FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

July-September, 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)

Carney v. State, 17 So. 3d 348 (Fla. 2d DCA 2009).

The district court reversed and remanded for the imposition of an appropriate sentence because the trial court erred in sentencing the defendant twice for one homicide, based on convictions for DUI manslaughter, driving while license suspended and causing death, driving while license suspended as a habitual offender, and two counts of misdemeanor DUI. The court affirmed on all other grounds without comment.

The defendant was involved in a single-automobile accident that resulted in a passenger's death when the car lost control and spun off the roadway. He pleaded guilty to driving while license suspended as a habitual offender, and a jury found him guilty of all other charges. He was sentenced to fifteen years for DUI manslaughter and to five years for driving while license suspended and causing death. The state conceded error. The court held that while it was proper to convict him of DUI manslaughter and driving while license suspended, the trial court erred when it enhanced the degree of both crimes based on a single homicide.

Bradsheer v. Department of Highway Safety and Motor Vehicles (DHSMV), 20 So. 3d 915 (Fla. 1st DCA 2009).

The district court affirmed in part, reversed in part, and remanded for further fact-finding on claims regarding alleged violations of federal due process, state due process, and the state prohibition against unauthorized agency penalties in a lawsuit in which plaintiffs had sued the state DHSMV (the department) alleging rights violations that occurred when the department ordered, absent required court orders, persons convicted of DUI to install ignition interlock devices or forfeit their driver's licenses.

Under section 316.1937(1), Florida Statutes (2002), a sentencing court had discretion to impose an ignition interlock device, in addition to any other authorized

penalty, upon a driver's initial DUI offense. Also, under section 316.1937(2)(a)(3), Florida Statutes (2002), a sentencing court was required to impose the device when the driver received a second DUI conviction. Despite these provisions, sentencing courts frequently did not order the installation of the device, even in instances in which the requirement would be mandatory. (An ignition interlock device is an instrument connected to an automobile's ignition. To start the vehicle, the driver must blow into the device, which measures alcohol concentration and then, if the concentration falls within an acceptable level, permits the engine to start.)

Beginning in 2004, the department began to send letters to all drivers previously convicted of DUI. The letters ordered the drivers to install and maintain an ignition interlock device on their vehicles. Some of the drivers who received the letters had not been sentenced by the trial court to install the devices. If the drivers failed to comply, the department threatened to suspend their licenses.

Subsequent cases clarified that the requirement to install an ignition interlock device as part of a criminal sentence could come only from the trial court. The cases held the department did not have authority to require the device as part of a defendant's DUI sentence as it was a state agency, not a sentencing court, and had no independent statutory authority. See Embrey v. Dickenson, 906 So. 2d 316, 318 (Fla. 1st DCA 2005); Dickenson v. Aultman, 905 So. 2d 169, 171-72 (Fla. 3d DCA 2005); Doyon v. Department of Highway Safety and Motor Vehicles, 902 So. 2d 842, 844 (Fla. 4th DCA 2005). In response to these cases, the legislature enacted section 322.2715, Florida Statutes (2005), which authorized the department to require the installation of the device whenever the sentencing court failed to order its mandatory placement. However, the provision did not have retroactive effect; its application was limited to DUI convictions that occur[red] on or after July 1, 2005. Prior to July 1, 2005, the department was not authorized to require installation of the devices unless installation was ordered by a trial court. Nevertheless, the department issued letters to all DUI offenders, including those convicted before July 1, 2005, requiring the device, even in cases for which it lacked the authority to do so.

The plaintiffs brought their claims on behalf of all licensed drivers convicted of DUI and sentenced before July 1, 2005, yet subsequently required by the department to install an ignition interlock device. The trial court granted the department's motion to dismiss all five claims with prejudice. Regarding the federal law claims, it found plaintiffs failed to allege a deprivation of a federally protected right. Regarding the state law claims, it found sovereign immunity shielded the state from reimbursing any monetary damages. The plaintiffs contested the dismissal and sought to have the group certified as a class. In an amended complaint, appellants raised five claims. The first three were federal law claims. The last two were state law claims.

The court reversed the final judgment regarding Count I of the complaint and remanded to discern whether the plaintiffs' federal rights were violated without adequate due process when the department required them to either install the ignition interlock device or forfeit their licenses.

The court held that the trial court must conduct further fact finding to determine whether Florida law recognizes a driver's license as a property right under the facts alleged here. It required further fact finding to determine if those plaintiffs convicted of a second DUI who avoided mandatory sentencing sanction of imposition of the device or license revocation still have suffered the loss of a protected property right. Similarly, fact finding was ordered to determine whether the sanction of imposition of the device or license revocation in those cases in which the offender has only one DUI conviction affects a protected property right. The court stated that even if a driver's license is found to be a protected property interest in one situation, it may not be in the other. The court ordered that on remand the trial court should take evidence and make findings regarding whether the defendants' licenses qualified as cognizable property interests and, if so, to make findings as to whether adequate process was provided.

The district court also reversed Count IV of the complaint to the extent that it requested declaratory or injunctive relief and remanded for further consideration of whether the department violated the state prohibitions against depriving liberty or property without due process and unauthorized agency penalties.

Parsons v. State, 16 So. 3d 317 (Fla. 2d DCA 2009).

The district court reversed the trial court's order denying the defendant's postconviction motion alleging that he had not been awarded sufficient jail credit after he was arrested without a warrant for DUI, a violation of his probation (VOP). The court stated that, in denying the defendant's motion for additional jail credit, the postconviction court attached a copy of an arrest warrant that appeared to relate to a 2007 probation violation rather than the 2008 warrantless arrest and subsequent incarceration for which the defendant claimed jail credit. The attachment did not conclusively refute the defendant's allegation; therefore, the district court reversed and remanded for reconsideration of the motion.

