FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

October-December, 2009

[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)

Blair v. State, __ So. 3d ___ (Fla. 5th DCA 2009), 2009 WL 4403202, 34 Fla. L. Weekly D2518, No. 5D08-3413.

The district court reversed and remanded the conviction of the defendant for DUI with serious bodily injury.

The defendant did not show up after the first day of his trial. At the end of the first day, the court instructed the jury and parties that court would reconvene the following morning at 9:30 a.m. but indicated that the attorneys were to be present at 8:45 a.m. When the defendant failed to appear for trial on the following morning, the trial judge inquired regarding his absence. The court clerk indicated that she had not heard from him, and defense counsel said that although he called his phone, he got only a voicemail. The judge decided to proceed with trial.

Later in the morning, defense counsel received an instant message from his secretary saying that the defendant was in a hospital. No other details were received. The trial court decided to proceed and denied a request to advise the jury of the message. After lunch, but before closing arguments, defense counsel said he tried to find further information and tried again to reach his client by phone. He was unsuccessful. The trial judge then stated: "All right. And this morning I told you we were going forward. . . . . And my observations of him yesterday led me to believe that he was voluntarily absenting himself, because he didn't look happy about how the trial was progressing. So he knew to be back. And whether you can prove anything about the hospital, that's a whole other issue for another day. But I did tell you that we're going forward without his presence if he wasn't here. And we waited 35 minutes. I thought that was reasonable under the circumstances. We had witnesses ready to go. So your objection is duly noted."

The jury found the defendant guilty of the lesser included misdemeanor offense of DUI with personal injury, and the court proceeded to sentencing immediately. After the state presented information concerning the defendant's prior criminal record, the defense offered only that he was a member of the Fraternal Order of Eagles. The court sentenced

him to 364 days in county jail and other associated DUI punishments. He moved for a new trial contending that he was not willfully absent from trial because he was in a hospital. He attached to the motion a fax from a hospital indicating that he was a patient and was admitted on the date corresponding to the second day of trial. After the trial court denied the motion without comment and without hearing, the defendant appealed.

The district court stated that among a criminal defendant's most basic constitutional rights is the right rooted in the Confrontation Clause of the Sixth Amendment to be present at every critical stage of a criminal proceeding. Trial and sentencing procedures are, of course, among the critical stages at which a defendant is entitled to be present. It has been held, however, that this right can be waived. See Capuzzo v. State, 596 So. 2d 438, 439-40 (Fla. 1992).

In this connection, rule 3.180(c)(1)-(2), Florida Rules of Criminal Procedure, states, in pertinent part: (c) Defendant Absenting Self. (1) Trial. If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of court, or is removed from the presence of the court because of his or her disruptive conduct during the trial, the trial of the cause or the return of the verdict of the jury in the case shall not thereby be postponed or delayed, but the trial, the submission of the case to the jury for verdict, and the return of the verdict thereon shall proceed in all respects as though the defendant were present in court at all times.

The court held that the proper resolution was to reverse the order denying the motion for new trial and to remand to the trial court for an evidentiary hearing to determine whether the defendant’s absence was voluntary or involuntary.

Aviles v. State, 22 So. 3d 151 (Fla. 4th DCA 2009).

The district court affirmed the defendant’s conviction and sentence for felony DUI with damage to the person or property of another. The state conceded error as to the trial court’s judgment, which erroneously reflected convictions on two counts. The court remanded to the trial court for correction of the written sentencing documents to reflect adjudication and sentence in one count only.

Bennett v. State, 23 So. 3d 782 (Fla. 2d DCA 2009).

The district court denied the defendant’s petition for writ of certiorari to review a circuit court's appellate decision reinstating a DUI charge against him in county court.

The county court had dismissed the DUI charge because either a deputy sheriff's video camera failed to record the roadside sobriety test or the digital recording system in the sheriff's office failed to preserve the recording. The circuit court reversed this order, concluding that the case was controlled by the holding in State v. Betts, 659 So. 2d 1137

(Fla. 5th DCA 1995), and that the county court had mistakenly treated dicta in State v. Powers, 555 So. 2d 888 (Fla. 2d DCA 1990), as a holding from this court. The district court concluded that, in light of the decisions in Samborn v. State, 666 So. 2d 937, 938 (Fla. 5th DCA 1995), and State v. Davis, 14 So. 3d 1130 (Fla. 4th DCA 2009), the circuit court did not depart from essential requirements of the law in sending the case back to county court for more consideration.

The district court explained that the issue was what, if any, sanction should be imposed upon the state when it attempts to create physical evidence for use in a criminal proceeding, under circumstances in which it has no legal duty to create that evidence, and in the process of preparing that physical evidence, it inadvertently destroys preliminary data and is unable to produce desired evidence at trial.

In a lengthy analysis, the district court explained that, although its suggestion was "only dicta, at least in the case of potential evidence that is accidentally destroyed when the State has no legal obligation to create the evidence," the court was inclined to believe that before lost evidence is declared to be 'material exculpatory evidence,' the "defendant should have a threshold burden to persuade the trial court, perhaps by the preponderance of the evidence, that (1) the lost opportunity to present relevant evidence involved evidence that would have created a reasonable probability that the outcome of the proceeding would have been different, and (2) the defendant did not have an adequate alternative method to provide comparable evidence. Only after such a threshold showing would the burden shift to the State to prove that the defendant had not been prejudiced. Whether dismissal is the only adequate sanction for an inadvertent loss of material exculpatory evidence is an issue that may require case-by-case analysis for which we suggest no solution—even in dicta."

Solórzano v. State, __ So. 3d __ (Fla. 2d DCA 2009), 2009 WL 3787196, 34 Fla. L. Weekly D2339, No. 2D07-5664.

The district court affirmed in part, reversed in part, and remanded for further proceedings after an appeal of a DUI defendant's dential of his motion for postconviction relief filed pursuant to rule 3.850, Florida Rules of Criminal Procedure.

The defendant was charged with one count of DUI manslaughter and three counts of DUI with serious bodily injury following an accident that occurred after defendant spent an afternoon and evening drinking at a bar with friends and co-workers. At some point in the evening, one of the defendant's co-workers became too drunk to drive and was feeling ill. While driving the drunk co-worker home, the defendant lost control of his truck, crossed the center median, and collided with four people on two motorcycles. One of the motorcyclists was killed; the other three suffered serious injuries.

The defendant's defense at trial was that he was not intoxicated when the accident occurred. He contended that he had had only two or three beers during his six or seven hours at the bar and that he had been eating during that time as well. He contended that he lost control of his truck only because his passenger vomited on him while he was

driving. He also contended that his blood alcohol level was due to his having taken Nyquil for a cold rather than due to his drinking at the bar.

The jury found him guilty as charged. The trial court sentenced him to 23.14 years in prison followed by five years' probation. The district affirmed on direct appeal.

On the appeal of the denial of the rule 3.850 motion, the district court reversed and remanded for reconsideration of ground five, in which the defendant alleged that defense counsel, the prosecutor, and the court failed to question a potential juror during voir dire and that, as a result, counsel had no basis for determining whether that person was competent to sit as an unbiased juror. The court held that the defendant stated a sufficient claim for ineffective assistance of counsel based on the lack of meaningful voir dire. On remand, the postconviction court must either attach portions of the transcript that conclusively refute the defendant's claim of an inadequate voir dire or hold an evidentiary hearing on this issue. As to grounds six and eight, the district court remanded for an evidentiary hearing on the claims that defense counsel was ineffective for failing to present testimony of a bartender and a fireman as to circumstances during the evening of the accident. The district court held that the postconviction court abused its discretion in finding that such testimony would have been cumulative.

Criminal Traffic Offenses

State v. Grosser, 24 So. 3d 718 (Fla. 4th DCA 2009).

The district court affirmed the trial court's dismissal of two felony charges on speedy trial grounds. The court reversed the trial court's dismissal of misdemeanor Counts I and II and remanded for further proceedings.

The defendant and the victim were at a party when there was an altercation between them. The victim attempted to leave in her vehicle and asked her friend to drive because she was afraid. The defendant followed the victim's vehicle onto I-95 and started to cross in front of her vehicle, trying to force her into the concrete barrier wall. He was also seen throwing things at the victim's vehicle. This continued onto an exit ramp where the victim tried to get away from the defendant. At that moment, the defendant, at a high rate of speed, cut in front of her and slammed on his brakes, causing the victim's vehicle to collide with the rear of the defendant's vehicle. The defendant left the scene of the accident. Three witnesses gave statements to a state trooper.

