FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

October-December, 2010

[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)

Cardenas v. State, 49 So. 3d 322 (Fla. 1st DCA 2010).

The district court affirmed the trial court's order denying defendant's rule 3.850 motion after an evidentiary hearing. Defendant was charged with two counts of vessel homicide, two counts of BUI (boating under the influence) manslaughter, and one count of operating a vessel under the influence involving serious bodily injury.

While fishing on his boat with his son, his father, and a family friend, defendant was intoxicated beyond the legal limit while operating the vessel. Defendant's vessel collided with a barge. As a result, the family friend was killed, defendant's father was seriously injured and later died, and defendant's son was injured but subsequently recovered. A jury found defendant guilty as charged except for finding defendant guilty of culpable negligence, a lesser included offense of one of the vessel homicide counts.

The trial court sentenced defendant to a total of 15 years in prison, followed by 10 years of probation. Defendant appealed his judgment and sentence, which was affirmed in part. The district court struck portions of the written judgment that were inconsistent with the trial court's oral pronouncements so that the written judgment conformed to the trial court's pronouncement that defendant was adjudicated guilty of DUI manslaughter and not culpable negligence because these dual convictions are precluded by State v. Chapman, 625 So. 2d 838 (Fla. 1993).

Defendant filed a timely rule 3.850 motion. The trial court summarily denied the motion. On appeal, the district court reversed and remanded for an evidentiary hearing on seven of the claims in the motion, including the claim that defendant's trial counsel was ineffective for failing to seek admission of exculpatory statements allegedly made by defendant's father.

The district court affirmed the trial court's summary denial of all other claims raised in the motion. On remand, the trial court conducted an evidentiary hearing. Following the hearing, the trial court entered an eighteen-page order denying relief on all

of the remanded claims. Defendant appealed that order, raising only one issue: whether the trial court erred in finding that his trial counsel was not ineffective for failing to seek the admission of "impending death" statements made by his father.

The district court stated that defendant's father told law enforcement shortly after the accident that defendant was the driver of the boat. The trial court granted defendant's motion in limine to exclude this statement from trial, but as observed by the trial court in the order on appeal, it is likely that "had defense counsel attempted to admit a statement made by [the father] which indicated that the family friend was driving the boat, such testimony would likely have also acted to allow the State to introduce evidence of [the father's] conflicting statement that defendant was driving the boat."

Defendant contends the trial court erred in finding that his trial counsel was not ineffective because the testimony presented at the evidentiary hearing established that his father made statements following the accident naming the family friend as the driver of the boat that would have been admissible as "dying declarations." The state argued that the evidence presented at the hearing supported the trial court's findings that the statements would not have been admissible as "dying declarations" and, therefore, the trial court correctly found that defendant's trial counsel was not ineffective for failing to seek to introduce the statements at trial.

Section 90.804(2)(b), Florida Statutes, provides an exception to the hearsay rule for "a statement made by a declarant while reasonably believing that his or her death was imminent, concerning physical cause or instrumentalities of what the declarant believed to be impending death or the circumstances surrounding impending death." This is commonly referred to as the "dying declaration" exception. Before a dying declaration may be admitted into evidence, a proper foundation must be presented to establish that the declarant possessed a subjective belief in the certainty of his death at the time the statement was made.

Here, the trial court found that testimony presented at the evidentiary hearing failed to establish the necessary predicate for admission of any of the statements allegedly made by defendant's father under the dying declaration hearsay exception. None of the witnesses who testified at the evidentiary hearing specifically testified as to statements made by defendant's father at a time when he believed his death was imminent. For example, none of the allegedly exculpatory statements were made on the night of the accident or immediately before defendant's father died; rather, the statements were made at different points during defendant's father's 14-week hospital stay during which time he was "gravely ill" but often in a regular hospital room and capable of carrying on at least minimal conversations. Additionally, the trial court explained that its assessment of the testimony at the evidentiary hearing was consistent with trial counsel's recollection that there were "some 'hazy' statements" that could not be corroborated.

The district court held that the trial court's findings were supported by competent substantial evidence. The court explained that the trial court correctly concluded that trial counsel was not ineffective for not seeking to introduce alleged exculpatory statements

made by defendant's father because the statements would not have been admissible under the dying declaration exception to the hearsay rule. The district court affirmed the trial court's denial of this claim and affirmed denial of the rule 3.850 motion in its entirety.

Urban v. State, 46 So. 3d 1113 (Fla. 5th DCA 2010).

The district court affirmed defendant's convictions but reversed his sentences for possession of cannabis and two counts of driving under the influence.

Defendant argued that the trial court erred by denying his motion for judgment of acquittal. The district court found the evidence was sufficient and rejected this argument without further comment. Defendant also contended the trial court applied the wrong version of Florida's Youthful Offender Act at sentencing. The state conceded error on this point. On the date of his offenses, September 27, 2008, a trial court could impose a youthful offender sentence under section 958.04(1)(b), Florida Statutes, if the defendant committed the crime before his 21st birthday. On October 1, 2008, section 958.04(1)(b) was amended to require the defendant to be under the age of 21 at the time of sentencing.

Defendant was under 21 on the date he committed the crimes, but over 21 on the date of sentencing. The trial court declined to consider a youthful offender sentence, and erred in retroactively applying the amended version of the statute. The district court held that the trial court should have applied the statute in effect on the date of the crime, not the date of sentencing. Thus, the district court remanded for resentencing under the correct version of the youthful offender statute. The district court did not hold that defendant should be sentenced as a youthful offender, only that the trial court must consider a youthful offender sentence at a de novo sentencing hearing on remand.

King v. State, 46 So. 3d 1171 (Fla. 4th DCA 2010).

The district court affirmed defendant's revocation of probation and his judgment and sentence on three counts of DUI with serious bodily injury. In its opinion, the district court addressed only defendant's argument that the trial court failed to render a proper written order revoking his probation by failing to specifically identify the conditions of probation defendant violated.

In 2001, defendant pled no contest to three counts of DUI with serious bodily injury and one count of DUI with property damage. In that same year, defendant received a composite sentence of two years' community control followed by three years' probation on his three counts of DUI with serious bodily injury. Defendant received a sentence of "time-served" on his one count of DUI with property damage.

In 2005, the state filed its first violation of probation (VOP) affidavit, alleging that defendant violated three conditions of probation. Shortly thereafter, the state filed two amended VOP affidavits. Defendant ultimately entered an open plea with the trial court, wherein he admitted to violating conditions of his probation. Before defendant was sentenced on these violations of probation, the state filed a new VOP affidavit in 2006,

alleging that defendant violated the conditions of his probation by committing the crimes of arson and battery. Following a VOP hearing on the new law violations, the trial court orally pronounced that defendant's probation was revoked and sentenced defendant to 150.3 months in prison on the 2005 and 2006 violations of probation. Defendant then filed the instant appeal. While his appeal was pending, defendant filed a Florida Rule of Criminal Procedure 3.800(b) motion, contending, among other things, that the trial court failed to render a written order revoking his probation. The trial court granted defendant's rule 3.800(b) motion solely on this issue and entered an order of revocation of probation. The revocation order noted that defendant violated his probation in a material respect "for the reasons announced in open court" at his VOP hearing.

On appeal, defendant challenged the sufficiency of the order of revocation of probation because it failed to specify the conditions of probation he violated. The state contended that the order was sufficient, as written, because the trial court orally pronounced on the record each condition defendant violated, finding the violations to be willful, substantial, and material, and incorporated them by reference in the written order.

The district court agreed with defendant, stating that, if a trial court revokes a defendant's probation, the court is required to render a written order noting the specific conditions of probation that were violated. The district court remanded for the trial court to amend the order to include conditions the trial court found were violated at defendant's VOP hearing. The district court found no merit to defendant's remaining arguments and affirmed the revocation of his probation as well as his judgment and sentence.

Criminal Traffic Offenses

Louden v. State, 49 So. 3d 868 (Fla. 4th DCA 2010).

The district court reversed defendant's judgment and sentences stating that the trial court erred by failing to rule on defendant's written motion to withdraw his no contest plea before sentencing

Defendant had entered a no contest plea to fleeing and eluding a law enforcement officer; willful, wanton reckless driving; resisting arrest without violence; and driving while his license was suspended or revoked. Subsequently, before sentencing, he retained new counsel and filed a written motion to withdraw his plea. He alleged that his prior counsel misstated the law, the possible sentence, and possible defenses to various charges, and that his plea was the result of "fear, misapprehension, persuasion, promises, inadvertence or ignorance." Without ruling on defendant's motion to withdraw his plea, the trial court had proceeded to sentencing, over defendant's objection.

The district court directed that, on remand, the trial court conduct further proceedings and rule on defendant's motion to withdraw his no contest plea.

Brown v. State, 50 So. 3d 747 (Fla. 4th DCA 2010).

The district court affirmed the defendant's judgment and sentence for driving while license revoked-habitual offender and leaving the scene of an accident causing property damage. The district court found no fundamental error by the trial court.

