FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

July-September, 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 referred to as the defendant throughout the summary, even though such proceedings are not criminal in nature. Also, a court will occasionally issue a change to a previous opinion on motion for rehearing or clarification. In such cases, the original summary of the opinion will appear followed by a note. The date of the latter opinion will control its placement order in these summaries.]

Driving Under the Influence (DUI)

State v. Walton, 42 So. 3d 902 (Fla. 2d DCA 2010).

The district court reversed the trial court's order granting defendant's motion to suppress post-crash admissions that he was driver of a vehicle that ran a red light and struck a minivan, causing serious injury to a small child in the minivan. Defendant argued, and the trial court agreed, that the state was required to establish *corpus delicti* by presenting independent proof of the identity of the car's driver in prosecuting defendant for driving under the influence (DUI) with serious bodily injury.

A car occupied by defendant and two companions — all of whom had been drinking for several hours and exhibited signs of impairment — ran a red light. The district court held that, because evidence demonstrated that a passenger in the minivan was seriously injured by someone who was driving the car while his normal faculties were impaired by alcohol, the state was able to establish the *corpus delicti*. Therefore, the state was not required to prove the identity of the driver as part of the *corpus delicti*.

According to testimony, when the car went through the red light, a mini-van struck the car in the front and rear doors on the driver's side. When two officers arrived, there were three people in or near the car and defendant was standing on the driver's side toward the front. Witnesses reported that a man wearing a baseball cap got out of the back seat and threw a bottle into the bushes. Officers found one empty beer can and one unopened bottle of beer inside the car.

An officer noted a strong odor of alcohol on defendant's breath and that defendant's speech was slurred. Another officer stated that defendant's eyes were bloodshot, his speech was slurred, and he had an odor of alcohol on his breath. Defendant twice told the officers that he was driving the car at the time of the crash. The officers arranged for defendant's blood to be drawn, and the test results showed that he had blood-alcohol levels of .143 and .145. The officers interviewed the other two who were in the car. One told the officers that he, his brother, and defendant had been drinking all night and into the morning. He also said that the three men had "smoked a little bit of

pot." The third man stated that when the crash occurred, he was in the back seat with an open bottle of liquor, which he later threw into the bushes. Neither of the brothers identified who was driving the car at the time of the crash.

All three occupants of the car sustained injuries. While defendant did not have major complaints at the scene, he went to a hospital the next day to be treated for two broken ribs on his left side. Both arresting officers testified that defendant's injuries could have been caused by sitting in the driver's seat when the accident occurred.

The district court noted that the case was procedurally unusual because defendant raised the issue of the state's ability to establish the *corpus delicti* in a pretrial motion to suppress. The state did not object. At the hearing on the motion to suppress, defense counsel argued that the state could not establish *corpus delicti* of the DUI offense because, apart from defendant's statements, evidence was insufficient to establish who was driving the car at the time of the crash.

The state argued that evidence supported a finding that defendant was the driver. The trial court concluded that it was impossible to conclude from the state's evidence that defendant was the driver. The trial court ruled that the Second District's decision in State v. Colorado, 890 So. 2d 468 (Fla. 2d DCA 2004), required the state to show that defendant was the driver independently of his postcrash admissions in order to establish corpus *delicti* for the DUI offense. The trial court granted defendant's motion to suppress.

The district court addressed only the state's second argument, disagreed with the trial court's reading of Colorado and concluded that the trial court's ruling that the state was required to establish defendant's identity as the driver of the car was inconsistent with established precedent. In his concurring opinion in Colorado, Judge Altenbernd pointed out that, under the facts in Colorado, establishing that defendant was the driver was a necessary part of *corpus delicti*.

In the present case, the district court stated that a fair reading of its holding in Colorado does not require that the state prove the driver's identity in a DUI case to establish the *corpus delicti* when identity of the driver is not critical to showing that a crime occurred. The court also stated that the trial court's conclusion that the state was required to produce evidence to show "by a preponderance or more likely than not" that defendant was the driver of the car to establish the *corpus delicti* is contrary to the supreme court's decisions in State v. Allen, 335 So. 2d 823 (Fla. 1976), and Burks v. State, 613 So. 2d 441 (Fla. 1993). Those cases recognize that generally the *corpus delicti* rule does not require the state to establish that the defendant is the guilty party as a predicate for the admission of a confession and that the state need only establish " 'substantial evidence' tending to show the commission of the charged crime." Allen, 335 So. 2d at 825; see also Burks, 613 So. 2d at 443 (citing Allen, 335 So. 2d at 825).

The district court concluded that, here, the state's evidence established that someone drove the car while under the influence of alcohol and thereby caused serious injury to at least one occupant of the minivan. All three occupants of the car had been drinking and smoking marijuana and showed signs of impairment. The car ran a red light

and was struck by a minivan, causing a significant injury to an occupant of the minivan. Under these facts, the exact identity of the driver of the car was not necessary to establish that a DUI with serious bodily injury had occurred. See § 316.193(3)(c)(2), Fla. Stat. Because the identity of the driver of the car was not necessary to establish that a DUI with serious bodily injury had occurred, the trial court erred in suppressing defendant's statements that he had been driving the car, according to the district court.

The district court recognized that it had previously cited Colorado for the general proposition that "[t]here must be proof independent of a confession that the defendant was driving the vehicle involved in the crash" to establish the *corpus delicti* for DUI with serious bodily injury. Esler v. State, 915 So. 2d 637, 640 (Fla. 2d DCA 2005). The district court explained that the Fifth District had interpreted Allen and Burks to support this overly broad statement of the law. Syverud v. State, 987 So. 2d 1250, 1252 (Fla. 5th DCA 2008). See also State v. Hepburn, 460 So. 2d 422, 426 (Fla. 5th DCA 1984). To the extent that these statements in Esler, Syverud, and Hepburn suggest that the state must always prove the defendant's identity as the driver in a prosecution for a DUI offense as part of the *corpus delicti*, they are incorrect, the district court stated. The court stated that these cases are distinguishable from the present case on their facts. Thus, the district court found no conflict between those three cases and its decision in the present case.

Edenfield v. State, 45 So. 3d 26 (Fla. 1st DCA 2010).

The district court denied defendant's petition for writ of certiorari in which he argued that his procedural due process rights were violated because the county court failed to ascertain whether his waiver of the right to counsel to defend him against a driving under the influence (DUI) charge was knowing and intelligent.

Before he pleaded no contest to DUI, defendant, along with other defendants, watched a video explaining the constitutional rights of individuals accused of committing a crime, signed waiver forms, and testified to the county judge that he wished to "handle the case" himself. After an analysis applying Faretta v. California, 422 U.S. 806 (1975), and relevant Florida law, the district court concluded that the county court had sufficient grounds to find a knowing and intelligent waiver under applicable law and thus denied defendant's petition.

Kezal v. State, 42 So. 3d 252 (Fla. 2d DCA 2010).

The district court reversed defendant's sentence following her conviction on a no-contest plea for DUI manslaughter and DUI with serious bodily injury to another. The district court held that the circuit court erred in determining that it could not consider the mitigating factors listed at subsections (2)(c) and (2)(j) of section 921.0026, Florida Statutes (2005), with respect to her request for a downward departure because her offenses involved driving under the influence.

Based on State v. VanBebber, 848 So. 2d 1046 (Fla. 2003), the district court vacated defendant's sentences and remanded for the circuit court to consider factors outlined in subsection (2)(j) in determining her sentences. The district court explained

that the trial court must first determine whether it can depart, i.e., whether defendant has met the burden of establishing sufficient factual support for a valid legal ground. The trial court then must decide whether it should depart—"a judgment call within the sound discretion of the court." The district court held that the circuit court incorrectly concluded that it could not depart under subsection (2)(j) for an offense involving a DUI because every DUI offense is inherently unsophisticated. The district court stated that it was unable to determine whether the circuit court would have imposed the same sentences if it had understood that it had the discretion to depart under subsection (2)(j) upon proof of each element of that subsection. For that reason, the district court vacated defendant's sentences and remanded for resentencing. Upon resentencing, the circuit court must consider subsection (2)(j) as a possible basis for a departure sentence.

Criminal Traffic Offenses

State v. Merriex, 42 So. 3d 934 (Fla. 2d DCA 2010).

The district court affirmed the judgment and sentence entered on defendant's guilty plea to third-degree felony murder related to a traffic crash after defendant ran a red light following attempted arrest on drug trafficking charges.

