing, finding that the search was part of a valid inventory search which was an exception to the warrant requirement.

Defendant pled no contest to felony DUI, possession of marijuana, and possession of alprazolam, reserving his right to appeal the denial of the two motions to suppress. The trial court adjudicated defendant guilty and sentenced him to 60 days in jail followed by 36 months of probation on the felony offenses (DUI and possession of alprazolam) with a concurrent 30 days in jail and 12 months of probation for the misdemeanor possession of marijuana offense. The state nol prossed the possession of hydrocodone charge.

The trial court made no findings regarding the existence of, or the deputy's compliance with, standardized criteria in conducting the inventory search of defendant's truck. Although the deputy testified that it was standard policy to conduct an inventory

search whenever a vehicle was towed, he also testified that there were no standardized criteria for performing such a search. Additionally, the state did not present any evidence that it was standard policy to open closed containers found during the search.

Relying on case law, the district court held that the trial court erred in denying defendant's motion to suppress the drugs found in his truck. Because that motion was dispositive of the possession of marijuana and possession of alprazolam offenses, the district court remanded with directions that defendant be discharged on those offenses. In all other respects, the court affirmed defendant's judgment and sentence.
http://opinions.1dca.org/written/opinions2011/02-22-2011/10-3614.pdf

McKelvin v. State, 53 So. 3d 401 (Fla. 4th DCA 2011).

The district court reversed the trial court's order adjudicating defendant guilty of possession of a firearm by a convicted felon (Count I) and possession of cocaine (Count II), holding that the trial court erred in denying defendant's motion to suppress.

Defendant pled no contest to the charges following the trial court's denial of his motion to suppress. Police detectives testified that they received information from an unidentified anonymous source who approached them while they were on an unrelated stop. The source told them that a black male in a burgundy or red Dodge Charger with 23 or 24-inch chrome rims was engaged in "narcotics activity." The person specifically described a black male. One detective specified that the source told the officers that the car "continuously drove into the Budget hotel/motel . . . five or six times a day." The source gave them the tag number of the vehicle. Finally, the source told the officers that s/he had witnessed "hand-to-hand transactions" in which the occupant of the Charger would take money from a person and give the person an object. The source wanted to remain anonymous. Accordingly, the officers never took the informant's name, phone number, or address.

The detectives were dressed in police tactical gear with clear markings identifying them as police officers. The detectives parked their unmarked vehicle near the Super Budget Motel mentioned by the source. A car matching the description and tag number given by their source arrived at the motel. Although they did not see traffic infractions or other indication of illegal activity, and the car contained a female passenger, unmentioned by the anonymous source, the detectives activated their lights and stopped the vehicle after checking the tag number. One detective approached the driver's side of the Charger and saw the driver remove a black object from his waistband and put it beneath his seat. The officer "clearly identified [the object], due to my training, knowledge, and experience, as a gun." He immediately removed the driver from the vehicle. The driver threw a bag that had white, rock-like substances in it to the floor.

Defense counsel agreed with the trial court that the motion would be determined by the legality of the initial stop because once the officers stopped and approached the vehicle, they saw, in plain view, that the driver had a gun that he threw under the seat.

Thus, the subsequent search and detainment was justified by probable cause. The trial court denied defendant's motion to suppress.

The district court explained that in many cases involving an anonymous tipster, the officers observe the subject of the tip long enough to witness what they believe is illegal activity. Had the officers watched the vehicle and seen a hand-to-hand transaction or some other activity similar to that described by the tipster in this case, that likely would have been corroborating evidence sufficient to warrant a subsequent stop.

After an analysis of case law, the district court held that there was no record evidence that officers knew of drug dealing activity in the subject area. There was also no evidence regarding the length of the officers' encounter with the informant.

The district court explained that the indicia of reliability typically attributed to face-to-face encounters between police officers and informants do not exist in the present case where the police have no contact information for the informant and no way to locate him or her. In the instant case, the officers did not know the informant's motive. He or she could have been providing information for his or her own pecuniary gain, may have had a falling out with defendant, or may have been acting on behalf of a competing drug dealer.