Defendant rear-ended a vehicle that had suddenly braked to avoid an accident. The occupants of the forward vehicle exited the vehicle, whereupon defendant, who was accompanied by two female passengers, fled the scene. Defendant was eventually caught and held until the police arrived. Defendant told police that his girlfriend was driving because his license was suspended. Defendant's girlfriend initially stated she was the driver; she later admitted that defendant was the driver. Upon checking defendant's records, the police confirmed that defendant's license was suspended and that he was a habitual traffic offender. Defendant was charged with driving while license revoked/habitual offender and leaving the scene of an accident causing property damage.

At trial, defendant maintained that his girlfriend was driving his vehicle at the time of the accident and elected to testify on his own behalf. The trial court conducted a thorough and proper examination and found that defendant knowingly and voluntarily waived his right to remain silent. Outside the presence of the jury, the state requested that defendant be required to proffer his testimony to the court. The trial court granted the state's request, adding that the state would be required to proffer its cross-examination with defendant providing his responses. Defendant did not object to the trial court's ruling or its instructions. In his proffer, defendant testified, among other things, that his girlfriend was driving the SUV on the date in question and that he sustained injuries from the individuals while they were restraining him.

The trial proceeded, and in the presence of the jury, defendant again testified that he was not the driver of the SUV and that he was injured by individuals who chased him down. Ultimately, the jury found defendant guilty, as charged. Defendant contends that the trial court infringed upon his constitutional rights to self-representation and to remain silent by requiring him to proffer his testimony and by allowing the state to cross examine him prior to testifying before the jury.

The district court stated that, throughout the trial, defendant experienced difficulty in understanding substantive and procedural matters. The district court further explained that defendant, after warnings about consequences of testifying, voluntarily waived his right to remain silent and thus had no claim that his Fifth Amendment privilege against self-incrimination was violated.

Ivey v. State, 47 So. 3d 908 (Fla. 3d DCA 2010).

The district court reversed in part and affirmed in part defendant's convictions and sentences for vehicular homicide, DUI manslaughter, and leaving the scene of a fatal accident. The court vacated the convictions for vehicular homicide and leaving the scene of a fatal accident, based on principles of double jeopardy, and affirmed the DUI manslaughter conviction and sentence.

While on the interstate, defendant struck a vehicle and continued driving. After the impact, the other vehicle hit a retaining wall, which killed the driver. Florida Highway Patrol investigated, determined that defendant was drunk, and arrested him. The state tried defendant on one count each of vehicular homicide, DUI manslaughter, and leaving the scene of a fatal accident. The jury returned a verdict of guilty to all charges. The trial court adjudicated defendant on all three counts but sentenced him only on the DUI manslaughter to 22 years in prison, followed by 5 years probation.

On appeal, defendant asserted that the constitutional prohibition against double jeopardy barred his conviction on all three counts based on a single death. The state contended that adjudicating defendant on all three counts while sentencing him only on one does not violate the double jeopardy clause.

The district court analyzed the double jeopardy issue under section 775.021(4), Florida Statutes (1983) (which codified the Blockburger test set forth in Blockburger v. U.S., 284 U.S. 299 (1932); Carawan v.State, 515 So. 2d 161, 165 (Fla. 1987); and Houser v. State, 474 So. 2d 1193, 1196 (Fla. 1985)). The legislature amended section 775.021(4) in 1988, to add subsection (b) which states:

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
> 1. Offenses which require identical elements of proof.
> 2. Offenses which are degrees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

The state contended that Valdes v. State, 3 So. 3d 1067 (Fla. 2009), made exception (b)2 applicable only where the two crimes charged are in the same statute. Defendant asserted that Valdes did not invalidate long-standing precedent that a single death cannot give rise to two convictions. The district court agreed with defendant.

Prior to Valdes, it was well settled that dual homicide convictions arising from a single death violated double jeopardy. See Houser, 474 So. 2d at 1193. The district court stated that, factually, Houser was identical to the present case in that it involved convictions for both DUI (then DWI) manslaughter and vehicular homicide for a single death, and the court ruled that defendant could not be punished for both. The court reasoned that the legislature never intended to punish a single death under two different criminal homicide statutes. Houser, 474 So. 2d at 1106.

Valdes involved convictions for shooting from a vehicle and shooting into an occupied vehicle arising from a singular shooting incident that did not result in death.

Thus, the Valdes court did not determine double jeopardy consequences of dual homicide convictions arising from a single death.

Moreover, after amendment of section 775.021(4), the supreme court did not overrule Houser. Chapman v. State, 625 So. 2d 838, 839 (Fla. 1993) ("Especially, we do not read the amendment as an overruling of Houser and its holding that a single death cannot support convictions of both DUI manslaughter and vehicular homicide.").

In the present case, the jury convicted defendant of vehicular homicide under section 782.071, Florida Statutes (2005), and DUI manslaughter, under section 316.193(3)(c)3b, Florida Statutes (2005). Although the defendant's criminal charges stem from two separate statutes, as stated in Houser and its progeny, the district court stated that the legislature did not intend to punish the single death by two separate homicide convictions. Accordingly, defendant's convictions for both vehicular homicide and DUI manslaughter cannot stand as they violated double jeopardy.

The jury also convicted defendant of leaving the scene of a fatal accident under section 316.027(1)(b), Florida Statutes (2005). The district court stated there is no double jeopardy prohibition against convictions for both DUI manslaughter and leaving the scene of a fatal accident. Here, however, defendant's DUI manslaughter conviction was enhanced from a second-degree felony to a first-degree felony because he left the scene of the fatal accident. Therefore, a separate conviction for leaving the scene of a fatal accident constitutes a double penalty and violates double jeopardy. See Cleveland v. State, 587 So. 2d 1145 (Fla. 1991).

Riggins v. State, ___ So. 3d ___ (Fla. 2d DCA 2010), 2010 WL 4484629, 35 Fla. L. Weekly D2480, 2D09-4886.

The district court affirmed in part and reversed in part defendant's convictions for escape, driving while license suspended or revoked as a habitual traffic offender, resisting arrest without violence, operating an unregistered vehicle, and unlawful use of a temporary tag.

An officer with the Motor Carrier Compliance of the Department of Transportation stopped the car defendant was driving for an apparent expired temporary tag. When the officer asked defendant for his driver's license, registration, and insurance, defendant produced only a Florida identification card. From the Florida ID card and the vehicle identification number (VIN) obtained from the car, the officer determined that defendant's driver's license was suspended and the car he was driving was not properly registered. When the officer began to place defendant under arrest for driving on a suspended license, defendant ran to another vehicle, got in, and rode away. Defendant was later arrested and charged with multiple offenses.

Following a jury trial, defendant was found guilty as charged. The district court affirmed his convictions for escape, driving while license suspended or revoked as a habitual traffic offender, and resisting arrest without violence without comment. The

district court reversed the convictions for operating an unregistered vehicle and unlawful use of a temporary tag because the only evidence supporting these convictions was inadmissible hearsay.

Section 320.02(1), Florida Statutes (2008), requires that every owner or "person in charge of a motor vehicle that is operated or driven on the roads of this state" register the vehicle. Section 320.57(1) provides that any person convicted of violating any of the provisions of chapter 320 is guilty of a second-degree misdemeanor unless otherwise provided. To convict defendant of the second-degree misdemeanor of operating an unregistered vehicle, the state had to prove by legally sufficient evidence that the vehicle defendant was driving was not, in fact, registered in this state.

At trial, the only evidence offered to prove this element of the offense was the officer's testimony that he had run the car's VIN through the FCIC/NCIC database on his in-car computer and had determined from the information provided by that database that defendant's car "wasn't registered properly." Defendant objected to this testimony on hearsay grounds, arguing that Burgess's testimony as to what the FCIC/NCIC database "said" was hearsay. The state argued that this testimony fell within the hearsay exception for either absence of an entry in public records or absence of an entry from business records. The state did not offer any evidence in the form of a certified printout from FCIC/NCIC to support Burgess's testimony. The trial court overruled defendant's objection, which was error for two reasons.

First, the officer's testimony did not fall within the hearsay exception for "[a]bsence of public record or entry" under section 90.803(10), Fla. Stat. (2008). Here, the state did not offer into evidence either a certification or testimony from someone with knowledge that a diligent search failed to disclose any record, report, statement, or data compilation or entry. While it is possible that an officer might be able to provide such testimony of diligent search in some cases, the testimony presented here did not satisfy that requirement. The officer testified that he could have checked another database "to query more information as far as title history, registration history, other tags that might be associated with certain vehicles," but he did not. Given this admission, the officer cannot be said to have performed a "diligent search" that failed to disclose a record that should have been made and preserved. Thus, the officer's testimony was not admissible under the hearsay exception for absence of information from a public record.