After a cocaine transaction with an undercover officer, defendant drove away at a high rate of speed, ran a red light, and crashed into another vehicle, killing one person and seriously injuring three others. Defendant pleaded guilty to leaving the scene of a crash involving a death, third-degree felony murder, and three counts of reckless driving with bodily injury. The trial court sentenced him to 24 years in prison. A few weeks later, a second occupant of the car died from her injuries. The state then charged defendant with vehicular homicide and third-degree felony murder. Defendant moved to dismiss the vehicular homicide charge. The trial court granted the motion, relying on Chikitus v. Shands, 373 So. 2d 904 (Fla. 1979), concluding that double jeopardy barred the vehicular homicide charge because defendant had been convicted of reckless driving with serious bodily injury for the same underlying act. Defendant pleaded guilty to third-degree felony murder. On appeal, the state challenged dismissal of the vehicular homicide charge, arguing that Chikitus does not apply.

The district court held that the state's argument was moot. Defendant's conviction of third-degree felony murder bars a vehicular homicide conviction for the same death. The district court stated that, even if the trial court had considered alternative charges, a conviction for the highest-degree crime would stand and the lesser crime would be set aside. Because both offenses are second-degree felonies subject to the same sentence, defendant's conviction of felony murder rather than vehicular homicide does not prejudice the state.

A.G. v. State, 41 So. 3d 1065 (Fla. 3d DCA 2010).

The district court reversed the trial court's order denying defendant's motion for judgment of dismissal of an order finding defendant guilty of trespass to a conveyance and withholding adjudication of delinquency.

A police officer saw defendant, a minor, riding a motorcycle in an erratic fashion. The officer ran the motorcycle's tag number, which did not match the vehicle description, and followed defendant to his destination. The officer identified himself and asked defendant for his license and registration. After noticing that the motorcycle's engine was running without a key and that something had been jammed in the ignition, the officer requested backup, ran the motorcycle's VIN (which came up as being reported stolen), arrested defendant, and read him his Miranda rights.

Defendant told the officer he had borrowed the motorcycle from an individual nearby for a test drive, as he was planning to buy it. Defendant agreed to take the officers to the owner, but nobody was found at the location. The motorcycle was towed to the police impound, where it was later retrieved by the purported owner.

Defendant was charged with grand theft of a motor vehicle. At the close of the state's evidence, defense counsel moved for judgment of dismissal on the ground that no evidence showed that defendant was riding the purported owner's motorcycle, as the VINs, manufacturers, and level of damage on the vehicles did not match. The court denied the motion and found defendant guilty of trespass to a conveyance. Adjudication of guilt was withheld, and defendant received a judicial warning.

The district court held that the state failed to make a prima facie case that the motorcycle was indeed owned by the purported owner. The district court held that the trial court should have granted defendant's motion for judgment of dismissal.

Kirkland v. State, 41 So. 3d 1048 (Fla. 1st DCA 2010).

The district court affirmed the trial court's denial of defendant's motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850 and alleging that his convictions violated principles of double jeopardy.

After stealing a car and fleeing arrest, defendant struck two individuals with the stolen vehicle and one of them later died as a result of the accident. Defendant was charged with and entered an open plea to, among other charges, vehicular homicide and driving without a valid driver's license resulting in death and/or serious bodily injury.

Defendant alleged that these two convictions violated principles of double jeopardy. After distinguishing relevant cases, the district court concluded that each of the two offenses to which defendant pled and was convicted applied to a different victim and thus no double jeopardy violation occurred. Because facts in defendant's motion refuted his claim, the district court affirmed the trial court's denial of the postconviction motion.

Dumais v. State, 40 So. 3d 850 (Fla. 4th DCA 2010).

The district court affirmed defendant's conviction for aggravated fleeing and eluding under section 316.1935(2), Florida Statutes (2007).

Defendant argued that the trial court erred in denying his motion for judgment of acquittal. Specifically, he contended there was no evidence that patrol vehicles from which he was fleeing had "agency insignia and other jurisdictional markings prominently displayed." § 316.1935(2), Fla. Stat. (2007).

At approximately midnight, two police officers, driving separate marked vehicles with overhead lights, were stopped one behind the other in eastbound traffic at a red light on a major city street. They observed defendant's vehicle pass to the right of the stopped traffic. Defendant's passenger-side wheels went up on the sidewalk. Defendant drove through the red light, continuing eastbound. The first officer activated his overhead lights and siren and pursued defendant. The second officer activated overhead lights, but not his siren, and also pursued defendant. After two blocks, the officers turned off their lights, and the first officer turned off his siren, per department policy not to engage in a chase for a mere traffic infraction. Defendant made a wild U-turn in front of oncoming traffic. As defendant made the U-turn, westbound traffic had to steer out of the way to avoid hitting defendant. Defendant turned down a side street into a residential neighborhood.

The officers followed defendant. After the first officer saw defendant's vehicle again, the officer re-activated his lights, but not his siren. Defendant continued driving. Defendant then parked in front of a house and ran from his vehicle toward the house. The officer parked and ran after defendant. Defendant tried to open a door to the house with a key. As the officer rushed towards him, defendant broke a window, reached in through the broken glass, opened the door, went inside, and shut the door in the officer's face. After backup officers arrived, the officer knocked on the door and announced, "Fort Lauderdale police!" Defendant opened the door. The officer told defendant that he was under arrest. Defendant said, "No, I'm not. I'm not going to get under arrest." The officers attempted to cuff defendant, who resisted. The officers eventually took defendant into custody. The officer testified that defendant, while in custody, spontaneously said "he was sorry for what he did, that he knew he should have stopped when he saw my lights." The state charged defendant with aggravated fleeing and eluding.

The district court found sufficient evidence existed to sustain defendant's conviction. Viewing the officers' references to "marked unit" and "marked police vehicle" in the light most favorable to the state, in conjunction with defendant's admission that he knew he was fleeing from the police, the court held that that competent, substantial evidence supported the defendant's conviction for aggravated fleeing and eluding. The district court noted that defendant's admission was significant, providing a guarantee that he knew that he was eluding the police.

Law v. State, 40 So. 3d 857 (Fla. 4th DCA 2010).

The district court affirmed defendant's convictions for driving while license revoked pursuant to section 322.34(5), Florida Statutes, and DUI impairment.

The district court issued an opinion to correct a misreading of State v. Byrd, 969 So. 2d 581 (Fla. 4th DCA 2007), involving the use of redacted records maintained by the Department of Highway Safety and Motor Vehicles ("DHSMV"). The state charged

defendant with a violation of section 322.34(5), Florida Statutes, as well as driving while impaired. "A conviction under section 322.34(5) simply requires competent evidence showing that the DHSMV maintained a record on the motorist, that the record reflected three prior moving violation convictions, and that the motorist received notice of his designation as a habitual traffic offender and the resulting suspension of his license." Patterson v. State, 938 So. 2d 625, 630 (Fla. 2d DCA 2006). If the record offered by the state fails to designate the requisite convictions to justify the habitual traffic offender designation under section 322.264, then the state has failed to make a prima facie case for a section 322.34 felony violation for driving on a revoked license. Carter v. State, 23 So. 3d 1238, 1244 (Fla. 4th DCA 2009).

The district court explained that when the state sought to admit defendant's driving record into evidence as a self-authenticating document, defense counsel objected to one entry on the driving record, contending that the entry was prejudicial and should be redacted. The state and the court both cited to Byrd for the proposition that it was error for the trial court to ever redact a driving record. Later, however, the trial court readdressed the issue and determined that based upon a section 90.403 analysis of prejudice outweighing probative value, it still denied the redaction. Based upon the court's interpretation of Byrd, the trial court denied the request.

The district court further clarified that, in Byrd, the Fourth District affirmed a judgment of acquittal by the trial court, where the state had not proved the requisite number of convictions, because it had offered a redacted copy of the defendant's driving record. The Fourth District explained in Byrd that the record admitted into evidence did not show the requisite convictions to prove a violation of the statute. Byrd did not hold that a redacted driving record can never be placed in evidence.

The district court held that redaction would be permitted in the present case. The district court affirmed the conviction, however, based on its conclusion that the error in failing to redact the driving record was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Norman v. State, 43 So. 3d 771 (Fla. 2d DCA 2010).

The district court affirmed defendant's judgments and sentences for driving with license suspended as a habitual offender and grand theft of a motor vehicle.

