FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

January-March, 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)

Davis v. State, 31 So. 3d 887 (Fla. 4th DCA 2010).

The district court reversed defendant's conviction of third-degree felony DUI. The court concluded the record lacked evidence of predicate prior offenses necessary to sustain a felony DUI conviction.

Defendant was charged by information with felony DUI pursuant to sections 316.193(1) and 316.193(2)(b)1., Florida Statutes (2005), which provide that a defendant is guilty of a felony DUI if he or she "is convicted of a third violation of this section for an offense that occurs within 10 years after a prior conviction for a violation of this section." Prior to voir dire, defense counsel stated he had filed a motion for a bifurcated trial. The state did not object, and the court granted the request.

The facts surrounding the instant DUI were presented to the jury. Before the verdict, the trial court clarified that parties had stipulated that if there was a guilty verdict, prior convictions would be determined by the court. Defendant was present, and all parties agreed. The jury returned a guilty verdict. Defense counsel requested that parties return on a later date to address prior convictions and conduct sentencing. He indicated the defense might stipulate to priors, but was not yet prepared to do so. At the sentencing hearing, prior DUI offenses were never mentioned, and no stipulation was presented, but defendant was adjudicated guilty of felony DUI and sentenced to 364 days in jail, followed by 36 months probation.

The district court stated that the requirement of prior DUI offenses is an element of felony DUI, which the state is required to prove beyond a reasonable doubt. Because the instant record lacks findings about prior DUI offenses or evidence establishing prior DUI offenses, the district court agreed that the state failed to satisfy this element. To cure this defect, findings about the predicate prior offenses would need to occur in the trial court. Defendant never validly waived his right to a jury trial as to his prior offenses.

The district court stated that it could not deem such an error harmless because there was no record evidence of the prior offenses to show that, if a jury trial had occurred during the second phase, defendant would most likely have been convicted of felony DUI, as the jury would have likely found the existence of the priors. In the absence of a valid waiver, defendant was entitled to have the same jury decide whether the state proved beyond a reasonable doubt all elements of the crime charged, meaning the prior offenses portion cannot be considered on remand. Alternatively, subjecting defendant to retrial as to the instant DUI would violate double jeopardy.

The district court reversed and remanded, directing the trial court to vacate defendant's adjudication and sentence for felony DUI and adjudicate him as to the instant DUI of which the jury found him guilty.

Chesser v. State, 30 So. 3d 625 (Fla. 1st DCA 2010).

The district court reversed and remanded convictions of defendant on two counts of driving under the influence (DUI) manslaughter.

That two people died in the accident was not in dispute. The state also had to prove that defendant, a driver who survived, was under the influence of alcohol, a chemical substance, or a controlled substance to the extent that his normal faculties were impaired immediately before the collision. Defendant contended the trial court erred in allowing the state to introduce, for this purpose, opinions of lay witnesses regarding the meaning of the word "throwed." The district court agreed and reversed on this basis.

Traveling east, defendant's vehicle crossed into westbound lanes and hit another vehicle. Both people in the oncoming vehicle died at the scene. Defendant was ejected from his vehicle. He was lying in the highway when witnesses arrived on the scene, where he remained unconscious for fifteen minutes. Two motorists testified that, after he regained consciousness, he began to scream, saying he "was throwed."

Over objection, the trial court allowed the state to introduce testimony from the witnesses regarding the meaning of "throwed." Defense counsel objected on grounds the testimony was "based purely on speculation and there won't be a foundation for those statements." The prosecutor responded: "[T]hose witnesses will tell you that, as young people who are the exact same age, to them that is a term in common usage that indicates a person's impaired or intoxicated. And it's a slang [sic] that's used."

Neither of the witnesses testified that defendant appeared to be "under the influence." Neither witness was offered as an expert or identified the basis for any opinion that defendant's use of "throwed" was an admission he was under the influence of drugs or alcohol.

The district court held that error in admitting the statement was not harmless. The court stated that the only contested issue was whether defendant was under the influence of alprazolam (Xanax) to the extent normal faculties were impaired at the time of the

accident. There was no alcohol in defendant's blood, and expert opinion testimony regarding the effect of alprazolam was conflicting. Non-expert witness testimony regarding the meaning of the word "throwed" may have been determinative, the district court stated in explaining its rationale for reversing and remanding for a new trial.

Mathis v. Coats, 24 So. 3d 1284 (Fla. 2d DCA 2010).

The district court reversed and remanded to allow defendant to file an amended complaint, and affirmed in all other respects the trial court's final summary judgment in favor of Pinellas County Sheriff Jim Coats, whom she sued alleging false arrest.

Defendant challenged the trial court's determination that she was under arrest when she was taken to Central Breath Testing (CBT). Second, she challenged the court's conclusion that a deputy had probable cause to arrest her for DUI. Third, she challenged denial of her motion to file an amended complaint.

Defendant was driving north on U.S. Hwy. 19 when a deputy saw her strike the center median, nearly sideswipe another vehicle, and then strike the center median again. A backup deputy stopped her. She does not contest the validity of the stop. The deputy told her that she failed to maintain a single lane and nearly caused a collision. According to the deputy, she seemed agitated and moved in a jerky fashion. He also testified that she had bloodshot eyes. In his written report, the deputy said she had slow coordination, exhibited difficulty following conversation, and had a flushed face.

Yet, she was cooperative, did not smell of alcohol, and had clear speech. At the scene, she reported that she had no sleep the previous night, took medication, and wore contact lenses. Although she denied being sick or injured, she later reported that she had a broken arm and complained of nausea at CBT. Based on his observations, the deputy administered field sobriety tests she did not satisfactorily complete. He concluded that she was driving under the influence, in violation of section 316.193, Florida Statutes.