State v. W.W., a child, 16 So. 3d 305 (Fla. 5th DCA 2009).

The district court reversed the trial court's order of dismissal of a DUI charge, concluding that when a juvenile is charged with both a felony and a misdemeanor traffic offense, and the charges arise out of the same circumstances, jurisdiction lies with the circuit court.

The defendant had moved to dismiss the DUI count, contending that the circuit court lacked jurisdiction over a juvenile charged with a misdemeanor traffic offense. The circuit court agreed and dismissed the count without prejudice to the state to re-file in the county court.

Blair v. State, 15 So. 3d 758 (Fla. 4th DCA 2009)

The district court granted defendant's petition for writ of habeas corpus and ordered the trial court to hold a bond hearing. The defendant was held without bond after he failed to appear for a court date on a felony DUI charge. He had never been arrested on the felony charge, and he did not receive notice of the court date. He had been arrested for misdemeanor DUI and appeared at a scheduled court date for that charge. At that time, he was advised that the court appearance had been cancelled and that the misdemeanor case had been nolle prossed. Unbeknownst to him, the state had filed an information charging felony DUI, but the uncontested evidence at the bond hearing showed that he did not receive notice of the felony charge.

McNulty v. State, 16 So. 3d 879 (Fla. 4th DCA 2009).

The district court reversed and remanded to give defendant an opportunity to amend his postconviction motion to allege necessary factors under State v. Kelly, 999 So. 2d 1029 (Fla. 2008).

The defendant was found guilty of felony DUI and pled nolo contendere to refusal to consent to alcohol testing. He received a five-year sentence for the felony DUI. On direct appeal, his convictions were affirmed. In his postconviction rule 3.850 motion, he alleged ineffective assistance of counsel, arguing that his lawyer failed to investigate whether a 1982 DUI (which was part of the foundation for the felony DUI) was uncounseled. The district court found that the defendant failed to allege that the offense was punishable by imprisonment; that he was indigent and entitled to court appointed counsel; and that he did not waive the right to counsel. These were the factors that must be alleged by the defendant under Kelly. The district court reversed and directed the trial court, upon remand, to afford McNulty the opportunity to amend his motion to allege the necessary Kelly factors.

A.J.M. v. Florida Department of Law Enforcement, 15 So. 3d 707 (Fla. 3d DCA 2009).

The district affirmed a final order denying the defendant's petition to compel the Florida Department of Law Enforcement to issue a certificate of eligibility for the sealing of a criminal history record.

A police officer arrested the defendant for driving under the influence of alcohol (DUI), and during a search incident to arrest, the police officer discovered cocaine in the defendant's pocket. He was later charged in circuit court with possession of cocaine, and in county court with DUI and driving while license suspended (DWLS). A.J.M. pled guilty to possession of cocaine, and the circuit court withheld adjudication. The DUI and DWLS charges were pending before the county court, and the county court stayed the proceedings pending the resolution of the present appeal.

The district court held that, under section 943.059(2), Florida Statutes, the department may only issue a certificate of eligibility to seal a criminal history record if certain criteria are met. The criterion set forth in subsection (2)(d) specifically provides that the applicant is not eligible to seal his criminal history record unless he has not been adjudicated guilty of committing any of the acts stemming from the arrest or any of the alleged criminal activity to which the petition to seal pertains. That criterion was not met, the court concluded.

Johnson v. State, 14 So. 3d 1282 (Fla. 2d DCA 2009).

The district court affirmed in part and reversed in part a summary postconviction order regarding the defendant's conviction for DUI manslaughter, DUI with serious bodily injury, and two counts of driving with license suspended or revoked. The defendant raised nine grounds in his motion, and the district court affirmed the postconviction order on six of those grounds.

The defendant alleged that his counsel was ineffective in failing to file a motion to sever offenses because he was prejudiced when the jury was confronted with his driving history, which was admitted to prove the counts of driving on a suspended license. The district court reversed and remanded for further consideration the denial of this claim because the postconviction court's order overlooked the provision in rule 3.152, Florida Rules of Criminal Procedure, that allows a motion for severance, even if offenses were not improperly joined, if appropriate to promote a fair determination of guilt or innocence.

In a separate claim, the defendant alleged that his counsel was ineffective for failing to move for an independent toxicology expert on the basis that medical records showed that the accident victim was under the influence of drugs that could have affected his ability to recall events and ability to drive. In denying this claim, the postconviction court held that the defendant should not be allowed to advance a hindsight argument that more cross examination would somehow have caused a different result. The district court reversed for an evidentiary hearing, stating that it was unable to say that there was no prejudice when the defendant alleged that the victim was the only witness to say that the defendant was driving and the jury did not hear that the victim was intoxicated with cocaine and other drugs at the time of the accident.

The defendant also alleged that his counsel was ineffective in failing to keep out opinion testimony as to who was driving and the defendant's prior traffic convictions, which were both the subject of motions in limine. The postconviction court's order addressed only the first part of this claim. The district court reversed and remanded with instruction to the postconviction court to address the second allegation of this claim, the allegation of ineffective assistance of counsel for allowing into evidence the defendant's prior convictions for traffic-related offenses.

Criminal Traffic Offenses

Scott v. State, 17 So. 3d 766 (Fla. 4th DCA 2009).

The district court affirmed a conviction and sentence of a defendant who was tried on charges of throwing a deadly missile into vehicle, stalking, and battery. After an argument, the defendant chased after his ex-girlfriend's vehicle and threw a brick that shattered the windshield.