Operative facts giving rise to the appeal are that a trooper arrived at the scene of the road rage incident and, after concluding his investigation, signed three traffic citations with the following charges: (1) Reckless Driving Property Damage Wanton Disregard for Life and Property; (2) Leaving Scene of Accident with Property Damage; and (3) Crash Failed to Give Information. On the first two citations, the trooper checked off the option stating "Criminal Violation Court Appearance Required As Indicated Below:" On the third citation, the trooper checked off the option stating "Infraction Which Does Not

Require Appearance In Court." On all three citations, the trooper typed in the section that provides for a date, time, and location for defendant to appear in court:

"Broward County Court To Be Set."

The record does not reflect that the defendant was ever served with these citations. The trooper attempted to serve the citations on July 16 and 17, 2007, but was unsuccessful. The trooper's report indicates that he requested a capias for the defendant, but the record does not reflect whether a capias was issued.

There was no further record activity until September 25, 2007 (74 days later), when the state filed an information in county court charging the defendant with two misdemeanors: Count I – Leaving the Scene of a Crash; and Count II – Reckless Driving. On January 31, 2008, the state filed an "Amended Information" in circuit court charging him with four criminal charges: Count I - Aggravated Assault with a Deadly Weapon (a motor vehicle); Count II – Felony Criminal Mischief; Count III – Leaving the Scene of a Crash; and Count IV – Reckless Driving. Counts I and II are third degree felony charges. Counts III and IV are the identical misdemeanor charges in the September 25, 2007, information in county court.

The trial court granted the defendant's Motion to Dismiss, stating that it used September 25, 2007, as the date when the speedy trial clock began. On appeal, the state argued that the trial court erred in granting the motion under the erroneous assumption that the speedy trial time limits had expired for both the misdemeanor and felony counts of the "Amended Information" as a result of using the date on the traffic citations as the commencement date (July 14, 2007).

The defendant and the state disagreed as to expiration of the time for speedy trial, pursuant to rule 3.191(h), Florida Rules of Criminal Procedure. On February 19, 2008, the state filed a "No Information" in the county court misdemeanors case, which the trial court likened to a nolle prosequi. The district court held that, although the state had the right to avail itself of recapture periods in rule 3.191(p), Florida Rules of Criminal Procedure, it foreclosed its rights to do so by filing a "No Information" indicating it had no intent to proceed on misdemeanor charges.

Prescott v. State, 23 So. 3d 1251 (Fla. 4th DCA 2009).

The district court affirmed the defendant's conviction for fleeing and eluding a law enforcement officer under section 316.1935(1), Florida Statutes (2006). The court rejected the defendant's argument that the crime's standard jury instruction uses a word that differs from the statute and that the trial court erred in denying the defendant's request to use the correct word from the statute. The court found the terminology difference to be immaterial.

Joerin v. State, 22 So. 3d 157 (Fla. 2d DCA 2009).

The district court affirmed the trial court's judgment and sentence for fleeing or attempting to elude a law enforcement officer under section 316.1935(3)(a), Florida

Statutes (2007), a second-degree felony. The defendant argued that double jeopardy principles barred his fleeing or eluding conviction because he had previously pleaded nolo contendere to and had been sentenced for a reckless driving offense, section 316.192(1), stemming from the same series of events that gave rise to the fleeing or eluding charge. The district court concluded that the convictions for both reckless driving and fleeing or eluding did not violate double jeopardy. See Cruz v. State, 956 So. 2d 1279, 1282 (Fla. 4th DCA 2007).

Brown v. State, 23 So. 3d 214 (Fla. 2d DCA 2009).

The district court affirmed two postconviction claims and reversed and remanded the defendant's eight other claims in a case involving convictions of aggravated battery on a law enforcement officer, aggravated fleeing to elude, resisting a law enforcement officer with violence, providing a false name to a law enforcement officer, and having no valid driver's license.

The trial court sentenced the defendant to 30 years in prison as a prison release reoffender. The district court affirmed his judgment and sentence. The state's theory at trial was that after an officer stopped the defendant's vehicle for a defective taillight, the defendant fled the scene, and in so doing, he drove his vehicle over the officer's foot. A police chase followed, and the defendant's vehicle collided with a pursuing patrol car driven by another officer. The defendant sustained injuries as a result of the collision, exited his vehicle, and fled on foot. He was caught near a residence by deputies after a brief foot chase. The defense theory was that the defendant had been targeted by the officers.

According to the defense, the officer pulled the defendant over because the officer was enamored of the defendant's girlfriend. When the officer approached the defendant's vehicle, he smashed the windshield with his flashlight, maced the defendant, and threatened "to beat the crap out of him." The defendant contended that he fled the scene in his vehicle to escape the officer's attack. The officer shot out the tires on the defendant's vehicle, and the defendant eventually lost control and collided with the second officer's patrol car. The defendant fled on foot toward a residence in an attempt to get witnesses on the scene.

According to the defense, the officers beat the defendant when they caught up to him in retaliation for ruining their "Yankees" patrol car, which had been donated by George Steinbrenner, owner of the New York Yankees baseball franchise. The defendant pursued this defense without the testimony of his girlfriend, who could not be located, and without any forensic evidence from his vehicle, which had been auctioned off in forfeiture proceedings. The defendant was the sole defense witness.

On claims one, four, six, and seven, the district court reversed and remanded for reconsideration, holding that the postconviction court erred in summarily denying the claims based on defendant's failure to allege prejudice. On claims two and nine, the

district court struck the claims and remanded with leave to amend. The court affirmed remaining claims without comment.

Steadman v. State, 23 So. 3d 811 (Fla. 2d DCA 2009).

On remand from the Florida Supreme Court, the district court affirmed the sentences in two cases involving convictions for burglary of a conveyance, grand theft, two counts of aggravated assault, fleeing or eluding, driving with a suspended license, and giving false identification to law enforcement.

The trial court gave the defendant jail time credit on all concurrent counts but did not give him jail time credit on consecutive counts. The defendant filed a motion to correct sentencing error, arguing that the trial court should have given him credit for time served in jail while awaiting sentence on four separate counts. The trial court denied the motion, and the defendant appealed.

On appeal, both the defendant and the state asserted that this case was controlled by Gisi v. State, 948 So. 2d 816 (Fla. 2d DCA 2007), which at the time was pending before the supreme court. The district court affirmed, Steadman v. State, 997 So. 2d 417 (Fla. 2d DCA 2008) (table decision), and the defendant sought and was granted review by the supreme court. Accordingly, when the supreme court decided Gisi and Rabedeau, it remanded the appeal for further consideration by this court. Steadman v. State, 14 So. 3d 218 (Fla. 2009). The district court held that Rabedeau and Gisi were inapplicable to this case because they involved denial of credit for time served on previously served concurrent prison sentences before the defendant was resentenced to consecutive prison terms.

Bailey v. State, 21 So. 3d 147 (Fla. 5th DCA 2009).

The district court rejected a double jeopardy argument and affirmed the defendant's convictions for carjacking with a weapon and aggravated assault (deadly weapon).

The defendant entered a no contest plea to charges of carjacking with a weapon, aggravated assault (deadly weapon), and petit theft. The state alleged that the victim was driving to work around 6:20 a.m. when she observed the defendant crying and waving her arms at an intersection. When the victim rolled down her window, the defendant said her van had broken down and she needed a ride home. The victim agreed and drove to the defendant's neighborhood.

Once there, the victim asked the defendant to get out so that she could get to work on time. The defendant reached forward as if to pick up her purse, but instead thrust a six-inch knife toward the victim's throat and demanded her purse, money, and phone. Fearing for her life, the struggling victim released the brake pedal, causing the defendant to panic. During the ensuing melee, the victim jumped from the vehicle, and the defendant drove off. Law enforcement located the vehicle later that day next to a

drainage ditch where the victim's purse, without her personal property, had been abandoned.

Defense counsel added that the defendant told the police the two men she left with her broken-down van had given her the knife with instructions to get another vehicle and money. The police apprehended the two men, who had criminal records, while they were attempting to refuel her van. Although a guilty plea and adjudication of guilt generally preclude a later double jeopardy attack, an exception applies when, as in this case, there is a general or open plea, the double jeopardy is apparent from the face of the record, and there is nothing in the record to indicate a waiver of double jeopardy.

