FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

April-June, 2010

[Editor's Note: In order to reduce possible confusion, the defendant in a criminal case will be referred to 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 determine the placement order in these summaries.]

Driving Under the Influence (DUI)

Edwards v. State, 39 So. 3d 447 (Fla. 4th DCA 2010).

The district court affirmed defendant's conviction for DUI manslaughter, holding that testimony of a toxicologist, who said the driver of the vehicle defendant hit was also impaired, was not relevant to material issues. The defendant claimed the trial court erred in granting the state's motion in limine excluding such testimony of the toxicologist.

Decedent and two friends had gone to a nightclub. As their car went through an intersection, the vehicle was hit in by defendant's vehicle, resulting in injuries to the driver and her husband and death of decedent. A witness testified that when the car carrying decedent entered the intersection the light was green in that direction. A police officer 100 feet from the intersection testified that defendant had a red light. The accident investigator viewed a surveillance tape, from a gas station at the intersection, which showed a green light for decedent's car at the time of the crash.

Defendant was taken to the hospital for his injuries and to secure a blood test, which showed that his blood alcohol level was well over the legal limit. While there, defendant told an investigating officer that he did not run a red light but the other driver did. That became his theory of defense.

Prior to trial, the state moved to preclude defendant's use of an expert to extrapolate that the driver of the other car had blood alcohol level at the time of the crash that was over the legal limit. The expert based his opinion on the driver's statements that she had consumed three drinks, which the expert determined contained two to three ounces of alcohol. Using this information, as well as the driver's height and weight, the expert made a calculation of blood alcohol. The court granted the motion in limine on grounds that the evidence would not be relevant and the testimony was speculative. At trial, state's witnesses confirmed that the driver had the green light. An accident reconstruction expert testified that defendant was driving between 41 and 60 miles per hour when his vehicle hit decedent's car.

Defendant argued that it was error for the trial court to preclude him from offering the expert evidence to show that the driver of the other car was intoxicated at the time of the accident. The state sought to prove that defendant ran a red light, and defendant maintained as his theory of defense that he had the green light, or at least there was reasonable doubt on that issue.

The district court stated that the fact that the other driver may have been intoxicated does not tend to prove who had the green light at the intersection. The evidence of who had the green light was supplied by eyewitnesses, the physical evidence from the accident reconstruction, and the surveillance camera at the intersection.

Sims v. State, 36 So. 3d 897 (Fla. 4th DCA 2010).

The district court affirmed defendant's 15-year sentence for DUI manslaughter, which included a four-year mandatory minimum. The state conceded that imposition of the mandatory minimum sentence was error.

The district court explained that defendant's sentence was controlled by the law in effect at the time of his offense. At the time defendant was sentenced in 2008, the statute required a four-year mandatory minimum. See § 316.193(3)(c)3., Fla. Stat. (2008). However, in February 2007, the time of the offense, the statute did not impose a mandatory minimum. See § 316.193(3)(c)3., Fla. Stat. (2006). The legislature amended the law in 2007 to provide for a mandatory minimum sentence. The change did not go into effect until July 1, 2007, approximately 5 months after defendant committed the underlying crime.

McGarrah v. State, 38 So. 3d 217 (Fla. 2d DCA 2010).

The district court affirmed defendant's costs but reversed and remanded her sentence for DUI manslaughter because it exceeded the maximum permissible sentence.

Defendant pleaded no contest to DUI manslaughter, a second-degree felony, and was sentenced to seventeen years' incarceration. She filed a rule 3.800(b)(2) motion with the trial court contending that her sentence was illegal because it exceeded the fifteen-year statutory maximum for the offense. Although the trial court eventually granted her motion and amended her judgment and sentence, it did so outside of the sixty-day time period set forth in the rule, rendering the amended judgment and sentence a nullity. See Fla. R. Crim. P. 3.800(b)(2)(B); Jackson v. State, 793 So. 2d 117 (Fla. 2d DCA 2001).

As the trial court recognized and the State conceded, defendant's seventeen-year sentence for DUI manslaughter was illegal. DUI manslaughter is punishable by a maximum term of fifteen years. §§ 316.193(3)(c)(3)(a); 775.082(3)(c), Fla. Stat. (2007). A sentence can exceed the statutory maximum for an offense, but only if the lowest permissible sentence under the Criminal Punishment Code exceeds the statutory maximum for that offense. Fla. R. Crim. P. 3.704(d)(25); § 921.0024, Fla. Stat. (2007).

When the lowest permissible sentence under the code exceeds the statutory maximum, the trial court must impose the sentence required by the code.

Houle v. State, 33 So. 3d 822 (Fla. 4th DCA 2010).

The district court affirmed the trial court's permanent revocation of defendant's driving privileges.

Defendant was convicted of one count of driving under the influence (DUI) of drugs or alcohol and causing serious bodily injury under section 316.193(3)(c)2., Florida Statutes (2008). The district court stated that under section 322.28(4)(a), a trial court is permitted to revoke a defendant's driving privileges permanently. Stoletz v. State, 875 So. 2d 572 (Fla. 2004). The trial court, however, revoked defendant's driving privileges pursuant to section 316.655(2), not section 322.28(4)(a). Section 316.655(2) may not be used to revoke driving privileges for a DUI conviction. Stoletz, 875 So. 2d at 575-76. The district court stated that, although the trial court cited the incorrect statute, the order revoking defendant's driving privileges was a sound exercise of its discretion under section 322.28(4)(a).

The district court reversed the trial court's imposition of a lien for public defender fees. The trial court was obligated to assess defendant at least $100 in fees and costs because she was convicted of a felony. § 938.29(1)(a), Fla. Stat. A trial court may assess more than $100 in fees, but the court must make factual findings of "higher fees or costs incurred." Id. Here, the trial court assessed $500 in fees and costs without considering evidence to establish a reasonable hourly rate or the public defender's time spent on the case. The trial court also failed to inform defendant of her right to contest this assessment. The district court found the $500 assessment to be arbitrary, and struck assessment of public defender fees without prejudice and remand for an evidentiary hearing. On remand, the trial court must advise appellant of her right to contest any lien imposed for public defender fees.

The district court also reversed the trial court's imposition of two optional $500 fines under section 775.0835 for causing injury to another. Section 775.0835(1) requires the court to find "that the defendant has the present ability to pay the fine." The trial court made no such finding, so the imposition of these fines was error. The district court also reversed the $135 "DUI assessment." The trial court did not cite statutory basis for this fee. The state conceded error on this point. The district court affirmed the trial court's assessment of the costs of prosecution and investigation under section 938.27(1).

Brown v. State, 32 So. 3d 779 (Fla. 2d DCA 2010).

The district court reversed the trial court's denial of defendant's motion for judgment of acquittal on a charge of driving under the influence with damage to the property of another, specifically, a truck that defendant was driving.

The defendant argued that the state did not produce evidence of the truck's ownership. The district court agreed, reversing the conviction on that charge and

remanding for the trial court to vacate the conviction and sentence for driving under the influence with damage to the truck. The court affirmed defendant's other convictions and sentences without comment.

Skinner v. State, 31 So. 3d. 940 (Fla. 1st DCA 2010).

The district court granted defendant's writ of certiorari and quashed the decision of the circuit court, sitting in its appellate capacity, which affirmed defendant's county court judgment of guilt for driving under the influence (DUI).

Defendant was charged with DUI following a two-vehicle collision. By the time the investigating officer got to the crash site, one victim was on the way to the hospital. The officer observed defendant and another man outside one of the vehicles, leaning against the passenger side. The officer did not see either man inside a vehicle. In response to a series of questions from the prosecutor, the officer testified "Mr. Skinner's vehicle," a four-wheel-drive pickup truck, made a left turn on a green light.

Defense counsel objected because the state had not laid a predicate indicating the source of the information. The trial judge "clarified" the state's intended question as "What did you observe when you arrived at the scene?" and sustained the objection. Defense counsel continued to object on the ground the characterization of the truck as petitioner's vehicle was based solely on privileged information from a police report.

The officer testified defendant was leaning against the vehicle, with a strong odor of alcohol on his breath, bloodshot eyes, and slurred speech, and that the officer had to ask several times what happened before defendant responded. On the basis of his observations and investigation, the officer arrested defendant for DUI with damage to a person or property and took him to the county jail for testing.