The district court stated that, though the informant provided police with extensive details regarding defendant and the suspicious activity, even anonymous tips "require detailed and specific information corroborated by police investigation" to establish reasonable suspicion required for a stop. Pinkney v. State, 666 So. 2d 590, 592 (Fla. 4th DCA 1996). Without contact information, the informant was no different from an anonymous informant who provides detailed information over the phone to police dispatch. The tipster approached officers while they were engaged in an unrelated stop. There is no record evidence of how long police interacted with the informant or whether they could discern his or her credibility. The district court held that the officers did not have reasonable suspicion, and the trial court erred in denying the motion to suppress. http://www.4dca.org/opinions/Feb%202011/02-16-11/4D09-4719.op.pdf

Nunez v. State, 56 So. 3d 823 (Fla. 2d DCA 2011).

The district court reversed an order of the trial court summarily denying ground one of defendant's motion for postconviction relief from his convictions of trafficking in amphetamine, trafficking in illegal drugs, and possession of a controlled substance. The order was entered after remand from the district court with directions to hold an evidentiary hearing or attach portions of the record conclusively refuting the claim. See Nunez v. State, 988 So. 2d 695 (Fla. 2d DCA 2008). Because portions of the record the postconviction court attached to the order do not conclusively refute ground one, the district court reversed and remanded for a new evidentiary hearing.

In ground one, defendant alleged that his trial counsel was ineffective for failing to file a motion to suppress evidence discovered during an illegal search of his car. The

district court reversed the postconviction court's first order denying this claim because the record did not contain evidence that the officer's inventory search was conducted pursuant to standard criteria or routine.

Upon remand, the postconviction court again denied ground one based on the officer's inventory search of defendant's vehicle. The trial court attached portions of the transcript of the officer's testimony in which he stated that he conducted the inventory search of defendant's vehicle after his arrest of defendant pursuant to standard operating procedure. However, the officer did not say what standard operating procedure was required of him, and the procedure was not introduced into evidence. The district court stated that case law required evidence of the procedure to be introduced in order for the court to determine whether the inventory search was conducted in accordance with procedure.

Thus, the conclusion of the postconviction court that the inventory search was performed according to standardized procedure was not supported by the record. The district court reversed and remanded for an evidentiary hearing on whether trial counsel was ineffective for failing to file a motion to suppress.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/January/January%208,%202011/2D09-5252.pdf

Frost v. State, 53 So. 3d 1119 (Fla. 4th DCA 2011).

The district court affirmed denial of defendant's dispositive motion to suppress in a case in which he entered pleas of no contest to charges involving possession of cocaine and cannabis. Defendant contended that the state failed to establish reliability of the police dog that alerted to the presence of drugs in his car. The district court found that competent, substantial evidence supported the circuit court's finding of probable cause based on the dog sniff.

According to testimony, a deputy stopped defendant's car for running a stop sign. Another officer arrived at the scene. The deputy approached defendant's car and asked if he could search the car, but defendant said no. The other officer called for a dog unit. While the deputy was writing a traffic citation, a police detective arrived at the scene with his dog. The detective walked the dog around defendant's car for the dog to perform an exterior sniff. The dog alerted at the driver's seat. The detective returned the dog to his patrol car and told the other officers about the alert. The deputy finished writing the citation and issued it to defendant.

After defendant was removed from his car, the officers searched it and found powder and crack cocaine in an Altoids can between the driver's seat and center console. A bag with marijuana was in the same area. The deputies placed defendant under arrest.

The detective described his dog's training and experience. The two had been a team for six or seven years. The dog was a dual purpose K-9, which means he was an apprehension dog and a narcotics detection dog. The dog's handler conducted proficiency

training throughout the dog's career. The detective explained that he relied on the dog's alerts to provide probable cause for searches. He testified that the dog was certified to detect marijuana, cocaine, hash, heroin, ecstasy, and methamphetamine by the National Detection Dog Association, the North American Police Work Dog Association, and the Florida Police Work Dog Association. Over the time that the deputy and the dog worked together, they obtained between 50 and 80 certificates. The deputy also trained the dog in a controlled odor environment. The sheriff's office maintained records for the dog's certifications and training.

On cross-examination, the deputy stated that the dog had failed one test in 2007 for detecting methamphetamine in a car. The dog was able to recognize the odor and identify the car but not the source of the odor within the car, "because of the depth of the hide." The deputy also described instances where the dog alerted to the odor of drugs in a car, but a subsequent search located no drugs. The deputy estimated these false positives, or alerts to residual odor, occurred in less than 5 percent of the hundreds of times the dog had been used. He added that, in such cases, he often questioned the driver of the car and determined that drugs had at one time been used in the car.