The deputy handcuffed defendant, placed her in his cruiser, and drove her to CBT. There, she was subjected further field sobriety tests. She also submitted to a breath test; there was no indication of alcohol. Due to inconsistency between the breath test and field sobriety test results, the deputy requested a urine sample. She was given a DUI citation and taken to the jail's booking area. She was released from jail at noon the next day.

Defendant argued that the trial court erred in concluding that she was under arrest when she was placed in the cruiser at the scene of the stop because she was not actually arrested until after arrival at CBT. She also contended she was not under arrest at the scene because she was not told specifically that she was under arrest. She claims that she was being detained only for investigation. A determination of when she was under arrest is important to assess whether her false arrest claim is barred by the existence of probable cause.

A lawful arrest occurs when there is: 1) a purpose or intention to effect an arrest; 2) an actual or constructive seizure or detention by a person having power to control the person arrested; and 3) communication by the arresting officer to, and an understanding by, the person whose arrest is sought of the officer's purpose and intention to effect an arrest. Dep't of Highway Safety & Motor Vehicles v. Whitley, 846 So. 2d 1163, 1167 n.2 (Fla. 5th DCA 2003) (citing Kearse v. State, 662 So. 2d 677, 682-83 (Fla. 1995)).

Defendant was detained and, after failing to complete field sobriety tests, handcuffed and involuntarily transported to CBT. She was notified that her car would be impounded if alternate arrangements were not made to secure it. The district court concluded that, although the deputy told defendant why she was stopped and testified that he took her to CBT to continue the DUI investigation, these statements are insufficient to establish mere detention. The district court held that the trial court correctly concluded that defendant was under arrest at the scene of the traffic stop.

Solano v. State, 32 So. 3d 648 (Fla. 1st DCA 2010).

The district court answered the county court's rephrased certified question in the negative and affirmed the county court's order denying defendant's motion for postconviction relief as untimely under rule 3.850(b).

In 1978, the defendant pled no contest to two misdemeanors: driving with an unlawful blood alcohol level and reckless driving. Appellant was ordered to pay fines and court costs but no jail time, probation, or community service was imposed. More than 30 years later, in 2008, defendant filed a motion in county court to vacate and set aside his 1978 plea and sentence on grounds that the judgment and sentence was "constitutionally infirm" because it "shows that the [defendant] was not represented by counsel and does not indicate a waiver of counsel."

The district court held that the county court properly treated the motion as a rule 3.850 claim for postconviction relief. The court denied the motion as untimely, and certified a question of great public importance to the First District, which rephrased it:

Whether a conviction procured without affording the accused the right to counsel or without securing from the accused a proper waiver of the right to counsel is void and may therefore be collaterally attacked at any time, the time limits of Florida Rule of Criminal Procedure 3.850(b) notwithstanding.

The district court assumed defendant was indigent in 1978, that he had a right to counsel, and that he did not waive his right to counsel because the record (such that it is) did not refute the implicit claim in defendant's motion. The court noted that the record was silent as to why defendant sought to vacate the judgment and sentence 30 years later. The court noted that the case appeared to be a straightforward collateral attack on the 1978 conviction, governed by rule 3.850.

The district court began with the proposition that a motion for postconviction relief must be filed within two years after judgment and sentence become final. Fla. R. Crim. P. 3.850(b). The only surviving document from the 1978 proceeding was the two-page judgment and sentence. "After the time for filing 3.850 motions has passed, the State's interests in finality are more compelling." State v. Anderson, 905 So. 2d 111, 118 (Fla. 2005). Defendant did not argue that any of the rule's exceptions applied.

The district court stated that it would likely be impossible to determine whether defendant was advised of and waived his right to counsel. Defendant argued that the two-year time limit did not apply because the 1978 judgment is "void," and a void judgment may be collaterally attacked any time. He argued the judgment is void because the record does not show that he waived his right to counsel, or that the trial court conducted an inquiry pursuant to Faretta v. California, 422 U.S. 806 (1975).

Defendant cited Johnson v. Zerbst, 304 U.S. 458 (1938). The district court stated that Johnson was decided when the U.S. Supreme Court construed the scope of federal habeas relief to be limited to claims based upon the trial court's lack of jurisdiction. Four years after Johnson, in Waley v. Johnston, 316 U.S. 101 (1942), the Court "openly discarded the concept of jurisdiction, by then more a fiction than anything else . . . ." Wainwright v. Sykes, 433 U.S. 72, 79 (1977). Thereafter, although uncounseled conviction claims could be raised in federal habeas proceedings, it was no longer necessary for these claims to be characterized as involving a jurisdictional issue; and, although the U.S. Supreme Court's more recent decisions have made clear that certain uncounseled convictions lack the reliability necessary to impose imprisonment or to enhance a sentence in a subsequent proceeding, those decisions do not suggest that uncounseled convictions are "void" for a lack of jurisdiction. Allen v. State, 463 So. 2d 351, 358-59 (Fla. 1st DCA 1985). The district court stated that, whatever merit defendant's argument that the court lacked jurisdiction may have had under Johnson, that argument is now baseless.

The district court concluded that, even if defendant was denied his right to counsel in the 1978 proceeding, the judgment and sentence in that case are not "void" as a result and subject to collateral attack 30 years later.

Criminal Traffic Offenses

State v. Shields, 31 So. 3d 281 (Fla. 2d DCA 2010).

The district court reversed the trial court's order of restitution for injuries suffered in a motorcycle accident in which defendant entered guilty pleas to the crimes of reckless driving and leaving the scene of an accident.

As part of sentencing, the state sought restitution on behalf of the victim for her past and future medical expenses and loss of past and future income. The district court agreed with the state's arguments that the trial court abused its discretion in ordering insufficient restitution that was not based on evidence adduced at the restitution hearing.

