FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

[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.]

October – December, 2008

Driving Under the Influence

Kelly v. State, 999 So. 2d 1029 (Fla. 2008).

In this case the Florida Supreme Court considered a certified question that it rephrased as:

> WHAT IS THE SCOPE OF A CRIMINAL DEFENDANT'S RIGHT TO COUNSEL UNDER ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION CONCERNING THE STATUTE'S USE OF PRIOR UNCOUNSELED MISDEMEANOR CONVICTIONS TO ENHANCE A LATER CHARGE FROM A MISDEMEANOR TO A FELONY?

The defendant was charged with felony DUI. Two of the three prior misdemeanor DUI convictions were each punishable by more than six months' imprisonment and arose from uncounseled no-contest pleas.

On the defendant's motion, the trial court dismissed the felony DUI information. The Fourth District affirmed but certified a question regarding state and federal precedent.

The court framed the issues of the cases as 1) whether the defendant carried his burden of production under State v. Beach, 592 So. 2d 237 (Fla. 1992); and if so, 2) whether the court would continue to follow Beach and Hlad v. State, 585 So. 2d 928 (Fla. 1991), or if it would, as the state argued, adopt the reasoning of the United States Supreme Court in Nichols v. United States, 511 U.S. 738 (1994), as part of Florida's law concerning a defendant's right to counsel.

After considering the plea forms and the silence of the record, the court held that the defendant in the instant case satisfied the requirements in Beach, creating *prima facie* evidence that the defendant did not validly waive his right to counsel. The court found that the state could not rely on a misleading plea form, and a record silent with regard to the plea colloquy, to assert waiver of counsel. The state thus failed to meet its burden under Beach to prove that the defendant validly waived counsel with regard to the two priors at issue.

The court then reviewed the federal standard regarding right to counsel in misdemeanor convictions, but held that Florida has provided a different standard through its Constitution, Rules of Criminal Procedure, and the Florida Statutes. The Florida standard regarding right to counsel addresses all cases in which imprisonment is a prospective penalty, while the federal standard addresses actual imprisonment.

The court examined Nichols (which held that prosecution may use an uncounseled misdemeanor conviction to impose enhanced imprisonment) and the precedent of the United States Supreme Court leading to Nichols. However, the court held that:

> Nichols is not persuasive precedent for purposes of interpreting article I, section 16, of the Florida Constitution. In addition, under article 2, sections 2 and 16 of the Florida Constitution, the Florida Rules of Criminal Procedure, and the Florida Statutes, we reaffirm that this state is a prospective-imprisonment jurisdiction and that indigent defendants possess an independent state-law constitutional right to appointed counsel during criminal prosecutions.

Slip op. at 41.

The court answered the certified question by stating:

> Article I, section 16 of the Florida Constitution, as influenced by Florida's prospective-imprisonment standard, prevents the State from using uncounseled misdemeanor convictions to increase or enhance a defendant's later misdemeanor to a felony, unless the defendant validly waived his or her right to counsel with regard to those prior convictions. However, the State may constitutionally seek the increased penalties and fines short of incarceration associated with the defendant's relevant number of DUI offenses.

Slip op. at 47.

The court then revised the framework of Beach and Hlad v. State, 585 So. 2d 928 (Fla. 1991), stating that to meet the initial burden of production, the defendant must sign an affidavit stating that:

(1) the offense was punishable by imprisonment;
(2) the defendant was indigent and, thus, entitled to court-appointed counsel;
(3) counsel was not appointed; and
(4) the right to counsel was not waived.

[emphasis in Kelly]. Once the defendant meets that burden, the state bears the burden of persuasion to show either that counsel was provided or that there was a valid waiver of right to counsel.

The court approved the district court's decision but disapproved any reasoning inconsistent with the court's opinion here.

Justice Wells dissented.

Stancliff v. State, 996 So. 2d 259 (Fla. 1st DCA 2008).

The defendant appealed the sentence for convictions of DUI with serious bodily injury and DUI manslaughter. On appeal the defendant contended that the trial court abused its discretion in denying his request for a downward departure. Noting that there is no statutory authority by which a defendant may challenge a sentence within the Criminal Punishment Code sentencing range, the district court concluded that it lacked authority to review the sentence, and so affirmed.