Defendant argued that the dog's alert, by itself, did not provide probable cause for the search of the car. The trial court denied the motion to suppress, relying on State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005). Following a discussion of case law, the district court stated that its analysis in Laveroni providing a framework for analyzing a Fourth Amendment challenge to a dog's sniffing qualifications was judicial dictum. It was unnecessary to the ultimate holding, but the dog issue was briefed by the parties. The analysis was not purely gratuitous; rather, it was to guide the case on remand and for future cases as well. The district court stated that it continued to abide by Laveroni, subject to a different ruling on the issue by the Florida Supreme Court.

Applying Laveroni to this case, the district court found no error in the ruling of the circuit court. The district court stated that a dog's reliability was a question of fact and, that, under Laveroni, the state was required to demonstrate that the dog was properly trained and certified in order to make a prima facie showing of probable cause. The district court held that the state satisfied this burden by having the detective describe the dog's certifications and training regimen, reflecting a 95 percent accuracy rate, and thus the state made a prima facie showing of the dog's reliability. The district court held that competent, substantial evidence supported the circuit court's finding of the dog's reliability to support a finding of probable cause.
http://www.4dca.org/opinions/Jan%202011/01-26-11/4D09-3561.op.pdf

Hill v. State, 51 So. 3d 649 (Fla. 1st DCA 2011).

The district court reversed the trial court's denial of a motion to suppress evidence seized from defendant's vehicle after he was stopped by a police officer because evidence was insufficient to establish a lawful basis for the stop.

The arresting officer testified that he observed defendant standing in front of a parked car in the vacant parking lot of a closed gas station at 1:15 a.m. The officer stated

that defendant "looked right at me went to his driver's door, got in and took off. . . ." The officer followed defendant's car for "about a mile and a half" while running a tag check. The officer testified that he did not notice anything unusual about the vehicle or about the way in which defendant was driving. The officer testified that he decided to stop defendant because the gas station had been closed over two hours before he observed defendant's car parked there; the gas station was located in a high crime area; and defendant departed upon making eye contact with the officer.

After stopping defendant's car, the officer requested backup from a canine unit and sent another officer to determine whether any "damage or criminal mischief" had taken place. The canine unit obtained a positive alert. A subsequent search of the car disclosed marijuana and a loaded firearm. Defendant was arrested and later charged by information with carrying a concealed firearm and possession of cannabis (less than 20 grams). Defendant moved to suppress the fruits of the search.

Following a suppression hearing, the trial court held that, given the totality of the matters testified to by the officer, a reasonable suspicion existed to stop defendant's vehicle. The trial court denied the motion to suppress. Defendant entered a plea of nolo contendere reserving the right to appeal the denial of suppression.

The district court stated reasonable suspicion of criminal activity is not established simply because a defendant leaves the scene when an officer nears. Thus, even when construed in a light most favorable to the state, the circumstance identified by the officer as prompting the stop was insufficient to establish a reasonable suspicion. The court reversed the judgment of conviction and vacated defendant's sentence. http://opinions.1dca.org/written/opinions2011/01-24-2011/10-2100.pdf

State v. Harris, ___ So. 3d ___ [not reported in So. 3d, opinion withdrawn, substituted opinion issued April 14, 2011] (Fla. 1st DCA 2011), 2011 WL 148786, 36 Fla. L. Weekly D133, 1D09-4520.

The district court reversed an order granting a motion to suppress evidence seized from defendant's vehicle during a search incident to arrest. The district court stated that, although the search was unlawful, the trial court erred as a matter of law by granting the motion because officers had relied in good faith on well-settled case law.

Police officers had defendant under surveillance for suspected drug activity and 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, and found illegal drugs. The district court stated the search was valid under New York v. Belton, 453 U.S. 454 (1981), controlling precedent at the time. However, the Supreme Court receded from Belton and adopted a new procedure in Arizona v. Gant, 129 S. Ct. 1710 (2009), several weeks later.

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.

In the present case, the district court held that 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 district court also found that the trial court was correct in holding that Gant applied retroactively. However, the district court held that the 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).

With little precedent available at the time, the trial court adopted the view expressed in U.S. v. Buford, 623 F. Supp. 2d 923 (M.D. Tenn. 2009), that the good-faith exception of Leon does not apply to reliance on supreme court precedent. The district court stated that courts, including Florida's Fifth District and the Eleventh Circuit Court of Appeals, have since decided that the good-faith exception applies to pre-Gant searches incident to arrest that were in the pipeline when Gant was decided.