The defendant argued that because the single action of thrusting a knife toward the victim comprised the elements of both offenses, her conviction for aggravated assault with a deadly weapon was subsumed by the greater offense of armed carjacking and, therefore, violated double jeopardy. The court stated that the analysis turned upon a comparison of the statutory elements rather than upon the single action she committed.

Carjacking involves the following elements: (1) the taking of a motor vehicle from the person or custody of another; (2) with the intent to either permanently or temporarily deprive the person of the motor vehicle; and (3) during the taking, there is the use of force, violence, assault, or putting in fear. § 812.133(1), Fla. Stat. (2007). If, in the course of committing the carjacking, the offender carried a firearm or other deadly weapon, the offense is a felony of the first degree. § 812.133(2)(a), Fla. Stat. (2007). In comparison, aggravated assault is an assault with a deadly weapon without intent to kill. §§ 784.021(1)(a), 784.011, Fla. Stat. (2007).

In Law v. State, 824 So. 2d 1055 (Fla. 5th DCA 2002), this court held that armed carjacking does not subsume aggravated assault with a firearm when the defendant's use of the gun to gain entry to the house was separate and apart from his subsequent act of armed carjacking. The prohibition against double jeopardy does not prohibit multiple convictions and punishments when a defendant commits two or more distinct criminal acts. The defendant in Law used a gun to threaten the victim and gain entry to the victim's house. Once inside, he ordered the victim to the ground, placed a knee in his back and a gun to his head, and demanded his car keys. After Law grabbed the car keys, he fled in the victim's car.

The district court held that in the present case, the Law time and space analysis was unnecessary to answer the double jeopardy issue. The court explained that, although it was undisputed that the events occurred over a matter of seconds while both individuals were seated in the victim's van, the gravamen of the aggravated assault offense was the use of a deadly weapon, not merely carrying one, as required for armed carjacking.

Carter v. State, 23 So. 3d 1238 (Fla. 4th DCA 2009).

The district court affirmed the defendant’s carjacking and robbery convictions and reversed his conviction on a charge of felony driving while license revoked.

The victim was a taxicab driver who picked up two men and a woman near a motel. One of the men was disabled and in a wheelchair. The victim helped secure the wheelchair in the trunk of his cab. Once the trio was in the cab, one of the passengers told him to drive them to another motel a few miles away. After they arrived at the motel, the cab driver could not find his cell phone. He got out of the cab and looked for his phone behind one of the seats. After helping the disabled man into his wheelchair, the defendant went to the driver's seat, turned the engine off, and told the cab driver he did not want to pay the fare. When the driver said he was looking for his phone, the defendant asked if the driver was accusing him of taking the phone, which the driver denied. The defendant then struck the driver with a closed fist, and the driver fell to the ground. The defendant continued to hit him on the face and neck. Once the beating stopped, the driver stood up and looked for his glasses. After he picked up the glasses, the defendant asked for them. Fearing for his life, the driver gave the defendant his glasses. Standing beside the open trunk, the defendant called to the driver, who feared that the defendant planned to put him inside. At that point, the driver ran away.

The defendant drove off in the cab, along with the cab driver's drivers license, immigration papers, and money. Motel security called the police, to whom the driver gave descriptions of his three passengers. About 20 minutes after the defendant drove off, the police found the cab a few blocks from the motel. The driver/victim never retrieved his driver's license, immigration papers, cell phone, money, or ignition key. The next day, an officer aware of the carjacking arrested three people matching descriptions of persons involved in the carjacking the day before. The driver recognized the defendant's photograph as depicting his assailant.

The district court rejected the defendant's argument that the taking of the car was an afterthought and thus did not meet the legal test for carjacking. The court cited Baptiste-Jean v. State, 979 So. 2d 1091 (Fla. 3d DCA 2008), in which a beating and robbery took place prior to the stealing of a car. The Fourth District analogized the facts of the present case to those in Baptiste-Jean, in which there was a logically interrelated 'continuous series of acts or events,' and thus 'in the course of the taking' of the vehicle itself as provided in subsection 812.133(3)(b).

The district court also affirmed the robbery conviction, based primarily on the taking of the victim's glasses, holding that competent, substantial evidence supported the robbery conviction. However, the district court reversed the conviction and sentence for felony driving with a revoked license, stating that the driving record offered by the state failed to prove an essential element of the crime because it did not specify the convictions that gave rise to the habitual traffic offender suspension.

Lamb v. State, __ So. 3d __ (Fla. 2d DCA 2009), 2009 WL 3787321, 34 Fla. L. Weekly D2330, No. 2D07-4175.

The district court affirmed the defendant's judgments and sentences for convictions on charges of false imprisonment while carrying or using a firearm, burglary of a conveyance, grand theft auto, and fleeing or attempting to elude. The court reversed as to an issue regarding a prison releasee reoffender (PRR) sentence under section 775.082(9)(a)(1), Florida Statutes (2006), which the court found to be imposed in error.

Arrest, Search and Seizure

State v. Abbey, ___ So. 3d ___ (Fla. 2009), 2009 WL 3837149, 34 Fla. L. Weekly D2372, No. 4D09-88.

The district court reversed the trial court's order granting the defendant's motion to suppress evidence seized after execution of a search warrant.

The defendant was driving his Corvette northbound in the right lane when another driver southbound in the left lane, attempted to make a left turn. The cars collided, and the other driver died as a result of his injuries from the crash. Subsequently, information downloaded from the car's "black box" revealed that the defendant's speed was 103 m.p.h. five seconds before impact and 98 m.p.h. one second before impact.

The trial court granted the defendant's motion to suppress physical evidence from his vehicle, including information downloaded from the black box. The court concluded "[t]hat the general affidavit and application for search warrant did not contain specific and sufficient facts to establish probable cause that a crime had been committed and that the evidence of that crime would be found in the defendant's vehicle. Speed alone was insufficient." A search warrant for property may be issued "[w]hen any property constitutes evidence relevant to proving that a felony has been committed." § 933.02(3), Fla. Stat. (2006).

The district court explained that, under Florida law, probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that the person is guilty of the offense charged. The district court held that the detective presented enough facts in his affidavit for the magistrate to make a practical, common-sense decision, based on the circumstances set forth in the affidavit, that there was a fair probability that evidence of vehicular homicide would be recovered from the Corvette's black box. The magistrate needed only to determine whether the facts related in the supporting affidavit were sufficient to justify a probable cause determination, not whether the facts made a prima facie showing that the crime occurred. Because the general affidavit and application for the search warrant contained sufficient facts to establish probable cause that vehicular homicide was committed and that the evidence of that crime would be found in the defendant's vehicle, the magistrate properly issued the search warrant.

Fuentes v. State, ___ So. 3d ___ (Fla. 4th DCA 2009), 2009 WL 5126240, 35 Fla. L. Weekly D65, No. 4D08-3770.

The district court reversed the trial court's denial of the defendant's motion to suppress evidence of possession of cannabis and drug paraphernalia with directions to discharge the defendant, holding that the state failed to prove reasonable suspicion to make the investigatory stop. The defendant had pleaded no contest to charges of possession of cannabis and possession of drug paraphernalia, reserving her right to appeal her motion to suppress, which was dispositive.

The investigating officer received a call from police dispatch regarding an anonymous complaint that a female and male were punching each other inside a U-haul truck. As the officer approached the area where the alleged incident occurred, she stopped at an intersection and saw a U-haul truck on the opposite side of the intersection moving in the opposite direction. Inside the truck were a female driver and male passenger. She turned her patrol car around and began driving behind the U-haul truck. She turned on her flashing lights and pulled over the truck. Before she pulled over the truck, the officer did not notice physical altercation between the passengers, nor did she observe erratic driving, speeding, or swerving.

The officer exited her patrol car. Due to heavy traffic, she walked up to the passenger's side of the truck. She asked the male passenger to step out of the truck. Because this was a possible domestic violence situation, the officer wanted to separate the couple and talk to them individually. The female driver (the defendant) remained in the car. Approximately two minutes later, a second officer arrived. The first officer asked the other officer to talk to the defendant. As the second officer walked over to the defendant, who was still sitting in the truck, the first officer and the male passenger discussed the alleged domestic violence. The male passenger told the officer that he and the defendant were having a verbal, not physical, altercation. There was no evidence of a physical altercation on the male passenger's person.

The second officer approached the driver's side of the truck. He asked the defendant whether there was a physical altercation. She said no. The officer asked the defendant to exit the truck and, due to traffic, relocate to its back. As she exited, a clear baggy with a green leafy substance fell from her lap. The officer suspected that it was marijuana. As the defendant started walking toward the back of the truck, the officer seized the baggy.