The state asked whether the officer had interviewed the other man standing with defendant, and the officer answered affirmatively. When the prosecutor asked whether the officer had identified defendant as the driver, defense counsel immediately objected based on the lack of foundation regarding the source of this information during the investigation. The county court sustained the objection based on the "accident or crash report" privilege in section 316.066(7), Florida Statutes (2007), and instructed the prosecutor to proceed to the next question.

Defense counsel argued the prosecution had not presented admissible evidence to prove defendant drove a vehicle involved in the crash. When the county court asked the state at the initial hearing what specific evidence it had presented (other than defendant's privileged statements) to establish he was a driver, the prosecutor relied on 1) the officer's testimony that he had observed defendant and the other man standing outside leaning against the side of the vehicle and that defendant smelled of alcohol and demonstrated other indicators of impairment, and 2) the state's "belief" the vehicle belonged to the petitioner.

Given the state's bare-bones response, the county court granted the amended motion to suppress because the state had presented no evidence to prove that defendant had been the driver. On rehearing, the court reversed its ruling and denied the motion to suppress. The circuit court affirmed the county court's ultimate ruling. The district court held that record supported the county court's initial ruling and that the circuit court departed from the essential requirements of law in affirming the county' court's ultimate order denying the motion to suppress.

Criminal Traffic Offenses

Chapman v. State, 36 So. 3d 822 (Fla. 5th DCA 2010).

The district court affirmed defendant's judgment and sentence for possession of ammunition by a convicted felon and tampering with physical evidence.

Defendant was arrested after an officer observed him drive a white GMC truck to an intersection and observed a person make contact with defendant through the driver's side window of the truck. The contact lasted about fifteen seconds, after which defendant drove the truck away. The officer noticed that a brake light was out on the truck and initiated a traffic stop by activating the lights of the unmarked patrol vehicle. Defendant did not pull over. The officer observed defendant's hand come out of a rolled-down window in the truck and an object bounce off the ground. Defendant then traveled approximately "another half a mile" before he pulled over. The officer made contact with defendant, explained the reason for the stop, and informed him the officer had observed him throw something out of the truck.

According to the officer, defendant stated that "he had, in fact, purchased some cocaine . . . ., and that he had discarded it out of the car [truck] because he didn't want to go to jail." Later, the officer "went back and tried to look" for the cocaine that defendant had thrown from the truck's window, but was unable to recover it since "[t]he road is very busy" and "there [are] all kinds of rocks in the road and everything else."

According to defendant, he did not make contact with anyone. Instead, as he was slowing down to make a turn, an officer pulled up behind him in a patrol vehicle and turned on the vehicle's lights. The officer "jumped" out of the patrol vehicle," and "snatched" defendant out of the truck "with his gun drawn," and asked about drugs. He did not ask whether defendant threw anything out of the truck window, and defendant did not tell him that he threw something out of the truck window.

Defendant argued on appeal that evidence was insufficient to prove that he had intent to destroy, conceal, or remove alleged contraband. He argued that while the act of throwing the alleged contraband out of the truck window amounted to abandonment, it did not amount to tampering with physical evidence because the substance was not altered and was not concealed. He argued that that the state failed to establish a prima facie case because the evidence was insufficient to prove the second element of the

charged offense, namely that he had the intent to destroy, conceal, or remove the alleged contraband so as to impair its verity or availability.

In affirming the conviction, the district court stated that throwing the cocaine from the moving car was almost certain to make its recovery impossible, and it was made more certain by the failure to stop for half a mile. The court stated that defendant's own words establish he was attempting to get rid of the cocaine. The court held that "this case is well within the language and intent of [section 918.13, Florida Statutes (2007)]."

State v. Beaubrun, 36 So. 3d 897 (Fla. 3d DCA 2010).

The district court reversed the trial court's order of dismissal and remanded for reinstatement of the charge against defendant of falsely assuming the persona of a law enforcement officer.

The sole issue on appeal was whether the trial court erred by granting the defendant's motion to dismiss the information under Florida Rule of Criminal Procedure 3.190(c)(4). Pursuant to rule 3.190(c)(4), a defendant may file a motion to dismiss criminal charges on the ground that "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant."

At the hearing on the defendant's motion to dismiss, the trial court granted the defendant's motion over the state's objection, concluding that "none of the actions taken by the defendant can be characterized as acting as a police officer." In its appeal, the state argued that the trial court erred by granting the motion to dismiss where its traverse specifically disputed material facts and asserts additional material facts, which, when viewed in the light most favorable to the state, are sufficient to make a prima facie case of guilt against the defendant.

Defendant's motion to dismiss asserts that undisputed facts are as follows: On the day of defendant's arrest, he held Class D and G security licenses and a concealed weapons permit. While attending his uncle's funeral, he volunteered to escort the funeral procession to the cemetery in his "security car," which was equipped with a light bar displaying amber and green lights to the front of the car and green and red lights to the back of the vehicle. Further, the vehicle had the following phrases written on it: "K-9 Enforcement," "911 Emergency," and "Detection Unit." While acting as a funeral escort, the defendant used his vehicle to block oncoming traffic outside the funeral home, but never exited the vehicle when doing so. Thereafter, he drove behind the procession with the light bar flashing.

While escorting the procession on Interstate 95 a police officer stopped defendant for failing to yield the right of way. When defendant exited his "security car," he was wearing gray cargo pants, a black shirt, a green traffic vest, and a nylon belt with a 9 mm gun, two magazines, a taser with two cartridges, pepper spray, and handcuffs. These items were not visible while he was in the vehicle. Thereafter, the officer who responded

to the scene, searched the trunk of the "security car," finding a rifle, 119 rounds of ammunition, two bulletproof vests, and a Velcro patch labeled "police."

The motion to dismiss asserted that at no time did the defendant identify himself to others as a police officer, wear anything identifying himself as a police officer, or detain or attempt to detain a citizen.

The state filed a traverse/demurrer denying the assertion in the motion to dismiss that the defendant remained in his "security car" while blocking oncoming traffic outside of the funeral home. Instead, the traverse stated that it has not been determined if the defendant exited his vehicle while blocking oncoming traffic and it was unclear if the public saw the defendant in his "police looking garb." The traverse denied the defendant's assertion that he was acting as a funeral escort when he was pulled over on I-95, explaining that before the procession entered I-95, the police escort had arrived and was actively escorting the funeral procession. Defendant, who was speeding and driving on the shoulder of the highway, continued to drive behind the police motorcycle at the end of the procession with his vehicle's lights activated. The traverse asserted that the "actions of the Defendant were not that of one who was escorting a funeral procession, but one who was intending to deceive the public to believe he was a law enforcement officer." The traverse stated that in addition to the phrases described in the motion to dismiss, the defendant's vehicle also had the following markings and equipment—red and blue stripes; a State of Florida seal; the phrases "Warning: Work Dog" and "K-9 Officer Enforcement"; a laptop computer mounted on the front console; a K-9 cage; and a Police Athletic League license plate.

The district court concluded that, based on the defendant's attire, his vehicle, and his actions, the jury could reasonably find that the defendant "falsely assume[d] or pretend[ed] to be a . . . police officer . . . and [took] upon himself to act as such," in violation of section 843.08.

Thomas v. State, 36 So. 3d 853 (Fla. 3d DCA 2010).

The district court affirmed the trial court's denial of defendant's motion for judgment of acquittal of a conviction of first-degree felony murder. The court further affirmed the findings by the jury of the elements of the predicate felonies of robbery and grand theft auto.

The victim was unloading luggage after arriving at an airport with his wife, his mother, and his mother's husband when he was approached by defendant under the pretext of selling them a CD player. When they declined to purchase, defendant snatched a purse from the shoulder of the victim's mother. In addition to personal items, the purse also contained cash. Defendant attempted to flee the scene in a getaway car driven by another individual. The victim attempted to prevent the taking by grabbing on to the passenger side door of the vehicle as it took off. As the vehicle sped away, defendant forcibly attempted to knock the victim from the side of the car. At one point, the driver stopped and apparently exited the car, but he re-entered and resumed driving after he

noticed approaching witnesses. The victim continued to resist the taking by holding on to the car door. After several minutes, the car arrived at a padlocked airport gate. The car slowed down, then sped through the gate and at least one more fence. The force of these impacts peeled the victim off the car door. The victim suffered broken bones, lacerations, and bruises and died later at the hospital. The car was found abandoned not far from the airport, along with the purse.