The defendant argued on appeal that the trial court erred in excluding his witness without considering a less drastic remedy. The state countered that the trial court properly prohibited the witness from testifying in light of the circumstances surrounding the defense's discovery violation and its showing of prejudice.

Popper v. Ficarelli, 12 So. 3d 930 (Fla. 4th DCA 2009).

The district court affirmed in part and reversed in part the trial court's judgment of injunction against repeat violence. The petitioner petitioned for an injunction against repeat violence, alleging that the respondent had run his car into her while she was jogging. The trial court found that her allegations did not warrant the entry of a temporary injunction and set a hearing. The respondent was served with notice of the petition and respondent hearing. Following the hearing, the trial court entered an injunction prohibiting the respondent from having any contact with the petitioner, and from using or possessing any firearms and also ordering him to surrender all firearms, ammunition, and concealed weapons to the sheriff's department.

On appeal, the respondent argued that he was not given proper notice of the hearing, that the trial court erred in allowing evidence of conduct not alleged in the petition, that the court erred in admitting evidence of a similar act, and that the trial court erred in enjoining his use or possession of a firearm.

The district court reversed the prohibition of his use or possession of a firearm. The petitioner conceded that she never sought to enjoin his use of firearms and that the issue was not presented during the hearing. The court affirmed as to all other issues.

Williams v. State, 19 So. 3d 1007 (Fla. 3d DCA 2009).

The district court affirmed an order revoking the defendant's community control. The defendant was convicted of several crimes and had been released from prison on probation, which he was accused of violating by, among other things, committing the crime of armed carjacking. The court found that the violations had been proven.

Atis v. State, ___ So. 3d ___ (Fla. 2d DCA 2009), 2009 WL 2568208, 34 Fla. L. Weekly D1705, August 21, 2009, No. 2D07-5924.

The district court affirmed a judgment and sentence for attempted carjacking and attempted robbery, concluding that any error in cross examination as to defendant's prior record was harmless error.

The arrest occurred after a deputy sheriff observed two men fighting next to a taxi van stopped in a lane of a highway. The deputy determined that the fight involved the taxi driver and a passenger. The defendant was found lying on the floor of the rear seat of the taxi. The taxi driver testified that he was hired by two men whom he had never seen before that evening. The defendant got in the back seat of the cab, and his friend got in the front seat.

During the drive, the passengers changed their instructions and wanted to go to a different location. The defendant put his hand around the driver's neck from the back seat and ordered the driver to give him everything he had. The driver did not immediately obey this instruction. The defendant threatened to shoot the driver and produced a handgun. The driver observed that the gun appeared to be broken. He took the gun away and began to struggle with the men. He claimed that the defendant jumped into the front seat and tried to take control of the taxi. The man who had been in the front seat exited the taxi. When he saw the deputy's car, he shouted "police," and the defendant hid in the back seat of the taxi.

The defendant argued on appeal that the trial court erred in allowing certain questions on cross examination regarding the prior felony record of the defendant. The district court stated: "The clumsy manner in which these questions were asked did not result in any detailed description of his prior offenses. The assistant state attorney's prompt that the offense could be an offense like a 'worthless check or a theft charge' is not a description of his prior record and did not suggest to the jury that he had an exceptionally bad prior record. At worst, it repeated Mr. Atis' admission that he had committed five felonies on more occasions than necessary."

McLaughlin v. State, 15 So. 3d 870 (Fla. 2d DCA 2009).

The district court reversed the trial court's order withholding adjudication and imposing court costs and remanded for the trial court to dismiss the charges, stating that the trial court should have granted the defendant's motion to dismiss because the state had not commenced the prosecution within the statute of limitations.

Hair v. State, 17 So. 3d 804 (Fla. 1st DCA 2009).

The district court granted a petition for writ of prohibition and ordered the release of the defendant who had been charged with first-degree murder. The defendant shot a man who unlawfully and forcibly entered his vehicle. The district court held that he was authorized by section 776.013(1), Florida Statutes, to use defensive force intended or likely to cause death or great bodily harm and was immune from prosecution for that action under section 776.032(1), Florida's "Stand Your Ground" law enacted by the

Florida Legislature in 2005. The district court held that the trial court should have granted the motion to dismiss.

Delgado v. State, 19 So. 3d 1055 (Fla. 3d DCA 2009).

The district court affirmed the defendant's judgments and convictions for burglary of an occupied conveyance, petit theft, grand theft of a motor vehicle, and kidnapping, addressing only the kidnapping conviction.

The district court held that the trial court did not err in denying a motion for judgment of acquittal on the conviction for kidnapping based on evidence that the defendant and a codefendant jumped into a pickup truck left running by its driver and drove away with a two-year-old child asleep in the truck, seat-belted into the back seat. At trial, the defendant had moved for a judgment of acquittal on the kidnapping charge based on Faison v. State, 426 So. 2d 963 (Fla. 1983). The district court concluded that all elements of the Faison test were satisfied and that there was sufficient evidence to support the jury's verdict.

Arrest, Search and Seizure

State v. Martissa, 18 So. 3d 49 (Fla. 2d DCA 2009).

The district court reversed the trial court's order suppressing statements made without Miranda warnings during a traffic stop when defendant was arrested and later charged with drug possession.

The trial court suppressed the defendant's statements regarding illegal drugs in his vehicle. The court found that detention regarding the defendant's suspended license "was pursuant to an ongoing criminal investigation and that the defendant was in custody for practical purposes." The court further found that before reading the defendant his Miranda rights, the arresting officer "confronted the defendant with the information that he had been seen in a known drug area and asked him if he was in possession of any illegal drugs." The trial court found that he was subjected to custodial interrogation, relying upon Fowler v. State, 782 So. 2d 461 (Fla. 2d DCA 2001).