Upon arriving at the back of the truck, the officer again asked the defendant if there was a physical altercation. She said no. The officer found no evidence of a physical altercation on the defendant's person. The officer obtained the defendant's consent to search the truck. The defendant signed consent to search waiver form. The officer arrested the defendant, as he believed the substance in the clear baggy was marijuana. The second officer searched the truck, where he found more suspected marijuana as well as two heat lamps commonly used to cultivate marijuana and two brown bags full of empty Ziploc bags. He field tested the substances found in the two clear bags and the gallon bag. The test was positive for marijuana.

After analyzing relevant cases, the district court concluded that the first officer did not have a reasonable suspicion of criminal activity when she conducted the investigatory stop. The facts known to her at the time of the stop did not indicate criminal activity. She observed a female driver and male passenger in a U-haul truck—as described by the anonymous tipster—but did not corroborate this identification with any criminal behavior, i.e., she did not see the couple physically attacking each other or otherwise engaging in illegal or suspicious activity. The place where the truck was pulled over was near a U-haul rental facility, further negating the premise that these two individuals were the subject of the anonymous tipster's call, as the couple may have been two other people who rented a U-haul truck at the same time the anonymous tipster informed the police of possible domestic violence.

Brown v. State, 24 So. 3d 671 (Fla. 5th DCA 2009).

The district court affirmed the trial court's denial of the defendant's motion to suppress evidence of stolen wallets gathered during a traffic stop.

A sheriff's deputy stopped the defendant's vehicle because of outstanding warrants. After the deputy identified the defendant and confirmed two outstanding warrants for theft, he took the defendant into custody, handcuffed him, and placed him in the patrol car. The deputy then looked in the car and noticed on the front seat a wallet immediately in his line of view, on the driver's seat. He opened the wallet and determined that it did not belong to the defendant, but instead to an elderly woman.

Thereafter, the deputy conducted a search of the vehicle. During this search, he located three other wallets on the floor of the passenger's side. These wallets also belonged to elderly women. The defendant told the deputy he found the wallets at a pharmacy and later said that he found them at a grocery store. He claimed he was trying to find a place to turn them in. The jury concluded otherwise.

The trial court denied the defendant's motion to suppress, which he argued without benefit of counsel. The defendant claimed, inter alia, that police had no cause to search his vehicle because the vehicle had no connection to the crimes for which he was arrested. The trial court dismissed this argument, applying the then-prevailing interpretation of New York v. Belton, 453 U.S. 454 (1981), which held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Id. at 460.

On appeal, the defendant challenged the trial court's reliance upon Belton in light of Arizona v. Gant, 129 S. Ct. 1710, 1716 (2009), decided after his conviction. He challenged applicability of the search incident to arrest exception because he was shackled and locked in a police car at the time of the search, a fact not in dispute. The district court examined parameters of the exception in light of Gant.

The district court concluded that the search was lawful under Gant, even though the defendant was not within reach of the vehicle at the time of the search. The district court also concluded that the fruits of the search should not be excluded, even if the search was unlawful, because police relied in good faith upon the widely accepted interpretation of the law in effect at the time of the search.

A.M. v. State, 24 So. 3d 731 (Fla. 3d DCA 2009).

The district court affirmed the adjudication of delinquency of a juvenile for giving a false name to a law enforcement officer. The court concluded that the law enforcement officer had a reasonable suspicion for an investigatory stop of the defendant.

The stop occurred after an officer received a dispatch regarding a burglary in progress in an area identified by the police department as a "hot zone" because of an increase in burglaries. The caller gave the location of the alleged burglary and a physical and clothing description of the suspect. The dispatcher also indicated that a witness had followed the suspect to an auto shop. The officer drove to the auto shop and was flagged down by the witness. The distance from the burglary location to the auto shop was between 1/8 and 1/4 of a mile. The officer stopped and spoke to the individual for ten to twenty seconds in order to ascertain that they were talking about the same person. The individual pointed out the direction taken by the suspect. Neither the officer nor the dispatcher obtained the name of this witness. The officer proceeded a few blocks and saw the defendant, who matched the description. The officer stopped and asked the defendant what he was doing in the area and why he was not in school. The defendant told the officer that he had a driver's license. The officer asked for a name and date of birth, and the defendant initially stated that his name was James Jackson. When the name and date of birth were checked through the police car's computer, no driver's license came up under that name and date of birth.

The officer told the defendant he was aware that sometimes people were afraid but that he was eventually going to find out his name, even if the officer had to take him into custody and fingerprint him. The officer placed the defendant in handcuffs in the back seat of the police car. The defendant then gave the name James Myles and a different date of birth, which would have made him an adult. Once again, a computer inquiry revealed no driver's license with that name and date of birth.

The officer patted down the defendant and found an identification card with what turned out to be his correct name. A computer inquiry revealed that there was a pick-up order for him. At the station, the defendant was fingerprinted and ultimately admitted his actual name.

By statute, "It is unlawful for a person who has been arrested **or lawfully detained** by a law enforcement officer to give a false name, or otherwise falsely identify himself or herself in anyway, to the law enforcement officer or any county jail personnel." § 901.36(1), Fla. Stat. (2008) (emphasis added). The defendant contended at

trial that he was not lawfully detained. The trial court rejected this argument and adjudicated him delinquent.

The defendant argued that there was no reasonable suspicion to support an investigatory stop, relying on Baptiste v. State, 995 So. 2d 285 (Fla. 2008), an argument that the district court rejected. The court held that, in this case, an anonymous tip was followed by a face-to-face encounter between an officer and a citizen who had followed the defendant. The defendant argued that the encounter with the citizen must be ignored because the officer testified that he did not know whether the citizen was the one who had placed the telephone call to the police. In rejecting that argument, the district court stated that the telephone call indicated that an individual had followed the subject to the auto shop, and a citizen flagged the officer down when he arrived at that location. The officer did not ask the individual specifically whether he or she had made the telephone call to the police. Logically, however, either the citizen was the one who placed the call, or the citizen had been present with the one who did make the telephone call. Under the circumstances, the stop was legal, the district court concluded.

Hidelgo v. State, 25 So. 3d 95 (Fla. 3d DCA 2009).

The district court reversed the trial court's denial of the defendant's motion to suppress cocaine she ostensibly abandoned after being illegally detained in a traffic stop.

The stop occurred after an officer observed a Lincoln Navigator switch lanes, causing the driver of another vehicle to slam on the brakes and honk the horn. Another officer was behind the first officer, and the two officers conducted a traffic stop. The first officer approached the driver while the second officer went to the passenger side. The defendant was the front seat passenger, and her 12-year-old daughter was in the back seat. The first officer testified he was not aware that a DEA agent had requested the Miami-Dade Police Department to develop probable cause and stop the Navigator. According to the first officer, while he was in the process of obtaining the driver's identification information, the defendant tried to answer questions for the driver and spoke to him in Spanish. This raised a safety concern in the first officer's mind because he did not speak Spanish and did not know what the defendant/passenger was telling the driver.

[The district court noted that the defendant's name is interchangeably spelled "Hidalgo" and "Hidelgo" and stated: "We will use Hidalgo." However, the name is spelled "Hidelgo" in the Third District's style of the case.]

The first officer questioned the defendant. He noticed that her voice changed, she slurred words, and she became nervous. When asked why, she responded that "cops make her nervous" because she had been arrested for drugs. The officer asked the driver and the defendant/passenger: "Do you have a problem if we look into the vehicle?" Separately, the defendant and the driver said no. The second officer asked the defendant to get out of the car, patted her down, and handcuffed her. A more intrusive search of defendant was later conducted by a female sergeant. The defendant was taken to the

second officer's vehicle, and the door was closed. The officer admitted that the defendant was not free to leave.

The driver was also handcuffed and placed in the back of the first officer's vehicle. The defendant's daughter was allowed to remain in the Navigator while the officers conducted part of their search, but when other officers arrived at the scene, she was placed in another police vehicle. During the next 15 to 25 minutes, the officers searched the Navigator. At one point, a canine unit arrived at the scene, as well as a DEA special agent. The officers found no contraband in the Navigator.

The driver was issued a citation, and both driver and passenger/defendant were allowed to leave. When the second officer checked the back seat of his vehicle, he found a plastic bag containing cocaine. The officers drove after the Navigator and arrested the defendant. The trial court denied her motion to suppress evidence of the cocaine, relying primarily on State v. Cromatie, 668 So. 2d 1075 (Fla. 2d DCA 1996).