Defendant was tried on charges of first-degree felony murder, robbery by sudden snatching, and grand theft auto. At trial, he moved for a judgment of acquittal on the count of first degree felony murder after the state rested. Defendant argued that there was insufficient evidence to establish the predicate felony of robbery. The motion was denied, and the jury found defendant guilty of first degree felony murder, robbery by snatching, and grand theft auto.

After a de novo review, the district court held that competent substantial evidence supported the convictions.

McPherson v. State, 35 So. 3d 981 (Fla. 3d DCA 2010).

The district court reversed and remanded for an evidentiary hearing the summary denial of defendant's rule 3.850 motion for postconviction relief alleging ineffective assistance of trial counsel.

A jury found defendant guilty of leaving the scene of an accident with injuries and fleeing a law enforcement officer at a high rate of speed, but not guilty of aggravated battery on a law enforcement officer. On direct appeal, defendant argued that the trial court erred by denying his motion for mistrial based on the state's improper closing argument. The Third District affirmed the trial court's judgment.

Defendant filed a timely rule 3.850 motion asserting ineffective assistance of trial counsel based on the following facts: After prospective jurors were sworn and the trial court read charges to the jury, the trial court took a ten minute recess. During this recess, prospective jurors interacted with police officers. The next day, prior to commencement of proceedings, defendant asked trial counsel if she had spoken to defendant's brother regarding the jury's contact with the police officers. In response, trial counsel acknowledged that the defendant's brother informed her that members of the jury and police officers discussed the police officers' opinion as to a defendant charged with fleeing or attempting to elude a law enforcement officer. Defendant requested that trial counsel inform the trial court so that the court could voir dire each juror about conversations with officers and/or enter a mistrial. Trial counsel refused to bring the matter to the court's attention.

In support of his motion, defendant attached his brother's affidavit. The brother averred that "some members of the jury panel ask[ed] the police officers outside the Court room [sic] what was their opinion about someone who is charged with leaving the scene of an accident on a police officer." Police officers stated that "every defendant of

this charge must be found guilty." Defendant's brother averred that he informed defendant's trial counsel of his observations. The court summarily denied defendant's 3.850 motion, stating the issue should have been raised on direct appeal.

On appeal of the summary denial of the 3.850 motion, the district court disagreed with the trial court's characterization of the alleged claim as "an issue regarding jury selection." The district court stated that, although alleged interaction between police officers and jurors took place during a recess in the jury selection process, the real issue was whether the jury had an inappropriate conversation with police officers, which biased the jurors against the defendant.

The district court stated that, contrary to the trial court's conclusion, defendant's claim of ineffective assistance of counsel could not have been properly raised on direct appeal as the claim would not be apparent on the face of the record. Defendant claimed he had a private conversation with counsel, asking her to inform the court of alleged conversation between officers and jurors so that the court could voir dire each juror about the alleged conversation. The district court held that, as the claimed error would not be apparent on the face of the record, the issue was properly raised in a rule 3.850 motion.

M.F. v. State, 35 So. 3d 998 (Fla. 2d DCA 2010).

The district court held that the state failed to establish that defendant, a juvenile, was involved with the theft of her mother's car and reversed the trial court's order finding that defendant committed grand theft of a motor vehicle.

Defendant's mother testified that she lived with defendant's grandmother, defendant, and defendant's boyfriend. The mother owned a white Camaro that she kept in the carport. The car was operational, but it had expired tags and was not registered, so the mother told everyone in the home not to touch the car.

In October 2008, defendant's mother temporarily moved to Fort Lauderdale. Defendant's grandmother testified that in early November 2008, a code-enforcement officer spotted the unregistered Camaro in the carport. The officer told her that the car had to be removed because it did not have a valid tag. The grandmother explained that the car belonged to her absent daughter, and the officer said he would give her until December to correct the problem.

On November 6, 2008, two unidentified men with a truck towed the Camaro from the driveway as the grandmother was painting a room in the back of the home. The grandmother heard the men and ran to the front of the home, but the men drove away with the car. The grandmother saw defendant and her boyfriend getting into the next door neighbor's car, along with the neighbor. The grandmother yelled to defendant, who ignored her. The neighbor drove his car in the same direction as the truck towing the Camaro, but the grandmother did not know whether the car followed the truck after it left her line of sight. When defendant came home, she said nothing about the Camaro.

The grandmother waited a couple of days, called the mother, and later called the police. Defendant told the mother the grandmother had the car towed away. The police officer who responded to the mother's stolen vehicle complaint on November 14, 2008, placed a BOLO for the Camaro, and verified that there was no police report from a towing company indicating that the car was towed.

The district court held that, under Florida law, the trial court should grant a judgment of dismissal when the state fails to present a prima facie case of the offense charged. In circumstantial evidence cases, the state must present evidence that is inconsistent with any reasonable hypothesis of innocence.

The elements of grand theft of a motor vehicle are (1) knowingly obtaining or using or attempting to obtain or use the property of another with (2) the intent to deprive the victim of the right to or benefit from the property or appropriate the property to one's own use or the use of another unauthorized person, when (3) the property is a motor vehicle. § 812.014(1), (2)(c)(6), Fla. Stat. (2008). The district court held that evidence presented by the state did not even establish that the mother's car was stolen as opposed to being towed away by code enforcement, let alone that defendant was responsible for having the car towed away. There was no evidence suggesting that defendant planned to steal the Camaro, and no evidence connecting defendant with the two men who towed the car, other than the fact that defendant got into a neighbor's car that headed the same direction as the tow truck for about one block. Since the Camaro was never retrieved, there was no physical evidence that defendant had used it or sold it to someone else.

Additionally, evidence did not exclude the reasonable hypothesis that code enforcement had arranged for the Camaro to be towed. The car did not have a valid tag, and code enforcement had already stopped by to warn the grandmother that it must be removed. The code enforcement officer supposedly told the grandmother that he would give her until December to have the Camaro registered, but there was no evidence regarding whether he or a different officer had the car removed. Indeed, no one from code enforcement testified. Because the Camaro remained in the carport without a valid tag, it was possible that code enforcement arranged for the car to be towed without waiting until December. Moreover, the state did not discount the possibility that some unknown third parties had stolen the Camaro.

Yeye v. State, 37 So. 3d 324 (Fla. 4th DCA 2010).

The district court reversed two of defendant's three convictions for separate counts of leaving the scene of an accident. The state conceded that error occurred because all three counts arose out of a single episode, permitting only a single conviction.

Defendant was charged with child neglect (count I), fleeing and eluding (count II), possession of cocaine (count III), reckless driving (count IV), and three counts of leaving the scene of an accident (counts V, VI, VII).

While out on patrol, a police officer witnessed what he suspected to be a narcotics transaction at a gas station parking lot in the front seat of a car driven by defendant. The officer approached the vehicle from the passenger side and identified himself as a police officer, with his badge, radio, and gun in plain view. Defendant immediately drove off, ignoring the officer's orders to stop. He drove through a stop sign and red light, and accelerated down the road out of view. The officer contacted his dispatcher and provided descriptions of the vehicle and passengers.

Other officers spotted the car traveling at a high rate of speed and weaving in and out of traffic. The car was followed into an apartment complex where it crashed into a series of parked cars and eventually came to a stop in the grass at the back of the building. After defendant was apprehended, the car was searched and a digital scale with a white powder residue on it and cash was found. The white powder residue field tested positive for cocaine and was later confirmed by a forensic chemist to be cocaine.

A jury returned a verdict of guilty on all counts except for count III. The trial court adjudicated defendant guilty on the remaining six counts and sentenced him to ten years in prison, concurrently. On appeal, defendant argued that his three convictions for leaving the scene of an accident (counts V, VI, and VII) constituted double jeopardy.