The district court relied upon Brown v. State, 24 So. 3d 671 (Fla. 5th DCA 2009), review denied, 39 So. 3d 1264 (Fla. 2010), and U.S. v. Davis, 598 F.3d 1259 (11th Cir. 2010), in concluding that the motion should have been denied. The case was remanded for further proceedings.
http://opinions.1dca.org/written/opinions2011/01-19-2011/09-4520.pdf

Torts/Accident Cases

Searcy v. Zawackis, 55 So. 3d 660 (Fla. 4th DCA 2011).

The district court reversed a final summary judgment in defendants' favor in a negligence case involving a two-vehicle crash resulting in one driver's death. The district court held that defendants did not meet their burden of showing absence of any genuine issue of material fact regarding defendant FedEx driver's alleged lack of negligence.

The crash occurred at an intersection a few days after Hurricane Wilma struck Palm Beach County. The intersection's traffic lights were inoperative. In such a situation, Florida law requires motorists to treat the intersection as a four-way stop. The local municipality also had placed stop signs facing all four directions of the intersection as a substitute traffic control device. On the day in question, the defendant FedEx driver was stopped at the intersection facing west, intending to make a left turn to head south. At her deposition, she described how she proceeded forward and stated that she saw decedent's car through peripheral vision, to her left a split second before the collision. Another witness testified that decedent went through the stop sign and hit the FedEx truck so hard that the whole rear end of the car came up off the ground.

A southbound driver testified that when he stopped at the intersection, he looked ahead and saw that the FedEx truck "was next in line to go, and so . . . I was looking

straight at the driver." He then testified that he saw the FedEx driver look right, left, "*and then she looked down, and then she looked right again and straight ahead, and went to move forward*. There were no cars coming. And she moved out into the intersection and then [the decedent's] car came flying into the intersection and barely had time to put her brakes on, hit the FedEx truck. (emphasis added)." The southbound driver testified that the FedEx driver looked down for approximately two to three seconds and never looked left again before the crash occurred.

The decedent's estate filed a negligence action against the FedEx driver and against FedEx for vicarious liability. Defendants' answer alleged that decedent was negligent and that she failed to follow the applicable traffic laws.

Defendants later moved for summary judgment alleging that the evidence "unequivocally demonstrate[s] that: (1) the accident occurred in a four-way-stop intersection; (2) the accident occurred while [the FedEx driver] had the right-of-way; (3) the . . . decedent failed to stop at the stop sign governing her direction of travel; (4) [the] decedent was speeding . . . ; and (5) [the FedEx driver was] not a contributory cause of the accident as a matter of law."

The estate responded that the FedEx driver's testimony of having "looked right and left" before proceeding through the intersection was the primary fact which [the estate] believe was inaccurate based on witness testimony of [the southbound driver]. The district court stated that disagreement on this particular fact created a material fact issue, which thus precluded Summary Judgment. . . .

Defendants argued there was no evidence that decedent constituted an immediate hazard at the time the FedEx driver entered the intersection and that the estate's alleged issue of material fact was based upon an impermissible stacking of inferences. The district court rejected those arguments based on direct evidence the southbound driver provided.

Defendants further argued that they should be absolved from liability as a matter of law because a driver is entitled to assume that others will obey the traffic laws and will stop at a stop sign. After hearing argument, the circuit court entered a summary final judgment in the defendants' favor.

The district court explained that the southbound driver's testimony indicated that the FedEx driver did not look to her left in the two to three seconds before entering the intersection. Further, the accident reconstructionist's testimony indicated that, if the FedEx driver had looked to her left in those seconds, the decedent's car would have been in plain view to alert the FedEx driver that the decedent was about to run the stop sign. Thus, evidence in this case reflected that a genuine issue of material fact remained as to whether the FedEx driver exercised reasonable care before entering the intersection. Therefore, district court reversed the summary final judgment.
http://www.4dca.org/opinions/Feb%202011/02-16-11/4D09-3605.op.pdf

Parkinson v. Kia Motor Corp., 54 So. 3d 604 (Fla. 5th DCA 2011).

The district court denied plaintiff's petition for writ of mandamus but admonished the trial court that it was obliged to schedule a case for trial that was at issue and properly noticed, notwithstanding pending motions for summary judgment.