The district court concluded that the trial court properly found that this was a legitimate traffic stop. The district court agreed with the state that the defendant consented to the search. The court stated that the problem with the trial court's analysis was that no contraband was discovered in the search of the vehicle. Assuming that the consent extended to a search of the persons, this too yielded no contraband.

The state argued that the contraband was discovered as a result of abandonment after the defendant was handcuffed and placed in the back of a police vehicle for almost thirty minutes, while she was separated from her daughter and the driver of the car. The state introduced no evidence that the defendant consented to being handcuffed and placed by herself in the back of a police vehicle for a lengthy period of time. Unlike in Cromatie, where the two occupants exited the vehicle and stood nearby with back-up officers, the defendant was treated no differently than someone under arrest. In fact, the second officer admitted that the defendant was not free to leave.

The district court held that when restraint by handcuffing is used in the course of an investigative detention, it must be temporary and last no longer than necessary to effectuate the purpose of the stop. The district court concluded that the trial court failed to analyze the legality of the defendant's seizure, which allegedly resulted in the abandonment of the cocaine. The court held that a valid consent to search a vehicle does not authorize officers to order occupants out of a vehicle and place them in handcuffs for a lengthy period in a police vehicle.

Barlatier v. State, __ So. 3d __ (Fla. 3d DCA 2009), 2009 WL 4824798, 34 Fla. L. Weekly D2587, No. 3D08-1189.

The district court affirmed the conviction and sentence of the defendant for unlawful possession of a firearm by a convicted felon.

A police detective received information regarding an arrest warrant for the defendant with an address and description of the vehicle he was driving. The detective observed the described vehicle at the given address and set up a surveillance perimeter. He observed two suspects walking to the vehicle, one going to the driver's side and the other to the passenger's side. When the vehicle drove off, he called for a Robbery Intervention Detail to block the car. Once the vehicle was blocked, the detective asked the passenger to step outside. He then handcuffed the passenger. Weapons were not observed on the passenger's side of the vehicle or seen being placed on the driver's side.

Another officer identified the driver as the defendant and ordered him to step out of the vehicle. When the defendant stuck his foot outside the car, the detective saw the gun on the floor. The defendant made a motion as if he was going to knock the gun under the seat to hide it. The detective did not see anyone else touch the gun. The second detective testified he also saw the gun protruding from under the seat of the driver's side. He further testified that the defendant had no opportunity to switch positions with the passenger.

The defendant's girlfriend testified that she had lent the car to the defendant prior to the incident but never brought firearms into the vehicle. At the close of the state's case, the defendant moved for a judgment of acquittal, arguing that the state did not meet its burden of proving constructive possession of the gun. The trial court denied the motion. The jury returned a verdict finding the defendant guilty of possession of a firearm by a convicted felon. He was sentenced to thirty years as a habitual offender.

On appeal, the defendant alleged error in the denial of the motion for judgment of acquittal on grounds that the evidence was insufficient to support the conviction for possession of a firearm by a convicted felon. The defendant based his argument on the proposition that constructive possession was not established as there was no evidence that the defendant knew the firearm was in the car or that he exercised control over it.

The district court explained that the facts, as established through the detectives' observations and testimony, excluded the possibility that someone other than the defendant could have placed the gun under the driver's seat between the time the vehicle was pulled over and it was searched, or that someone other than the defendant could have placed the gun under the driver's seat during the search. The only one who could have had possession and control over the gun was the defendant. That the defendant tried to knock the gun back under the seat is in accord with the detective's testimony. The district court held that the circumstantial evidence surrounding discovery of the gun in plain view under the driver's seat where the defendant was sitting was sufficient to establish constructive possession on the motion for judgment of acquittal.

E.I. v. State, ___ So. 3d ___ (Fla. 2d DCA 2009), 2009 WL 5125170, 35 Fla. L. Weekly D38, No. 2D08-4971.

The district court reversed the trial court's adjudication of delinquency and resulting sentence for one count of attempted tampering with physical evidence. The

defendant argued that his statements to police should have been suppressed and that his motion for judgment of dismissal should have been granted because the state did not present a prima facie case of attempted tampering. The district court agreed that the state did not present a prima facie case of attempted tampering.

The defendant was a passenger in a pickup truck being driven after midnight. An officer, noticing that the truck's tag light was not working, pulled behind the pickup truck and activated his lights and siren. As the truck pulled into a gas station, the officer saw the defendant throw an item out of the passenger window. After the truck stopped, the officer located the item, which was visible on the surface of the gas-station parking lot. The item was a package containing three small baggies each containing methamphetamine. In a post-Miranda statement, the defendant told the police that when the officer pulled in behind the truck, the driver of the truck removed the package of methamphetamine from his pocket, handed it to the defendant, and told the defendant he didn't want the police to find it. At the driver's direction, the defendant threw the package out the truck window. The defendant made no statements about his intent in throwing the package.

The defendant was not charged with possession of the methamphetamine; instead, he was charged with attempted tampering with evidence pursuant to section 918.13, Florida Statutes (2008), and section 777.04(1), Florida Statutes (2008). In interpreting the tampering statute, the Second District has held that the simple act of throwing a bag of cocaine out of a car window is generally not sufficient to constitute the offense of tampering with evidence. See Boice v. State, 560 So. 2d 1383, 1384 (Fla. 2d DCA 1990).

The district court explained that, under the reasoning of Boice, the defendant's act of tossing the driver's package of methamphetamine out the window in the clear sight of the officer would not constitute attempted tampering. The court stated that, while the defendant was clearly trying to disassociate himself from the package, there was nothing about this act under the circumstances presented that shows that defendant was trying to alter, destroy, or conceal the package. Further, while the defendant did remove the package from his hand, he did not remove it from the scene of the traffic stop. Thus, this act was factually and legally nothing more than abandonment, and the trial court should have granted the defendant's motion for judgment of dismissal. The court further explained that, while the state's evidence might arguably show that the driver of the pickup truck intended to conceal the methamphetamine, the state presented no evidence that the defendant shared this intent. In the absence of such evidence, the state failed to present a prima facie case of attempted tampering.

Evans v. State, ___ So. 3d ___ (Fla. 1st DCA 2009), 2009 WL 5151528, 35 Fla. L. Weekly D84, No. 1D09-1548.

The district court affirmed the trial court's denial of the defendant's motion to suppress evidence of the firearm seized from her vehicle and motion for judgment of acquittal on the charge of carrying a concealed firearm.

A deputy observed a swerving truck matching a description based on a 911 call. The 911 caller provided the name of the defendant as the driver of the truck, and the caller stated that the defendant possessed a firearm, had been drinking, and had threatened to kill her boyfriend. The deputy stopped the truck and asked the defendant to get out of the vehicle. He asked whether she had a firearm in the car, and she replied that she did. The deputy testified that the defendant had bloodshot eyes, slurred speech, smelled of alcohol, and failed field sobriety tests. He testified that, prior to being placed under arrest for driving under the influence, the defendant became combative. The deputy handcuffed the defendant, placed her in his car, and found the firearm in the front passenger seat under some papers.

The district court cited J.E.S. v. State, 931 So. 2d 276 (Fla. 5th DCA 2006), a traffic stop case in which the Fifth District construed section 790.01(2) under facts similar to those in the instant case and held that evidence was sufficient to support a conviction for carrying a concealed firearm. The court distinguished White v. State, 902 So. 2d 887 (Fla. 1st DCA 2005), and Lamb v. State, 668 So. 2d 666 (Fla. 2d DCA 1996) on their facts. In J.E.S., the Fifth District held that evidence was sufficient to support a conviction for carrying a concealed firearm when the defendant was ordered out of the vehicle and a search of the vehicle revealed a firearm hidden under the seat. In J.E.S., the court found that the facts in White were unclear, but since the White opinion stated that the facts were "practically identical" to those in Lamb, the court looked to the facts set out in Lamb. J.E.S., 930 So. 2d at 279-280. The Fifth District distinguished the cases by the fact that the appellant in J.E.S. was sitting in the vehicle with the concealed firearm at the time the police officer approached the vehicle, but the appellant in Lamb had been outside the vehicle for some period of time before the firearm was found. Id.