Defendant challenged the trial court's denial of his motion to withdraw plea after sentencing filed pursuant to rule 3.170(1), Florida Rules of Criminal Procedure. The district court stated that, under the facts of this case, when defendant failed to return from a furlough and appear at sentencing as agreed, the trial court was not required to allow him to withdraw his plea and could impose the maximum legal sentence. Therefore, the trial court properly denied defendant motion to withdraw plea, and the district court affirmed his judgments and sentences.

Cummings v. State, 39 So. 3d 555 (Fla. 2d DCA 2010).

The district court affirmed in part judgments and sentences for two counts of trespass in an occupied structure or conveyance and reversed that part of the restitution order requiring defendant to pay for the loss of a victim's vehicle, because the state failed to establish a nexus between defendant's offense and loss of the vehicle. The remaining portion of the restitution order was affirmed.

Defendant was originally charged with burglary of an unoccupied dwelling and two counts of grand theft. The charges were reduced pursuant to a plea agreement, and a restitution hearing was held after defendant had entered the plea. At the hearing, the owner of the vehicle at issue testified regarding how much the vehicle was worth and his other expenses related to the theft of the vehicle. However, there was no testimony or evidence indicating that the loss of the vehicle was caused directly or indirectly by defendant's offense of trespass or that such loss was related to his criminal episode.

Section 775.089, Florida Statutes (2008), provides: "An order of restitution entered as part of a plea agreement is as definitive and binding as any other order of restitution, and a statement to such effect must be made part of the plea agreement. A plea agreement may contain provisions that order restitution relating to criminal offenses committed by the defendant to which the defendant did not specifically enter a plea."

The district court stated there was no language in the plea agreement indicating that defendant agreed to pay restitution. Although the state asked the trial court at the plea hearing to "order and reserve on restitution," defendant did not orally agree to pay restitution. Consequently, the state was required to show that the loss of the vehicle was caused directly or indirectly by defendant's offense and that such loss was related to his criminal episode.

There was no testimony establishing a nexus between defendant's trespass in the vehicle and the loss of the vehicle. Therefore, according to the district court, the trial court erred in ordering him to pay restitution for the loss of that vehicle. The district court reversed the portion of the restitution order as it related to the loss of the car, but affirmed the restitution order in all other respects. The case was remanded for a new hearing concerning what restitution, if any, was owed for the loss of the vehicle.

Hicks v. State, 41 So. 3d 327 (Fla. 2d DCA 2010).

The district court affirmed defendant's convictions for aggravated assault, fleeing or eluding, and driving with a suspended license, which were not challenged on appeal. The district court reversed defendant's convictions for second-degree murder and vehicular homicide and remanded with directions for the trial court to vacate the conviction for vehicular homicide and to enter a conviction and sentence for manslaughter in lieu of the second-degree murder conviction.

According to testimony at trial, defendant was driving a car involved in a high-speed pursuit that resulted in a deadly collision on an interstate overpass. The pursuit began with defendant driving through town after midnight at high rates of speed, running a red light, and then stopping in the middle of the road. The first police vehicle came

upon the car stopped in the middle of the road. A second police vehicle arrived and shined his spotlight on the car. Defendant drove directly toward the second police vehicle but swerved away from the vehicle before hitting it. Defendant fled from the scene and eventually drove north onto a southbound exit ramp. Defendant proceeded northbound in the southbound lanes of the interstate at an estimated speed of 76.5 miles per hour, causing a head-on collision with a car traveling southbound. The driver in the other car was injured, and her brother, the passenger, was killed.

At trial, defendant moved for a judgment of acquittal on the basis that the state failed to prove that defendant was the driver of the car. The trial court denied the motion. The jury convicted defendant as charged, and the trial court adjudicated him guilty of all charges. The trial court sentenced defendant to concurrent sentences of life in prison as a prison releasee reoffender on the second-degree murder count, thirty years as a habitual felony offender on the aggravated assault count, and ten years as a habitual felony offender on the fleeing or eluding and the driving with suspended license counts. The trial court did not sentence him on the vehicular homicide count.

Defendant argued on appeal that the trial court committed fundamental error by adjudicating him guilty of both vehicular homicide and second-degree murder when the convictions were based on a single death, even where the trial court did not sentence him on the vehicular homicide. He contended that the dual convictions violated his right against double jeopardy. The state conceded that the vehicular homicide conviction should be vacated. The district court found fundamental error and held that that one of defendant's convictions must be vacated.

Defendant also contended that his trial counsel was ineffective for failing to move for a judgment of acquittal on the second-degree murder count on the basis that the state failed to prove that defendant committed the act with ill will, hatred, spite, or an evil intent. Second-degree murder and manslaughter are the result of "criminal actions of an accused who had no premeditated design to kill" and are "committed when an unintended death occurs as a result of an act of the killer." Ellison v. State, 547 So. 2d 1003, 1005-06 (Fla. 1st DCA 1989), approved in part and quashed in part on other grounds, 561 So. 2d 576 (Fla. 1990). Second-degree murder is committed when the element of ill will, hatred, spite, or evil intent is present. Id. at 1006. The question here was whether defendant's act of driving up the exit ramp and into oncoming interstate traffic at full interstate speed crosses the line from reckless behavior to behavior evincing malice and a depraved mind.

The victim's sister testified that she was driving up an overpass when she saw the headlights of defendant's car at the top of the hill. She tried to veer away but did not have enough time before the collision occurred. The district court concluded that, while the act of driving in the opposite direction on the interstate was done with a reckless disregard to human life, there was no evidence that the act was done with hatred, spite, evil intent, or ill will towards the occupants of the other car. The cars approached each other on an overpass, and the drivers did not see each other until it was too late. The district court concluded that the state failed to present evidence to prove the necessary intent for second-degree murder and that defendant's trial counsel was ineffective for failing to move for a judgment of acquittal on this basis.

Koch v. State, 39 So. 3d 464 (Fla. 2d DCA 2010).

The district court reversed defendant's conviction based on its conclusion that the trial court erred in refusing to instruct the jury on a lesser included offense.

At trial, two law enforcement officers testified that they activated lights and sirens of their marked patrol cars to direct defendant to stop his car, but he continued to drive down the road. The trial court read the jurors the standard instruction for the crime of fleeing and eluding, tailored to this case: Defendant asked to have jurors also instructed on a permissive lesser included offense, refusal to obey an officer's lawful order under section 316.072(3), Florida Statutes. The trial court initially agreed, then declined to give the instruction, reasoning that section 316.072(3) applies only in emergency situations.

The district court disagreed, interpreting the plain language of the statute and holding that the statute is implicated by any lawful order or direction given by a law enforcement officer, by a traffic crash investigation officer, by a traffic infraction enforcement officer, or by a "member of the fire department at the scene of a fire, rescue operation, or other emergency" and citing State v. Mahoy, 575 So. 2d 779, 781 n.5 (Fla. 5th DCA 1991) (suggesting section 316.072 could be applied to a situation where law enforcement stopped a driver who was weaving and driving slowly on an expressway; no emergency was underway).

The district court concluded that defendant was entitled to the instruction under general principles governing instructions on lesser included offenses. The district court found that the misdemeanor offense of disobeying a lawful order by law enforcement under section 316.072(3), Florida Statutes, could be characterized as a necessarily, or category one, lesser included offense of fleeing and eluding under section 316.1935(2), Florida Statutes, the felony with which defendant was charged.

Arrest, Search and Seizure

State v. Williams, 43 So. 3d 145 (Fla. 3d DCA 2010).

The district court reversed the trial court's order granting defendant's motion to suppress evidence of a firearm and marijuana found in defendant's vehicle during a stop.

Police stopped defendant's vehicle due to darkly tinted windows and instructed him to pull over. As officers approached, they smelled marijuana and saw a marijuana cigarette by the gearshift. Officers arrested defendant for possession of cannabis. While conducting a search incident to arrest, an officer found a loaded handgun under the driver's seat, which defendant admitted belonged to him.

Defendant moved to suppress evidence of the firearm and marijuana, arguing that the search was unconstitutional. Based on Arizona v. Gant, 129 S. Ct. 1710 (2009), the trial court found that the search was an illegal warrantless search. The trial court granted the motion to suppress, and the state appealed. On appeal, the state argued that the search

was a permissible search incident to arrest.

The district court held that, distinguished from facts in Gant, officers in the present case made a lawful stop and arrested the defendant after smelling and then seeing marijuana in his car. The officers could legally search the vehicle, as it was reasonable to believe that evidence of marijuana might be found there. The search was permissible, and the evidence was admissible.

State v. Cuomo, 43 So. 3d 838 (Fla. 1st DCA 2010).