At issue is whether the defendant was in custody for purposes of Miranda when the officer asked if the defendant had any illegal narcotics on him. The district court concluded that the officer did not directly confront the defendant with an allegation that he had actually committed a drug crime. Rather, while conducting an investigatory detention on the suspended license, the officer told the defendant that "he was observed leaving an area known for the sale of illegal narcotics" and asked if the defendant "had any illegal narcotics on him." During a traffic stop an officer may ask if a person is in possession of a weapon or drugs. See Hewitt v. State, 920 So. 2d 802, 805 (Fla. 5th DCA 2006); see also State v. Stone, 889 So. 2d 999, 1000 (Fla. 5th DCA 2004).

The district court held that the defendant was not in custody for Miranda purposes. The defendant was not subjected to restraints during the stop that were comparable to the restraints associated with a formal arrest. The officer did not accuse the defendant of committing a drug crime. The circumstances of his detention did not exert pressure that would sufficiently impair a detainee's free exercise of his privilege against self-incrimination to require that he be given Miranda warnings. The court reversed the suppression order and remanded for further proceedings

Ballenger v. State, 16 So. 3d 1022 (Fla. 2d DCA 2009).

The district court reversed the defendant's convictions for possession of illegal drugs and drug paraphernalia, holding that the trial court erred in denying her motion to suppress evidence seized during the traffic stop of the vehicle she was operating.

The court held that a second pat-down search conducted by a second officer was constitutionally improper. In order to legally pat-down a detainee without consent or a warrant, "the officer must be able to articulate some basis which would support a reasonable belief that an individual is armed." D.L.J. v. State, 932 So. 2d 1133, 1134 (Fla. 2d DCA 2006). When the second deputy patted down the defendant, she had already been subjected to a pat-down revealing no weapons, and her hands remained cuffed behind her back. At the suppression hearing, the second officer offered no justification for the second pat-down, saying only that the first deputy requested it. Under these circumstances, there was no reasonable basis to believe that she was armed or posed a threat. Accordingly, the second pat-down was a violation of the defendant's Fourth Amendment rights, and the evidence it produced must be suppressed.

Rodriguez v. State, 16 So. 3d 317 (Fla. 2d DCA 2009).

The district court reversed the trial court's denial of the defendant's motion to suppress evidence. The state conceded that the motion should have been granted.

Illegal drugs were discovered during a patdown search of the defendant during a traffic stop. He agreed to a search of his car but did not consent to a search of his person. The deputy who conducted the traffic stop testified that he routinely conducts a patdown of a vehicle's occupants before he begins searching the car. The deputy did not state any facts that supported a reasonable belief that the defendant was armed or dangerous.

The district court held that such routine searches based on a generalized concern for officer safety are not constitutionally permissible. See McNeil v. State, 995 So. 2d 525, 526 (Fla. 2d DCA), review denied, 990 So. 2d 1060 (Fla. 2008).

J.J.V., a child v. State, 17 So. 3d 881 (Fla. 4th DCA 2009)

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The district court reversed the trial court's order denying the defendant's motion to suppress physical evidence and statements because the deputy exceeded the scope of the defendant's consent to search his car.

A deputy on routine bicycle patrol stopped a car without headlights that was backing out of a residence in a mobile home park. The vehicle turned around and headed towards him without its headlights on. The deputy motioned for the vehicle to stop, intending to advise the driver that he did not have his lights on and to investigate whether the car had working headlights and whether the driver had a valid driver's license and any traffic record. There were two people in the car. The deputy recognized the driver (defendant) and knew his name. He told him why he had stopped him. He gave the defendant a written warning for the headlight infraction. After asking the defendant a few questions about his presence in the area and noting his nervousness, the deputy asked the defendant if he had anything illegal in the car. The defendant responded, "No, I don't have anything illegal in the car. You're welcome to search it if you like."

A center console with a compartment was located between the two front seats of the vehicle. The compartment was locked. The deputy asked the defendant if he had a key to it. The car belonged to the defendant's mother, and the defendant told the deputy that she had the only key. Without asking the defendant's permission, the deputy then removed the key from the ignition and used it to open the center console lock. Inside the center console, he found a small plastic baggie containing three small blue pills and an even smaller baggie containing suspected marijuana. He also found a small glass pipe, the type frequently used for smoking illegal narcotics. The deputy read Miranda warnings to both the defendant and his passenger. The defendant told the deputy that all of the "stuff" was his.

The defendant filed a motion to suppress all physical evidence, which the trial court denied after a hearing. The district court analyzed the relevant law and concluded that the deputy should have reasonably understood that the defendant was setting limits on his consent to search when he told the deputy that only his mother had a key to the console. This clearly showed that the defendant was "at least reluctant, if not unwilling" to open the console for the deputy's inspection.

State v. Reaves, 15 So. 3d 784 (Fla. 5th DCA 2009).

The district court reversed the trial court's granting of a motion to suppress illicit drugs and a firearm that were found in a vehicle after a traffic stop. The district court concluded that the evidence did not support the trial court's factual findings.

A law enforcement officer, working as part of a tactical anti-crime unit, checked the tag on a vehicle. He discovered electronically that the registered owner of the vehicle was a black male born in 1969, whose driver's license had been suspended. No photo identification was sent to the officer, however. As the driver appeared to the officer to be a black male in his late thirties, the officer pulled over the vehicle.

After a drug-sniffing dog alerted on the vehicle, the officer looked inside and saw what appeared to be a bag of cocaine. He searched the vehicle and also found a firearm. The defendant was a passenger sitting in the front seat of the car. The defendant admitted that the drugs were his and that he kept the handgun for personal protection.