In J.E.S., as in the instant case, the defendant was inside the vehicle with the concealed firearm at the time the officer approached; the defendant was ordered out of the vehicle; and the firearm was found concealed in the vehicle immediately. As in J.E.S., the concealed firearm was "readily accessible" to the defendant immediately prior to being ordered out of the vehicle; the defendant was in the driver's seat with the concealed firearm readily accessible to her in the passenger seat. The district court stated that the record in this case demonstrated that the deputy had reason to believe the driver was armed prior to stopping the vehicle and asking the defendant get out.

Daniel v. State, 20 So. 3d 1008 (Fla. 4th DCA 2009).

The district court affirmed the trial court's denial of a motion to suppress evidence of illegal narcotics obtained during a search of the defendant's vehicle.

The defendant was placed on probation after pleading no contest to a charge of uttering a forged instrument. He was also placed on probation when, in a separate case, he pled no contest to the charges of possession of cannabis and driving without a valid driver's license.

After a stop of a vehicle implicated in an armed robbery, the arresting officer called for backup to get additional units from the City of Margate and the City of Coconut Creek. Upon the arrival of Margate police officers, the defendant was placed under arrest. A search of the car revealed a gun, papers belonging to the victim, and a white pullover shirt and purse.

The defendant argued that suppression of his detention and arrest was warranted because detectives from the City of Coconut Creek did not have jurisdiction to take action in the City of Margate. The state countered that the detectives acted in accordance with the "Mutual Aid Agreement" entered into by both municipalities. The district court agreed with the state.

Marin v. State, 19 So. 3d 436 (Fla. 4th DCA 2009).

The district court affirmed the trial court's denial of a motion to suppress evidence gathered from the defendant's vehicle during a consensual police encounter.

The arresting office testified that he and his partner were on routine patrol in a residential area. They saw the defendant's vehicle parked at the end of a dead end street. The vehicle appeared to be occupied. As the officers were driving up behind the vehicle, the occupants starting exiting the vehicle. The defendant exited the driver's side. The defendant was already out of his car and walking towards the back of it by the time the deputies exited their vehicle. As the deputy approached the defendant and came near to the back bumper of the defendant's car, he noticed that the driver's door was open. He smelled the odor of cannabis. The defendant admitted right away that he had marijuana in the car. The deputy did not tell the defendant that he was not free to leave; he just told him that he needed to see his identification.

The defendant tried to re-enter the car. The deputy looked inside the car where he saw cannabis and a firearm in the driver's seat. At that point, the deputy grabbed the defendant and handcuffed him. The deputies also found cocaine inside the car. After the defendant was arrested, the deputy read him his Miranda rights. The defendant was charged with possession of cocaine and possession of a misdemeanor amount of cannabis. He filed a motion to suppress evidence.

The trial court found that the defendant's vehicle was already stopped when the deputy approached and the defendant voluntarily exited the vehicle without instruction from the deputy. The district court found that the initial encounter between the deputy and the defendant was a consensual encounter permitted by law. Once the deputy smelled cannabis emanating from the defendant's vehicle, he had the requisite probable cause to search the defendant's vehicle and arrest him.

State v. Outler, 20 So. 3d 421 (Fla. 3d DCA 2009).

The district court reversed the judgment of the trial court, holding that the trial court erred in finding that the police obtained evidence of marijuana without reasonable articulable suspicion.

The case originated out of a call by a Los Angeles detective to a U.S. Drug Enforcement Administration (DEA) Special Agent. The detective told the agent that Los Angeles police had seized several crates of marijuana from a Los Angeles trucking company, and the trucking company was carrying a similar crate to Tiffany Transport in Miami-Dade County. He described the crate and advised the agent that the shipping name and address were fictitious.

That afternoon, the DEA agent and five other federal agents and two local officers visited Tiffany Transport and inspected the crate. One agent diverted to check the delivery information on the accompanying crate and found that, like the shipping information, the delivery name and address were fictitious. A drug-trained canine was exposed to the crate, but the dog did not alert. One agent told the assembled officers the crate was similar in size, weight, and packaging to crates being used in another marijuana trafficking scheme he was investigating. His investigation had revealed the drug smugglers there had a practice of pre-packing contraband in cardboard boxes before laying them into a crate, then baffling the crate's interior with oily paper towels and dryer sheets to mask the marijuana odor, and securing the crate "excessively," using nails, screws, glue, and metal banding.

Because the canine failed to alert, the officers were unable to obtain a search warrant. A Tiffany Transport representative told the group that the defendant, who recently had picked up two other similar crates, was on his way to Tiffany Transport to pick up the crate in question. The defendant arrived at Tiffany Transport as expected, and a Tiffany forklift operator transported the crate to the defendant's car, where it was opened, and the boxes were removed and placed in the trunk and on the back seat of the defendant's car.

The defendant then departed and traveled north, then east. The DEA agents and local officers sought to trail him surreptitiously in several vehicles. After getting beyond rush-hour traffic, the defendant increased his speed above the speed limit. He weaved back and forth between lanes frequently and checked his rearview mirrors "excessively," according to agent testimony. Although one of the local officers testified he could have pulled the defendant over for excessive speed, he elected not to do so because he was traveling in an unmarked car. Instead, the agents and officers called for another Miami-Dade officer in a marked car to join them to make the stop.

Meanwhile, the defendant made frequent right and left turns from block to block, and did not honor stop signs. For safety reasons, local officers stopped him, even though the marked car had not arrived. As he rolled down his car window, the agents detected the odor of marijuana wafting from the vehicle's backseat and ordered him out of the car. A canine that accompanied the joining officer quickly and unambiguously alerted to

marijuana in the vehicle. The defendant was Mirandized, consented to the opening of the boxes, and was arrested after a few of the cardboard boxes were opened.

The district court concluded the officers had reasonable articulable suspicion to stop the defendant from these undisputed facts: (1) the officers knew the crate in question had come from a shipping company in Los Angeles from which numerous similar crates had been seized and found to contain marijuana; (2) the officers had on hand a DEA agent who related he was investigating a marijuana trafficking conspiracy involving crates of similar weight, build, and packaging; (3) employees of Tiffany Transport related that the defendant had picked up two similar crates in the past; (4) neither the sender's address in Los Angeles nor the destination address in Miami could be verified by the DEA to exist; and (5) once broken down, the wooden crate was found to contain several cardboard boxes, just as the DEA agent described from his other investigation.

Aldin v. State, 21 So. 3d 68 (Fla. 3d DCA 2009).

The district court reversed and remanded for a new trial on charges of burglary and theft, holding that the trial court erred in denying the motion to suppress evidence taken from the defendant's van. The encounter with the defendant began at 1:00 a.m., followed by arrest and transportation to the police station. The defendant denied consent to search his van at 6:00 a.m. The van was later towed away and searched. The court held that search of the van could not be considered a search incident to a recent occupant's arrest. Thus, the district court held the search was unreasonable.

The state argued that the evidence was admissible under the inevitable discovery rule. That rule is applicable "where it can be shown that, had the evidence in question not been obtained by the challenged police conduct, it 'ultimately or inevitably would have been discovered by lawful means.'" Craig v. State, 510 So. 2d 857, 862 (Fla. 1987). The district court held that state did not demonstrate how the evidence would have inevitably been discovered. The court also rejected the state's alternative argument that the failure to grant the motion to suppress was harmless error.

Murphy v. State, __ So. 3d ___ (Fla. 2d DCA 2009), 2009 WL 3878529, 34 Fla. L. Weekly D2406, No. 2D08-3666.

The district court reversed and remanded for a new hearing on the defendant's motion to suppress because the state of the law regarding the reasonableness of a search incident to arrest had changed based on a new United States Supreme Court case decided since his suppression hearing.

The defendant was charged with trafficking in cocaine and possession of drug paraphernalia after a police search, incident to his arrest, of a car he had been seen driving. The defense motion alleged that the evidence was obtained as a result of an illegal, warrantless search of the vehicle. At the hearing on the motion to suppress, an

officer testified he responded to a domestic battery disturbance call. When the officer arrived at the apartment complex, a bystander told him, "[T]he guy you're looking for, he's right over there." The bystander pointed to a man standing between two buildings behind the officer. The officer turned and made eye contact with the defendant and asked the defendant to come over to him. In response, the defendant ran in the opposite direction.

The officer gave chase and tasered the defendant, who fell to the ground about ten feet from a purple Dodge Stratus, which was missing hubcaps and had a temporary tag. The officer arrested the defendant, patted him down, and placed him in the back of his patrol car. The officer had been told by his sergeant that there was a gun involved during the domestic altercation, and the gun was missing. The officer had not found a gun on the defendant during the pat down, and he asked the victim whether the defendant could have a gun on him. The victim responded in the affirmative.