The district court reversed the trial court's two orders granting defendant's motion to suppress evidence obtained as a result of his allegedly unlawful arrest. The district court agreed with the state's argument that, based on totality of the circumstances, officers had probable cause to arrest defendant at the time he was taken into custody.

A woman was shot in a residence sometime after midnight. A witness, who was out walking his dog, observed a navy blue or black BMW drive past him and park in an odd location in the subdivision. A man exited the car, spoke briefly to the witness, shut his door, and walked away. The witness continued walking down the street and eventually lost sight of the BMW. The witness then heard a gunshot and called 911. While still on the phone, he heard a vehicle start up and speed down the street and then saw a navy blue or black sporty vehicle speed out of the subdivision and head west. He could not positively identify the vehicle as the BMW.

While en route to the scene, a police officer was told there was a shot fired and a dark colored vehicle was seen fleeing from the subdivision and heading west. Based on that information, he put out a BOLO for a black sporty vehicle heading west. When he arrived at the scene, he discovered that a shot was fired from outside the residence into the front bedroom and the woman had been shot in the back. At least four other individuals were in the house, but no one saw the shooter. When the officer asked the occupants who could have fired the shot, one mentioned defendant's name because he was the woman's former boyfriend and had been allegedly harassing her. When she heard that a black BMW had been involved, she told the officer that defendant drove a black BMW. After confirming that the witness out walking his dog had seen a BMW, the officer updated the BOLO for a black BMW heading west and defendant as the driver.

About 15 minutes after the officer arrived on the scene and about a minute after the updated BOLO went out, a deputy spotted a black BMW heading west about four or five miles from the scene and pulled the vehicle over. He learned the tag was in defendant's name. When the deputy made contact, the driver identified himself as defendant. The deputy detained defendant, handcuffing him and placing him in the back of his patrol car as a suspect in the shooting. At 2:00 a.m., a deputy transported defendant to the Sheriff's Office for questioning and the vehicle was impounded and searched.

At 4:20 a.m., the witness identified defendant's vehicle as the vehicle he saw parked in the subdivision. Sometime before 10:52 a.m., defendant was transported to jail. At 12:00 p.m., an investigator wired the attorney visitation room where he hoped to

secretly record a conversation between defendant and his mother during their visit. The defendant made incriminating statements to his mother regarding the shooting.

Defendant was later charged with aggravated battery with a firearm and shooting into an occupied dwelling. He filed a motion to suppress any evidence seized from his vehicle, the witness's identification of his vehicle, and his statements to his mother. He argued that, when he was transported to the Sheriff's Office, it amounted to a de facto arrest without probable cause and any evidence obtained as a result of that unlawful arrest was subject to suppression. The state took the position that the officers had probable cause to arrest the defendant at the time he was taken into custody. Following a hearing, the trial court entered two orders. The first order suppressed evidence seized from defendant's vehicle and a witness's identification of his vehicle. The second order suppressed defendant's statements to his mother.

To establish probable cause, the state must demonstrate that an officer had reasonable grounds to believe that the arrestee committed the crime. See Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984). The district court concluded that the state clearly demonstrated that officers had reasonable grounds to believe that defendant shot the victim and that, consequently, they had probable cause to arrest defendant.

E.J. v. State, 40 So. 3d 922 (Fla. 4th DCA 2010).

The district court reversed the trial court's juvenile disposition on a charge of possession of marijuana, agreeing with defendant's claim that the trial court erred in denying her motion to suppress because her actions did not constitute consent to search but a mere acquiescence to authority.

At the hearing on defendant's motion to suppress, the arresting deputy testified that she observed a vehicle make an illegal turn. The deputy eventually pulled the vehicle over although it took an "unusually long" time for the vehicle to stop. Defendant was a passenger. When the deputy approached the driver, she could smell alcohol on him. She asked him to step out of the car, and a DUI officer arrived and conducted sobriety tests. The driver was arrested.

The deputy took defendant's name and date of birth, which showed that she was fourteen. Because the vehicle needed to be towed, the deputy opened the door and asked defendant to step out so she could inventory it. The officer asked if she had anything on her person about which the deputy should be concerned. Defendant said no. At that point, the officer did not have any reason to believe that defendant was armed or dangerous. Nevertheless, after defendant stepped out, she spontaneously turned and placed her hands on the top of the car, spreading her legs. The deputy took that to mean that defendant was consenting to a search so she patted her down and found a large bulge on her right side. She asked defendant what it was and the juvenile said "weed." The officer took the marijuana from her pocket and arrested defendant.

A second officer at the scene also testified to observing defendant place her hands on the vehicle and spread her legs. He had no reason to believe that defendant was armed

or dangerous, although he said he had no reason to think that she wasn't. He said, "I think everybody is a danger to . . . until they're proven otherwise."

Defendant testified that she was fourteen years old at the time of the stop, and this was her first and only encounter with police. When she exited and placed her hands on the car top, she was following what the driver was doing, as he was being searched also.

In denying the motion to suppress, the trial court found that there was a founded suspicion to stop the vehicle for making an improper turn and there continued to be a founded suspicion to detain and frisk the driver because this was a nighttime stop, and the vehicle had tinted windows.

The district court held that the trial court used the wrong standard and thus erred in determining that the state proved a voluntary consent to search. The district court stated that it is not what officers reasonably believed but whether by a preponderance of the evidence defendant in fact gave consent. The district court further stated that the trial court did not analyze the consent issue based upon this standard and did not address the issues of defendant age or experience or any other factors.

The district court held that defendant's age and inexperience with police prevented the conclusion that she freely and voluntarily consented to any search. The deputy did not ask for consent to search. The district court stated that, with her age and lack of experience, defendant did not know that she could refuse to consent and her actions merely mimicked what she observed the arrested driver doing. Thus, her conduct did not yield the conclusion that she consented but merely acquiesced to the authority around her and what she expected was required in the circumstances. The arresting officers testified that they had no information or suspicion that defendant had committed a crime or was armed and dangerous. The district court stated that generalized fear for officer safety is understandable, yet it alone did not justify a frisk of defendant.

Kates v. State, 41 So. 3d 1044 (Fla. 1st DCA 2010).

The district court held that the trial court erred in admitting testimony regarding an uncharged drug transaction and, therefore, reversed defendant's convictions for fleeing or attempting to elude, resisting an officer without violence, and possession of cannabis. The district court remanded for a new trial.

Undercover officers investigated reports of street-level drug dealing in a particular area. An officer observed defendant in what he suspected was a hand-to-hand drug transaction with another man. When a uniformed officer responded to the scene in a patrol car and approached defendant's vehicle, defendant drove away, turning sharply to go around the patrol car as the officer yelled for him to stop. The officer did not pursue defendant's vehicle because high-speed chases were against department policy. Instead, he turned off his lights and instigated a search for the vehicle.

Another officer radioed that he had found the vehicle, but that defendant and his passenger were running away from it. Moments later, the second officer radioed that

defendant had been observed hiding in some bushes. As the first officer approached the scene, he told defendant not to move, but defendant stood up and started walking away. As he did so, he jettisoned a bag of cannabis and some keys. The officer stopped defendant with a taser. Defendant was arrested and charged with fleeing or attempting to elude, resisting an officer without violence, and possession of cannabis.

Defendant filed a motion in limine to exclude evidence of the suspected drug transaction. At a hearing, the state acknowledged that evidence was not sufficient to charge defendant with the suspected drug transaction, but argued that the state should be allowed to present evidence of the transaction as part of the same criminal episode. The trial court denied defendant's motion, finding that the drug transaction was inextricably intertwined with the charged offenses. The jury convicted the defendant on all three counts, and the trial court sentenced him to four years in prison on the fleeing or attempting to elude count and time served on the remaining counts.

Following an analysis of relevant case law, the district court stated that the officers' testimony concerning defendant's suspected drug transactions was admitted purportedly to provide context and to provide a reason for the police to stop defendant. However, the court held, it would have been sufficient simply to inform the jury that the officers were in the area because they were conducting a criminal investigation there. The district court explained that the state could have given a complete account of the encounter without delving into details of the suspected drug transaction. The district court concluded that unnecessary and detailed testimony of the alleged transactions unduly prejudiced the defendant, and its admission could not be said to have been harmless error.

Beehan v. State, 41 So. 3d 1000 (Fla. 1st DCA 2010).

The district court reversed the trial court's order withholding adjudication of guilt and placing the defendant on probation for possession of a controlled substance and possession of drug paraphernalia. The district court concluded that the contraband items at issue should have been suppressed from evidence on the ground that they were illegally seized from defendant's vehicle.