Plaintiff, personal representative of decedent who was killed while driving a Kia vehicle, sought a writ of mandamus that would direct the trial court to set a trial date in the underlying wrongful death suit filed by petitioner against Kia Motors Corporation and Kia Motors America, Inc. [defendants]. Decedent was stopped in a line of traffic when a motor vehicle being operated at a high rate of speed by an alcohol intoxicated driver struck the rear of the Kia. The complaint lodged claims for negligence and strict liability against each corporate defendant on the theory of enhanced injury crashworthiness as recognized in D'Amario v. Ford Motor Co., 806 So. 2d 424, 425 (Fla. 2001).

In D'Amario, the Florida Supreme Court held that principles of comparative fault involving the causes of the first collision do not generally apply in crashworthiness cases. Such a rule recognizes the distinction between fault in causing the accident and fault in causing additional or enhanced injuries as a result of a product defect, a distinction that defines and limits a manufacturer's liability in crashworthiness cases. In such cases, the automobile manufacturer is solely responsible for the enhanced injuries to the extent the plaintiff demonstrates the existence of a defective condition and that the defect proximately caused the enhanced injuries. Thus, an automobile manufacturer who allegedly designed a defective product may not be held liable for damages caused by the initial collision and may not apportion its fault with the fault of the driver of the vehicle who caused the initial accident.

After the pleadings were at issue, on June 24, 2010, plaintiff filed a Notice of Jury Trial. Plaintiff's notice estimated that the trial would take fifteen days. On August 20, 2010, Plaintiff's filed motions for partial summary judgment directed to defenses raised by defendants.

The district court explained that the trial court did not refuse to set a trial date but rather offered to set a date in 2012 based on its conclusion that the case was complex and that many difficult and novel issues required resolution before a trial of such length could go forward. The district court stated that it could micromanage the trial scheduling, for which timing was left to the sound discretion of the trial court.
http://www.5dca.org/Opinions/Opin2011/021411/5D10-3716.op.pdf

Peterson v. Sun State Int'l Trucks LLC, 56 So. 3d 840 (Fla. 2d DCA 2011).

The district court reversed the circuit court's order in part and remanded for a new trial limited to the issue of the amount of plaintiff's damages for loss of consortium.

The plaintiffs, a married couple, appealed the circuit court's order denying their motion for a new trial on the husband's claim for loss of consortium after a jury found

that the wife had sustained a permanent injury as a result of an automobile accident in which the wife's vehicle was rear-ended by a truck driven by an employee of defendant.

The jury awarded the wife damages for her injuries but awarded nothing to the husband on his claim for loss of consortium. The district court held that, because the plaintiffs presented substantial unrebutted testimony concerning adverse effects that the wife's injuries had on their marital life, the husband was entitled to an award of at least nominal damages on his claim.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/February/February%2002,%202011/2D08-5529.pdf

Drivers' Licenses

DHSMV v. Edenfield, 58 So. 3d 904 (Fla. 1st DCA 2011).

The district court denied the state Department of Highway Safety and Motor Vehicles' (DHSMV) petition for a writ of certiorari to review an order of the circuit court which, while sitting in its review capacity, overturned an administrative order suspending defendant's driver's license.

Defendant was stopped by law enforcement after he was observed driving in excess of the posted speed limit. After an odor of alcohol was detected and defendant exhibited other signs of impairment, he was subjected to a breath test, which produced a breath-alcohol ratio in excess of the legal limit. Following his arrest for driving while under the influence of alcohol, defendant's license was suspended.

Defendant requested a subpoena for a sheriff's inspector of breath machines. The inspector requested to appear by telephone, and the hearing officer granted the request over objection of defendant. At the hearing, defendant refused to examine the inspector. The hearing officer sustained the suspension of defendant's driver's license.

Defendant sought review by a petition for writ of certiorari in the circuit court. The circuit court granted the petition and vacated the suspension on the ground that defendant was denied due process when the inspector was permitted to appear telephonically. The circuit court ordered a new proceeding.

DHSMV sought to invoke a second-tier certiorari review. The district court stated that a district court should grant second-tier certiorari only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. In determining whether the court has applied the correct law in its first-tier review, the district court must consider whether the court has failed to apply the correct law as clearly established.