A bystander told the officer that she witnessed the domestic dispute and that, after the dispute, the defendant left the scene in a purple Dodge with a temporary tag and no hubcaps, returned shortly thereafter, and then the officer arrived. The officer ran the VIN number of the purple Dodge, and the defendant was not the registered owner. The victim told the officer that the defendant owned the vehicle and had been driving it to work. Another witness also told the officer that he had seen the defendant driving the vehicle.

The officer searched the vehicle and discovered cocaine and a scale that formed the basis for the underlying charges. When the officer's search of the vehicle failed to turn up the firearm, the officer again questioned the victim about it. At this point, the victim indicated that she was not sure that the defendant had been armed.

The trial court denied Murphy's motion to suppress. The court ruled that the vehicle search was legal under the Supreme Court's decisions in New York v. Belton, 453 U.S. 454 (1981), authorizing search of a vehicle incident to arrest of an occupant of the vehicle, and Thornton v. United States, 541 U.S. 615 (2004), which extended Belton to authorize a search of a vehicle incident to the arrest of a "recent occupant" of a vehicle. The trial court determined that the defendant was a recent occupant of the purple Dodge because he was seen in the vehicle "just moments after the crime."

While this appeal was pending, the Supreme Court issued Arizona v. Gant, 129 S. Ct. 1710 (2009), limiting the scope of Belton and Thornton. In Gant, officers observed Gant enter a driveway in a vehicle, exit the vehicle, and shut the door. An officer, who knew that there was an outstanding warrant for Gant's arrest, called to Gant, and the two approached each other. The pair met about ten to twelve feet from Gant's car, where the officer arrested Gant for driving with a suspended license. After Gant was placed in the back of a police cruiser, the officers searched his car and discovered a gun and a bag of cocaine.

The state charged Gant with possession of a narcotic drug for sale and possession of drug paraphernalia. Gant filed a motion to suppress the cocaine and the bag in which it

was found, arguing that the search was not authorized under Belton because he did not pose a threat to the officers at the time of the search and he was not arrested for an offense for which evidence could be found in his car. The trial court denied the motion to suppress, and the Arizona Supreme Court reversed.

On appeal, the United States Supreme Court recognized that many lower courts had interpreted its decision in Belton to permit police to search a vehicle incident to arrest regardless of whether the defendant could reach into that area at the time of the arrest. The district court concluded that such a reading was not consistent with its earlier jurisprudence limiting searches incident to arrest to those including "the arrestee's person and the area within his immediate control."

Thus, the supreme court held in Gant that police are authorized to search a vehicle incident to arrest "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." The supreme court also recognized another justification for a search of a vehicle incident to arrest; such a search would be justified "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' " Concluding that neither justification was supported by the facts of the case, the district court affirmed the reversal of the trial court's order denying Gant's motion to suppress.

Bowers v. State, 23 So. 3d 767 (Fla. 2d DCA 2009).

In a second-tier certiorari proceeding, the district court granted the defendant's petition for writ of certiorari and remanded for the circuit court to affirm the county court's order granting her motion to suppress.

Following a traffic stop, the defendant was arrested and charged in county court with misdemeanor offenses of possession of marijuana, possession of paraphernalia, and DUI. She filed a motion to suppress all evidence obtained during a search of her vehicle following the stop. She argued that the stop was illegal because it was not founded upon probable cause that she had committed a traffic infraction, and thus the warrantless search of her vehicle was also illegal.

The officer who performed the stop did not appear for the evidentiary hearing on the motion to suppress, despite the fact that he had been subpoenaed by the state. The state called the officer who performed the DUI investigation and arrested the defendant but arrived at the scene after her vehicle was already stopped. He never observed her driving, and his understanding of the reason she was stopped was based solely on what another officer told him. The defendant's counsel raised a hearsay objection. The state responded that the testimony was admissible under the fellow officer rule. Defense counsel disagreed. The county court permitted the officer to testify as to what the other officer told him was the basis for the stop of the defendant's vehicle.

The county court expressed difficulty in reaching a decision about whether the officer had a reasonable basis to believe that the defendant committed a traffic infraction. The county court entered a written order granting the defendant's motion without explanation. The state appealed to the circuit court, which reversed the county court's order. The circuit court found that testimony by the arresting officer regarding statements of the officer who made the stop was admissible under the fellow officer rule and concluded that the county court's decision to grant the motion to suppress was not supported by competent, substantial evidence or the law.

The district court concluded that the circuit court applied the wrong law in determining that the officer's testimony was admissible. The court held that, because the only evidence presented by the state to meet its burden of proving a valid stop was the erroneously admitted testimony of the arresting officer, the county court order granting the motion to suppress must be affirmed.

Torts/Accident Cases

Weatherly v. Louis, ___ So. 3d ___ (Fla. 3d DCA 2009), 2009 WL 4281374, 34 Fla. L. Weekly D2498, No. 3D07-2079.

The district court affirmed the final judgment and the trial court's denial of plaintiff's motion for new trial.

A motorcycle driven by the plaintiff collided with an SUV driven and owned by the defendants. Following a trial, the jury returned a verdict finding that the defendants were not negligent. At trial, the plaintiff testified that, just before the accident, he was travelling on the left-hand side of the southbound lane when he saw the SUV exiting a parking lot and making a left-hand turn across the street's southbound lane onto the northbound lane. The plaintiff testified that he flashed his headlights and honked his horn but ran into the left side of the SUV. The defendant testified that he pulled out of the parking lot to turn left and that when he was in the middle of the street, he heard a boom when the plaintiff's motorcycle hit his SUV. The defendant/driver further testified that prior to pulling out into the street, he looked left and no vehicles were approaching. He testified that the light was red when he pulled out into the street. The plaintiff testified that he did not run any red lights while driving home on the day of the accident.

A disinterested witness testified that, before the accident, the plaintiff passed him on the left and that he then saw the plaintiff run two red lights. As a result of what he observed of the plaintiff's driving, the witness testified that he thought Weatherly was going to "kill himself." The witness further testified that, while he did not see the impact, he came upon the accident just after it happened.

The jury returned a verdict finding that the defendant/driver was not negligent and was not the legal cause of damages to the plaintiff. The plaintiff filed a motion to set aside the verdict or, in the alternative, for a new trial, arguing that the verdict was against

the manifest weight of the evidence. The trial court denied the motion and entered a final judgment in favor of the defendants.

The plaintiff contended that the verdict was against the manifest weight of the evidence, and the trial court, therefore, failed to apply the correct legal standard in denying his motion for a new trial. The district court concluded that the trial court did not abuse its discretion when faced with conflicting evidence.

Bryant v. Tarman, ___ So. 3d ___ (Fla. 5th DCA 2009), 2009 WL 3671736, 34 Fla. L. Weekly D2276, No. 5D08-3385.

The district court affirmed the trial court's summary judgment because the plaintiff split her cause of action by first obtaining a judgment for property damage to her motor vehicle and then filing a lawsuit for personal injuries resulting from the same motor vehicle accident. All damages claimed as a result of a single wrongful act must be sought in one lawsuit, even when it involves a motor vehicle accident. The law does not permit the owner of a single cause of action to divide or split that cause of action so as to make it the subject of several lawsuits. Mims v. Reid, 98 So. 2d 498, 500 (Fla. 1957).

Roberts v. Stidham et al., 19 So. 3d 1155 (Fla. 5th DCA 2009).

The district court reversed dismissal of plaintiff's lawsuit with prejudice due to untimely service of process under rule 1.070(j), Florida Rules of Civil Procedure.

The plaintiff filed suit against the defendants seeking damages for personal injuries suffered in a motor vehicle accident. After being served, the defendants moved to dismiss the complaint based on the plaintiff's failure to comply with rule 1.070(j), Florida Rules of Civil Procedure. The plaintiff conceded that service was 32 days late but asserted that she had good cause for failing to serve process within 120 days. In support, she filed an affidavit by the process server. In addition to asserting good cause, she pointed out that the trial court possessed discretion to allow service outside the 120-day period if the statute of limitations would bar refiling of the action, as was the case here.