The charges arose from a traffic stop in front of a housing project. The officer on patrol at that location, where drug transactions were known to occur, testified that he observed defendant drive slowly down the street and stop in front of several housing units. The street was two lanes with sidewalks on each side. After proceeding down the street, defendant turned around and headed in the other direction. He made a U-turn by driving over the curb on the opposite side of the street. The wheels of his car went onto grass two or three feet from the curb's edge. There were no other vehicles on the street.

Based on these facts, the officer signaled for defendant to pull over. Defendant produced his driver's license and, while running a computer check, the officer called another officer for assistance. The office told defendant that the reason for the stop was that he had made an illegal U-turn onto grass. He testified that defendant was nervous but did not appear to be under the influence of drugs or alcohol.

Within five minutes, a canine officer arrived with a drug-sniffing dog. The canine officer had planned to be close by, in case he was needed. The dog alerted on defendant's car, and officers found in the car a smoking pipe and baggie containing a crushed up white substance. The officer arrested defendant for the drug offenses.

Defendant moved to suppress the evidence found in his car and the court held a hearing on the motion. At the hearing, the officer conceded that he had not issued defendant a citation for making an illegal turn even though that was the reason he initially gave for stopping the vehicle. He testified that he stopped the vehicle because he feared that defendant was driving under the influence of alcohol or drugs.

The trial court concluded that the improper turn could give rise to a suspicion that the defendant was impaired. Based on that reasoning, the trial court denied the motion to suppress. The defendant entered a plea of *nolo contendere*, reserving his right to appeal the order denying the motion. The parties acknowledge that the order is dispositive.

Following an analysis of the facts and relevant legal authority, the district court concluded that the officer did not have a reasonable suspicion that defendant was impaired at the time of the stop and thus held that the search of the vehicle was unlawful.

Clift v. State, 43 So. 3d 778 (Fla. 1st DCA 2010).

The district court affirmed the trial court's order denying defendant's motion under rule 3.850, Florida Rules of Criminal Procedure, found the collateral appeal to be frivolous, and referred defendant to the Florida Department of Corrections for disciplinary procedures in accordance with section 944.279, Florida Statutes (2004).

The district court held that, because defendant pled guilty to the offenses at issue, he waived his claim that his counsel should have moved to suppress evidence. The district court further held that defendant improperly attacked the sufficiency of the evidence of his conviction. The court stated that the claim of insufficient evidence to sustain a conviction was an issue that should have been raised on direct appeal.

Defendant was arrested and charged with trafficking in opium or its derivative, fleeing or eluding a law enforcement officer, and a misdemeanor offense of possession of drug paraphernalia. The arresting officer testified that he attempted to stop defendant for a traffic offense, but defendant did not stop until after the officer had followed him for several blocks and turned on his siren. Upon stopping defendant, the officer ordered him to the ground and handcuffed him. When he looked into defendant's car, the officer could see an altered pill bottle in plain view, and seized the bottle. Defendant pled guilty to the fleeing and possession charges only. Defendant did not appeal his conviction or sentence.

Defendant filed a rule 3.850 motion, arguing that trial counsel was ineffective for failure to move to suppress drugs found in defendant's car and failure to assert lack of probable cause or reasonable suspicion to stop defendant's car. Defendant also argued that the police illegally searched his car and that the trial court erred by convicting him of fleeing and eluding an officer because the police car was unmarked.

The trial court denied defendant's rule 3.850 motion because the officer saw the pill bottle lying in plain view in the vehicle; thus, the search was legal. The trial court denied claim two because defendant entered a plea and agreed to facts as set forth by the state; thus, defendant cannot challenge his conviction in a rule 3.850 motion. The district court stated that, by entering a plea to the charges, defendant waived his right to have counsel investigate or put forward a defense, including filing motions to suppress.

The district court further held that the trial court properly rejected defendant's frivolous claim that, despite his guilty plea, he could not be convicted of fleeing and eluding a law enforcement officer. "

Ray v. State, 40 So.3d 95 (Fla. 4th DCA 2010).

The district court reversed the defendant's judgment and conviction and remanded for further proceedings, holding that the trial court erred in denying defendant's motion to suppress drug evidence obtained during an investigatory traffic stop which led to her arrest for possession of cocaine.

After the trial court denied defendant's motion, she entered a no contest plea, reserving her right to appeal the order. On appeal, defendant argued that the officer did not have a reasonable suspicion that defendant had committed a crime. The district court agreed that the stop was illegal and therefore evidence obtained incident to the stop could not be used against her.

At the hearing on the motion, the arresting officer testified that she was monitoring the neighborhood where defendant was arrested in response to resident complaints of drug dealing. The officer observed defendant drive up and stop in the middle of the road. While defendant remained inside the vehicle, an unknown adult male approached the passenger side of the vehicle. The officer observed a hand-to-hand exchange between defendant and the unidentified male. Although the officer could not identify the objects exchanged, she perceived the exchange to be a drug transaction.

After the exchange, the officer followed defendant as she drove away. The officer activated the lights on her police cruiser in an attempt to effectuate a traffic stop. Defendant subsequently drove through a stop sign without stopping and the officer pulled her over. As the officer approached, defendant dropped a small amount of a white substance out of her window. The substance tested positive for cocaine.

Defendant argued that the officer could not form a reasonable suspicion that she participated in a drug transaction. The state countered that, based on the totality of the circumstances, including the nature of the exchange, the officer's narcotics training, and the location's reputation as a drug area, the officer could form a reasonable suspicion that a drug transaction occurred. Alternatively, the state argued that defendant was detained and investigated because of a traffic law violation.

The district court cited its own holding that an "officer's observation of hand-to-

hand movements between persons in an area known for narcotics transactions, without more, does not provide a founded suspicion of criminal activity." Belsky v. State, 831 So. 2d 803, 804 (Fla. 4th DCA 2002). The district court concluded that there were not enough factors present to support a finding of reasonable suspicion.

The district court concluded that when the arresting officer activated emergency lights to pull over defendant, she commenced an investigatory stop without reasonable suspicion. Defendant's traffic infraction occurred after the officer turned on her lights. Thus, the district court concluded that the arresting officer did not have a reasonable suspicion of a drug transaction to justify the investigatory stop. The officer could not identify objects exchanged, the participant involved in the exchange with defendant was not a known drug dealer, and the officer was monitoring the area in response to reported drug deals rather than prior drug arrests. The district court held that, because the arresting officer was not justified in performing the investigatory stop, the trial court erred in denying defendant's motion to suppress.

Noto v. State, 42 So. 3d 814 (Fla. 4th DCA 2010).

The district court affirmed defendant's conviction for trafficking in cocaine, rejecting defendant's argument that the trial court erred in failing to suppress his statements and seized cocaine and in denying his motion for judgment of acquittal.

Police detectives conducted surveillance on a residence. A car drove into the driveway and detectives observed the driver exit her vehicle and enter the residence for fifteen minutes. Upon leaving the residence, she drove away. Detectives followed her to a restaurant parking lot where she parked her vehicle next to a vehicle occupied by defendant. She entered defendant's vehicle through the passenger side door. After thirty seconds, she got back into her own vehicle. Both vehicles drove away.

One of the detectives followed defendant. After defendant's vehicle failed to come to a stop at a red light, the detective pulled over defendant and asked for his driver's license and registration, which he furnished. Defendant asked why he was pulled over. Instead of responding, the detective took the driver's license and registration back to his vehicle. The detective returned and explained that he was a narcotics investigator and what he observed at the parking lot was consistent with a drug transaction. The detective asked if defendant had anything illegal. Defendant said no, but then stated that tomorrow was his birthday and he wanted to "get a little something." The detective asked what he meant, resulting in defendant's admission that he picked up a gram of cocaine, but had since swallowed the cocaine. The detective informed him that his stomach would be pumped and that he was going to call for a canine. A canine arrived and alerted to the presence of drugs from the exterior of the vehicle. A subsequent search of the vehicle's interior revealed more than thirty grams of cocaine; defendant was transported to the police station, where he was first advised of his Miranda rights.

Defendant demanded an attorney. While in a holding cell, defendant overheard "trafficking" mentioned between police officers. Defendant asked what "trafficking" meant. After the detective stated that it meant cocaine greater than one ounce, defendant

said he was supposed to be picking up an "8-ball" and two grams. Later, in a recorded interview room occupied by only defendant and the driver of the other vehicle, defendant reiterated he was supposed to pick up an "8-ball" and two grams.