Mata v. State, 31 So. 3d 257 (Fla. 4th DCA 2010).

The district court affirmed the trial court's revocation of defendant's probation based on these violations: leaving scene of an accident (count I); failure to report a crash (count II); reckless driving (count III); failing to have a valid driver's license (count IV); driving with a suspended license (count V); failure to provide proof of insurance (count VI); and failure to remove an obstructing vehicle (count VII). The court reversed as to counts III, IV and VI, stating that evidence was insufficient. The court affirmed as to counts I, II and VI, holding that revocation would stand based on affirmed violations.

At the conclusion of the Violation of Probation (VOP) hearing, the trial court dismissed count V, found the defendant guilty of the remaining violations, and revoked probation. On appeal, defendant challenged sufficiency of the evidence (point I), claimed that the trial court abused its discretion by relying upon uncharged misconduct, i.e., the theft of a cell phone, in revoking probation (point II), and asserted the trial court erred by failing to enter a written order of revocation (point III).

The district court agreed that evidence was insufficient to establish count III, charging reckless driving; to establish count IV, driving without a valid driver's license; and to establish count VII, charging failure to remove an obstructing vehicle. The court affirmed the trial court's decision to revoke defendant's probation and sentence, finding it clear from the record that the trial court would have revoked probation and imposed the same sentence based upon the remaining counts, i.e., counts I, II, and VI. The court remanded, instructing the trial court to enter a written order of revocation.

Knowles v. State, 29 So. 3d 466 (Fla. 4th DCA 2010).

The district court denied the defendant's motion for rehearing and affirmed the trial court's denial of defendant's motion for judgment of acquittal on an enhanced charge of failing to stop and render aid following an accident resulting in the death. The district court concluded that the state presented evidence inconsistent with the defendant's reasonable hypothesis of innocence that he was unaware of the accident. The court affirmed on all other issues, including defendant's conviction on a charge of first-degree vehicular homicide under section 782.071, Florida Statutes (2005).

The charged crime constituted a first-degree felony because the state alleged that defendant knew or should have known that an accident occurred, and failed to give aid and information as required by law. § 782.071(1)(b), Fla. Stat. The accident occurred around 10:30 a.m., on a clear sunny day, amid moderate traffic, on southbound lanes of the Florida Turnpike where the speed limit was 70 mph. According to witnesses, the defendant was driving his truck in a reckless manner that caused another car to flip, killing the driver who had been forced to veer off the road.

The state charged defendant with vehicular homicide under section 782.071(1)(b), Florida Statutes, which requires that the state prove the killing of a human being "caused

by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another" and that "[a]t the time of the accident, the person knew, or should have known, that the accident occurred; and "[t]he person failed to give information and render aid as required by s. 316.062."

The defendant moved for judgment of acquittal, arguing that evidence of whether he knew or should have known that an accident occurred was circumstantial in this case. He posited a reasonable hypothesis of innocence that he did not know an accident occurred, nor should he have known as he had passed the scene before the victim's vehicle rolled over. The district court concluded that evidence was inconsistent with defendant's claim he was unaware of the accident unfolding beside him. The district court held that the trial court properly submitted the issue to the jury for resolution and that any errors were harmless beyond a reasonable doubt.

State v. K.S., 28 So. 3d 985 (Fla. 2d DCA 2010).

The district court affirmed the trial court's order granting defendant's motion to suppress a firearm seized during a search of defendant's vehicle and defendant's statements relating to his ownership or use of the firearm. Because circumstances surrounding defendant's arrest did not justify a search incident to a lawful arrest, we conclude that the search was unreasonable and that the trial court properly granted the motion to suppress based on Arizona v. Gant, 129 S. Ct. 1710 (2009).

A police officer observed defendant driving without headlights on. Defendant pulled up to a red light, waited five to ten seconds, then ran the red light. The officer followed him down an alley where he pulled into a driveway behind a house. The officer activated his lights and directed his spotlight toward the vehicle. Defendant opened and closed the driver's side door, reversed the car toward the officer, then accelerated away from the officer. Defendant drove into a yard where he stopped the car. The officer pulled up behind the car, directed his spotlight through the back window, and exited his vehicle. He observed defendant reaching toward the dashboard and ordered defendant to step out of the car. Defendant exited the car, and backup officers arrived.

The officer handcuffed defendant, arrested him for fleeing and eluding, and found no weapons on him. The officer then took his car keys and used the keys to unlock and open the glove box, where he found a semiautomatic firearm. At the suppression hearing, defendant testified that he did not agree or consent to a search of the car. Relying on Gant, the trial court granted defendant's motion to suppress.

Similar to the facts in Gant, at the time of the search defendant was separated from his car, placed in handcuffs, and under the supervision of backup officers. Further, the officer could not reasonably have believed he would find evidence of defendant's crime of fleeing and eluding. Since defendant was secured by officers and not within reaching distance of his car, the district court concluded the officer's search of the car was unreasonable and affirmed the trial court's order granting defendant's motion to suppress.

Robinson v. State, 25 So. 3d 1246 (Fla. 3d DCA 2010).

The district court affirmed defendant's convictions but reversed and remanded as to his sentences for fleeing to elude a police officer and burglary with intent to commit the offense of resisting an officer without violence. The court held that trial court erroneously imposed consecutive habitual felony offender sentences because the two crimes for which defendant was found guilty arose out of the same criminal episode.

A police officer encountered a suspicious vehicle with dark tinted windows. The officer ran the tag on the vehicle and learned it was not assigned to the car he was following. He decided to conduct a traffic stop and activated his overhead police lights. Defendant, driver of the vehicle, accelerated and made an "erratic" turn into a residential neighborhood, requiring the officer to deactivate police lights pursuant to a rule prohibiting police chases in the neighborhood.