Second, the officer's testimony does not fall into the related exception for absence of an entry from business records under section 90.803(7). To admit evidence under this section, "it must be shown that the records were kept in accordance with section 90.803(6) and in such a manner that the fact would have been recorded if it had occurred. It is necessary to call a witness to testify to the required foundation." Rae v. State, 638 So. 2d 597, 598 n.3 (Fla. 4th DCA 1994); see also Garcia v. State, 564 So. 2d 124, 128 (Fla. 1990). Here, the state called no witness to establish this required foundation.

The district court noted that the state could have obtained a certification from the Department of Highway Safety and Motor Vehicles to establish that there was no record

of a proper registration of the car on the date in question. The state could also have called a witness to testify as to how the FCIC/NCIC records were maintained and to testify that a diligent search of its database did not turn up any registration for the car. However, the officer's testimony that he accessed the FCIC/NCIC database and did not find any registration for the car, standing alone, is hearsay when offered to prove that the car was not actually registered, and the testimony does not fall into any exception to the hearsay rule. Therefore, the trial court should have sustained defendant's hearsay objection. The district court held that the trial court should have granted defendant's motion for judgment of acquittal on this charge.

Arrest, Search and Seizure

Gentles v. State, 50 So. 3d 1192 (Fla. 4th DCA 2010).

The district court reversed the trial court's order denying defendant's motion to suppress evidence obtained after he was detained when a police officer ordered him to turn off his car engine after noticing that defendant was asleep in his parked car, with the motor running, during early morning hours in a shopping mall parking lot.

The appeal followed the defendant's no contest plea to felony driving with a suspended license (DWLS) and violation of probation. Based on Popple v. State, 626 So. 2d 185 (Fla. 1993), the district court held that the officer's direction that defendant turn off his car engine constituted a seizure without the requisite reasonable suspicion.

The officer testified that while patrolling a shopping mall, he encountered defendant in the parking lot at 4:15 a.m. The mall was closed, and there were no other vehicles in the parking lot. He saw that defendant was asleep on the driver's side of his car and the engine was running. The officer approached the vehicle to make contact with defendant to make certain he was not injured or sick. The officer could not recall whether the window was up or down or what he did to awaken defendant; after failing to respond initially, defendant woke up, and the officer made contact with him. The officer ordered defendant to turn off his car, and defendant complied. The officer said he ordered defendant to turn off the car for safety reasons. He explained that he did not want defendant to drive off, or if he was injured or sick, to get scared and throw the car into gear and accidentally drive into whatever was in front of him. The officer did not testify about any facts which made him believe that defendant posed a danger.

The officer asked for identification, and defendant complied. The officer asked defendant if there was a problem. Defendant responded that he was in the parking lot because he could not go home to his apartment; he drove around and fell asleep in the parking lot. Using defendant's identification, the officer ran a computer warrant check which revealed that defendant had a suspended license as a habitual traffic offender and was on probation for felony driving with a suspended license. The officer placed defendant under arrest and issued him a citation for DWLS (habitual offender).

The officer testified that he was not responding to calls relating to criminal activity, drug transactions, or violence. He acknowledged that he did not observe defendant doing anything illegal and that he did not know about defendant's suspended license until after he ran the NCIC check. The officer said he saw no signs that defendant was impaired; his speech was not slurred, and he did not smell of alcohol.

The trial court denied defendant's motion to suppress, determining that the officer's actions did not rise to the level of an unconstitutional stop or seizure. Citing State v. Baez, 894 So. 2d 115 (Fla. 2004), the court found that the officer was motivated by concerns that defendant might need assistance. The court reasoned that such a scenario usually indicates some sort of problem, such as intoxication or fatigue, or signals possible danger from carbon monoxide gases from the running motor. The court concluded that the officer acted prudently in ordering defendant to shut off his engine.

Defendant did not dispute that the officer was justified in approaching his vehicle to conduct a routine check and engage in consensual interaction. Instead, he challenged the instruction to turn off the engine as an unreasonable seizure. He argued that the officer's actions constituted a "show of authority" that turned a consensual encounter into an unlawful detention not based on reasonable suspicion of criminal activity. He contended that everything that followed, including asking for his identification and running the computer check, led to discovery of "fruit of the poisonous tree."

The district court stated that cases involving orders to turn off a car motor have usually contained additional circumstances, such as ordering a defendant out of the car or blocking a defendant's path. However, as Justice Pariente pointed out in Golphin v. State, 945 So. 2d 1174, 1197 (Fla. 2006) (Pariente, J., concurring), "[t]here are times when one circumstance among the totality converts what would otherwise be a consensual encounter into a detention." The district court concluded that ordering a citizen to shut off a car engine is such a circumstance and that it alone constitutes a seizure. When police conduct amounts to a seizure, there must be a justification in the form of articulable facts and circumstances suggesting criminal activity. The court also held that the order to shut off the engine was not supported by a reasonable suspicion of criminal activity. The officer did not testify about facts that gave him a well-founded suspicion that defendant had committed, was committing, or was about to commit a crime.

The district court stated that, although there may be scenarios wherein an officer will have personal safety concerns that justify ordering a motorist to shut off the car, no evidence was presented in this case showing a specific concern for officer safety. A temporary detention may also be based on an officer's discharge of his "community caretaking" duties. See Cady v. Dombrowski, 413 U.S. 433, 441 (1973). In keeping with such responsibilities, the officer in this case could properly check defendant's status and condition to determine whether he needed any assistance. This type of limited contact has been deemed a reasonable and prudent exercise of an officer's duty to protect the safety of citizens. The district court found the record to be devoid of facts showing that the officer's instruction to shut off the car was reasonably based on concerns for defendant's safety or was necessary to determine if he needed any assistance.

The district court stated that the fact that a motorist is asleep in a car with the motor running in an empty parking lot at night does not, without more, provide a reasonable basis for seizing the motorist. The court distinguished State v. Baez, 894 So. 2d 115 (Fla. 2004), on which the trial court and the state relied. In the present case, the officer ordered defendant to turn off his engine before asking for identification, which constituted a seizure. Because the seizure was not based on a reasonable suspicion of criminal activity or a specific concern for officer safety or the health and safety of the defendant or others, the district court reversed the trial court's order denying the motion to suppress and remanded for further proceedings.

State v. Y.Q.R., 50 So. 3d 751 (Fla. 2d DCA 2010).

The district court reversed the trial court's order granting defendant's motion to suppress, in which the trial court concluded that defendant was arrested following an unlawful traffic stop. The district court concluded that the arresting officer lawfully stopped the car in which defendant was riding after watching the car make an improper left turn, as defined under section 316.151(1)(b), Florida Statutes (2008).

An officer on patrol was traveling northbound in the center lane of a street. He came to a stop at a light at an intersection. Although the light was green, the car in front of the officer was stopped in the through-lane. The driver of this car waited for all vehicles in the left-turn lane to proceed through the intersection. The driver then activated his turn signal and made a left turn. Although this turn did not affect other traffic, the officer concluded that the turn was unlawful. He stopped the vehicle and discovered marijuana and paraphernalia.

After the state filed a delinquency petition against defendant, defendant argued successfully to the trial court that the vehicle's turn was lawful because it "was done in a safe manner and did not affect the flow of traffic."

The district court stated that the officer simply stopped the driver for an improper left turn, an offense defined under section 316.151(1)(b), Florida Statutes (2008). As a noncriminal traffic infraction, a violation of this section can provide a basis to perform a lawful traffic stop. See § 316.151(3), Florida Statutes (2008); see also State v. Allen, 978 So. 2d 254, 255 (Fla. 2d DCA 2008).

Section 316.151(1)(b) requires a driver performing a left turn to make the turn from "the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle." This section does not condition the lawfulness of a left turn on whether the turn impacts traffic. The district court rejected defendant's argument that, under the last sentence of section 316.151(1)(b), a proper left turn is required only "[w]henever practicable." This sentence more likely pertains to those situations in which it is not practicable for a vehicle to remain within the turn lane while completing the turn. Here, it is undisputed that the driver of the car in which defendant was riding began his turn from the center, through-lane of traffic, not the extreme left-hand lane. In doing so,

the driver committed a traffic infraction. The officer observed and videotaped the infraction. The trial court therefore erred in concluding the officer did not have a lawful basis to stop the vehicle in which defendant was traveling. The district court reversed the order granting defendant's motion to suppress and remanded for further proceedings.

State v. Watana, 50 So. 3d 92 (Fla. 4th DCA 2010).

The district court affirmed the trial court's order suppressing evidence, finding that the record supported the trial court's determination of no voluntary search consent.

Around 3:00 a.m. on the morning in question, a police sergeant stopped defendant for "careless driving." According to the officer, defendant's vehicle was traveling between 90 and 100 miles per hour over a bridge, and was crossing all lanes of traffic. Defendant did not pull over immediately, but proceeded a short distance and parked behind a closed business. The officer said this was "very unusual," because "there was [sic] ample places to pull over on 17th Street." As defendant sat in the driver's seat, the officer asked for defendant's license and registration. Defendant was "extremely nervous," and kept looking around and over his shoulder. The officer described him as "very distracted" as the officer was talking to him, picking up items in the car not relevant to the traffic stop, and sweating "profusely."