After a hearing, the trial court suppressed the incriminating statements defendant made at the traffic stop, but not the cocaine found in his vehicle. On appeal, defendant contended that the initial traffic stop was unlawful because it was a pretext for a narcotics investigation. The trial court found that the detective observed defendant rolling through a red light, a traffic-law violation. See § 316.075(1)(c), Fla. Stat. (2004). The district court held that the detective had probable cause to pull over defendant's vehicle. Accordingly, the stop was lawful.

Regarding statements defendant made to police during the stop, the state argued, in its cross appeal, that the trial court erred in suppressing defendant's admission during the traffic stop concerning his possession of a gram of cocaine. The trial court found that defendant's admission was a product of custodial interrogation and suppressed the admission since Miranda warnings were not given. At the time defendant made his admission, the detective was in possession of defendant's license and registration. The district court concluded that a reasonable person placed in the same position as defendant would believe his or her freedom of action was curtailed to a degree associated with actual arrest. Thus, the trial court did not err in suppressing defendant's unwarned admission during the traffic stop since it was a product of custodial interrogation.

Defendant argued that the violation of Miranda during the traffic stop supported suppression of the discovery of the cocaine in the vehicle. Following analysis of relevant caselaw, the district court stated that defendant sought to suppress the physical evidence of cocaine, which was derived from an unwarned but voluntary statement by defendant during a lawful traffic stop. The district court held that, under Florida law, the suppression of the cocaine by the trial court was not required.

Defendant also argued that the trial court erred in failing to suppress the cocaine because the detective's continued detention of defendant at the traffic stop was unlawful. The district court noted that it took an additional fifteen to twenty minutes for the canine to arrive on the scene after defendant admitted he picked up a gram of cocaine. The district court held that the traffic stop extended beyond the time necessary to write a citation. In order to justify the continued detention, the detective must have had "a reasonable suspicion based on articulable facts that criminal activity is occurring." Summerall v. State, 777 So. 2d 1060, 1061 (Fla. 2d DCA 2001). The state argued, and the district court agreed, that the detective had sufficient reasonable articulable suspicion of criminal activity occurring—based on the information of drugs being purchased from the residence, observing the encounter between defendant and a driver of another vehicle, and defendant's admission of picking up a gram of cocaine—which justified the continued detention. The district court held that the trial court did not err in failing to suppress the cocaine.

The district court also held that the recorded statement was properly admitted into evidence since it was not the product of custodial interrogation and that the trial court did

not err in denying defendant's motion for judgment of acquittal.

T.T.N. v. State, 40 So. 3d 897 (Fla. 2d DCA 2010).

The district court reversed defendant's adjudication of delinquency and sentence of commitment to a residential program for possession of cocaine, holding that the trial court erred in denying his motion to suppress because the evidence was the product of an illegal stop.

At the hearing on defendant's motion to suppress, an officer testified that he was on duty when he came into contact with defendant. Other members of his unit initiated a traffic stop but the driver fled on foot, and the remaining passengers drove away in the vehicle. The driver was apprehended and arrested, and the officers – who had obtained the registered owner's address based on the vehicle's tag – drove to the vehicle owner's residence. The officer testified that once he arrived at the residence in a marked police car, three individuals were standing by the vehicle. When they saw the officer pull up to the residence, two of the individuals ran inside the house while the third, later identified as defendant, ran to the side of the house. The officer testified that upon exiting his vehicle, he identified himself as a police officer and advised the three individuals to stop. He followed defendant to the side of the house and "[he] located [defendant] hiding behind a bush. [Defendant] stood up, dropped a green M&M tube on the ground. [The officer] placed him in custody and retrieved the tube from the ground." The contents of the tube were later positively identified as cocaine. Following the suppression hearing, the trial court entered its order denying defendant's motion to suppress.

The trial court found that, because the tube of cocaine was voluntarily abandoned by defendant and not obtained as a result of the stop, it was irrelevant whether [the officer] acted properly in fresh pursuit or acted improperly under the color of office when he arrested defendant outside his jurisdiction. Because the tube of cocaine was voluntarily abandoned, [the officer] was entitled to retrieve it regardless of the lawfulness of his stop of defendant.

At the close of trial, defendant was adjudicated guilty of possession of cocaine, and the trial court adopted the recommendation from the Department of Juvenile Justice by sentencing defendant to the moderate-risk program.

The district court concluded that the trial court erred in refusing to suppress the evidence as a product of an unlawful stop because the trial court's factual finding that the tube was voluntarily abandoned was not supported by the record. The district court noted that the officers were outside their jurisdiction and had no authority to initiate an investigation at the vehicle's registered address.

Here the officers' initial involvement with the vehicle arose from an attempted traffic stop. Once the driver, who fled on foot, was apprehended and arrested, there was no new crime or incident to investigate. Because the officers' investigation of the traffic infraction and the fleeing driver concluded with the driver's arrest, the district court found no basis for the arresting officer to stop defendant.

The officer testified at the suppression hearing that the police did not know whether the vehicle was stolen. The district court did not find this hypothesis sufficient to justify an ongoing investigation outside the officers' jurisdiction because the vehicle was never reported stolen and was located at the address to which it was registered. The district court stated that there was no reasonable indication that defendant was involved or about to be involved in a crime at the time officers arrived at the residence address, and defendant's attempt to run away from the arresting officer was not sufficient to justify an investigatory stop.

The trial court concluded that even if the stop was unlawful, the tube of cocaine was admissible because defendant voluntarily abandoned it. The district court held that the trial court's finding that the tube was voluntarily abandoned was not supported by competent, substantial evidence adduced at the suppression hearing and at trial. At the suppression hearing, the arresting officer testified that when he followed defendant to the side of the house, he found defendant hiding behind a bush. At trial, he testified that when he found defendant, he "asked [defendant] to show me his hands." Then defendant "moved a little bit, and then the narcotics . . . came off of his body as he moved." Therefore, the arresting officer's testimony supports a finding that defendant submitted to the officer's authority after he was ordered to show his hands, and at that time the tube containing cocaine fell from defendant's body. The district court noted that the additional facts from the trial supplemented the deputy's testimony at the suppression hearing and did not support the trial court's conclusion that the tube was voluntarily abandoned.

The district court concluded that the nexus between the illegal stop and the abandonment warranted suppression of the evidence. Accordingly, the district court reversed defendant's adjudication and sentence.

State v. Townsend, 40 So. 3d 103 (Fla. 2d DCA 2010).

The district court reversed the trial court's suppression order and remand for reinstatement of charges for possession of cocaine and drug paraphernalia. The court concluded that the search of defendant's vehicle was valid as an inventory search.

A deputy obtained the evidence at issue during a search of defendant's vehicle following his arrest for violating his restricted driver's license. In his motion to suppress, defendant argued that under Arizona v. Gant, 129 S. Ct. 1710 (2009), the deputy conducted an illegal search incident to arrest. The state argued that the search was proper whether it was an inventory search or a search incident to arrest.

The deputy testified that he stopped defendant because an obstruction on the vehicle's license tag covered the expiration sticker. The deputy discovered that defendant had a business-purpose-only license and arrested defendant for violation of his restricted license, handcuffed him, and placed him in the back of the patrol car.

Defendant's vehicle was on the shoulder of the road on the county easement and was obstructing the bicycle lane. The deputy determined that defendant was the primary

registered owner of the vehicle and that his wife was registered co-owner. No one was at the scene who could take possession of the vehicle, and the deputy acknowledged that he did not attempt to contact defendant's wife to ask if she could remove the vehicle.

The deputy began the impound procedure for the vehicle. He followed standard operating procedure, searched the vehicle to inventory its contents, and found a crack cocaine rock on the driver's seat and a glass crack cocaine pipe under the driver's seat. He then charged defendant with possession of cocaine and possession of paraphernalia. When asked about the impound procedure, the deputy noted that the purpose is for "the safety of the vehicle's contents and property for the owner" and "for safety on the obstruction of a right of way." In his police report, he wrote that he conducted a search incident to arrest. He did not write that the search was an inventory search but testified that the search was both incident to arrest and to impounding the vehicle. The inventory search that he performed was the only search of the vehicle.

The trial court granted the motion to suppress physical evidence and stated that the search was not proper as a search incident to arrest. The court added that an inventory search as part of impounding the vehicle "would have been fine because it was violating a right of way. It was on public property and that would have been it." The court noted that it was making its ruling based on the fact that the deputy wrote in his report that the search was a search incident to arrest without mentioning an inventory search.