Defendant made quick turns and lost the officer. The officer discovered the vehicle parked in front of a house next to a chain link fence. The officer re-activated his lights as he approached, prompting defendant to exit the vehicle, jump over the fence and run. The officer pursued on foot, but lost his suspect. Defendant gained access to a home occupied by two women who apparently were known to him. He did not have permission to enter the home. When asked to leave, he refused, stating the police were after him. After one of the women was able to contact the police, officers arrived, entered the house and found him hiding inside a closet. Defendant was found guilty of fleeing to elude an officer, burglary with intent to commit the offense of resisting an officer, resisting an officer without violence, and driving with a suspended license.

The trial court sentenced Robinson as a habitual violent offender on two felony counts and imposed sentences of 30 years in prison for burglary, followed by ten years for fleeing to elude an officer. He was ordered to serve 364 days for resisting an officer and 60 days for driving with a suspended license concurrent to his felony terms.

The district court held that the trial court erred in imposing the consecutive sentences, stating that a trial court is not authorized to enhance the defendant's sentences as a habitual offender and make each of the enhanced sentences consecutive when they arise out of the same criminal episode. Hale v. State, 630 So. 521, 525 (Fla. 1994). The district court held that, although the crimes were separate crimes, committed against separate victims—a police officer and two women—at different locations, they are united by the defendant's sole purpose of eluding the officer and were committed within a short period of time in the same neighborhood. The court remanded for resentencing.

Boggs v. State, 27 So. 3d 246 (Fla. 2d DCA 2010).

The district court affirmed the trial court's judgments for high speed fleeing to elude, possession of cocaine, possession of drug paraphernalia, driving while licensed suspended or revoked, and reversed the judgment for third-degree grand theft.

The district court concluded that the state failed to present evidence establishing that the value of the items stolen by the defendant exceeded the level required to establish a third-degree felony. The court reversed and directed that, on remand, the trial court enter a judgment for petit theft as lesser statutory degree of the offense that was established by the evidence and an appropriate sentence for the misdemeanor.

White v. State, 32 So. 3d 132 (Fla. 3d DCA 2010).

The district court affirmed the trial court's judgments and sentences as to defendant for fleeing or attempting to elude a law enforcement officer and driving with a suspended driver's license and reversed as to public defender fees imposed under section 938.29(1)(a), Florida Statutes (2006).

The district court held that the defendant preserved his challenge to this cost by filing a motion to correct sentencing error in accordance with Florida Rule of Criminal Procedure 3.800(b)(2). The trial court did not rule on the motion within sixty days, and thus it was deemed denied. Because the trial court failed to properly advise defendant of his right to contest or object to the amount of the lien from these fees, the district court reversed and remanded for further proceedings. See Fla. R. Crim. P. 3.720(d)(1). On remand, the defendant had thirty days from issuance of the district court's mandate to file a written objection to the fee amount. If an objection is filed, the trial court shall conduct a hearing. Otherwise, the trial court may reimpose the lien for public defender fees without a hearing.

Powell v. State, 28 So. 3d 958 (Fla. 1st DCA 2010).

The district court affirmed in part, reversed in part the trial court's convictions and sentences for kidnapping, burglary, assault, fleeing law enforcement, battery, resisting an officer, possession of cannabis, and leaving the scene of an accident. The court rejected defendant's challenge to the trial court's determination that appellant was competent to stand trial, and remanded with directions to the trial court to enter a written order adjudicating appellant competent.

The district court reversed defendant's conviction for count XI, leaving the scene of an accident, because the state failed to establish the statutory elements of the offense. Defendant claimed in his motion for judgment of acquittal that the state had not presented evidence of damage to property or to another vehicle. Section 316.063(1), Florida Statutes, provides that any driver who crashes into and damages an unattended vehicle or property has a duty to notify the owner of that property. The only pertinent evidence in the trial court was a photograph of the damage to the car appellant was driving, and testimony that he crashed into a wooden barricade, a steel beam, or a culvert. There was no testimony about any damage to whatever object the vehicle hit, and there may have been none at all. The district court held that the trial court erred as a matter of law by denying judgment of acquittal on count XI and reversed the conviction on that count but affirmed appellant's remaining convictions and sentences without comment.

Slack v. State, 30 So. 3d 684 (Fla. 1st DCA 2010).

On rehearing, the district court withdrew its prior opinion and substituted the present opinion, which reversed and remanded for entry of judgment of conviction for the lesser-included offense of fleeing or attempting to elude a law enforcement officer in violation of section 316.1935(1), Florida Statutes (2006), on the authority of section 924.34, Florida Statutes (2009).

Defendant appealed his conviction for fleeing or attempting to elude a law enforcement officer in violation of section 316.1935(2), Florida Statutes (2006), on grounds the trial court erred in denying his motion for judgment of acquittal. He contended the state failed to prove that the vehicle in which he fled prominently displayed agency insignia. The district court agreed that, because of this failure of proof, the trial court erred in denying the motion for judgment of acquittal.

Defendant was charged with violating section 316.1935(2), Florida Statutes (2006), which provides:

> Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The state attempted to prove the charged offense through the testimony of a deputy who testified that he passed an oncoming two-door Mercury vehicle, noticed in his rearview mirror that the vehicle's taillights were not working, turned around and decided to initiate a traffic stop. He testified he was driving a "marked patrol car, lights on top," and was wearing a uniform at the time. He testified that, to make the Mercury stop, he "engaged" his exterior lights and activated his siren.

At the close of the state's case in chief, defendant moved for judgment of acquittal. Defense counsel argued, "I don't believe there was any testimony about the insignia on the vehicle. I have a case on that that says they must establish this was a law enforcement vehicle that has a law enforcement insignia."