After observing this behavior, the officer ordered defendant out of his car. The officer claimed he asked for permission to search defendant's person, and that defendant complied, never resisting or withdrawing consent. When asked whether he had reason to believe defendant had weapons, the officer testified, "I just had a heightened suspicion."

The officer put his hand inside of defendant's right front pocket and pulled out a small baggy containing cocaine residue. Defendant moved to suppress the cocaine, alleging in part that it was obtained during an unlawful detention and that he did not consent to the officer's request to search but, rather, acquiesced to his authority.

Defendant testified he did not remember exactly how fast he was driving that night, but it was not 90 to 100 miles per hour. He was nervous when he saw the police car behind him because it was 3:00 a.m., and he was out later than he had told his wife. Defendant looked for a safe spot to pull over. When he saw the officer approaching his vehicle, he rolled down his window. He presented his license, registration, and insurance, upon the officer's request. When the officer returned shortly thereafter, he told defendant to step out of the vehicle. Defendant complied. He did not know he had the option to say "no." The officer asked defendant to go to the back of the police vehicle and turn around. Then "he just started searching" defendant. Prior to that, the officer never told defendant what he was doing. Defendant thought the officer might give him a sobriety test. Defendant testified that the officer did not ask for permission to search him.

The trial court ruled that, although defendant was properly stopped for speeding, he did not give the officer consent to search his person. The trial court found that any consent given was a submission to authority and not voluntary. The district court

concluded that the trial court's finding that consent was an involuntary submission to authority was supported by competent substantial evidence.

Watson v. State, 50 So. 3d 685 (Fla. 3d DCA 2010).

The district court reversed defendant's conviction for trafficking in cocaine.

The police pulled defendant over for driving erratically and found a plastic bag with 124.6 grams of cocaine under the driver's seat. The police arrested defendant, and the state charged him with trafficking in cocaine. At trial, defendant's defense was that he did not know about the cocaine because the car did not belong to him. The arresting officer testified and took photographs showing a plastic bag protruding from under the driver's seat. However, the officer never testified that he saw defendant hide the bag. There were no fingerprints or other admissible evidence linking defendant to the bag.

Defense counsel argued that there was no evidence that defendant placed the drugs under the seat. The state argued that it could be inferred from the bag's position that defendant was trying to conceal the cocaine before the police stopped him. Defense counsel objected three times concerning the state's reference to concealment. Each time, the trial court overruled the objection. The trial court also denied defense counsel's motion for mistrial. The jury convicted defendant, and the trial court sentenced him to ten years in prison with a three-year minimum mandatory sentence.

On appeal, defendant asserted that the trial court erred in overruling defense counsel's objections to the state's improper rebuttal argument, contending that, because there was no evidence of defendant's concealment, it was highly prejudicial, and reversible error to argue facts not in evidence.

The state contended that the trial court did not err in overruling defense counsel's objections to rebuttal argument as the comments were reasonable inferences from the evidence and invited responses to the defense closing. The district court agreed with defendant and reversed, stating that a prosecutor must confine his or her closing argument to evidence in the record and must not make comments which could not be reasonably inferred from the evidence. Further, a proper rebuttal argument is limited to a reply to what has been brought out in the defendant's closing argument.

The district court stated there was no trial evidence presented to infer that defendant hid the drugs under the driver's seat. Defense counsel's closing argument discussed the absence of evidence proving defendant's knowledge of the cocaine. Knowledge, in turn, is an essential element of the crime charged. The district court determined that allowing the prosecutor's rebuttal argument, inferring from the bag's position that defendant was trying to conceal drugs before the police stopped him, was improper and reversible error. Thus, the district court held that the trial court erred in overruling defense objections to the prosecutor's rebuttal argument.

State v. Jimoh, ___ So. 3d ___ (Fla. 2d DCA 2010), 2010 WL 4365960, 35 Fla. L. Weekly D2469, 2D09-3979.

The district court reversed the trial court's order granting defendant's motion to suppress evidence seized after defendant was discovered unresponsive behind the wheel of her parked car. The district court agreed with the state's argument that officers had reasonable suspicion to justify an investigatory stop of defendant's vehicle based on her condition, the fact that the engine was running and the headlights were on, and the odor of alcohol that could be detected coming from the vehicle.

A deputy observed defendant sitting in the driver's seat of her car with the engine running in the parking lot of a convenience store. The deputy testified that defendant appeared to be asleep or looking down at her telephone. After inquiring and discovering that defendant had been parked there for approximately ten to fifteen minutes, the deputy called for back-up, and another deputy, an experienced DUI investigator, responded and observed a woman "slumped over" at the wheel of her vehicle. The engine was running, and the headlights were on. The driver's side window was open about four inches. The second deputy could smell alcohol coming from the vehicle. Both deputies attempted to wake defendant by banging on the car roof and doors. When she did not respond, the second deputy reached into the vehicle, shut off the engine, opened the door, and shook defendant until she woke up. He then had defendant get out of the car. Based on her bloodshot and glassy eyes together with the odor of alcohol coming from the vehicle, the officer conducted a DUI investigation that led to defendant's arrest.

The trial court granted defendant's motion to suppress finding that the facts were indistinguishable from those in Danielewicz v. State, 730 So. 2d 363 (Fla. 2d DCA 1999). The district court disagreed, stating that, in Danielewicz, the officer observed the defendant's car lawfully parked in the parking lot of a restaurant with the headlights on and the engine running. The defendant was in the driver's seat apparently asleep. When the officer knocked on the car window, the defendant looked at the officer but did not unlock the door. The officer had to ask the defendant five times to get out of the car. It was after the defendant unlocked the car door and got out of the car that the evidence leading to her DUI arrest was discovered. On appeal, the Second District held that the investigative stop was not lawful because the officer did not articulate a well-founded suspicion of criminal activity:

The district court rejected defendant's contention that circumstances observed by the deputies were consistent with innocent conduct and, therefore, could not have given the deputies requisite founded suspicion to justify an investigatory stop. The district court reversed and remanded for further proceedings.

England v. State, 46 So. 3d 127 (Fla. 2d DCA 2010).

The district court affirmed defendant's judgments and sentences for possession of cannabis and possession of drug paraphernalia but wrote to address the trial court's denial of the motion to suppress defendant's statements and whether that order is appealable.

Defendant entered a guilty plea to the charges while reserving his right to appeal the denial of at least one motion to suppress.

Defendant was the passenger in a car that was validly stopped for a traffic violation. The driver gave consent for a deputy to search the car and, as a result, the traffic stop became a consensual encounter. Because the deputy had consent, he was lawfully permitted to detain all occupants of the car until he completed the search. The district court held that there was no unlawful search and seizure and affirmed the denial of defendant's motion to suppress evidence of drugs and drug paraphernalia.

The district court stated it was clear that the trial court erred by denying the motion to suppress defendant's statements. Once the deputy located the baggie of marijuana on the passenger-side floorboard of the car, the deputy confronted the driver and defendant and told them that they would both be arrested if someone did not own up to possessing the drugs. It was only at that point that defendant stated that the drugs belonged to him and that he would "take the rap."

The district court explained that this case was a prime example of why specificity is needed in making determinations regarding the dispositive nature of motions. As the court emphasized in Everett, "when a trial court receives a plea subject to the requirements of rule 3.172 of the Florida Rules of Criminal Procedure and the defendant reserves a question of law for appeal, the trial court is obligated to determine the dispositive nature of the reserved question." 535 So. 2d at 669. "A trial court . . . errs if it merely acknowledges that the defendant has reserved an issue for appellate review." *Id.* The court advised parties and trial courts to use care when stipulating which motions are dispositive so that a clear, accurate record of the proceedings can be created for appeal.

The district court agreed with defendant's argument that he was improperly subjected to custodial interrogation without the benefit of Miranda warnings. The determination of custody does not depend on the subjective views of either the interrogating officer or the person being questioned; instead, " 'the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.' " Stansbury v. California, 511 U.S. 318, 323-24 (1994) (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).

The deputy told defendant and the driver they would be arrested if someone did not own up to possessing the marijuana. This statement was likely to elicit an incriminating response. Indeed, defendant incriminated himself in response to the coercive questioning. Because defendant was not provided with Miranda warnings, his statements relating to drugs should have been suppressed, according to the district court.

The district court remanded for further proceedings with directions to the trial court to afford defendant the opportunity to withdraw his plea. The court cautioned defendant that if he chose to withdraw his plea and proceed to trial, the state would be able to use the physical evidence which is properly admissible.

Austin v. State, 44 So. 3d 1260 (Fla. 1st DCA 2010).

The district court reversed and remanded the conviction of defendant for trafficking in cocaine, concluding that the trial court erred by allowing a Florida Highway Patrol trooper to testify about the general behavior patterns of drug traffickers.