In its written order, the trial court reiterated that its decision was based on the fact that the report only referred to a search incident to arrest. Although the court noted that the deputy had the vehicle towed without attempting to contact defendant's wife, the court specifically found that "[t]he Deputy was following standard impound procedures ('SOP 504') as to the search, inventory, and towing of Defendant's vehicle which had to be removed from public property." The court concluded that the search was not valid as one incident to an arrest.

The district court stated that the trial court correctly determined that, under Gant, the deputy's search of the vehicle was not valid as one performed incident to arrest. The district court found it undisputed that defendant was not within reaching distance of his vehicle's passenger compartment when he was handcuffed and in the back of the patrol car. It was also undisputed that there was no reason to believe the vehicle contained evidence regarding the restricted license violation.

The district court concluded that, nevertheless, the trial court erred by suppressing the evidence. Under applicable law, an inventory search as part of the impoundment of a vehicle, conducted according to standardized procedures, is recognized as an exception to the warrant requirement. Further, an officer is not required to offer an arrested driver an alternative to impoundment, provided the officer is acting in good faith. Finally, it is the nature of the search, not the label the officer places upon it, that controls.

Here, the trial court's factual findings support the state's argument that the search was a proper inventory search, conducted in accordance with standardized police procedures, regardless of the label in the written report. Defendant's vehicle obstructed

the right of way, and the deputy was not required to offer an alternative to impoundment before he had the vehicle towed. The trial court did not make any finding that the deputy was acting in bad faith. Rather, the court made the specific finding that the deputy followed standard impound procedures "as to the search, inventory, and towing of defendant's vehicle which had to be removed from public property." The district court concluded that the search was valid as an inventory search.

Torts/Accident Cases

Allan v. Graf, 43 So. 3d 151 (Fla. 4th DCA 2010).

The district court affirmed the summary judgment entered by the trial court and held that an employer cannot be held vicariously liable for an employee's negligence in mishandling keys to his own car, thereby allowing a thief to steal the car and injure a third party.

Plaintiff was struck by a car owned by defendant. At the time of the collision, the car had been stolen and was being driven by the thief. Among others, plaintiff sued defendant and defendant's employer, USA Parking System, Inc. The complaint alleged that defendant's negligence led to the theft of defendant's car and that such negligence occurred within the course and scope of his employment. The complaint asserted liability against USA Parking under a theory of *respondeat superior*.

USA Parking operated a limousine service that ferried customers around town. Defendant was employed by USA Parking as a driver of the company's limousines. The drivers never used their personal vehicles for work. The company did not require that the drivers commute to work in any particular form of transportation. Defendant's work shift varied, depending on the demand for drivers. USA Parking operated the limousine service at the Diplomat Hotel and Convention Center, where it also maintained an office. Prior to beginning a shift, employees typically went into the office to find out their assignments; at the end of their shift, they would go into the office to turn in their trip tickets. The trip tickets were used to compute commissions to which USA Parking's drivers were entitled. There was a ramp which led to the office, and employees parked their cars on the ramp when they went into the office before and after their shifts. While employees worked their shifts, their cars were parked in the Diplomat's parking garage.

On the day in question, defendant finished his shift at 8:00 p.m. He retrieved his Pontiac Firebird from the parking garage and parked it on the ramp leading to the office, so he could turn in his trip tickets. Defendant turned off the engine and lights, got out of the car, and went into the office. While he was there, a thief jumped into the car and used defendant's keys to drive away. The following afternoon the car collided with plaintiff.

To impose vicarious liability on USA Parking for defendant's negligence, plaintiff relies on cases holding that a car owner has a duty to protect the public from theft and later conduct of car thieves, which may be breached by the owner's negligent mishandling of car keys. These cases are an outgrowth of duties imposed upon car owners because motor vehicles are dangerous instrumentalities. The district court

rejected the argument that these cases could be read to impose vicarious liability upon employers for their employees' negligent mishandling of their own car keys.

Two Florida Supreme Court cases recognize the "legal foreseeability of automobile theft and ensuing collisions as a result of persons leaving ignition keys in unattended vehicles." Michael & Philip, Inc. v. Sierra, 776 So. 2d 294, 298 (Fla. 4th DCA 2000). Vining v. Avis Rent A-Car Systems, Inc., 354 So. 2d 54 (Fla. 1977), involved the owner of a car who left it unlocked with a key in the ignition. Schwartz v. American Home Assurance Co., 360 So. 2d 383, 384 (Fla. 1978), concerned the owner of a car who "left the keys to his automobile in the glove compartment when he parked it in front of a bar which he was frequenting." In both Vining and Schwartz, the court found that theft of owners' vehicles and subsequent accident could be the foreseeable result of the owners' key mismanagement. The court reasoned that ownership of a dangerous instrumentality imposed a duty on the owner to avoid an unreasonable risk of harm.

The district court noted that courts have not extended Vining and Schwartz to situations where it is the bailee of a vehicle who mismanages car keys, but not the owner. The district court stated: "We decline to create new law by holding USA Parking vicariously liable for the negligence of its employee in mishandling his own car keys . . . . Florida law has determined that liability in key mishandling cases is an aspect of the ownership of a motor vehicle, so that the cost of such negligence is imposed on an owner for the owner's negligence and nothing more."

Salsbury v. Kapka et al., 41 So. 3d 1103 (Fla. 4th DCA 2010).

The district court reversed judgment of the trial court, which found an all-terrain vehicle ("ATV") not to be a "dangerous instrumentality" under Florida's tort law. The district court remanded for an evidentiary hearing on the dangerous instrumentality issue. The district court stated that it could not reach the issue because the trial court did not compile an adequate factual record.

The district court noted that the dangerous instrumentality doctrine is a common-law doctrine imposing strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another." Aurbach v. Gallina, 753 So. 2d 60, 62 (Fla. 2000). The district court cited Meister v. Fisher, 462 So. 2d 1071 (Fla. 1984), in which the supreme court held that a golf cart is a dangerous instrumentality. In reaching that decision, the court pointed to three different justifications for the decision: golf carts fit the statutory definition of "motor vehicle"; golf carts are extensively regulated by statute; and record evidence regarding the causes and consequences of golf cart accidents.

The district court noted that, in the present case, it lacked the type of factual record available in Meister to analyze the third factor, which would be record evidence regarding causes and consequences of ATV accidents, required before a court may invoke or reject an application of the dangerous instrumentality doctrine.

The district court recognized that extension of the dangerous instrumentality

doctrine is generally a pure question of law and thus the trial court should, in theory, have been able to resolve the issue without proffer of evidence. However, the district court stated that Meister compels a contrary result because the court held in Meister that evidence of a vehicle's danger in its normal operation is essential before a court may extend the dangerous instrumentality doctrine.

Abbott et al. v. Dorleans, 41 So. 3d 984 (Fla. 4th DCA 2010).

The district court affirmed the trial court's judgment awarding damages to plaintiffs totaling $1,442,636 for injuries sustained in an automobile accident.

Defendants claimed that they owed no legal duty to the plaintiffs, that the evidence did not support the jury's finding of negligence, and that the evidence did not support the amount of damages awarded. Defendants made further arguments regarding evidentiary issues. The district court concluded that all issues were meritless.

Plaintiff and her daughter were driving south on U.S. Highway 27 on a dark evening when plaintiff's vehicle struck a tow truck. At the time of the collision, the tow truck was partially blocking the left lane of traffic in which plaintiff was driving. The tow truck had responded to an accident and was removing a vehicle. A deputy was on the scene directing the action, and his police car was parked off the road, completely in the median, with its lights flashing. Plaintiff's vehicle struck the rear of the tow truck.

Plaintiff sued the tow-truck driver and the towing company (defendants). Defendants claimed that plaintiff herself was negligent in failing to avoid the tow truck. A lengthy trial on liability and damages ensued. As to liability, there was conflicting evidence on whether caution cones or road flares had been set up. There was also conflicting evidence on whether plaintiff had slowed down.

The jury returned a verdict finding plaintiff 10 percent at fault, the tow truck driver 35 percent at fault, and the deputy 55 percent at fault. After the verdict, defendants moved for a new trial and for remittitur of the damage award, but the trial court denied all motions. Defendants appealed the jury verdict, and plaintiffs cross-appealed inclusion of the deputy on the verdict form.

The district court found ample, although disputed, evidence to support the verdict. The jury awarded substantially less than plaintiff sought in closing argument. The district court stated that defendants pointed to one very small award that was slightly greater than the specific testimony at trial. The district court attributed the minor discrepancy to the jury rounding up the amount, which was not a ground for reversal.