In arguing the motion, defense counsel highlighted Gorsuch v. State, 797 So. 2d 649 (Fla. 3d DCA 2001). The district court reviewed de novo the legal issue presented by a trial court's ruling on a motion for judgment of acquittal. While the deputy testified he was driving a "marked patrol car" with "lights on top" and that he activated his lights and siren, there was no evidence of "agency insignia and other jurisdictional markings prominently displayed on the vehicle." § 316.1935(2), Fla. Stat. (2006). That not all markings on law enforcement vehicles constitute agency insignia was made clear in Gorsuch. By neglecting to adduce evidence that the deputy's vehicle had agency insignia or other jurisdictional markings, the state failed to make out a prima facie case of fleeing

or attempting to elude a law enforcement officer in violation of section 316.1935(2), and the trial court erred in denying defendant's motion for judgment of acquittal.

The state argued that it also proved and the jury also found the defendant guilty of violating section 316.1935(1), which the state argued should be deemed a lesser-included offense. That statute provides that it is unlawful for the operator of any vehicle, having knowledge that he or she has been ordered to stop such vehicle by a duly authorized law enforcement officer, willfully to refuse or fail to stop the vehicle in compliance with such order or, having stopped in knowing compliance with such order, willfully to flee in an attempt to elude the officer, and a person who violates this subsection commits a felony of the third degree.

Arrest, Search and Seizure

State v. Zaldivar, 34 So. 3d 76 (Fla. 3d DCA 2010).

The district court reversed the trial court's order suppressing certain physical evidence and statements made by the defendant to law enforcement officers regarding a burglary of $300 in cash and two firearms from a business.

A surveillance video identified a former employee using a key to open the door of the business after it had closed. This allowed hooded burglars to enter, burglarize the business, and exit. The business owner recognized the former employee, and a detective interviewed her. She admitted her involvement and agreed to identify the persons she claimed were the burglars. She provided the full name of one such and the first name of the defendant. Officers set up surveillance at the address provided by the former employee. A vehicle matching the description given by the former employee, and occupied by two males, drove up to the residence. One detective identified the driver.

As the car was about to enter the driveway, occupants spotted one of the unmarked cars and quickly sped away. The surveillance team called additional police units and the vehicle was blocked in a "felony stop" maneuver. Both occupants were directed to exit the car, at which point the police saw, through clear windows of the vehicle, a shotgun on the back seat and a ski mask and cash box on the floor of the vehicle. Another handgun was also found.

The lead detective identified himself as an investigator and read the codefendant his rights in Spanish per a Miranda card. The codefendant acknowledged that he knew that the police were there because of "the burglary last night." The passenger in the vehicle identified himself as "Yoander," the first name that had been provided by the former employee. He was in fact Yoander Zaldivar, the defendant. Upon learning that first name, the detective administered a verbal Miranda warning to him as well.

The district court explained that such a stop assumes that one or more of the occupants are armed and dangerous. Unlike a routine stop, police have their service weapons ready until they can confirm that the occupants pose no threat. The lead

detective on this case testified that a felony stop was conducted in this instance "because there were firearms involved in the burglary." Defendant was transported to the police station and provided a written Miranda form in Spanish, which he signed. Thereafter, he provided oral and written statements admitting his involvement as one of the burglars.

The trial court found that this sequence of facts did not provide a reasonable suspicion to detain and question defendant. At the very moment the vehicle was stopped, the officers did not know the passenger's name and had no photographic identification to link the passenger to the burglary. The district court held that law enforcement officers had a founded suspicion sufficient to stop the codefendant based on the statement given by the former employee, the visual identification of the codefendant as the driver (made possible because the lead investigator had obtained a copy of his driver's license photo), the appearance of the specifically-described car at the codefendant's residence as related by the former employee, and the attempt by the codefendant to flee once he spotted the police. See State v. Herrera, 991 So. 2d 390, 392 (Fla. 3d DCA 2008). The district court reversed, based on its holding that a passenger in a car with an occupant reasonably suspected of criminal activity occurring within, or involving, the car may be questioned.

Brunson v. State, 31 So. 3d 926 (Fla. 1st DCA 2010).

The district court reversed the trial court's conviction for trafficking in cocaine based a finding that the trial court erred in granting the state's motion in limine precluding defense counsel from asking appellant whether he had ever been arrested.

Appellant was stopped while driving and after consenting to a search of his vehicle, the arresting officer found 270 grams of cocaine in plastic baggies in the center console of his vehicle. The entire stop and search was videotaped by a camera mounted on the officer's windshield. On the videotape, the officer can be heard asking appellant if he had ever been arrested. At the time the question was asked, appellant was off camera, but the audio feed evidenced no audible response. At trial, the state played the entire video of the stop for the jury and presented it with a transcript of the taped conversation. The video and the transcript included the unanswered question regarding appellant's arrest history. The state also admitted, over appellant's objection, evidence establishing appellant was carrying $1000 in cash on his person at the time of arrest. At the close of state's evidence, appellant announced his intention to testify. The state filed a motion in limine seeking to exclude questioning regarding appellant's lack of a prior arrest record. Appellant asserted he was entitled to clear up confusion regarding whether he had been previously arrested because the state had created ambiguity issue by playing the tape of the stop in its entirety. The court granted the state's motion in limine. In his testimony, appellant asserted he had no knowledge of cocaine in his vehicle and that several individuals had access to his car in the days preceding the stop. The jury convicted appellant as charged.