The process server's affidavit averred that he received the summons, complaint, and discovery requests on July 31, 2007, and thereafter, on at least ten occasions, personally attempted to serve the codefendants at their last known address. On his fifth attempt, he left a business card on their door, but they did not contact him. On December 21, 2007, he again attempted to serve them at 8:30 p.m. and spoke with a neighbor who told him that the codefendants spent most of their time in Georgia with family but that they usually visited Florida over the Christmas holidays. The neighbor also informed the process server that she observed the defendant's son at the home earlier in the day. Acting on this information, the process server returned the next morning, and ultimately the defendant opened the back door to the process server's knock.

The server confirmed the defendant's identity, personally served him, and served a codefendant by substitute service. Upon being served, the defendant told the process

server that his father told him not to respond to the business card the server had previously left at their home.

The trial court granted the defendants' motion to dismiss, stating that it was incumbent upon the plaintiff to move for an enlargement of time to effect service of process, particularly when she knew or reasonably should have known that service of process would not be accomplished within 120 days. The trial court also found that it should not have taken five months for the plaintiff to ask a neighbor when the defendants would be home. In response, the plaintiff filed a motion for reconsideration and request for oral argument with a memorandum of law and a supplemental affidavit by the process server, which added that the house appeared shuttered with cobwebs on the door, and the carport was empty. The server stated that he had tried several times to contact the neighbors, but they did not answer his knocks.

The district court agreed with the plaintiff's argument that the process server's ten attempts to serve process demonstrated a diligent effort and established good cause not to dismiss the complaint.

Hanson v. Maxfield, 23 So. 3d 736 (Fla. 1st DCA 2009).

The district court reversed a final judgment arising out of a motor vehicle accident in which a motorcycle, on which the plaintiff was a passenger, collided with an automobile driven by the defendant when the defendant turned in front of the motorcycle. The defendant (the driver and his parents, who owned the car) argued that the trial court erred in denying their motion for summary judgment since the parties had entered into a settlement agreement prior to the suit. The court held that the evidence reflected that the parties did enter into an enforceable settlement agreement.

Driver's Licenses

Langlais v. State, 24 So. 3d 766 (Fla. 4th DCA 2009).

The district court reversed and remanded to the trial court with instructions to correct the final judgment and sentence to reflect that the defendant was adjudicated guilty of driving while license suspended (DWLS), a first degree misdemeanor.

Judgment and sentence signed by the court indicated that the defendant entered a plea of no contest and was adjudicated guilty of Count I Grand Theft (motor vehicle), a third degree felony, and Count III "Felony DWLREV3 (habitual offender)," a third degree felony. The defendant argued that he entered a plea of no contest to the lesser included offense charged in Count III of DWLS, the first degree misdemeanor, which carries a maximum sentence of one year in the county jail.

The district court concluded that there was a scrivener's error in the judgment and sentence indicating that the defendant entered a plea to, and was adjudicated guilty of, the

third degree felony of driving while license revoked (habitual offender), which is the as-charged offense in Count III.

The state argued that it never negotiated a plea to a lesser charge under Count III or amended the information to do so. The district court noted that the state raised no objection at the plea and sentence hearing when the court specifically advised the defendant that he was entering a plea to driving while license suspended, which carried a maximum sentence of one year in the county jail.

Jennings v. State, 22 So. 3d 708 (Fla. 2d DCA 2009).

The district court reversed the revocation of the defendant's probation and remanded for further proceedings.

The defendant was on probation following his sentence of a prison term arising from his conviction on two second-degree felony charges. The defendant was stopped by a police officer for running a red light. The officer cited him for the violation of a traffic control device and also issued a citation because the borrowed car that he was driving had a crack in the windshield.

Subsequently, the defendant submitted a required monthly report to his probation officer. The report form contained the following question: "Have you been arrested or had any contact with law enforcement during the last month?" The defendant answered this question by checking the box indicating a negative response. The defendant's probation officer filed an affidavit alleging that he had violated Condition 1 of probation in that he "falsely report[ed] that he had no contact with law enforcement [during] June." The affidavit also alleged the defendant violated Condition 5 of his probation by "committing the criminal offense of Driving While License Suspended/Revoked." The district court held that, because the state failed to prove that the defendant willfully violated Condition 5 by driving with a suspended license, the trial court erred in finding that he had violated Condition 5 of his probation.

The district court directed that, on remand, the trial court must consider whether the defendant's violation of filing a false report to his probation officer, standing alone, warrants probation revocation. The district court directed that, if the trial court finds that the single violation warrants revocation of probation, the trial court should impose the same sentence as before or a lesser sentence.

Dupree v. State, 20 So. 3d 989 (Fla. 1st DCA 2009).

The district court quashed the defendant's second amended judgment and sentence as entered without jurisdiction. The trial court had erred in listing the defendant's second-degree misdemeanor for driving while license suspended or revoked as a first-degree misdemeanor. The court remanded to the trial court to correct the scrivener's error. The state conceded error on the issue of the scrivener's error.

State v. Cantu, 17 So. 3d 1284 (Fla. 2d DCA 2009).

The district court reversed the trial court's order granting the defendant's motion to dismiss information charging her with habitually driving with a revoked license. The trial court dismissed the information because section 322.34(10), Florida Statutes (2008), makes the offense a misdemeanor when the current revocation results from the failure to pay specified financial obligations. This section, however, became effective on July 1, 2008. The alleged offense occurred on May 1, 2008. Accordingly, the new statute did not apply to the defendant's offense.

Vehicle Forfeiture

Hernandez et al. v. City of Miami Beach, 23 So. 3d 163 (Fla. 3d DCA 2009).

The district court reversed an order finding probable cause in a forfeiture proceeding because the city delayed in requesting an adversary probable cause hearing.

Miami Beach police officers seized a 2005 Land Rover, cash, and jewelry pursuant to the Florida Contraband Forfeiture Act, sections 932.701-.706, Florida Statutes (2008). As required by the Act, the City of Miami Beach sent a notice to the claimants advising them they could request an adversarial preliminary hearing. Counsel for the claimants sent a written request to the City for a hearing. This request was received by the City on Tuesday, January 22, 2008.

Under the Act, it is the responsibility of the seizing agency (in this case, the City) to "set and notice the hearing, which must held within 10 days after the request is received or as soon as practicable thereafter." The tenth day (deadline for the hearing) was Friday, February 1, 2008. The City waited until January 30 (eighth day) to file its request for hearing with the circuit court clerk. On the ninth day, the City hand-delivered a request for emergency hearing to the judge's chambers. The City requested a thirty-minute hearing on or before Monday, February 4. Through a calendaring error, the City calculated Monday, February 4, as the tenth day.

The trial judge's chambers responded immediately and scheduled the hearing for Wednesday, February 6. The City explained at oral argument that the trial judge reserved time on each Wednesday's calendar for forfeiture matters. Having received the request on Thursday, January 31, the judge set the hearing for the next available calendar, which was February 6. This was sixteen days after the claimants requested the hearing.

The claimants' counsel filed a motion to dismiss the forfeiture proceeding and requested return of the seized property. At the hearing, the claimants argued that the hearing was scheduled beyond the ten-day deadline because the City did not promptly request a hearing date. The City responded that it had made the written request for hearing within ten days, and the trial court had set the matter on its next available calendar. The City contended that the scheduling satisfied the "as soon as practicable thereafter" provision of the statute. The trial court denied the motion to dismiss but

observed that appellate guidance regarding required time frames would be helpful. The court found probable cause for the seizure, and the claimants appealed.

The court explained that, under the Act, a property owner is entitled to an adversarial preliminary hearing. If there is no probable cause, the owner is entitled to receive the property back. The hearing is to be held "within 10 days after the request is received [by the seizing agency] or as soon as practicable thereafter." § 932.703(2)(a), Fla. Stat. (2008). The court interpreted this language to mean that the hearing must be held by the tenth day, unless there is good cause to go beyond the ten-day deadline.

The court found that the City waited until the eighth day to file its request for hearing with the circuit court clerk and waited until the ninth day to hand-deliver the request for emergency hearing to the trial judge's chambers. The trial court set the case on its next forfeiture calendar. The district court held it is impermissible for the seizing agency to consume most of the ten-day period before requesting a hearing. The magnitude of the delay made it a practical impossibility for the hearing to be held before the tenth day expired. The ten-day deadline is to be exceeded only if there is good cause or if there is a showing of excusable neglect on the part of the seizing agency. However, the district court noted that neither good cause nor excusable neglect were argued.

The court held that the City submitted its request so late that there was no practical prospect of holding the hearing before the ten-day deadline expired. The court reversed the order and remanded the cause with directions to dismiss the forfeiture action.