A highway patrol trooper stopped defendant and found cocaine in a closed compartment within the rental car defendant was driving. The car had been rented to defendant's wife, who was not in the car at the time of the stop. Defendant argued that the state failed to prove that he knew cocaine was in the car. His fingerprints were not on the bag in which the cocaine was stored, and there was no evidence to indicate that he knew of the presence of cocaine, other than the fact that it was found in the car.

The trooper was not offered or accepted as an expert witness, yet he was allowed to give his own assessment. He began by stating his opinion that the rental contract defendant produced "was definitely unusual." He described the situation as a "third-party rental," meaning the car was rented not to the driver of the vehicle but to someone who was not in the car at the time. The prosecutor asked the trooper whether, based on his training, he considered it significant that this was a third-party rental. Over defense counsel's objection, the trooper was allowed to testify, "Yeah. A lot of times it means a lot. Normally, um, it's been my experience and training that what drug traffickers will do is rent a vehicle in someone else's name or someone else rent [sic] a vehicle for them. They will operate that vehicle, for several reasons, one, if they get stopped by the law enforcement and there's narcotics or whatever their [sic] transporting in the vehicle is located [sic], they can distance themselves from that, they can say, hey, I didn't know nothing about it, it was just in the car, it ain't my car, didn't rent the car, don't know nothing about it. Again, they are just distancing themselves from that. If they leave the vehicle or run or if it's a situation where they can bail out on foot and run, there's nothing in the vehicle to tie them back to that vehicle, you know, for successful prosecution."

Defense counsel reiterated his previous objection. The trial court overruled the objection, stating that the trooper had testified to the training and education he had received "and that these are factors they are taught to look for," which "makes it a relevant area of inquiry." The prosecutor argued in closing that using a third-party rental sounded "like a pretty good practice" and "a good idea if you are in the business of distributing or trafficking drugs," because "if your name is not on any documentation in the vehicle when it is stopped, maybe, just maybe, you can create reasonable doubt." The jury found defendant guilty of trafficking in cocaine.

The district court stated that testimony about general behavior of certain kinds of offenders is inadmissible as substantive proof of a defendant's guilt. Every defendant has the right to be tried on the evidence, not on characteristics of certain types of criminals. The district court explained that allowing evidence of general behavior patterns invites the jury to convict the defendant by association rather than on the evidence. The trooper's explanation that drug traffickers often use third-party car rentals impermissibly suggested to the jury that defendant was a drug trafficker. The district court concluded that such an

inference was prejudicial and misleading. The district court also rejected the state's alternative argument that admission of this testimony was harmless error.

Faith v. State, 45 So. 3d 932 (Fla. 1st DCA 2010).

The district court reversed defendant's convictions for possession of a controlled substance and resisting arrest without violence, holding that the trial court erred in admitting evidence obtained as a result of defendant's illegal arrest and that no exception to the exclusionary rule was shown to apply.

While conducting a traffic stop of a car in which defendant was a passenger, an officer asked defendant for identification. She provided a false birth date and a name other than her current one. The officer arrested defendant for obstruction by disguise, under section 843.03, Florida Statutes (2009), and placed her in a patrol vehicle. A search of her purse revealed methadone pills in her possession. After being handcuffed, defendant resisted. The violations were grounds for a violation of probation. Defendant pled no contest, reserving the right to appeal the denial of the motion to suppress.

The district court stated that, at the suppression hearing, the court correctly concluded that defendant's arrest for obstruction by disguise was illegal because she was neither under arrest nor subject to lawful detention when she gave the false name and birth date. See § 901.36(1), Fla. Stat. (2009). The trial court dismissed this charge.

In support of her motion to suppress, defendant argued that both the pills and the behavior that formed the basis of the resisting charge were "fruits of the poisonous tree" stemming from her illegal arrest and thus inadmissible. Without making any factual findings, the trial court concluded that the search and what it revealed were legal, and denied the motion to suppress. The district court denied the state's request for a remand to allow the prosecution to clarify the evidence or to present additional evidence demonstrating why the post-arrest evidence should not be suppressed.

Torts/Accident Cases

Tolan v. Coviello, 50 So. 3d 73 (Fla. 4th DCA 2010).

The district court reversed the summary judgment in favor of Marjorie Johnson, one of the defendants involved in a multiple-car rear-end collision.

The driver of the leading car, Mary S. Tolan, and her son, Danny Garza, filed negligence suits against the driver of each of the cars behind them, i.e., Johnson, the driver of the car immediately behind Tolan; Coviello, the driver of the car behind Johnson; and Jaworski, the driver of the car behind Coviello. Johnson, the driver of the car immediately behind Tolan, asserted that undisputed evidence established she brought her car to a stop behind Tolan and was then herself rear-ended and pushed into Tolan, and, thus, there was no negligence on her part. Because there was record evidence that

Johnson was negligent in placing her car abruptly between the Tolan and Coviello vehicles immediately prior to impact, the district court reversed the summary judgment.

Deposition testimony was that Johnson was able to stop her car behind Tolan, Coviello was able to stop his car behind Johnson, and, when Jaworski rear-ended Coviello, Coviello struck Johnson and pushed her into Tolan. However, testimony also supports an inference that, while driving through an intersection, Johnson changed lanes right in front of Coviello and then suddenly stopped short, causing Coviello to slam on his brakes and stop short such that he was only six to twelve inches from Johnson's car. The evidence offered in support of summary judgment thus failed to demonstrate that there was no negligence on the part of Johnson that was a cause of the accident or that the presumption of negligence attaching to Jaworski, as the rear driver, was unrebutted.

Sun v. Aviles, 53 So. 3d 1075 (Fla. 5th DCA 2010).

The district court affirmed the trial court's order dismissing the complaint of plaintiffs alleging liability for damages from an accident in which Mr. Sun, one of the plaintiffs, was injured. Mr. Sun sought damages for personal injuries he allegedly suffered in the accident, and his wife and daughter filed consortium claims.

The trial court dismissed plaintiffs' claims based on their commission of fraud upon the court after the defendants learned that all three plaintiffs lied repeatedly about Mr. Sun's ability to work and function on his own after the accident. Recognizing the stringent standard applicable to dismissals based on fraud, the district court concluded that the trial court did not abuse its discretion when it dismissed the claims.

The district court stated that the three claimants over a span of six years lied repeatedly about Mr. Sun's employment and his abilities to perform even the most basic functions of daily life. Moreover, the defendants did not simply make a bald and unsupported accusation to this effect. Rather, the plaintiffs, who admitted they knew they were supposed to give truthful and accurate answers, repeatedly chose not to do so out of some sort of purported desperation connected with Mr. Sun's employment in China.

The district court stated that the plaintiffs lied on virtually every discovery occasion to their own attorneys and experts, as well as to the defendants, making it virtually impossible for the defendants to defend against the damage claims. The utterly deceitful behavior of the plaintiffs fit the standard for dismissal of their suit. The district court concluded that the trial court did not abuse its discretion in finding that the appellants' complaint should be dismissed.

Keck v. Eminisor, 46 So. 3d 1065 (Fla. 1st DCA 2010).

The district court denied defendant's petition for writ of certiorari alleging error in the trial court's denial of defendant's motion for summary judgment in a lawsuit brought by plaintiff after she was struck by a bus the defendant was driving.

Plaintiff sought recovery for injuries she suffered when, as she walked across the street, she was struck by the bus that defendant was driving. She alleged that her injuries resulted from defendant's negligence when he was driving a Jacksonville Transit Authority (JTA) bus. She also sued JTA, along with the Jax Transit Management Corporation (JTM), which employed the defendant as a bus driver for the JTA.

Each defendant admitted that the bus driver defendant was operating JTA's bus when it struck plaintiff. Each defendant invoked section 768.28, Florida Statutes, and asserted immunity from tort liability. The bus driver defendant maintained that he was entirely immune from liability under the statute and that he could not be held personally responsible regardless of any negligence that might have caused plaintiff's injuries.

The trial court denied the motion for summary judgment and determined that JTM is a private corporation formed for the express purpose of creating a private employer for the JTA bus drivers. The court ruled that JTM was not a state agency under section 768.28 and that JTM was not an agent of the state. Concluding that defendant was not entitled to immunity granted to employees and agents of the state and its subdivisions under section 768.28(9)(a), the court denied the motion for summary judgment.

Following analysis of relevant case law, the district court denied defendant's petition for certiorari and certified to the supreme court the following question of great public importance:

> Whether review of the denial of a motion for summary judgment, based on a claim of individual immunity under section 768.28(9)(a) without implicating the discretionary functions of public officials, should await the entry of a final judgment in the trial court?

Cantalupo v. Lewis, 47 So. 3d 896 (Fla. 4th DCA 2010).

The district court affirmed a final summary judgment finding that defendant could not be held liable for negligent entrustment or negligent undertaking where defendant took his alcohol-impaired brother's car keys and then put the keys in a place where his brother easily found the keys, resulting in his brother causing a fatal collision.