The district court held that contents of the videotape opened the door for appellant to present evidence regarding his lack of arrest history, and thus the trial court erred in barring this evidence. The court explained that the state, by planting the officer's

unanswered question (otherwise barred by the rules of evidence) in the minds of the jury, created a misimpression that appellant had been previously arrested. Benefited by this negative inference and anticipating appellant would try to rebut it, the state then moved to exclude any evidence relating to the subject of appellant's arrest history. The principle of "opening the door" protects fairness and truth-seeking from being overcome by adversarial games. The trial court erred by not granting appellant an opportunity to "'qualify, explain, or limit'" the incomplete picture depicted in the videotape and clarify whether he had been previously arrested. The court reversed and remanded for a new trial, holding that the error was not harmless.

The district court affirmed the trial court ruling admitting evidence that appellant possessed $1000 cash at the time of his arrest, holding that such evidence does tend to prove appellant had or was intending to engage in distribution or sale of the large amounts of cocaine in his possession.

The district court also addressed an error in the trial court's judgment in which the written sentence included the following relevant provision: "X the defendant's Drivers License shall be suspended for 2 years." The district court cited cases holding that, per section 322.055, Florida Statutes, a trial court has authority to direct the Department of Highway Safety and Motor Vehicles to suspend a defendant's license, but may not revoke the license itself.

State v. Major, 30 So. 3d 608 (Fla. 4th DCA 2010).

The district court reversed the trial court's granting of the motion to dismiss since, taking all inferences in the light most favorable to the state, there remained a material factual dispute for the trier of fact to determine.

Defendant was observed by a law enforcement officer failing to stop at a stop sign. The officer stopped defendant and while approaching the vehicle noticed defendant chewing. The officer asked defendant to open his mouth and discovered a "green leafy substance." The substance in defendant mouth subsequently tested positive for cannabis.

Defendant filed a motion to dismiss**,** claiming that no criminal investigation was pending when he was stopped for a traffic violation. In the motion, he admitted to "eating an illegal substance" but denied any knowledge of any investigation. He asserted that the traffic stop was "made for failure to stop at a stop sign and had nothing to do with cannabis." The state filed a traverse which claimed the officer, when approaching the car, "immediately smell[ed] cannabis coming from the vehicle." The state claimed that defendant was aware of the criminal investigation since he "would not have eaten the cannabis" otherwise.

The trial court noted that the officer never saw defendant put anything in his mouth, and thus it was unclear when he started to chew the marijuana. The court dismissed the charge, finding that the destruction of the cannabis was not destruction of evidence unless defendant had knowledge of an investigation.

In his sworn motion, defendant did not assert when he started chewing the marijuana. The trial court could only speculate as to the relationship between the chewing of the marijuana and the start of the investigation. The facts as alleged would allow either an inference that defendant was chewing prior to attracting the attention of law enforcement or that defendant placed the drugs in his mouth exactly because he knew he was about to be investigated. Since the sworn facts as alleged, when taken in the light most favorable to the state, did not refute the state's prima facie case, the district court reversed. Defendant's chewing the marijuana could lend itself to differing conclusions, depending on intent. Determining intent of defendant should be left to the trier of fact and is not the proper subject of a motion to dismiss.

Patrizi v. State, 31 So. 3d 229 (Fla. 1st DCA 2010).

The district court affirmed the defendant's convictions and sentences for resisting an officer without violence and resisting a different officer with violence. After a traffic stop, defendant was arrested and transported to the police station by a police officer. When the officer parked in the police station parking lot, the defendant attempted to escape on foot but was promptly apprehended and escorted to the breath test room. Once inside, the defendant refused to remain seated, struggled with a second officer and "stomped on" the second officer's foot as she resisted his efforts to restrain her in her seat. She was charged with various crimes, including resisting an officer with violence (count II) and resisting another officer without violence (count VI). She entered a plea of nolo contendere and was adjudicated guilty of all charges.

The district court stated that defendant's characterization of her convictions for both resisting an officer with violence and resisting an officer without violence as double jeopardy and fundamental error must fail. The court held that her acts resisting the two officers were not part of a single criminal episode. Beahr v. State, 992 So. 2d 844, 846 (Fla. 1st DCA 2008). The convictions were not fundamental error, and defendant was not "twice put in jeopardy for the same offense." Art. I, § 9, Fla. Const. Regarding the trial court's denial of a downward departure and entry of the legal, guidelines sentence, the district court held that this sentence was not subject to appeal by defendant under section 924.06, Florida Statutes.

State v. Lopez, 29 So. 3d 399 (Fla. 3d DCA 2010).

The district court reversed and remanded the trial court's order in a prosecution for cocaine trafficking and conspiracy. The trial court's order suppressed self-incriminating statements obtained after a stop that the trial court found was unsupported by founded suspicion of defendant's involvement in criminal activity.

An undercover detective had arranged to purchase two kilograms of powder cocaine from defendant's cousin. The officer had previously purchased drugs from him on several occasions, in all of which he had been assisted by others. Prior to the sting, the cousin was surveilled by officers who observed him arrive at a residence

and then leave with another man, whom they did not know but who turned out to be defendant. Defendant followed his cousin in his own car to a restaurant parking lot. The cousin met with the detective on the east side of the lot while defendant parked on the south side and remained in his vehicle. After the faux transaction had been completed, a takedown unit moved in and arrested the cousin. Defendant immediately began backing up to leave, but another police detective used his car to block and then detain him. After the stop, defendant volunteered that his cousin owed him money, and that he was there to collect the debt from the proceeds of the sale he knew was going to take place. After the defendant agreed to accompany the detective to the police station, he was read and waived his Miranda rights and then gave the recorded interview primarily at issue on appeal, in which he specifically admitted involvement in the transaction.

At a hearing on defendant's motion to suppress, which challenged the validity of the initial investigatory stop, the detective testified that, based on his experience, a second vehicle follows a vehicle involved in a drug transaction to insure there are no police at the transaction site. The second detective stated that defendant's behavior gave rise to the suspicion that he was in communication with his cousin during the drug sale. Notwithstanding all of this, the lower court suppressed the admissions, ruling that the stop of which the statements were products was unjustified.