In granting certiorari relief below, the circuit court relied primarily upon Lee v. DHSMV, 4 So. 3d 754 (Fla. 1st DCA 2009), which holds that a driver in a license suspension proceeding must have a meaningful opportunity to cross-examine the creators

of reports introduced by DHSMV in support of suspension. The district court explained that, in holding that a party had the right to subpoena and then cross examine the author of inspection reports, the First District in Lee cited section 322.2615, Florida Statutes, which gives a driver the right to present relevant evidence and to rebut evidence. In Lee, the First District further cited rule 15A-6.013(5), Florida Administrative Code, which authorizes a hearing officer to receive the testimony of any witness under oath.

The district court explained that neither the cited statute nor the cited rule in Lee precluded appearance of a relevant witness by telephone. The district court stated that, while the circuit court misread Lee to require live appearance of a witness in an administrative proceeding regarding a license suspension when a party requests the live appearance, this misreading did not constitute a violation of a clearly established principle of law. Further, the district court stated that there was no clear controlling precedent for the issue raised. Therefore, the district court denied the DHSMV's petition for a writ of certiorari.
http://opinions.1dca.org/written/opinions2011/03-10-2011/10-4780.pdf

Dees v. State, 54 So. 3d 644 (Fla. 1st DCA 2011).

The district court reversed, on double jeopardy grounds, defendant's convictions on two of three counts related to driver's license offenses.

Defendant was convicted of driving while license revoked as a habitual traffic offender, in violation of section 322.34(5), Florida Statutes (2009) (Count I); driving while license suspended, revoked or canceled with knowledge, in violation of section 322.34(2)(c), Florida Statutes (2009) (Count II); and driving without a valid license, in violation of section 322.03(1), Florida Statutes (2009) (Count III). All three counts arose out of the same offense.

The district court affirmed the conviction on Count I without discussion. The court reversed the conviction on Count II because Counts I and II were mutually exclusive. See Franklin v. State, 816 So. 2d 1203 (Fla. 4th DCA 2002). The court also reversed the conviction on Count III.

The district court explained that dual convictions on Counts I and III violated double jeopardy because Count III was a necessarily lesser-included offense of Count I. See § 775.021(4)(b)3., Fla. Stat. (2009); Fla. Std. Jury Instr. (Crim.) 28.11(a).
Thus, the court affirmed in part, reversed in part, and remanded with instructions to vacate the convictions on Counts II and III and resentence defendant on Count I.
http://opinions.1dca.org/written/opinions2011/03-02-2011/09-5638.pdf

Lyons v. State, 56 So. 3d 51 (Fla. 1st DCA 2011).

The district court affirmed defendant's sentence for driving while his license was canceled, suspended, or revoked (DWLSR).

The district court stated that defendant pled no contest to the charges and had no agreement with or offer from the state on a sentence. He normally would have faced a maximum sentence of five years in prison for the third-degree felony. §§ 322.34(2)(c), 775.082(3)(d), Fla. Stat. (2009). But because his scoresheet reflected only 10.7 sentence points, the presumptive maximum sentence pursuant to section 775.082(10), Florida Statutes, was a nonstate prison sanction.

As permitted by the statute, the trial court found that defendant could pose a danger to the public if a nonstate prison sanction were imposed and sentenced defendant to 30 months in prison with 32 days' credit for time served. Defendant argued on appeal that the court's written findings were insufficient to satisfy section 775.082(10) and that the court improperly used his two prior DWLSR convictions to justify the sentence.

Defendant conceded that he did not argue at sentencing that the trial court could not consider his prior record in determining whether a nonstate prison sanction was appropriate. The record did not reflect that defendant raised the trial court's reliance on his prior record or adequacy of the court's written findings. Thus, defendant preserved neither issue for appeal, and the district court affirmed the sentence.
http://opinions.1dca.org/written/opinions2011/01-28-2011/10-3548.pdf

Smith v. State, __ So. 3d ___ (Fla. 2d DCA 2011), 2011 WL 182128, 36 Fla. L. Weekly D162, 2D10-559.

The district court reversed defendant's judgment and sentence for one count of driving while his license was revoked.

Defendant argued that the trial court erred in denying his motion to withdraw plea. The state cross-appealed, challenging defendant's sentence of one year and one day, which was a downward departure from the 15.4-month lowest permissible sentence indicated on defendant's guidelines scoresheet.

The district court concluded that the trial court did not abuse its discretion in denying defendant's motion to withdraw his plea. However, because the trial court failed to state on the record valid reasons for imposing a downward departure sentence, the district court reversed and remanded for the trial court to allow defendant to choose either to withdraw his plea or be resentenced within the sentencing guidelines.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/January/January%2021,%202011/2D10-559.pdf