The defendant argued that the stop was unconstitutionally prolonged and not based on any reasonable suspicion of criminal activity once it had been determined that the driver had a valid driver's license. While the arresting officer was attempting to determine whether the person he had detained was the owner of the vehicle, the other deputy's dog alerted on the driver's side. Although the trial court found that the stop was valid, the checking of the license was authorized, and the officer was telling the truth, it decided to grant the suppression motion. The district court stated that comments of the trial court indicate that it misunderstood the testimony to be that the K-9 sweep occurred after the completion of the license investigation, thus suggesting that the officer unnecessarily detained the driver without a basis for doing so. The court concluded that there was not evidentiary support for the trial court's ruling in this respect.

Flowers v. State, 15 So. 3d 886 (Fla. 4th DCA 2009).

The district court affirmed a conviction and sentence for trafficking in cocaine, felony possession of cannabis, and possession of drug paraphernalia.

Among other issues, during a controlled buy, a police informant told the defendant to meet him at a grocery store parking lot near the defendant's apartment. At the designated time, he arrived at the parking lot in a vehicle that the informant had identified. During another call which the police recorded, the informant told the defendant that he was inside the grocery store and would come out shortly. The defendant replied that he had to go to the ATM. After he parked and exited his vehicle, the police seized him. The police then brought over a K-9, which alerted on the vehicle. The police found 87 grams of cocaine in the center console.

The defendant contended that police did not have reasonable suspicion or probable cause to seize him because they did not record or corroborate the first-time informant's alleged conversation setting up the transaction. He further argued that the information was stale because the informant's most recent interaction with him was three months prior. He also moved to suppress the cannabis and paraphernalia. He contended that the affidavit that the police submitted to obtain the search warrant did not inform the circuit court that they based their arrest and vehicle search upon a first-time informant's unrecorded and uncorroborated conversation with the defendant. He further alleged that the affidavit did not establish a nexus between the cocaine found in his vehicle and a search of his apartment because the police never observed the vehicle at the apartment.

The district court held that the trial court correctly denied the defendant's motion to suppress the evidence found in the search of the vehicle and the residence.

Martin v. State, 12 So. 3d 912 (Fla. 4th DCA 2009).

The district court affirmed the trial court's order as to violation of probation, rejecting the defendant's challenge to the search resulting in his charge of trafficking and possession of cocaine.

Upon request of the FBI, police stopped and detained a man in a described van on I-75. The man was the subject of at least three pending warrants. The driver identified one of the passengers seated behind him as the man police were seeking. Police removed the man from the vehicle and detained him. There were nine other passengers in the van. Luggage for the passengers was placed in the rear. To retrieve baggage from the rear, the driver had to leave the passenger compartment and walk around to the rear and open the rear door. The driver pointed to one of the bags and stated that the detained passenger had brought it onto the van. The passenger also identified it as his bag. Police took the man and the bag to the station and conducted a search. Inside the bag were articles of clothing and personal care and also a box containing two bricks of cocaine wrapped in black tape. The quantity was sufficient to charge him with trafficking.

The defendant argued that the state failed to prove that the cocaine was his and not one of the other passenger's. Nothing suggested how a passenger might have been able to place the bricks inside the box into another passenger's luggage located in the rear of the van. Whether property in a vehicle was accessible to other persons in the same vehicle was a factual matter. On appeal, the district court is required to assume that the trial judge's decision resolved all factual issues in favor of the ultimate decision. The district court agreed with the state that a reasonable view of the evidence could exclude an issue of constructive — as opposed to actual — possession.

Byers v. State, 17 So. 3d 825 (Fla. 2d DCA 2009).

The district court reversed the judgment and sentence for trafficking in methamphetamine, concluding that the trial court erred in denying the defendant's motion for judgment of acquittal because evidence did not establish that he possessed the methamphetamine in a backpack found in a car he had been driving.

Evidence established that the defendant knew methamphetamine was in the car he drove to the motel where he was arrested, that he knew his friend intended to sell the methamphetamine, and that he agreed to drive his friend to the motel in exchange for a small amount of the drug. Even if proof of these circumstances permitted an inference that the defendant had control over the methamphetamine, it did not exclude his reasonable hypothesis of innocence that the drugs in the backpack in the car belonged exclusively to the friend.

Possession may be either actual or constructive. Actual possession exists when the accused has knowing physical possession of a controlled substance. Gartrell v. State, 626 So. 2d 1364, 1366 (Fla. 1993). The state did not contend the defendant was in actual physical possession of the methamphetamine but rather contended he possessed it

constructively. Constructive possession exists when it is shown that the accused knows of the presence of the contraband and has the ability to maintain control over it or reduce it to his possession, even though he does not have it in his physical possession. State v. Snyder, 635 So. 2d 1057, 1058 (Fla. 2d DCA 1994). When a defendant has been in exclusive possession of the premises where contraband is found, knowledge and control can be inferred. However, when the premises have not been in the exclusive possession of the defendant, as is the case here, knowledge and control cannot be inferred unless there are incriminating statements or other circumstances that would support such an inference. Santiago v. State, 991 So. 2d 439, 442 (Fla. 2d DCA 2008).

Ramirez v. State, 15 So. 3d 827 (Fla. 2d DCA 2009).

The district court reversed the summary denial of claim one and affirmed the denial of seven postconviction claims of ineffective assistance of counsel.

The defendant was convicted of trafficking in methamphetamine and sentenced to 20 years' prison with a 15-year minimum mandatory. Her charges stemmed from a traffic stop that occurred while she was driving away from a shopping mall. The officer who testified at trial indicated that he had received a tip that the defendant would be at the mall in a white car and would possess a one-half-pound bag of methamphetamine. The officer proceeded to the mall and located a white car in the parking lot. He waited until he observed a Hispanic female exit the mall and enter the white car. The officer radioed additional officers, who stopped the defendant on a side street after she had left the parking lot. The officers searched the car, and a one-half-pound bag of methamphetamine was found under the driver's seat.