The district court stated that it found that the circumstances apparent before the stop gave rise to a founded or reasonable suspicion, as required by the Constitution, that the defendant was a principal or accomplice in the ongoing drug transaction. See Terry v. Ohio, 392 U.S. 1 (1968); Baptise v. State, 995 So. 2d 285, 290 (Fla. 2008) ("[T]he existence of a reasonable suspicion is based upon specific and articulable facts, and the rational inferences that may be drawn from those facts.")

Teart v. State, 26 So. 3d 644 (Fla. 1st DCA 2010).

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

Defendant was a front-seat passenger in a vehicle stopped for running a red light. The officer saw defendant without his seat belt on and asked for his name. When defendant gave a false name, the officer arrested him for violating section 901.36(1), Florida Statutes (2004). A search of the vehicle incident to defendant's arrest revealed cocaine in the center console and a firearm under defendant's seat.

In his postconviction motion, defendant claimed that his trial counsel was ineffective for failing to file a motion to suppress the cocaine and firearm because those items were seized incident to unlawful detention and arrest. The trial court denied the motion, finding that even if initial detention was illegal, the officer's discovery of defendant's outstanding warrants was an intervening circumstance purging the taint of the illegality, and, thus, defendant could not show that his trial counsel was ineffective for failing to file a meritless motion to suppress.

The district court held that the record did not refute defendant's claim that his initial detention and arrest was illegal because there is no indication the officer observed him not wearing his seat belt while the vehicle was moving. The court agreed with the trial court that illegality of the initial detention is not sufficient for a successful motion to suppress because the taint of evidence seized incident to an illegal detention may be purged based upon intervening circumstances.

The district court held that discovery of defendant's outstanding warrants was an "intervening circumstance" because there was no indication when the warrants were discovered in relation to defendant's illegal detention and the resulting search of the vehicle in which he was riding. The district court noted that the trial court did not consider other factors to be weighed and balanced in determining whether taint of an illegal detention has been purged, i.e., the time elapsed between the illegality and the acquisition of the evidence and the purpose and flagrancy of the official misconduct.

The district court held that the question of whether defendant was wearing his seat belt while the vehicle was moving is a matter for an evidentiary hearing. The court further held that the record did not refute defendant's claim that his trial counsel was ineffective for not filing a motion to suppress.

Cooks v. State, 28 So. 3d 147 (Fla. 1st DCA 2010).

The district court reversed and remanded with directions to grant the motion to suppress, vacate conviction and sentence, and discharge defendant to the extent that he was not held in other cases. Defendant had pled no contest to possession of cocaine, reserving the right to appeal denial of his dispositive motion. The district court held that the state failed to prove the deputy who stopped defendant had reasonable suspicion of criminal activity to stop him.

A deputy was dispatched to investigate a report of suspicious activity called in by a hotel clerk. After making a traffic stop, the deputy asked defendant to come to the back of the car, which he did. While defendant remained behind, the deputy went to speak with his passenger. The deputy then noticed "a small baggie of green leafy substance pushed down next to [the passenger's] leg." The deputy asked the passenger to get out of the car and arrested him. The deputy then searched defendant and found crack cocaine in his jacket, at which point he was arrested. When asked why he stopped the car, the deputy answered: "It closely matched a vehicle description given to us of a vehicle which had possibly been used in the commission of a crime." [Defense counsel:] "What crime was that?" [Deputy:] "Well, sir, that's what we were being dispatched to ascertain. And at the very least what I felt to be true when I was responding was at the very least, a trespassing and possibly an attempted burglary, sir."

To justify an investigatory stop, the deputy had to have a reasonable suspicion that defendant had committed, was committing, or was about to commit a crime. King v. State, 17 So. 3d 728, 730-31 (Fla. 1st DCA 2009); § 901.151(2), Fla. Stat. (2006).

To create reasonable suspicion, a tip must be reliable not only in its description of the subject, but also "in its assertion of illegality." Florida v. J.L., 529 U.S. 266, 272 (2000). Defendant argued that the deputies had no objective basis to stop him because what was reported to the dispatcher and relayed to the deputy did not create a reasonable suspicion that he (or anyone else) had committed, was committing, or would commit a crime.

The district court agreed, finding the tip as to defendant was not reliable "in its assertion of illegality" and was thus insufficient to justify the stop. The court stated there was no dispute as to the hotel clerk's reliability but that information the clerk provided did not create a reasonable suspicion that criminal activity was afoot.

Torts/Accident Cases

Samuels v. Torres, 29 So. 3d 1193 (Fla. 5th DCA 2010).

The district court reversed for a new trial on the issue of damages. The court held that the trial court erred in denying the motion for mistrial made by plaintiff after defense counsel disclosed to the jury during opening statement how little the defendant earned in income. The issue arose from the appeal of a final judgment awarding plaintiff damages in the amount of $70,873.33 in her personal injury action. Plaintiff argued that disclosure of defendant's income entitled her to a new trial because it improperly roused the jury's sympathy in favor of defendant, which resulted in an inadequate award of damages for her injuries suffered in an auto accident caused by defendant.

Liability was not an issue because defendant stipulated that he struck plaintiffs' vehicle from behind with his semi-truck, forcing their vehicle and trailer into a guardrail, thus damaging their vehicle and destroying the contents of their trailer. Plaintiff was a passenger in the vehicle driven by her husband and sustained spinal injuries.

The district court concluded that counsel for defendant employed a defense stratagem in his opening statement to curry sympathy from the jury, it was obvious from the record that he succeeded and, thus, plaintiff was deprived of a fair trial. The court reversed the judgment and remanded for a new trial on the issue of damages so that a verdict may be rendered untainted by sympathy for one party or the other.