The undisputed facts are as follows: one night at 8:30 p.m., defendant and his brother went to a restaurant. Over the next hour and forty-five minutes, defendant's brother drank several glasses of bourbon. At 10:15 p.m., defendant and his brother left the restaurant. Defendant asked for his brother's keys because he felt his brother had too much to drink. His brother handed over the keys. Defendant then drove himself and his brother to defendant's home. They arrived at 11:30 p.m. Defendant put the keys in the kitchen and went into his home office to do some work. His brother remained in the other part of the house.

At 2:00 a.m., defendant's brother came into the office. Defendant recognized that his brother had been drinking more and was in worse shape than when they had left the

restaurant. His brother had the keys and said he was going home. Defendant told his brother it would be best if he stayed the night. His brother agreed and again handed over the keys, saying that he would stay the night. The brother then went back to the other part of the house. At 2:10 a.m., defendant went into the living room and put the keys on a hutch. The hutch was 20 feet from the couch on which his brother would be sleeping. Defendant did not keep the keys because he did not want his brother to wake him and his wife when leaving for work at 8:00 or 9:00 that morning. After defendant put the keys on the hutch, his brother got ready to sleep on the couch. Defendant then went back to his office. At 2:30 a.m., defendant went into the living room. He saw his brother lying on the couch with his eyes closed. Defendant then went to bed. At some time before 3:13 a.m., defendant's brother got up, took the keys, and left the house. He drove the wrong way down a nearby road and collided head-on with a vehicle driven by Suzanne Cantalupo. Both defendant's brother and Cantalupo were killed.

Plaintiff, the personal representative of Cantalupo's estate, filed a two-count action against defendant for negligent entrustment and negligent undertaking. Defendant moved for final summary judgment, arguing that he could not be liable under the undisputed facts. After a hearing, the trial court granted the motion, reasoning:

> "Obviously, (the defendant) could have done more . . . to secure the keys. But I'm going to grant the summary judgment, and the 4th can decide — I don't know much about public policy, but I don't think people in a position like this, where they're going to be liable no matter what they do if what they do fails. I recognize the analogy to the Good Samaritan law . . . So I'm going to grant the motion for summary judgment."

On appeal, plaintiff argued that the trial court erred in granting the motion for summary judgment on public policy grounds without addressing the merits of the claims for negligent entrustment and negligent undertaking. Plaintiff further argued that, on the merits, the court should have denied the motion for summary judgment because genuine issues of material fact existed as to whether defendant was liable for negligent entrustment and negligent undertaking.

The district court agreed that the trial court should not have granted the motion for summary judgment on public policy grounds without addressing the merits of the claims. In its de novo review, the district court analyzed legal authority for negligent entrustment and negligent undertaking. The district court concluded that the trial court properly granted the motion for summary judgment.

Fontaine v. R & E Nifakos, Inc. D/B/A Fontana Auto Service, 45 So. 3d 548 (Fla. 4th DCA 2010).

The district court reversed the trial court's order for directed verdict after a jury trial, holding that plaintiff presented sufficient evidence to avoid a directed verdict as to her claim that defendant negligently repaired her truck, which later caught fire while she

was driving, causing her personal injuries and loss of the truck. The district court remanded for a new trial.

The plaintiff and her partner purchased a truck for their roofing business. At the time of the purchase, the truck was fifteen years old and had been driven roughly 55,000 miles. The plaintiff's partner road-tested the truck and obtained the truck's service history before the purchase. However, he did not have a mechanic inspect the truck. The plaintiff and her partner drove the truck weekly for the next three months without any problems.

However, the plaintiff's partner was driving the truck on a highway when it began "bucking" and would not continue running at highway speed. The plaintiff's partner had the truck towed to the defendant's auto repair shop. The plaintiff's partner told the defendant's mechanic what occurred on the highway. The mechanic said he would "check out the fuel tanks and the filters." When the plaintiff and her partner came to pick up the truck the next day, they asked the defendant's mechanic what the problem was. The mechanic said "the fuel lines were messed up" and performed a second repair.

The plaintiff's partner testified that the truck "ran fine after the second [repair]. It had a little bit of bucking to it, but nothing like it was." However, five or six weeks after the second repair, the plaintiff was driving the truck on the highway and it began to sputter "like [it was] not getting fuel, like [it was] going to stall." According to the plaintiff, "I was pushing my foot on the fuel and I wasn't getting any fuel. So I started to smell gas really, really bad. . . . So the truck started to slow down, so I went across the two lanes on the left-hand side, right along the median or whatever, and I started to slow down. And I slowed down, and I got the truck into park and that's when the fire started. The flames came up through my legs, through the steering wheel."

The plaintiff could not get out of the truck using her door, so she dove out of the truck through her open window. Although she did not suffer burns, the hair on her body and head was signed. The truck and its contents were a total loss. The plaintiff and her partner had the truck towed back to their business and later to a nearby storage yard. The storage yard was fenced in and under lock and key. To the knowledge of plaintiff and her partner, the truck was not altered after the fire. The fire lieutenant who responded to the fire testified that, after looking inside the engine compartment, he determined that "the fuel lines were the cause of the fire." He determined that there was a fuel leak because "there was fuel on the ground leading up to the vehicle."

Plaintiff had a master automobile technician inspect the truck two years after the fire and testify as an expert witness. In the technician's opinion, the fuel line separated because "it wasn't properly attached or it wasn't locked properly with a lock on it." Not locking the fuel line properly would be a breach of a mechanic's standard of care.

After plaintiff rested, defendant moved for a directed verdict, arguing that plaintiff did not present evidence that the defendant negligently repaired the truck or caused the fire. According to defendant, there was no evidence that its mechanic disconnected the fuel line. Defendant contended that the only way plaintiff could prove

her case was by "a pyramiding of impermissible inferences." Plaintiff responded by relying on the technician's testimony that there was no way for the fuel line to have come apart but for not being properly locked. Plaintiff also relied on the technician's opinion that the fuel would spill onto the middle of the engine, and on the fire lieutenant's testimony that the fire started at the middle of the engine where the fuel line was separated. The trial court granted the motion for directed verdict.

The district court held that a proper view of the evidence could sustain a verdict in favor of plaintiff. The district court noted that plaintiff presented prima facie evidence that defendant negligently repaired the truck. Plaintiff's expert technician testified that the standard of care after flushing the fuel lines requires the mechanic to reinstall the locks. However, the technician observed that, on the connection to the back of the engine, the locks were not attached together or in place. If the technician's testimony is viewed in the light most favorable to plaintiff, a reasonable inference could be made that defendant failed to use reasonable care in locking the fuel line to the back of the engine.

The district court also held that plaintiff presented prima facie evidence that defendant's failure to use reasonable care caused the fire that led to the plaintiff's injuries. The district court concluded that, viewing the totality of evidence in the light most favorable to plaintiff, a reasonable inference could be made that defendant's failure to use reasonable care caused the fire that led to plaintiff's damages. Thus, the district court reversed the directed verdict and remanded for a new trial.

Marion v. City of Boca Raton, 47 So. 3d 334 (Fla. 4th DCA 2010).

The district court reversed final summary judgment in favor of defendant (the city) in a negligent maintenance suit, holding that genuine issues of material fact remained as to causation between negligent maintenance of the city's traffic light and the intersectional collision causing injury to plaintiff.

Plaintiff was injured in a car accident while driving westbound into a major intersection, with six lanes going west, two of which were turning lanes. At the time of the accident, the traffic light was flashing yellow for traffic on one road and flashing red for traffic on the other road. Plaintiff started to slow down, hitting her brakes when she saw other cars to her left also braking. As she entered the intersection, she struck a vehicle travelling north.

Plaintiff sued the driver and owner of the vehicle she struck, alleging negligence, and settled those two lawsuits. As to the city, she alleged that it had negligently maintained the traffic control device at the intersection in that the device had failed prior to the accident and the city had failed to make repairs. She further alleged that failure to have a functioning traffic control device that stopped traffic on one street while the traffic on the other street proceeded was the proximate cause of the accident.

In deposition, a city traffic engineer testified that when traffic control devices at this intersection had a problem or fault, a conflict monitor defaulted the traffic lights into

flashing red for North/South traffic and flashing yellow for East/West traffic. The city had been called to the same intersection as a result of the traffic control devices going to flashing red and flashing yellow mode twice just prior to the accident. The first fault occurred the day before, and the second fault occurred earlier on the day of the accident. Each time, the city simply reset the light and did not change the monitor responsible for tripping the lights into flashing mode. No one determined why the fault occurred. After the accident, the city replaced the monitor. The city moved for summary judgment on issues of sovereign immunity, negligence, and proximate cause. It contended: 1) the city's planning decision to control intersections with traffic signals in safety mode was protected by sovereign immunity; 2) plaintiff could not establish that the city was negligent as the flashing traffic control was not defective; 3) plaintiff could not establish that the flashing light proximately caused the accident.

The trial court granted summary judgment on the third ground, ruling that the flashing traffic light was not a proximate cause of the accident. The court did not address the issue of sovereign immunity. The city contended that was entitled to sovereign immunity because its decision to control the intersection with a flashing light was a policy decision, not an operational one.