The district court held that the postconviction court's attachments to its order did not conclusively refute the defendant's claim that counsel was ineffective for failing to file a motion to suppress evidence gathered during the traffic stop. The district court stated that the record did not conclusively show that the stop was a legal traffic stop, merely suggesting but not clearly stating that the defendant committed a traffic violation. Further, even if a traffic stop was properly executed, there is no indication that the stop gave the officers a basis to conduct a search. The district court held that the postconviction court erred in summarily denying this claim.

R.D.D., Jr., a child, v. State, 15 So. 3d 857 (Fla. 1st DCA 2009).

The district court affirmed, concluding that the state proved that the defendant constructively possessed cocaine and drug paraphernalia found in a jointly occupied vehicle.

The defendant was a passenger in the back seat of a car stopped by an officer. Two other individuals were in the vehicle, both in the front seat. Upon searching the vehicle, the police found a small clear plastic bag in plain view on the left hand side of the rear seat. The defendant was in the right hand rear seat. The bag, which contained

cocaine, was within the defendant's reach. The officer gave Miranda warnings to all three occupants of the car, and they spoke to him. The officer could not remember their exact words, but he claimed all three of them knew "there was cocaine in the car, just no one would claim it."

On cross examination, the officer explained that it was dark that night and, due to tint on the car windows, he could not see what was going on in the car before the stop. The officer admitted he could not see whether one of the other passengers had tossed the bag into the back seat before the door was opened. In a constructive possession case, the state must prove beyond a reasonable doubt that "the accused had dominion and control over the contraband, knew the contraband was within his presence, and knew of the illicit nature of the contraband." Brown v. State, 428 So. 2d 250, 252 (Fla. 1983). Knowledge was not at issue in this case.

In affirming, the court relied upon Williams v. State, 742 So. 2d 509 (Fla. 1st DCA 1999), in which the district court found that evidence that drugs were in an area of a car that was in the exclusive possession of a defendant was sufficient to satisfy the control element of constructive possession. In the instant case, there was direct evidence of control; the cocaine was in the back seat, which was in exclusive control of the defendant. The defendant argued that the state failed to prove that one of the other occupants of the vehicle had not tossed the cocaine into the back seat when the car was stopped by police. The district court held that the issue of how the cocaine ended up in an area exclusively in the defendant's control was for the trier of fact to decide.

King v. State, 17 So. 3d 728 (Fla. 1st DCA 2009).

The district court reversed a conviction of cocaine possession based on a conclusion that facts available to police officers did not support a reasonable suspicion to detain the vehicle in which the defendant was a passenger. The district court held that the trial court erred in denying a motion to suppress evidence of cocaine police found in the vehicle after the stop.

The district court concluded that the only objective information upon which the officers relied in stopping the vehicle was the race of the alleged perpetrators. The court stated that race assumed great importance in the assessment of reasonable suspicion, as evidenced by the officers' failure to stop a different vehicle, whose occupants were white, despite the officers' testimony that victims of crimes are often confused as to descriptive details.

Torts/Accident Cases

Cevallos v. Rideout, 18 So. 3d 661 (Fla. 2009).

The district court affirmed a directed verdict in favor of the defendant in an accident case in which the plaintiff attempted unsuccessfully to rebut the presumption that her own negligence was the sole legal cause of a rear-end collision.

The district court discussed the rebuttable presumption in Florida law which provides that the negligence of the rear driver in a rear-end collision was the sole proximate cause of the accident." Department of Highway Safety and Motor Vehicles. v. Saleme, 963 So. 2d 969, 972 (Fla. 3d DCA 2007).

The court stated that a rear-driver plaintiff, like a rear-driver defendant, must prove that the lead-driver stopped abruptly and arbitrarily to rebut the presumption that the plaintiff's own negligence was the sole proximate cause of the accident. Evidence must establish that the rear-driver plaintiff cannot reasonably have been expected to anticipate the lead driver's sudden stop. Pierce v. Progressive Am. Ins. Co., 582 So. 2d 712, 713–14 (Fla. 5th DCA 1991) (en banc). More importantly, a rear-driver plaintiff cannot rely on the mere fact that the lead-driver defendant "ran into a preceding vehicle" without "material evidence of negligence" on the part of the lead-driver defendant in stopping abruptly. Id. at 714–15.

The plaintiff argued that the rebuttable presumption of rear-driver negligence does not apply to bar a claim by a rear-driver plaintiff because the lead-driver defendant could be comparatively negligent. The court stated that the distinction between a presumption of comparative negligence and a presumption of the sole cause of the accident is reasonably related to the purpose of the presumption. Not only does the "sole cause of the accident" presumption relieve the lead-driver plaintiff of the difficult task of adducing "proof of all four elements of negligence," but it also serves the additional public policy of ensuring that all drivers "push ahead of themselves an imaginary clear stopping distance or assured stopping space or adequate zone within which the driven vehicle can come to a stop." Clampitt v. D.J. Spencer Sales, 786 So. 2d 570, 573, 575 (Fla. 2001). It further avoids the burden of proof being shifted to the lead-driver defendant.

Cooper Tire v. Pierre, Not reported in So. 3d (Fla. 4th DCA 2009), 2009 WL 2168916, 34 Fla. L. Weekly D1473, July 22, 2009, NO. 4D08-2414.

The district court affirmed a jury verdict awarding damages to the plaintiff (personal representative for decedent's estate) in a lawsuit filed against the defendant after a one-vehicle accident allegedly caused by a defective tire manufactured by the defendant. In its opinion, issued on motion for clarification, the district court addressed only the issue of whether the jury verdict was illegally compromised. The court held that it was not, and affirmed the judgment and award of damages.