Nilo et al. v. Fugate, 30 So. 3d 623 (Fla. 1st DCA 2010).

The district court affirmed the trial court's evidentiary and collateral source rulings, reversed the determination as to attorney's fees and reversed in part as to the award of costs.

In a personal injury case, the jury awarded damages to a commercial truck driver whose vehicle was rear-ended by a tractor trailer. Defendants raised ten issues, including evidentiary and collateral source matters, and two rulings: (1) the trial court taxed more prevailing party costs against defendants than plaintiff was entitled to; and (2) the trial

court erroneously determined that plaintiff was entitled to attorney's fees and costs pursuant to plaintiff's proposal for settlement.

In a civil action for damages, "[i]f a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand." § 768.79, Fla. Stat. (2006). Only those costs incurred pre-demand may be considered in determining whether total judgment meets the statutory threshold. See Perez v. Circuit City Stores, Inc., 721 So. 2d 409, 412 (Fla. 3d DCA 1998). Plaintiff would have been entitled to attorney's fees and costs if the judgment exceeded $500,000. Plaintiff admitted a trial court error, because he did not incur the additional costs needed to reach the statutory threshold before tendering the proposal for settlement. As judgment did not exceed $500,000, the district court reversed the attorney's fees and costs pursuant to section 768.79. The court affirmed the trial court's rulings in all other respects and remanded with instructions to correct the costs award and vacate the fee award.

Cruz-Govin v. Torres, 29 So. 3d 393 (Fla. 3d DCA 2010).

The district court granted defendant's petition for certiorari and quashed discovery orders, including an order denying their motion for protective order. The district court concluded that the trial court departed from essential requirements of law because the orders requiring disclosure of defendant's substance abuse treatment information and records violated defendant's psychotherapist-patient privilege.

A car driven by defendant and a car driven by plaintiff collided, resulting in serious injuries to plaintiff and the death of his wife, a passenger in his car. Plaintiff filed a negligence action against defendant, his father (owner of the car) and his mother. After filing suit, plaintiff learned that several months after the accident, defendant had been admitted to a drug rehabilitation facility. Plaintiff sought a subpoena requiring the facility to produce defendant's substance abuse treatment records. Plaintiff also sought orders from the trial court compelling defendant's parents to answer interrogatories concerning their son's treatment. The trial court rejected defendants' objections to such discovery, and denied their motion for a protective order.

The district court stated that section 90.503(2), Florida Statutes (2009), provides that a patient has a privilege to decline to disclose information or records made in the diagnosis or treatment of mental conditions. The privilege applies to "confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction." The district court stated that the requested discovery falls under the statute and the only question is whether the requested discovery falls within one of the three exceptions to the privilege, i.e., communications that are: (a) relevant to an issue in involuntary commitment proceedings; (b) made in the course of a court-ordered mental examination; or (c) relevant to an issue of the patient's mental or emotional condition which the patient relies upon as an element of his or her claim or defense.

The district court concluded that plaintiff did not meet his burden of showing that an exception to the psychotherapist/patient privilege applies. The court held that the complaint's allegations as to defendant's impairment and the "strong inference" from other discovery of illegal drug use do not abrogate the privilege. The statutory exception applies when the patient, not the opposing party, places his mental health at issue.

The court stated that the defendant did not place his mental or emotional condition at issue by merely denying allegations or suggestions of impairment. The district court held that, because the defendant did not rely upon his mental or emotional condition in this case, section 90.503(4)(c) does not abrogate the asserted privilege.

Driver's Licenses

Florida DMV v. White, 30 So. 3d 606 (Fla. 5th DCA 2010).

The district court granted The Department of Highway Safety and Motor Vehicles' petition for certiorari review of a circuit court appellate decision that granted defendant's petition for writ of certiorari and denied the department's motion for rehearing. The court concluded that the department was denied procedural due process in the appellate proceeding.

Defendant petitioned for certiorari review of the department's revocation of his driving privileges. The circuit court, sitting in its appellate capacity, issued an order to show cause requiring the department to respond. The order to show cause reflected the circuit appellate court's view of the petition as showing a prima facie case for relief. It directed the department to show cause why the relief requested should not be granted.

The order was not served on the department. The order shows service only on defendant's attorney. The circuit appellate court granted defendant's petition after the department failed to respond to the court's order to show cause.

Vaughan v. State, 29 So. 3d 423 (Fla. 5th DCA 2010).

On rehearing, the district court withdrew its earlier opinion and substituted a revised opinion. In the new opinion, the court reversed the trial court's summary denial of defendant's rule 3.850 motion for postconviction relief. Defendant claimed his trial counsel was ineffective for allowing him to plead no contest to felony driving while license suspended, as he did not have requisite prior convictions to enhance his latest offense to a felony.

Defendant pled no contest to numerous offenses, one of which was felony driving while license suspended, a violation of section 322.34(2)(c), Florida Statutes (2008). The district court agreed with defendant's argument that convictions under section 322.34(1), driving with a suspended license without knowledge of the suspension, cannot be used as a predicate to enhance later convictions of driving while license cancelled, suspended or

revoked with knowledge. The information charging defendant with driving while license suspended in 1997, one of the two predicate offenses charged by the state, charged that he "did while his operator's or chauffer's [sic] license or driving privilege had been cancelled, suspended or revoked, drive a motor vehicle upon the highways of this State, in violation of Florida Statute 322.34(1)."

The district court stated that, unless the information was amended (not apparent from the record), there was no charge of driving while license suspended with knowledge of suspension, an offense that could serve as predicate for felony driving while license suspended. The district court remanded for attachment of documents refuting defendant's allegations or an evidentiary hearing, and instructed the trial court on remand to consider only the driving while license suspended matter. The district court stated that all other convictions in defendant's case are unaffected.