Based on its double-jeopardy analysis, the district court reversed convictions and sentences for counts VI and VII and remanded for recalculation of a proper sentence.

E.L.F. v. State, 33 So. 3d 760 (Fla. 4th DCA 2010).

The district court reversed the trial court's denial of motion for judgment of acquittal of defendant's conviction for criminal battery. The issue was whether defendant was acting as a good Samaritan and defending himself after becoming involved in a traffic altercation between a pregnant woman driver and a male driver.

According to testimony, the woman driver followed a male driver who had let her car into traffic and then tapped her rear bumper twice with his vehicle. She ultimately blocked him at a traffic light, left her vehicle, approached his car, swung a blow at him, then reached within his car and took his key. The male driver emerged from his car and some tussling took place between them. At that point, the defendant, a third-party juvenile, confronted the male driver. The male driver claimed that the juvenile attacked him and struck him 10 times, and that he attempted to hit back but was unsuccessful.

The woman driver testified that there was a car next to her with the juvenile's mother driving and the juvenile as a passenger. She asked the mother to call 911 because her phone battery was dead. The woman driver testified that, during the fight that ensued after the cars stopped, the juvenile defendant, who was in the passenger seat of his mother's car, saw the male driver punching and kicking her. It was only then that the juvenile left his mother's car.

The juvenile defendant's mother testified that she was driving her son to work and, at the request of the woman driver, called 911 and stayed on the phone with 911 the entire time while following the man and the woman. She saw the woman get out of her car and approach the man's window.

According to testimony, the juvenile defendant told the male driver, "You're not supposed to hit a woman." The male driver began hitting defendant. The woman reached into his window, the man punched her in the face, and she fell to the ground. The male driver then leaped from his vehicle and started fighting. Seeing that he was punching the woman, the juvenile left his mother's vehicle and tried to get the male driver off of her. The driver swung at defendant and they started fighting. Defendant testified that he tried to get the male driver off of the woman driver and that the male driver swung at him first but missed. The man then hit defendant, who hit him back.

The trial court denied defendant's motion for judgment of acquittal after hearing defendant argue that he came to the defense of another person. The district court agreed with the defense and held that the court erred in denying the motion because the state had failed to present rebuttal evidence disproving self-defense beyond a reasonable doubt, and thus the court was required to grant the judgment of acquittal.

E.D., a child, v. State, 31 So. 3d 328 (Fla. 4th DCA 2010).

Upon the state's concession of error, the district court reversed the defendant's conviction for criminal mischief,. The district court held there was no evidence that, in striking the vehicle of another while backing from a parking space, defendant acted willfully or maliciously. The court held that the only thing proven was negligent operation of a motor vehicle.

Johnson v. State, 32 So. 3d 728 (Fla. 1st DCA 2010).

The district court reversed and remanded the trial court's denial of defendant's rule 3.850 motion alleging ineffective assistance of counsel.

Defendant argued that his counsel was ineffective for permitting him to plead to driving while license suspended or revoked because he had previously been designated as a habitual traffic offender pursuant to section 322.264(1)(b), Florida Statutes (2006), and thus could not be convicted of violating section 322.34(2), Florida Statutes (2006). Section 322.34(2) expressly states that it does not apply to those who have been designated "habitual traffic offenders," as defined in section 322.264.

The district court remanded with instructions to the trial court to either attach portions of the record conclusively refuting the appellant's claim that he cannot be convicted under section 322.34(2) where he has previously been designated as a habitual traffic offender, or, in the alternative, to hold an evidentiary hearing at which the defendant may prove his claim.

Morges v. State, 33 So. 3d 115 (Fla. 1st DCA 2010).

The district court reversed the trial court's denial of defendant's motion for acquittal on a charge of arson and affirmed convictions for robbery and grand theft of an automobile.

A van was stolen from a medical supply company and later was seen to be parked behind a same-day loan business. Two men wearing hooded sweatshirts were observed exiting the van and approaching the store. Shortly thereafter, these men were seen running from the store to the van with a cash drawer. The van fled at a high rate of speed until coming to a stop at the end of a street. The van was on fire. Witnesses directed law enforcement in the direction in which the van occupants were seen fleeing on foot. With the assistance of a police dog, law enforcement approached a residence. A man, a woman, and a child were outside in an automobile. When police approached, a gun was observed being held by the child in the back seat of the automobile. The surname given by the male occupant of the vehicle was found to match an outstanding warrant. According to police, defendant was located in the residence. A black ski mask was found in the residence, as was ten pounds of marijuana. More than $600 was found in a bundle on top of the refrigerator.

At the conclusion of the state's case-in-chief, defendant moved for a judgment of acquittal arguing, in part, that the state produced "no evidence that links [defendant] to the robbery or the theft of the car or the arson." The trial court denied the motion as to all three charges. The district court stated that, while it was likely one of the men poured the gas about the van before fleeing, there was no evidence of record suggesting who poured the gasoline or who lit the fire. The district court vacated the arson conviction and remanded for resentencing.

Arrest, Search and Seizure

Gonzalez v. State, 38 So. 3d 226 (Fla. 2d DCA 2010).

The district court affirmed the trial court's denial of defendants' motions to suppress as to the cocaine found on one defendant during a traffic stop and reversed denial of motions to suppress as to evidence obtained from the residence of codefendants pursuant to a search warrant. The court remanded with instructions that the trial court vacate the codefendants' judgments and sentences for manufacture of cannabis, possession of cannabis, and possession of drug paraphernalia. The court affirmed the judgment and sentence of one defendant for possession of cocaine.

Two codefendants were each charged with manufacture of cannabis, possession of cannabis, and possession of drug paraphernalia as a result of evidence seized during the search of their home. One defendant was also charged with possession of cocaine as a result of evidence obtained during the traffic stop. They filed identical motions to

suppress, arguing that the traffic stop was illegal and that the affidavit for the search warrant was insufficient to establish probable cause.

The trial court concluded that the traffic stop was valid. The district court agreed and affirmed without further comment. The trial court found that the affidavit for the search warrant lacked probable cause but determined that the evidence seized during the execution of the warrant was nevertheless admissible under the good faith exception established in United States v. Leon, 468 U.S. 897 (1984). The district court disagreed and found that the good faith exception was inapplicable in this case.

State v. Goodwin, 36 So. 3d 925 (Fla. 4th DCA 2010).

The district court reversed the trial court's order granting defendant's motion to suppress. The district court held that asking for a person's driver's license amounts to only a consensual encounter, but asking also for a person's registration and proof of insurance converts the consensual encounter into an investigatory stop.

Defendant drove an SUV into a public housing complex to an area where no vehicles were permitted. The SUV went past a police patrol officer's car and then went around to the back of the complex. The officer thought defendant was lost and would do a u-turn to exit. When defendant did not exit after five minutes, the officer drove to the back of the complex. She saw the SUV parked at an angle. The officer pulled up behind the SUV, but did not block it in. She did not turn on her overhead lights. For safety, she turned on her spotlight to see inside the vehicle.

The officer walked up to the SUV, which was running. The officer approached the driver's side with a flashlight. She asked defendant what he was doing in the complex. Defendant responded that he was looking for his friend. The officer was skeptical and asked defendant for his driver's license, registration, and proof of insurance. Defendant opened the center console. The officer saw a small amount of cannabis wrapped in plastic. She asked defendant to step out of the SUV and took him into custody. A pat-down search revealed controlled substances in defendant's pocket.

The state charged defendant with possession of cannabis and controlled substances. In his motion to suppress, defendant argued that the officer conducted an investigatory stop without reasonable suspicion of a crime. The state responded that the officer and defendant were engaged in a consensual encounter when the officer saw the cannabis in plain view.

The trial court granted the motion to suppress, but not for the reason which defendant argued. Instead, the trial court reasoned that asking for a person's driver's license amounts to only a consensual encounter, but asking for a person's registration and proof of insurance converts a consensual encounter into an investigatory stop.

According to the trial court, police have no reason to ask for registration and proof of insurance other than to conduct a criminal investigation into whether the vehicle

belongs to the person and whether the person has proper insurance. Based on those legal conclusions, the court found there was no reasonable suspicion to justify the stop.