[Note: the following opinion was withdrawn and superseded on clarification by amended opinion cited above.]

Cooper Tire and Rubber Co. v. Pierre, Not Reported in So. 3d, 2009 WL 2168916 Fla.App. 4 Dist., July 22, 2009, 4D08-2414 (withdrawn and superseded on clarification by amended opinion cited above).

The district court held that alleged conduct of two groups of jurors in reaching compromise under which first group would agree to find manufacturer 50 percent responsible for motorist's death and second group would agree to decrease damages award did not rise to level of reaching verdict by aggregate or by lot and thus did not warrant new trial.

Community Asphalt Corp. v. Bassols, 13 So. 3d 538 (Fla. 3d DCA 2009).

The district court reversed the trial court's granting of a new trial because the comments defense counsel made during closing argument were insufficient to warrant a new trial.

The case involved a motorcycle accident in which the defendant's truck struck the plaintiff (Bassols). Various witnesses testified at trial and both parties presented expert testimony. Credibility became a central issue in the case. The jury ultimately found no liability, and Bassols moved for a new trial based upon comments made during closing argument. In its order granting a new trial, the court noted that the defense counsel's comments created the inference that available witnesses would have testified contrary to the plaintiff, the plaintiff's sister, and the rest of the family. Bassols maintains that during closing argument, defense counsel made an impermissible argument that Bassols had failed to call witnesses. The district court found that no new trial was warranted.

Copeland v. Buswell and Patco Transport, Inc., 20 So. 3d 867 (Fla. 2d DCA 2009).

The district court affirmed in part and reversed in part a final judgment entered against defendant in a lawsuit in which the plaintiff represented the estate of a decedent who died as a result of a traffic accident.

The trial court found that the defendants were liable for damages caused by the injury resulting in the death of the decedent. The court awarded the plaintiffs (the estate of the decedent) a portion of the damages sought in a wrongful death action.

The plaintiff argued on appeal that the trial court erred by denying the estate's claim for damages for medical expenses incurred by the decedent. The trial court had declined to award medical expenses on the basis that the expenses had been satisfied by the defendants. Because the defendants' payment improperly circumvented the priority of payments set forth in Florida's probate code and because the payment was made without knowledge and consent of the estate's personal representative, the district court reversed the portion of the final judgment denying the claim for medical expenses. The court affirmed the remainder of the final judgment.

Rippey v. Shephard, 15 So. 3d 921 (Fla. 1st DCA 2009).

The district court affirmed the trial court's order granting the defendant's motion to dismiss, concluding as a matter of law that a tractor is not a dangerous instrumentality.

The court held that farm tractors, like road graders, are neither used as a mode of transportation nor are routinely operated in public places as to pose a danger to the public.

The court explained that the dangerous instrumentality doctrine finds its roots in the law of master and servant, and principal and agent. Canull v. Hodges, 584 So. 2d 1095, 1097 (Fla. 1st DCA 1991). "The master who entrusts a servant with a dangerous agency . . . is liable for any injury occasioned by its negligent use." Id. The doctrine states that "the owner of an instrumentality which [has] the capability of causing death or destruction should in justice answer for misuse of this instrumentality by anyone operating it with his knowledge and consent." Meister v. Fisher, 462 So. 2d 1071, 1072 (Fla. 1984). In Florida, the doctrine is invoked only by a judicial decision that "an instrumentality of known qualities is so peculiarly dangerous in its operation" as to justify the doctrine. Canull, 584 So. 2d at 1097. In 1920, the doctrine was extended to include automobiles.

The defendant argued that a farm tractor is a dangerous instrumentality because the legislature defines a farm tractor as a motor vehicle and extensively regulates its use. The court found this argument to be without merit. Although a farm tractor meets the statutory definition of a motor vehicle, Florida courts have held that statutory definitions of motor vehicle are not controlling in determining whether a device is a dangerous instrumentality. The plaintiff also argued that a farm tractor is a dangerous instrumentality because it is of such size and character as to be peculiarly dangerous in its operation, and the district court found this argument to be without merit.

Griffis v. Wheeler, 18 So. 3d 2 (Fla. 1st DCA 2009).

The district court reversed and remanded, holding that the trial court erred in directing a verdict in favor of the defendants. The court held that, based on the evidence presented, a reasonable jury could have determined that the defendant was negligent in his failure to react and swerve to avoid hitting the decedent, who was a pedestrian in his lane.

The defendant was driving in the right-hand lane of a four lane highway. When he came over a hill, the decedent was walking in his lane of traffic. While the testimony indicated that the defendant, who was driving under the speed limit, could not have braked in sufficient time to avoid the collision, the testimony concerning his ability to take evasive action was unclear. The defendant's spouse, who was a passenger in the vehicle, said that when she first saw the decedent, he was right in front of the passenger seat of the truck. The testimony of the defendant and his spouse as to any evasive action taken by the defendant was ambiguous.

The evidence concerning the defendant's ability to swerve was sparse, but there was some evidence reflecting that, had the defendant begun to swerve immediately, he might have avoided the decedent. The plaintiff alleged that defendants negligently operated their vehicle so that it fatally collided with the decedent. The defendants

defended on the grounds of comparative negligence, collateral source, and the decedent's intoxication at the time of the accident.

Enterprise Leasing Co. v. DeMartino, 15 So. 2d 711 (Fla. 2d DCA 2009).

The district court reversed final summary judgment and remanded for further proceedings, stating that the trial court erred in relying on incompetent evidence as to the plaintiff's claim of mutual mistake in releasing the leasing company from claims of liability related to a traffic accident.