The district court disagreed, citing Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), in which the supreme court held that government planning-level decisions continue to be immune, despite the statutory waiver provided in section 768.28, Florida Statutes, in determining liability questions. The district court explained that the statute did waive immunity for operational decisions.

The district court stated that, in this case, the city exercised a planning level decision in designing the intersection and its traffic signal. Every intersection may be inherently dangerous. See Dep't of Transp. v.Konney, 587 So. 2d 1292, 1295 (Fla. 1991). Such a large intersection as present in this case would qualify as being inherently dangerous. The city installed traffic control devices providing red, yellow, and green lights for each road, as well as turning signals.

While the city maintained that the default to "safe mode" when the designed traffic control device malfunctions is part of the planning level decision, the district court concluded that the inclusion of "safe mode" was merely the city's method of providing a warning of a known dangerous condition when the planned traffic control device malfunctions. As such, it fulfills an operational duty to warn, not a planning decision. Were it otherwise, then a city could never be liable for failing to maintain existing traffic control devices, because its liability could be excused simply by providing default flashing lights.

The district court held that the city had an operational duty to maintain traffic control devices and to warn of known hazards. The court stated that the city was not immune for negligent performance of these operational duties. The district court further held that the record did not conclusively refute the allegations that the city was negligent in failing to repair the malfunctioning device. During the 36 hours prior to the accident,

the traffic control device malfunctioned three times, defaulting to flashing mode. While the city maintained that the flashing yellow light did not malfunction, that was not the issue. The issue, according to the district court, was whether existing traffic control devices were maintained and functioning as designed by the city so as to control a large intersection. The fact that the light defaulted to "safe mode" showed that traffic control lights were not functioning as they were intended.

Because allegations of negligence were not conclusively refuted on the record, the district court stated that it was bound to accept them for purposes of the motion for summary judgment. The district court reversed the summary judgment, holding that a jury should be entitled to consider the city's negligence and plaintiff's comparative negligence in determining whether the city's negligent failure to repair the traffic signal was a proximate cause of the accident.

Driver's Licenses

DHSMV v. Auster, 50 So. 3d 802 (Fla. 5th DCA 2010).

The district court denied a petition of the Department of Highway Safety and Motor Vehicles (DHSMV), which sought second-tier certiorari review of a decision of the circuit court in its appellate capacity. The circuit court granted defendant's petition and quashed an order of the DHSMV hearing officer that had upheld suspension of defendant's driver's license for refusal to submit to a breath test.

In doing so, the circuit court determined that the hearing officer departed from the essential requirements of law and denied defendant due process by refusing to issue a subpoena for a breath test technician. The district court disagreed with the circuit court's analysis but agreed with the ultimate conclusion.

Defendant was arrested for driving under the influence, and her license was subsequently suspended pursuant to section 322.2615(1)(a) for refusal to submit to a test of her breath-alcohol level. Prior to her hearing, defendant requested the hearing officer issue a subpoena for a breath technician. The request was denied. At the onset of her hearing, defendant renewed her request, arguing, inter alia, that she wished to examine the technician on the issue of whether defendant had timely recanted her refusal to submit to a breath test. Without explanation, the hearing officer again denied her request.

After reviewing the DUI citation, the arrest affidavit, the DUI work sheet, and the "refusal to submit" affidavit submitted by the arresting officer, the hearing officer entered an order upholding the suspension of defendant's driver's license. The hearing officer found that 1) the arresting officer had probable cause to believe that defendant was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substance, 2) defendant refused to submit to a breath test after being requested to do so by a law enforcement officer subsequent to a lawful arrest, and 3) defendant had been advised that if she refused to submit to such

test, her privilege to operate a motor vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months.

In quashing the hearing officer's order, the circuit court erroneously asserted that in Dep't of Highway Safety & Motor Vehicles v. Amodeo, 711 So. 2d 148 (Fla. 5th DCA 1998), the Fifth District had "squarely and unequivocally held that a hearing officer has absolutely no discretion whatsoever to refuse to issue a subpoena for a fact witness to attend a formal driver's license suspension hearing."

The district court agreed with the circuit court's conclusion that it was error for the hearing officer to refuse to issue the subpoena. A hearing officer is expressly authorized to issue subpoenas for witnesses identified in documents submitted by a law enforcement officer. Here, the technician was identified in these documents.

The district court agreed with the general proposition that a hearing officer has discretion to grant or deny a subpoena request. However, that discretion is limited. Where the witness' expected testimony would be relevant to the issues within the limited scope of the review hearing and would not be clearly cumulative, due process considerations require the hearing officer to issue a subpoena if the hearing officer has the authority to do so. Here, a defendant alleged to have refused to take a breath test. Thus, pursuant to section 322.2615(7)(b), the scope of review was limited to issues of:

1. whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances;

2. whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer; and

3. whether the person whose license was suspended was told that if he or she refused to submit to such test, his or her privilege to operate a motor vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months.

Defendant wished to examine the breath technician on an issue within the scope of the hearing. Further, the hearing officer could not have concluded from the record that the breath technician's testimony would be cumulative. The district court held that defendant should have been afforded the opportunity to present the testimony.

State v. Warner, 50 So. 3d 99 (Fla. 4th DCA 2010).

The district court reversed the trial court's order withholding adjudication of guilt and failing to revoke the driver's license of a defendant who committed aggravated fleeing and eluding. The district court found that section 316.1935, Florida Statutes

(2008), prohibited the court from withholding adjudication of guilt and required the court to revoke defendant's driver's license.

The state charged defendant with aggravated fleeing and eluding and open carrying of a weapon. At a hearing, the trial court offered that if defendant pled no contest to the charges, the court would withhold adjudication and would place the defendant on probation for 18 months. Defendant responded that he wished to accept the offer. The court asked the state if it objected. The state responded "yes." The court then asked the state if the court's offer was "nonetheless a legal sentence." The state responded, "No. According to the statute[,] fleeing and alluding [sic] should be an adjudication with a one year [license] revocation."

Despite the state's objection, the court stated that it was not going to adjudicate defendant for the following reasons: "[T]his defendant has no prior history of criminal activity, has led a law[-]abiding life for a substantial period of time before the commission of the present offense, and I find [this] to be an offense that was committed in an unsophisticated manner[;] it was an isolated incident for which this defendant has shown remorse." The court accepted defendant's plea, withheld adjudication, and placed defendant on probation. The state renewed its objection to the sentence.

Section 316.1935, entitled "Fleeing or attempting to elude a law enforcement officer; aggravated fleeing or eluding," provides, in pertinent part: (5) The court shall revoke, for a period not less than 1 year nor exceeding 5 years, the driver's license of any operator of a motor vehicle convicted of a violation of subsection (1), subsection (2), subsection (3), or subsection (4). (6) . . . [N]o court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation of this section. . . . § 316.1935, Fla. Stat. (2008).

The district court held that the trial court erred by withholding adjudication under the premise that such a sentence was a permissible downward departure. The court similarly erred in failing to revoke the defendant's driver's license for a period not less than one year nor exceeding five years. The district court reversed and remanded with instruction to the trial court to permit defendant to withdraw his plea.

Hutto v. State, 50 So. 3d 85 (Fla. 1st DCA 2010).

The district court reversed and remanded defendant's sentence for driving while license suspended or revoked. Defendant entered into a negotiated plea agreement with the state that called for 18 months' imprisonment. Defendant argued that the court did not make any findings that he could be a danger to the public, and the record did not contain any such written findings.

In his rule 3.800 motion, defendant argued that his sentence was illegal because he should have been sentenced to a nonstate prison based upon his score of 14.1 points. The trial court denied the motion without analysis or record attachments. Defendant based his claim on the fact that section 775.082(10), Florida Statutes (2009), which took

effect just prior to his arrest, stated that anyone who committed a crime on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in section 776.08, and excluding any third degree felony violation under chapter 810, and if the total sentence points pursuant to section 921.0024 are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

Defendant scored 14.1 points on his scoresheet, and the record contained no written findings from the lower court that he could present a danger to the public if not sentenced to prison. The district court concluded that the record reflected that the defendant should have been sentenced to a nonstate prison. Thus, the district court reversed and remanded the order for the lower court to attach record documents conclusively refuting the appellant's claim or to conduct further proceedings.

Gerali v. State, 50 So. 3d 727 (Fla. 5th DCA 2010).

The district court affirmed in part and reversed in part defendant's judgment and sentence following a finding that she violated her probation. Defendant was placed on probation for a plethora of crimes ranging from uttering a forged instrument to organized fraud. Pursuant to a plea bargain, she was sentenced to a total of ten years, suspended upon successfully completing five years of supervised probation.

Within a month of being sentenced, defendant failed a random drug screen administered by her probation officer and admitted using cocaine. The trial court approved her probation officer's recommendation of continued probation. Soon thereafter, defendant was arrested for driving while her license was suspended or revoked. The probation officer filed an affidavit alleging a violation of probation.