The defendant asked the district court to affirm based on an argument that the officer's use of the spotlight and flashlight constituted a show of authority for which a reasonable person in defendant's position would not feel free to leave, thus amounting to an investigatory stop without reasonable suspicion of a crime. The district court held that the officer's mere use of her spotlight and flashlight did not transform the consensual encounter into an investigatory stop. And the court stated that it was not aware of any authority holding that asking for a person's registration and proof of insurance converts a consensual encounter into an investigatory stop.

The district court stood by the principle that "[t]he mere questioning of an individual, including a police request for identification, does not amount to a Fourth Amendment detention." State v. Dixon, 976 So. 2d 1206, 1208 (Fla. 4th DCA 2008). The district court held that requesting license, registration, and proof of insurance is a reasonable way to verify a person's identity.

State v. E.A., 35 So. 3d 1006 (Fla. 3d DCA 2010).

The district court reversed an order granting the juvenile defendant's motion to suppress and remanded for the trial judge to enter adequate findings of fact determining the credibility of testimony on the issue of whether or not a seizure within the Fourth Amendment had occurred to implicate a finding on probable cause.

At the motion to suppress hearing, a police officer testified he approached the car in which defendant was a passenger because the vehicle was blocking the entrance to the driveway to a residence. As the officer approached the vehicle, he smelled burnt marijuana emanating from the car. He shined his flashlight through the open window and saw defendant holding a bag of suspect marijuana between his legs. The officer removed defendant from the car and placed him under arrest.

Defendant testified that his car was parked next to an abandoned residence. He stated he was across the street from the car when he first saw a police officer. He crossed back to his car and, as he was getting into the car, the officer approached defendant with his gun drawn and ordered him out of the vehicle. Defendant consented to a search of his person and contends the officer found nothing. The trial court granted the motion to suppress solely upon the finding that defendant did not commit a parking violation or law violation and, thus, there was no reasonable suspicion for the stop.

On appeal, defense and the state agreed the officer's initial approach to the vehicle was lawful. The state asserted error in the trial court's failure to include in its written order credibility findings resolving the conflict in testimony between defendant and the officer. The factual resolution on credibility is necessary in order to determine whether or not there was a Fourth Amendment seizure before addressing probable cause for the seizure of the marijuana and ensuing arrest of defendant.

The defense argued that the state failed to preserve the issue for appeal by failing to get a factual ruling from the trial court. The district court rejected this argument, stating that, because the trial judge first ruled, incorrectly, that there was no reasonable suspicion to uphold the stop, he granted the motion to suppress without ever addressing the issue of probable cause for the arrest. The state was left with no opportunity to object to the failure of the trial court to resolve the conflict in testimony on the issue of whether or not a valid Fourth Amendment seizure had occurred.

The district court reversed the order granting the motion to suppress and remanded for the trial judge to resolve the conflict in testimony

Morales v. State, 35 So. 3d 122 (Fla. 3d DCA 2010).

The district court affirmed defendant's convictions and sentences for grand theft auto and fleeing or eluding a police officer.

After observing defendant drive the wrong direction on a one-way street, an officer attempted to pull over defendant's vehicle with his emergency lights. The officer ran the license plate from defendant's vehicle and learned that it had been reported stolen. As the officer opened his car door, the defendant sped away, running a red light. The officer followed with lights and siren on until defendant stopped in a parking lot. The officer approached with gun drawn and ordered defendant to lie flat on the ground. After defendant resisted, the officer pulled defendant out of the vehicle. Defendant curled up, flailing his arms, making it difficult for the officer to handcuff him. Defendant told the officer that he had gotten the car from a friend. The officer observed a broken steering column, wires sticking out of the ignition and that the ignition had been removed. The officer was unable to turn off the vehicle, which had to be towed with engine on. Defendant was charged with third-degree grand theft of a vehicle, willfully fleeing or attempting to elude a police officer, and resisting an officer without violence.

At trial, the vehicle's owner testified that the car the defendant was driving belonged to him and that it had been reported stolen. It was returned to him three weeks later with a hole in the ignition and in undriveable condition. A jury returned a guilty verdict on all counts.

On appeal, defendant contended the evidence was insufficient to support convictions for grand theft auto and fleeing or eluding. He contended the evidence was circumstantial and did not refute the reasonable hypothesis of innocence—that the car was not stolen when defendant drove it and that, even if it were, defendant had no knowledge that it was stolen. Further, he argued that the state presented no evidence that defendant willfully fled with knowledge that the officer ordered him to stop.

The district court concluded that defendant's reasonable hypothesis of innocence that the car belonged to a friend was refuted by the fact that he could not provide the name or address of the friend, and the owner of the vehicle testified that the vehicle had been missing for approximately three weeks after it had been stolen. Unless satisfactorily

explained, proof of possession of recently stolen property gives rise to an inference that the person in possession of the property knew, or should have known, that it was stolen. See § 812.022(2), Fla. Stat. (2009).

The district court held that the trial judge correctly determined that, beyond a reasonable doubt, the jury could find that, viewing evidence in a light most favorable to the state, the state proved all elements of grand theft auto and willfully fleeing or eluding a police officer.

State v. Ameqrane, 39 So. 3d 339 (Fla. 2d DCA 2010).

The district court reversed an order granting defendant's motion to suppress, holding that the trial court erred in its legal conclusion that a police officer who conducted a traffic stop of defendant's vehicle did not possess reasonable suspicion that defendant's faculties were impaired by alcohol so as to justify a request to perform a horizontal gaze nystagmus (HGN) field sobriety test or any other field sobriety test.

Defendant was charged with one count of driving under the influence and one count of escape from law-enforcement custody. He filed a motion to suppress evidence of the field sobriety testing and his statements. The arresting officer testified that he observed defendant's vehicle speeding, and he conducted a traffic stop. Once the vehicle was stopped, the officer approached defendant's vehicle, began talking to him, detected alcohol on his breath, and noticed that his eyes were bloodshot and glassy. The officer testified that defendant admitted he had consumed alcohol. The officer asked defendant to step out of the vehicle to determine if he was driving under the influence of alcoholic beverages. The officer first performed an HGN test of defendant's eyes and concluded that his eyes were "bouncing everywhere" and that it appeared defendant had "quite a bit of alcohol in [his] system." He asked defendant to submit to additional field sobriety exercises. Defendant vacillated between agreeing to additional sobriety testing and refusing to undergo such testing, eventually stating, "Just go ahead and take me to jail." Defendant refused further sobriety testing, and he was arrested for DUI.

In his motion to suppress, defendant argued that the smell of alcohol and his bloodshot eyes were insufficient to establish reasonable suspicion to conduct any field sobriety testing. The trial court agreed, concluding that the officer did not have sufficient reasonable suspicion that defendant's faculties were impaired due to consumption of alcohol and, therefore, he could not request field sobriety testing. The trial court stated that defendant could be detained only long enough to be issued a citation for speeding. Accordingly, the court suppressed all evidence and statements obtained by the officer after his request that defendant perform the HGN field sobriety exercise. This included evidence of the HGN field test, defendant's refusal to participate in additional field sobriety tests, and any evidence related to subsequent blood tests.

To request that a driver submit to field sobriety tests, a police officer must have reasonable suspicion that the individual is driving under the influence. The purpose of a DUI investigation is to confirm or deny existence of probable cause for a DUI arrest. In

this case, the officer testified that he observed defendant speeding at four o'clock in the morning. When he approached defendant to issue a citation, the officer smelled alcohol and observed defendant's glassy, bloodshot eyes. Upon performing the HGN test, the officer observed that defendant's eyes were jerky and bouncy and concluded that he had apparently consumed "quite a bit" of alcohol. The district court held that these facts provided sufficient reasonable suspicion to ask defendant to submit to further field sobriety tests to confirm or deny whether there was probable cause for a DUI arrest.

The district court found no basis to support the trial court's conclusion that the officer lacked reasonable suspicion to require field sobriety testing under the undisputed facts. The court reversed the suppression order and remanded for further proceedings.

State v. Gamez, 34 So. 3d 245 (Fla. 2d DCA 2010).

The district court reversed the trial court's order granting the defendant's motion to suppress evidence of illegal narcotics.