Of the remaining evidentiary errors raised by defendants, none were properly preserved at trial. As to claims of improper argument, the district court held that the alleged error was fair comment in rebuttal of the defense argument.

Plaintiffs argued on cross-appeal that it was error to include the deputy on the verdict. The district court stated that, if it agreed with that argument, it would have to

conclude that the proper remedy would be a new trial. At oral argument, however, plaintiffs' counsel informed the court that, if final judgment was otherwise affirmed on appeal, plaintiffs would withdraw the cross-appeal rather than have the court reverse for a new trial. The district court, therefore, considered the cross-appeal to be withdrawn.

Driver's Licenses

M.A.R. v. State, ___ So. 3d ___ (Fla. 2d DCA 2010), 2010 WL 3655501, 2D09-5200.

The district court reversed a trial court order adjudicating a juvenile delinquent, placing him on probation, and suspending his driver's license based on his admission to the offense of fleeing or eluding.

Defendant argued that the trial court erred in determining that the mandatory sentencing provisions of sections 316.1935(5) and (6), Florida Statutes (2008), apply to juveniles. The district court held that, because those statutory sections do not contain a clear legislative mandate that they apply to juvenile proceedings, the court erred in determining that it was required to adjudicate defendant delinquent and suspend his driver's license under these provisions.

Prior to entering his plea, defendant had filed motions for an order finding that an adjudication of delinquency and driver's license revocation was not required under sections 316.1935(5) and (6). Defendant argued that these adult sanctions were not applicable to juveniles. The court held a hearing and issued an order denying relief. The court thereafter imposed sanctions including an adjudication of delinquency and suspension of defendant's driver's license.

After analyzing relevant statutes, the district court rejected the state's argument that, under section 322.01(11)(a), Florida Statutes (2008), an adjudication of delinquency constitutes a "conviction." The court remanded for reconsideration because the trial court was clearly under the impression that adult sanctions were mandatory.

Raleigh v. State, 46 So. 3d 1018 (Fla. 2d DCA 2010).

The district court denied without prejudice the certiorari petition of defendant, charged with habitual driving while license suspended or revoked, which asked the court to quash a circuit court order preventing him from deposing the arresting officer.

After defendant scheduled the officer's deposition, the trial court granted the state's motion for a protective order on the ground that defendant had not complied with rule 3.220(h)(1)(D), Florida Rules of Criminal Procedure. Under that rule, no deposition may be taken "in a case in which the defendant is charged only with a misdemeanor or a criminal traffic offense . . . unless good cause can be shown to the trial court."

The specific conduct giving rise to the charge, driving while one's license is canceled, suspended, or revoked, may be a second-degree misdemeanor, a first-degree misdemeanor, or a third-degree felony, depending on the number of times the driver has

been convicted based on that behavior or depending on whether the driver is a habitual traffic offender. See § 322.34(2) and (5), Fla. Stat. (2008).

The district court denied defendant's petition for relief, but did do so without prejudice to his right to argue good cause for a deposition. The court noted the rule's provision that "[i]n determining whether to allow a deposition, the court should consider the consequences to the defendant, the complexity of the issues involved, the complexity of the witness' testimony (e.g., experts), and the other opportunities available to the defendant to discover the information sought by deposition." Fla. R. Crim. P. 3.220(h)(1)(D).

Mattingly v. State, 41 So. 3d 1020 (Fla. 5th DCA 2010).

The district court affirmed defendant's conviction for possession of methamphetamine and driving while license suspended or revoked.

Defendant contended that the trial court erred in denying his motion to suppress because he was not driving on a street or highway as defined by Florida statutes when he was stopped for driving with a suspended license. At the hearing on defendant's motion to suppress, the arresting deputy testified that he observed defendant drive his car from the rear of his property onto a dirt road, and then start driving toward another dirt road. The deputy knew that defendant's driver's license was suspended. After the deputy confirmed that defendant was the person driving the car, he attempted a traffic stop, but defendant continued driving until he was back at his own house. When defendant got out of his car, a packet containing illegal drugs fell to the ground.

The deputy testified that, although the roads were privately owned, he would describe them as public access roads. The roads do not have stop signs or streetlights, but one of the roads has a bar that is open to the public. The deputy testified that the roads had no signs labeling them as private property or otherwise restricted access.

Defendant presented testimony of an asset manager for the county transportation department, who testified that the county did not maintain roads in the area. Defendant argued that, because the dirt roads were not maintained by the county, it was not illegal to drive there without a valid license. The trial court denied defendant's motion to suppress. In Florida, it is illegal for a person with a suspended, canceled, or revoked license to drive a motor vehicle. § 322.34(2), Fla. Stat. (2009). Based on its analysis of the definition of "highway" and relevant case law, the district court found that the record supported the trial court's conclusion that roads at issue were open to public use.

Mickell v. State, 41 So. 3d 960 (Fla. 4th DCA 2010).

The district court affirmed defendant's conviction for driving while license revoked as a habitual offender.

The district court found no abuse of discretion in the trial court's admission of evidence concerning defendant giving a false name to the arresting officer after a traffic

stop. The arresting trooper testified that he pulled over a car on an interstate highway for the infraction of following too closely. See § 316.0895(1), Fla. Stat. (2008). Defendant was the driver of the car and there were three passengers. The trooper asked defendant for his license. He replied that he had left his license at home. The trooper then asked defendant for his name and birth date. Defendant answered the question. However, the trooper's database search of the information defendant provided revealed no matches. The trooper returned to defendant and confirmed the information defendant had given him. Again, there were no matches in the database. The trooper asked defendant to step out of the car and confronted him with his belief that defendant was being dishonest. For a third time, the trooper ran the given information through his database, producing no results. Finally, about 20 minutes after the initial stop, defendant provided his true name and birth date. The trooper discovered that defendant was a habitual traffic offender with a suspended license, so he arrested him.

At trial, defendant invoked the defense of necessity. He contended that he had been driving another passenger in the car to get medical assistance. In support of his defense, he called as a witness the passenger purportedly in need of medical assistance. She testified that she had been initially driving the car, but suffered an asthma attack and could not find her inhaler. She said she felt unsafe driving, so she pulled over and defendant moved behind the steering wheel. Defendant drove because, of the other two passengers, one was drinking and the other had a suspended license. At the time they were stopped, they were on the way to a hospital to obtain medical assistance for the driver, who had subsequently found and used her inhaler.

Defendant argued that the trial judge abused his discretion in admitting evidence of an uncharged collateral crime—defendant giving a false name to the trooper—because probative value of the evidence was substantially outweighed by the danger of unfair prejudice. See § 90.403, Fla. Stat. (2008). The district court held that the trial judge did not abuse his discretion in admitting the testimony. The district court noted that three times defendant gave the trooper a false name, thereby extending the traffic stop by at least 20 minutes. This conduct made it unlikely both that there was a real medical emergency and that defendant believed that one existed. Thus, relevance of evidence to disprove the defense was not substantially outweighed by the danger of unfair prejudice.

Dep't of Highway Safety and Motor Vehicles v. Trauth et al., 41 So. 3d 916 (Fla. 3d DCA 2010).

The district court reversed the circuit court's appellate division judgments awarding attorney's fees and costs to defendants' counsel in consolidated cases involving administrative driver's license suspensions based variously on a refusal to submit to a breath test after an arrest for suspected driving under the influence (DUI) and on allegedly-coerced consents to breath and blood samples after an arrest for suspected DUI. The district court found no legally sufficient statutory, contractual, or other predicate for imposition of such fees and costs.

In each case, the circuit court appellate division quashed administrative orders suspending defendants' drivers' licenses because of improper consent forms or warnings.

Defendants moved for awards of appellate attorney's fees and costs under rule 9.400, Florida Rules of Appellate Procedure. The appellate division concluded in each case that the motions should be granted because the Department "persisted in pursuing this appeal, despite clear knowledge, based on an extensive body of existing Florida law, that the consent form being used by the police was unlawful." The appellate division also determined that the Department "should have confessed error rather than pursuing the appeal." Defendants' attorney's fees and costs were heard and determined and consolidated appeals followed. Defendants acknowledged there was no contractual or statutory basis for the circuit court fee awards. They argued that the circuit court had "inherent authority" to impose attorney's fees and costs under Moakley v. Smallwood, 826 So. 2d 221 (Fla. 2002). The district court did not agree.

The district court reversed with directions to vacate the orders and final judgments awarding attorney's fees and costs in each of the underlying appellate division cases.