Driver's Licenses

Stevenson v. State DMV, 17 So. 3d 1260 (Fla. 2d DCA 2009).

The district court denied a petition for second-tier certiorari review of the circuit court's order that upheld the petitioner's driver's license suspension by the Department of Highway Safety and Motor Vehicles after she refused to submit to a breath-alcohol test in a DUI investigation.

Haygood v. State, 17 So. 3d 894 (Fla. 1st DCA 2009).

The district court affirmed the defendant's drug-related convictions and reversed his driving with a suspended license conviction because the state presented insufficient evidence on the "knowledge" element of the offense.

The court stated that under section 322.34, Florida Statutes (2006), it is a crime for any person with a suspended driver's license to operate a motor vehicle upon this state's highways if the person knows of the suspension. The statute explains what the state must show to prove that a defendant has knowledge that his or her license is suspended. In the present case, the court held that the state did not prove the knowledge element merely by introducing the defendant's records from the Department of Highway Safety and Motor Vehicles.

Dawson v. Florida Department of Highway Safety and Motor Vehicles, 19 So. 3d 1001 (Fla. 4th DCA 2009).

A panel of the Third District Court of Appeal, sitting as the Fourth District Court of Appeal because of a conflict, denied certiorari for a defendant whose Florida driver's license was suspended based on a drunken driving conviction in New York State. The defendant sought to quash the judgment entered by the appellate division of the circuit court. The district court concluded that the circuit court's ruling was correct and denied the petitioner relief.

The defendant was convicted of "Driving While Ability Impaired" (DWAI) in New York pursuant to New York Vehicle and Traffic Law section 1192(1). The defender's driver's license was suspended for 90 days. The Florida Department of

Highway Safety and Motor Vehicles revoked the defendant's Florida driver's license for one year based on the New York conviction. The department has the authority to revoke the driver's license of a Florida resident for certain out-of-state convictions. § 322.24, Fla. Stat. (2008). The department treated the New York DWAI offense as a conviction for driving under the influence (DUI) under Florida law. See § 316.193(1), Fla. Stat. (2008). Under section 322.24, the department may suspend or revoke a license when the out-of-state conviction is an offense which, "if committed in this state, would be grounds for the suspension or revocation of his or her license." The district court held that statutory elements of the out-of-state conviction satisfied the statutory elements of the Florida crime.

Deatherage v. State, 15 So. 2d 775 (Fla. 2d DCA 2009).

The district court affirmed in part and reversed in part postconviction orders as to sentencing. The court reversed the postconviction court's dismissal without prejudice of the first claim because the claim should have been denied. The defendant was sentenced to two years in state prison on two counts (in separate cases) of driving while his license was suspended or revoked, a third-degree felony. In his first claim, the defendant alleged that his sentence was illegal because he lacked the requisite prior convictions necessary for felony convictions. The postconviction court ruled that the issue was not cognizable in a rule 3.800, Florida Rules of Criminal Procedure, motion and dismissed the claim without prejudice for the defendant to raise it in a rule 3.850 motion, even though his motion was submitted with an oath and within the time allowed for rule 3.850 motions.

Legg v. State, 15 So. 3d 918 (Fla. 1st DCA 2009).

The district court granted a petition for writ of certiorari and quashed the order of the trial court directing the defendant to surrender his driver's license.

The petitioner was found incompetent to stand trial, and the trial court found that the defendant was "required to surrender his Florida Driver's License pursuant to [section] 322.2505 [Florida Statutes]."

The district court held that the trial court should have looked only to section 916.106(11), Florida Statutes (2008), which determines competency for the purpose of trial and does not address driver's licenses. The district court held that there was no reason for a statutory interpretation that looked to other statutes, since section 916.106(11) was clear on its face.

State v. K.R.G., 12 So. 3d 1269 (Fla. 2d DCA 2009).

The district court reversed and remanded an order in which adjudication was withheld for a delinquent act committed by defendant. The court held that plaintiff (the state) correctly asserted that the disposition order was illegal because the juvenile court refused to comply with statutory requirements concerning revocation of the defendant's driver's license. The juvenile court did not have discretion to forego the dictates of

section 322.056(1)(a)(1), Florida Statutes (2007), which required it to direct the Department of Highway Safety and Motor Vehicles to revoke or to withhold issuance of the defendant's driver's license or driving privilege for a period of "[n]ot less than 6 months and not more than 1 year" on her first-time juvenile delinquent act of marijuana possession in violation of the 2007 statutes. The juvenile court had withheld adjudication, placed the juvenile on probation, and declined to comply with the mandatory provisions of section 322.056(1)(a)(1).

Vehicle Forfeiture

No new opinions.

Government Contracts

Dealer Tag Agency, Inc. v. First Hillsborough County Auto Tag Agency, Inc., 14 So. 3d 1238 (Fla. 2d DCA 2009).

The district court reversed the final summary judgment entered by the trial court. That judgment declared void as a matter of law a contract awarded to Dealer Tag by the Hillsborough County Tax Collector's Office.

The tax collector is an agent of the State of Florida Department of Highway Safety and Motor Vehicles authorized to issue motor vehicle license plates and the required registration. The tax collector decided to provide automobile dealers in the area with an alternative to dealing directly with that office and sent out a request for proposal which included a description of the project and the application and approval procedures. Dealer Tag and First Hillsborough County Auto Tag Agency, Inc., were among the applicants. Dealer Tag was awarded the contract, and First Hillsborough protested.

The district court found that the trial court incorrectly ruled that the process used by the tax collector to award the disputed contract was governed by the provisions of chapter 287, Florida Statutes (2007), and chapter 120, Florida Statutes (2007).