A police detective stopped defendant's car after it failed to stop at two stop signs. Defendant appeared nervous and was shaking. According to the detective's testimony, the detective asked defendant if he could talk to him by the detective's car, away from the passengers in defendant's vehicle. When they walked back to his car, the detective asked defendant if he had any objection to the detective searching his car and defendant said he did not. He then asked defendant if he had anything illegal on him. Defendant said no and the detective asked if he could double check. Defendant raised his hands above his head and spread out his feet, indicating that he was giving consent to search his person.

The detective patted down defendant and defendant did not pull away or otherwise indicate that he did not want to be searched. The detective felt a "squishy" material wrapped in plastic on defendant's waistline. Based on his training and experience, the detective believed the plastic contained methamphetamine, marijuana or cocaine. The detective asked defendant to empty his pockets, and defendant took out a couple of cell phones and a roll of money. The detective asked defendant if he could double check his pockets and defendant again raised his hands. The detective found another roll of money and methamphetamine in a plastic bag.

After the hearing on the motion to suppress, the trial court stated that it would suppress evidence found in defendant's pants because there was not clear and convincing evidence that defendant gave the detective consent to search his person when he lifted his hands and spread his feet. But the written order granting the motion to suppress, prepared by defendant's attorney, differs from the trial court's oral findings because it states that the consent was a concession to the detective's authority.

The district court stated that, under Florida case law, consent to search may be in the form of conduct, gestures, or words. The court further stated that the facts were not in dispute at the hearing on the motion to suppress. When the detective asked defendant if he could check to see if he had anything illegal on him, defendant raised his hands above

his head and spread out his feet. Further, when the detective asked to search him a second time, defendant responded the same way by raising his hands. The court concluded that these actions conveyed defendant's consent to search his person. Defendant's subsequent behavior supports the conclusion that defendant consented to a search of his person, because defendant never pulled away or otherwise indicated that he did not want to be searched.

The district court concluded that defendant's consent to search was voluntary. The court found no evidence supporting defendant's argument that his consent was a mere acquiescence to police authority. Defendant never testified that he felt his consent was not voluntary or that he felt he did not have a choice. The district court also concluded that there was no evidence that defendant suffered from a vulnerable, subjective state, caused by a mental condition, age, intelligence, or education. The court also noted that there was no evidence of a coercive circumstance or any coercive conduct by the detective, such as a show of force, threatening conduct, or a prolonged detention, or deception. The court held that the fact that defendant was subject to a traffic stop and was asked to talk to the detective by his car was insufficient to support a finding that his consent was involuntary.

Jackson v. State, 36 So. 3d 132 (Fla. 5th DCA 2010).

The district court affirmed the conviction of defendant, who argued on appeal that police officers lacked "reasonable suspicion" to believe the car they stopped contained a person who was the subject of outstanding arrest warrants, justifying the detention.

A wanted felon with numerous outstanding arrest warrants eluded deputies following a high speed pursuit. A week later, the sheriff's office received an anonymous tip that he was staying at a particular house. A deputy contacted the wanted felon's bail bondsman, who also desired to apprehend that person. The bondsman related that he had driven by the same house earlier in the day and "thought he had seen [the wanted felon] out in front of the house." The bondsman agreed to meet officers in the area of the house to assist them in attempting to find him. Once the bondsman arrived, it was agreed that he would watch the house and notify officers if he saw the wanted felon. Around midnight, the bondsman saw a car stop at the house. Several people congregated around the car, then got in it and hurriedly drove away. The deputy testified that the bondsman informed him that the wanted felon was a passenger in the car. The bondsman denied telling the deputy that the person was in the car, but acknowledged that he informed deputies that the car was leaving at an accelerated rate of speed and that they should stop the car. The deputies stopped the car and ordered the occupants out at gunpoint. The wanted felon was not among the occupants.

However, defendant was one of the occupants in the car. During the stop, deputies located a gun beneath defendant's seat and arrested him for possession of a firearm by a convicted felon. The trial court did not specifically resolve the apparent conflict in the testimony regarding what the bondsman had told the deputies. It did find that the stop was not the product of "whim, caprice or desire to harass all drivers leaving

[the wanted felon's] house." It concluded that, under the totality of the circumstances, the police officers acted reasonably in stopping the vehicle. The district court agreed.

The district court held that the relevant question is whether the deputies had a reasonable belief that the wanted felon was in the car and, therefore, justifiably stopped the car. The district court concluded that they did. Deputies were looking for the wanted felon. They believed he might be found at a particular house, based on information supplied by an anonymous tip and a bondsman. They set up surveillance for the express purpose of locating him. When the bondsman advised them to stop a car that was leaving hurriedly, it was reasonable for deputies to believe that the wanted felon was in the car, whether the bondsman actually saw him or not.

Whitfield v. State, 33 So. 3d 787 (Fla. 5th DCA 2010).

The district court reversed defendant's judgment and sentence for trafficking in over twenty-eight grams of cocaine. Defendant pled nolo contendere to the charge, reserving his right to appeal the trial court's denial of his motion to suppress evidence of the cocaine seized during an automobile search. Defendant contended that evidence of cocaine should have been suppressed because it was found in his vehicle pursuant to an illegal detention.

The arresting trooper initiated a traffic stop for unlawful speed on a highway. Defendant was driving a rental car with his son as passenger. They were on their way to Georgia from the South Florida area. The trooper asked defendant to step out of the car and asked for his driver's license. He had defendant return with him to the trooper's vehicle. Defendant was nervous throughout the encounter. The trooper engaged defendant in idle conversation to calm him down. This consisted of a series of rapid-fire questions on a wide range of topics, beginning with, "What are you up to today?" While he waited for dispatch to report back on the status of defendant's driver's license and warrants check, the trooper asked defendant his occupation. Defendant answered that he was in the commercial lawn care business. The trooper testified that he did not believe defendant owned his own business because defendant gave him common brand names of equipment, not brands the trooper knew were used for commercial purposes.

After checking defendant's license, about six to seven minutes into the traffic stop, the trooper, inquired about the car's registration. He required defendant to remain by his police vehicle while he went up to the passenger side of defendant's car and asked the son to give him the papers. As he did so, he asked the son questions similar to those he had been asking defendant. When his review of the rental car documents revealed that defendant was not the renter of the vehicle, defendant told the trooper that his friend, "Terry," had rented it because defendant did not have a credit card. Defendant said he was added as an additional driver. The rental agreement did have a page attached that listed defendant as an authorized driver. About twelve minutes into the stop, the trooper ran a check to verify the car was not reported stolen.

Fifteen minutes into the stop, the trooper inquired whether defendant had a criminal record. Defendant admitted to past arrests. The next several minutes included questions about which crimes he had been arrested for, which were the most serious, which were the most minor, whether any were homicides, and the like. Then, eighteen minutes into the traffic stop, the trooper asked defendant whether he had any contraband, narcotics, weapons, or large sums of cash in the car. Defendant answered "no" to all of his questions. The trooper then asked defendant for consent to search his car. Defendant declined, citing the delay and the rain. As a result, at 19:55 minutes into the traffic stop, the trooper called for a K-9 unit. (Time references refer to the number on the video screen for the DVD recording of the stop.)

Although the trooper had confirmed the car was not stolen, he resumed examining the authorized driver documentation, expressing doubt about its authenticity. He then informed defendant he was going to verify that he was an authorized driver of the vehicle. At 24:53 minutes into the stop, the trooper gave dispatch the phone number for Avis on the rental agreement and asked dispatch to find out whether defendant was an authorized driver. At 26:13, the trooper can be heard on the video telling dispatch or another officer that "the guy doesn't want me to search so I am waiting on Harold," presumably, the K-9 unit. At 26:45, the K-9 unit is seen driving past their location on the opposite side of the turnpike.

The trooper gave defendant a completed written warning at 27:26. It was undisputed at the hearing, that defendant was still not free to leave because the trooper had not yet received confirmation that defendant was an authorized driver of the rental car. At 27:55, the trooper instructed defendant's son to exit the vehicle for the canine sniff. At 28:36, dispatch informed the trooper that defendant was an authorized driver. The canine does not appear in the video until 28:57. Because the turnpike is divided with guardrails, the K-9 unit had to go two to three miles past their location to turn around. Defendant said at the suppression hearing: "I already had the ticket in my pocket at that point when we was waiting for the officer to go down and come back." Shortly thereafter, the canine alerted, the officers conducted a search, and drugs were discovered.