At the violation of probation hearing, the first witness was the officer who observed defendant driving and identified a certified copy of defendant's license reflecting license suspension. The officer testified that defendant admitted being aware of the suspension. The record of the license was admitted into evidence without objection. The second witness was defendant's probation officer, who testified defendant was informed of probation conditions, including the requirement of no new law violations.

The trial court, without objection, swore in defendant and began asking questions. The judge asked defendant whether she had a suspended license; she responded, "Yes, sir." The trial court also asked how many names defendant used. Her reply of "three" evoked a response from the state relating to the use of at least one other name, that of her sister, which formed the basis of the charges for which probation was imposed. The trial court then asked defendant whether she had any reason to be driving. She responded that she had several family issues and was trying to get to her father's home.

During this questioning, defendant was never informed of her Fifth Amendment right against self-incrimination relating to the charge of driving with suspended license,

and her counsel did not object to the trial court's questioning. The trial court found defendant in violation of her probation and imposed a five-year prison sentence. The trial court awarded credit for time served "(s)ince violation of probation [VOP] arrest only. So she gets credit for time served from the VOP arrest."

Defendant contended the trial court committed fundamental error in abandoning its role as impartial magistrate and erred in failing to award full credit for time served.

The district court stated that all parties who appear before a court, including probationers, are entitled to a proceeding "presided over with cold neutrality by an impartial judge, particularly when the judge also acts as the finder of fact." Sears v. State, 889 So. 2d 956 (Fla. 5th DCA 2004). However, this does not foreclose a trial judge from asking questions to ascertain the truth or to clarify issues. The district court stated there is no bright-line test to determine when a judge crosses the line and departs from the role of impartial magistrate, which depends upon the circumstances of each case.

Because defendant did not object to the trial court's questioning, the issue was fundamental error. After analyzing relevant case law, the district court concluded that the most troubling conduct of the trial court was the questioning of defendant. The district court stated that the trial court order was unclear as to whether the trial judge relied upon defendant's testimony or the arresting officer's testimony to find that defendant admitted driving with a suspended license.

The district court further stated that the state established a prima facie violation of probation before the trial court interjected by calling defendant as a witness. The trial court did not supply any missing elements, orchestrate prosecutorial strategy, direct evidence gathering on essential issues, or demonstrate a bias, either on behalf of the state or against defendant. See Turner v. State, 745 So. 2d 456 (Fla. 4th DCA 1999). While the trial court should have inquired whether the defense wished to present a case before fleshing out whether there were mitigating factors to defendant's decision to drive, the trial judge apparently accepted defendant's explanation, and rather than simply impose the suspended sentence, halved it.

The district court did not find that defendant was denied a fair hearing or that the trial court committed fundamental error regarding the judge's questioning of defendant. As to the credit for time served issue, the district court found that defendant was entitled to receive credit for all days served prior to the imposition of the original sentence, as well as the credit for time served following her arrest on the violation of probation. The district court remanded for proper determination of credit for time served.

Sweeting v. State, 46 So. 3d 1217 (Fla. 4th DCA 2010).

The district court reversed defendant's convictions and remanded for a new trial because the trial court erred in denying challenges for cause to three jurors who stated that defendant's failure to testify would influence their decision.

The district court affirmed as to all remaining issues. To guide the parties on remand with respect to the issue of whether appellant could be convicted for driving with a suspended license, the district court referred the parties to section 322.251, Florida Statutes, which provides that if a licensee whose driving privilege is suspended fails to surrender all licenses, the period of suspension will not expire "until a period identical to the period for which the driving privilege was suspended … has expired after the date of surrender of the licenses, or the date an affidavit swearing such licenses are lost has been filed with the department." § 322.251(3), Fla. Stat.

Francis v. State, 47 So. 3d 366 (Fla. 4th DCA 2010).

The district court affirmed defendant's conviction and sentence for driving while his license was revoked as an habitual offender.

The sole issue on appeal was whether the trial court erred in admitting into evidence a certified copy of defendant's driving record in order to prove that defendant was an habitual traffic offender. During trial, the state showed the arresting officer a certified driving record from the Division of Driver's Licenses and asked whether the name and date of birth matched those of defendant, and the officer replied that they did.

Defense counsel objected to admission of the driving record on the ground that the state failed to lay the proper predicate because name and date of birth do not conclusively establish that a driving record belongs to a defendant. The court found the predicate sufficient and admitted the driving record into evidence. The officer testified that, based on the driving record, defendant had been an habitual traffic offender in 1995, in 2000, and in 2004. Furthermore, defendant had never reinstated his license and did not have a valid license on the date of his arrest.

Section 322.201, Florida Statutes, provides in pertinent part:

> A copy, computer copy, or transcript of all abstracts of crash reports and all abstracts of court records of convictions received by the department and the complete driving record of any individual certified by the department or by the clerk of a court shall be received as evidence in all courts of this state without further authentication, if the same is otherwise admissible in evidence. Further, any court or the office of the clerk of any court of this state which is electronically connected by a terminal device to the computer data center of the department may use as evidence in any case the information obtained by this device from the records of the department without need of such certification; however, if a genuine issue as to the authenticity of such information is raised by a party or by the court, the court may require that a record certified by the department be submitted for admission into evidence.

§ 322.201, Fla. Stat. (2008).

The district court stated that this statutory section allows admission of a copy of a defendant's driving record to show both habitual traffic offender status and notice of revocation. The district court held that the state complied with the statute in the present case, and thus there was no error in the trial court's admission of the driving record.

DHSMV v. Berne, 49 So. 3d 779 (Fla. 5th DCA 2010).

The district court quashed a circuit court order that had quashed the decision of an administrative hearing officer sustaining the administrative suspension of defendant's driver's license by the Department of Highway Safety and Motor Vehicles ("department") after he was arrested for driving under the influence of alcohol in violation of section 316.193, Florida Statutes (2005). The effect of the district court's decision was to affirm the six-month license suspension.

After he was arrested for driving under the influence of alcohol, defendant submitted to a breath test. The test results revealed a blood alcohol level in excess of 0.08. Defendant's driver's license was administratively suspended. Defendant requested and received a formal review pursuant to section 322.2615(6)(a), Florida Statutes (2005).

A Florida Highway Patrol trooper was dispatched to a crash involving defendant. After completing the crash investigation, the trooper read defendant his Miranda rights, and defendant admitted to driving the vehicle involved in the crash. The trooper detected the odor of alcohol from defendant's breath, along with unsteadiness and slurred speech. Defendant admitted to consuming two glasses of wine prior to driving.

Defendant consented to field sobriety exercises and did not maintain his balance or follow instructions. He was placed under arrest for DUI and transported to a breath testing center where he submitted samples of .137 and .131 blood alcohol level. His privilege to operate a motor vehicle was suspended for six months for driving with an unlawful alcohol level.

Defendant filed a petition for writ of certiorari in the circuit court. It was the conclusion made by the hearing officer—that defendant had a blood alcohol level of .08 or higher—that prompted the circuit court to quash the suspension order. The circuit court explained that defendant's breath test results were acquired by use of a testing machine that had not been properly approved pursuant to FDLE Rule 11D-8.003. Under Florida's "Implied Consent Law," only approved breath testing machines may be used to establish impairment, and Florida Administrative Code Rule 11D-8.003 establishes procedures for approval of such machines. State v. Muldowny, 871 So. 2d 911, 913 (Fla. 5th DCA 2004). For analysis of a person's breath to be considered valid, the state must show that it was performed substantially according to methods approved by the Department as reflected in rules and statutes.

The department countered defendant's claims by asserting that it had complied with applicable FDLE regulations. The Department claimed that "breath test results are admissible if evidence of the following is provided by the Department: (1) the breath test

was performed substantially in accordance with [FDLE] rules, with an approved machine and by a qualified technician; and (2) the machine has been inspected in accordance with [FDLE] rules to assures it accuracy." State v. Donaldson, 579 So. 2d 728, 729 (Fla. 1991). The department referred to the Breath Alcohol Test Affidavit, the Agency Inspection Report, and the department Inspection Report to demonstrate compliance with FDLE rules and requirements in Donaldson.

The district court concluded that documents introduced into evidence at the hearing revealed that defendant had a blood-alcohol level in excess of 0.08, which raised the presumption that defendant was driving while under the influence of alcohol to the extent that his normal faculties were impaired. This shifted the burden to defendant to overcome the presumption by showing that the department did not comply with pertinent statutes and methods, approved by FDLE, that were incorporated into rules.

The district court explained that, instead, defendant attacked the approval of the machine because it incorporated a version of software that had not been approved, when all that was required under the rule was an evaluation. Thus, defendant failed to meet his burden of overcoming the presumption of impairment, and the circuit court applied the wrong law in quashing the order affirming suspension of defendant's license. The district court stated that the circuit court order indicated that, absent an opinion from Fifth District Court of Appeal, the circuit court would continue to apply the wrong law in cases of license suspensions involving breath tests administered on the Intoxilyzer 8000. The district court granted the department's petition and quashed the order under review.