The trial court rendered a written order denying defendant’s motion to suppress. Although the trial court found that the stop lasted approximately thirty minutes, because the K-9 unit arrived within a minute of the verification that defendant was an authorized driver, the court found the delay in conducting the canine search was not unreasonable and defendant was not entitled to suppress the evidence. Defendant contended on appeal that the charges against him stemmed from an unreasonably prolonged traffic stop and, therefore, the trial court erred in denying his motion to suppress.

The district court stated that, absent an articulable suspicion of criminal activity, the time an officer takes to issue a citation should last no longer than is necessary to make any required license or registration checks and to write the citation. The trial court expressed at the hearing that the trooper "did everything he could to expedite the stop" because he called for the canine as soon as consent was refused and it took time for the closest canine to get there. It is well established that the use of a narcotics dog to sniff a

vehicle does not constitute a search and may be conducted during a consensual encounter or traffic stop. If a properly trained police dog alerts to the presence of illegal drugs during this time period, the officer will have probable cause for a vehicle search.

Here, the trooper stopped defendant's vehicle for speeding and immediately indicated to defendant he was issuing him a written warning for excessive speed. Defendant's vehicle could be properly subjected to a canine search as long as the search was done within the time required to issue the citation, provided the time was not unreasonably prolonged. In this case, the routine investigation had been completed within approximately twelve minutes after defendant's vehicle was stopped and that the amount of time reasonably required to do the necessary license/warrant checks and issue the citation – even including the several minutes expended on verifying defendant's authority to drive the car – was significantly less than the twenty-nine minutes expended. The trooper had completed all routine investigation within twelve minutes of the traffic stop and, but for the extended interrogation of defendant, there is no apparent reason why the citation should not have been issued within a short time thereafter.

The district court stated that it did not find the length of this stop to be justified by the circumstances. Even adding up separately the amount of time to: (1) run the registration/warrants checks and stolen car checks, (2) complete the warning paperwork and (3) verify that defendant was authorized to drive the car, the time reasonably required for this traffic stop was several minutes less than the time that was taken.

The court stated that when a driver and passengers are ordered from a vehicle, they are exposed to the dangers of standing on the shoulder of the roadway. In this case, although it was daylight, it was raining. In Florida, thirty minutes spent standing on the shoulder of a roadway exposed to the sun and heat can easily be an adverse health event. It is a humiliating and, for some, a frightening experience. Sniff searches are not free from error, both because of the limitations of the canines and because drug residue can often be found on common items, like currency. Even in innocent circumstances, such a search can lead to further intrusive, time-consuming and destructive searches.

The state argued, alternatively, that, even if the stop were unreasonably prolonged, the trooper had a reasonable, articulable suspicion that defendant was engaging in illicit drug activity.

The district court found that, even though defendant's story about his business was not credible, the facts fell short of establishing reasonable suspicion of criminal activity sufficient to detain defendant past the time reasonably necessary to issue him a citation for speeding. The court stated that the stop should have been concluded by the issuance of the written warning. The district court concluded that the fact that the dog sniff began shortly after the traffic stop was concluded does not save the search.

Young v. State, 33 So. 3d 151 (Fla. 4th DCA 2010).

On rehearing, the district court affirmed defendant's convictions for robbery with a firearm or other deadly weapon and other charges. The court rejected defendant's arguments that the trial court erred in denying his motion to suppress evidence.

Defendant contended that the officer who initiated the vehicular stop which preceded the search did not have probable cause. The district court stated that there was evidence of speeding as well as a reasonable suspicion that the occupants of the vehicle had committed a crime. Defendant also claimed that the court improperly admitted a test that a detective made to determine the operability of a firearm. The district court concluded that the test was relevant and admissible. Defendant challenged his sentence, claiming that the trial court relied on improper factors. The district court rejected this argument and affirmed on all issues.

Corker v. State, 31 So. 3d 958 (Fla. 1st DCA 2010).

The district court reversed the trial court's order revoking defendant's probation based on a finding that that he had violated the terms of his probation by possessing marijuana. The district court held that evidence of a violation was insufficient to support revocation of probation.

A policeman testified at the revocation hearing that police found marijuana in a makeup pouch concealed in the back seat of defendant's car near where a female passenger was sitting. The officer testified that defendant said, "I know she did this stuff. I shouldn't have let her in my truck." The trial court made a finding that defendant, who was in the front seat and had been driving the vehicle that was searched, knew the marijuana was in the car.

The district court held that, even if this was sufficient proof of actual knowledge that marijuana was present in the vehicle, it was insufficient to prove that defendant had the ability to maintain dominion and control of the marijuana at any time. The court held that there was no proof that defendant saw the marijuana before the police search or that it was ever within his reach. Thus, the state failed to carry its burden to prove constructive possession at the revocation hearing by a preponderance of the evidence.

Torts/Accident Cases

Hair v. Morton, 36 So. 3d 766 (Fla. 3d DCA 2010).

The district court reversed the trial court's order dismissing plaintiff's personal injury suit with prejudice as a sanction for fraud upon the court and remanded with instructions to reinstate the complaint.

A truck driven by defendant ran a stop sign at a high rate of speed and collided with the car driven by plaintiff. Plaintiff filed a negligence action against defendant which sought damages for injuries suffered from the collision.

In response to interrogatories, plaintiff replied that she "ha[s] had various physical infirmities including but not limited to hypertension and an STD but [she] was not suffering at the time of the accident." She further claimed damages from the collision for injuries to her "head, upper back, lower back and herniated disk." Her interrogatory response disclosed the names of the physicians who had treated her prior to and after her accident, as well as the medical facilities where she had received treatment.

At her deposition, plaintiff testified that she suffers from HIV/AIDS, and responded to defense counsel's questions that she was tired and weak related to HIV, but had no other physical problems, and that she was determined to be disabled by Social Security. A doctor who had treated her for HIV/AIDS until shortly before the 2004 automobile accident, stated that he had prescribed drugs for her complaints of muscle pain, joint pain, lower back pain, and feeling tired. The doctor testified that he diagnosed osteoarthritis and, shortly before the accident, completed a Social Security form stating that plaintiff suffered from HIV, hypertension, and chronic lower-back pain. He also testified that he had seen her for treatment at approximately forty appointments and that she had never visited him with a chief complaint of lower back pain. At one examination, he did make a finding of lower-back tenderness of moderate intensity. However, he never ordered an MRI of her spine or a surgical consult concerning back pain. He conducted a neurological exam that did not suggest a finding of neurological involvement that would cause radiating pain.

In December 2006, defendant filed a motion to dismiss the negligence claim as a fraud upon the court, based on plaintiff's answers to interrogatories, her deposition, and the doctor's deposition. Defendant contended that plaintiff's denials of any lower back problems before this accident were untrue as shown by the doctor's deposition, which allegedly revealed that plaintiff had significant orthopedic problems requiring long-term narcotic medication. The trial court granted the motion to dismiss with prejudice.

The district court concluded that, while plaintiff's discovery responses might preclude some of her claimed damages regarding her lower back, they do not address the issue of liability, nor address all of her claimed damages so as to justify dismissal of her action. The court held that any allegations against plaintiff regarding inconsistencies, non-disclosure, or even falseness should be dealt with through cross-examination or impeachment before a jury – not through dismissal of her action.

Charron v. Birge, 37 So. 3d 292 (Fla. 5th DCA 2010).

The district court reversed the trial court's order granting summary final judgment in favor of defendant and its subsequent order denying rehearing.

Plaintiff sued defendant, alleging negligence in relation to a motor vehicle. Plaintiff was a passenger on a motorcycle when the car traveling ahead of the motorcycle stopped and the motorcycle driver was unable to avoid a collision, which caused the bike to flip and come to rest on top of the plaintiff.

Defendant slowed or stopped at a yield sign rather than merging into traffic. The motorcycle rear-ended his car. After he was sued, defendant filed a motion for summary judgment, asserting that a presumption of negligence attached to the motorcycle driver as the following driver, that plaintiff failed to overcome the presumption, and, thus, defendant was not liable for the accident as a matter of law.

Following a discussion of Florida case law related to the presumption, the district court stated: "The presumption clearly does not apply where a passenger of the following vehicle sues the lead driver for his negligence. The issue in this case is whether [defendant] was negligent as the forward driver, not whether the presumed negligence as to the following driver was rebutted." The court held that to the extent that there exists evidence sufficiently demonstrating that defendant was negligent as the forward driver, summary judgment against plaintiff is improper whether or not the presumption of negligence as to the following driver was rebutted. In turn, a failure to rebut the presumption of the following driver's negligence only leads to the determination that the following driver was the sole proximate cause of the accident if there is no evidence to sufficiently demonstrate that defendant was negligent.

The district court stated that the record contained evidence that defendant suddenly stopped at a juncture where merging traffic yields to vehicles traveling on another highway. To the extent that defendant suddenly stopped, in deciding whether defendant was entitled to summary judgment, the inquiry is not whether the following driver should have anticipated defendant's sudden stop, but whether defendant's sudden stop was negligent. Under one view of the evidence, defendant was negligent because, even though he had the right-of-way on a major thoroughfare, he suddenly stopped his car, erroneously believing an oncoming truck had the right-of-way, to the point that he even waved the truck driver on. There is no suggestion that the truck driver was not operating his vehicle correctly. Defendant stopped because the truck driver reached the intersection as defendant reached the point of merger and defendant was not sure what was happening.

But, the court continued, if defendant wanted to stop until he was sure it was safe to proceed, or if he wanted to let the truck driver have the right-of-way, he had to do so in a way that would not place others in a zone of risk of harm. There is a difference between stopping for a reason and unnecessarily stopping.

The district court held that it was also error to enter summary judgment under the facts on the issue of whether the rear driver should have anticipated the lead driver's stop at the location where the accident happened. Based upon the evidence, the question whether defendant's alleged sudden stop occurred at a time and place where a following driver should reasonably have anticipated a sudden stop is a question of fact.

The district court held that the issue properly framed is not whether any presumption of the following driver's negligence was rebutted, but whether there is record evidence that defendant was negligent as the forward driver and solely caused, or caused in connection with the following driver, the injuries to plaintiff. The court stated

that evidence could support a verdict for negligence on the part of defendant because there is evidence that he suddenly stopped in the middle of a highway, that he did so unnecessarily, under the mistaken belief that a truck driver might have the right to proceed, and that he did so under circumstances where there was following traffic endangered by the unnecessary stop. Therefore, the court held, entry of summary final judgment in defendant's favor was error and the case was remanded for a new trial.

Nason v. Shafranski, 33 So. 3d 117 (Fla. 4th DCA 2010).

The district court reversed the trial court's award of damages in a personal-injury lawsuit in which the defendants admitted negligence in causing the accident but disputed the amount of damages claimed by plaintiff.

On appeal, plaintiff contended that the trial court erred by allowing defendants to present expert medical testimony regarding unnecessary surgeries and thereby shifted the blame for plaintiff's damages from defendants to plaintiff's treating physician. Plaintiff argues that the trial court compounded the error by refusing to give plaintiff's requested jury instruction that the defendants were responsible for any damages resulting from any negligent or improper medical treatment. The district court agreed that the trial court's refusal to give such an instruction was reversible error and remanded for a new trial.

Driver's Licenses

Lyons v. State, 43 So. 3d 737 (Fla. 1st DCA 2010).

The district court reversed as to one count of driving without valid commercial license and affirmed other counts of driver's license convictions.

Defendant was convicted of one count of possession of a fraudulent driver's license and two counts of operating a commercial motor vehicle without a valid commercial license. The district court reversed the second count because the sole evidence adduced to support the charge should have been privileged under the crash report statute. § 316.066(7), Fla. Stat. (2008).

Gee v. State, 38 So. 3d 806 (Fla. 2d DCA 2010).

The district court reversed and remanded defendant's 48-month sentence for driving while license was revoked as a habitual traffic offender.

After approving a negotiated plea of 364 days in county jail for this offense, the trial court deferred defendant's sentencing date. But for reasons beyond his control—which were promptly communicated to the court—defendant was unable to appear as scheduled. When defendant did appear for sentencing, the trial court, without considering whether his failure to appear was willful, imposed the harsher sentence. The district court held that the trial court abused its discretion in this regard.

Defendant faxed a letter that reached the court prior to the original sentencing date. In the letter, defendant explained that he was out of the area and lacked funds or means of transportation. He further stated that he had attempted to contact his lawyer but that counsel was away from his office on an emergency. When defendant did appear before the trial court for sentencing, he further explained the circumstances of his failure to appear. No one questioned his credibility, and the trial court never addressed or made findings on whether his failure to appeal was willful. The district court reversed and remanded for the trial court to sentence defendant in accordance with the original plea agreement with appropriate credit for time served.

Dep't of Highway Safety and Motor Vehicles v. Icaza, 37 So. 3d 309 (Fla. 5th DCA 2010).

The district court granted the Department of Highway Safety and Motor Vehicles' (DMV's) petition for writ of certiorari, asking the court to review the circuit court's certiorari opinion quashing the administrative hearing officer's order that sustained the suspension of defendant's driver's license under section 322.2165, Florida Statutes. The basis for the suspension was his refusal to submit to a breath-alcohol test.

Defendant crossed solid double yellow lines to pass another vehicle, which was a police car. The officer stopped defendant and observed that his eyes were bloodshot, watery, and glassy; he staggered; his speech was slow and thick-tongued; and the odor of alcohol was on his breath. He was placed under arrest for driving under the influence of alcohol. The Implied Consent Law was read to defendant, who then refused to submit to a breath test. The officer, on behalf of the DMV, suspended his license pursuant to section 322.2615(1)(a), Florida Statutes (2007). Defendant invoked his right to formal review of that suspension under section 322.2615(1)(b)(3), and the subsequent administrative hearing resulted in an order that sustained the suspension.

Provisions of the 2007 version of section 322.2615 did not require the hearing officer to address the issue of the lawfulness of the arrest because the 2006 amendment of that statute had deleted that requirement. Hence, the hearing officer did not address that issue at the administrative hearing. Defendant sought certiorari review by the circuit court, which granted certiorari and quashed the suspension order.

The circuit court held that there was not substantial competent evidence to support the suspension because the DMV failed to produce evidence regarding the lawfulness of the arrest in accordance with Department of Highway Safety & Motor Vehicles v. Pelham, 979 So. 2d 304, 305 (Fla. 5th DCA), review denied, 984 So. 2d 519 (Fla. 2008). In *Pelham,* which was not rendered until after defendant petitioned for review in the circuit court, the Fifth District reasoned that, despite the 2006 amendment, section 322.2615 had to be read in pari materia with section 316.1923, Florida Statutes (2007), and that any refusal to take a breath-alcohol test had to be "incidental to a lawful arrest." Hence, under Pelham, the lawfulness of the arrest is an issue that must be addressed at the administrative hearing in order to sustain a driver's license suspension.

Despite the fact that the circuit court applied the outdated 2005 version of section 322.2615, it arrived at the correct conclusion under Pelham when it held that the lawfulness of the arrest is an issue that must be addressed. The district court stated that its holding in Pelham does not conclude the matter, however, because Pelham did not involve the issue of remand. The court concluded that the circuit court applied the wrong law when it refused to remand the case to the hearing officer. Because the hearing officer did not have the benefit of Pelham, he relied on the provisions of section 322.2615(7), which limits the scope of review to enumerated issues that do not include the lawfulness of the arrest. Therefore, the DMV did not address that issue at the hearing. After Pelham was rendered, the DMV sought remand so it could have the opportunity to comply with that decision, but its motion was denied.

The district court, stating that the DMV was denied procedural due process, granted the DMV's petition for writ of certiorari and quashed the circuit court's opinion. However, the court stated, because Pelham requires consideration of the lawfulness of the arrest and in light of the fact that the Florida Supreme Court has decided to address the issue, the court's mandate was stayed until the supreme court renders its decision.