Cardenas v. State, 993 So. 2d 546 (Fla. 1st DCA 2008).

In this appeal from denial of a rule 3.850 motion for postconviction relief, the defendant challenged his convictions of boating under the influence and operating a vessel under the influence.

The district court found several claims of ineffective assistance of counsel to be facially sufficient and not conclusively refuted by the record: counsel's failure to call the defendant's son to testify that the defendant was not the operator of the boat; counsel's failure to seek admission of out-of-court statements by the defendant's father that the victim was operating the boat; counsel's failure to elicit evidence of bias by an officer that testified against the defendant; counsel's failure to investigate a polygraph; counsel's failure to object to improper prosecutorial comments; counsel's failure to request a jury instruction regarding the defendant's use of psychotropic medications during trial; and counsel's failure to effectively counter inappropriate courtroom behavior by the victim's wife.

The district court reversed as to these claims but otherwise affirmed, and remanded the case. Judge Hawkes dissented, finding that the claims were refuted by record attachments.

Chamblin v. State, 994 So. 2d 1165 (Fla. 1st DCA 2008).

The defendant was convicted of DUI manslaughter, reckless driving, and possession of alcohol by a person under 21 years of age. The case arose after an accident in which the defendant, with two passengers in his jeep, was driving in tight circles. The jeep flipped, killing one of the passengers and injuring the defendant and the other passenger. This appeal is from a second trial, the first trial having ended with a hung jury.

On cross-examination, the prosecutor referred back to the first trial and asked the defendant if his testimony at the first trial was the first time that he had publicly said that the deceased victim grabbed the steering wheel. Then during closing, the prosecutor referred to the EMT's conversation with the defendant at the time of the accident, noting that that conversation was a chance for the defendant to shift blame to his dead friend, but that the defendant waited a year to do that. The trial court denied defense motions for mistrial on both issues.

The district court held that the prosecutor's comments violated the Florida Constitution's

prohibition against prosecutorial comment on the defendant's silence at arrest, before Miranda warnings. The jury could have construed the prosecutor's comments as a comment on the defendant's right to silence.

In addition, the district court held that the prosecutor's comments also violated Florida and federal law prohibitions against comments on a defendant's silence after Miranda warnings. The prosecutor's questions and comments focused the jury's attention on the extended post-Miranda period of the entire year after the accident.

The district court reversed and remanded for a new trial.

State v. Dunning, 995 So. 2d 1162 (Fla. 2d DCA 2008).

The state appealed from the trial court's order dismissing a felony DUI charge because it was enhanced to a felony by using a prior uncounseled conviction for which the defendant was imprisoned.

The district court noted that a court may not enhance a conviction based on an uncounseled prior misdemeanor conviction, if incarceration was imposed for that prior conviction. However, the defendant in the instant case was sentenced to time served for the prior conviction. The district court agreed with other courts that such a sentence for time served did not constitute incarceration for purposes of the later enhancement. Thus the district court here reversed the order granting the defendant's motion to dismiss.

DiPietro v. State, 992 So. 2d 880 (Fla. 4th DCA 2008).

The defendant pleaded no contest to DUI, reserving the right to appeal the county court's enhancement. The county court found that two prior New York convictions for driving while ability impaired (DWAI) qualified as prior DUI convictions under section 316.193(6)(c), Florida Statutes.

Section 316.193(6)(c) provides that a previous conviction in another state for driving under the influence, driving while intoxicated, driving with an unlawful blood alcohol level, "or any other similar alcohol-related or drug-related traffic offense," shall also be a qualifying prior conviction. The district court noted that the New York statute provides that: "No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol." N.Y. Veh. & Traf. Law Art. 31 § 1192 (1) (2006).

The district court pointed out that the Florida legislature intended that a broad range of out-of-state prior offenses would qualify as prior offenses for enhancement under section 316.193(6). The district court approved the lower court determination that the New York DWAI offenses were sufficiently similar to trigger enhanced sentencing under section 316.193(6).

Ibarrondo v. State, 1 So. 3d 226 (Fla. 5th DCA 2008).

The defendant was convicted of DUI with three prior convictions and driving while license suspended with two prior convictions. The district court discussed several issues on appeal.

The defendant argued that the trial court erred by refusing to strike a juror who indicated that he would give more credibility to a police officer than to the defendant. Finding that there was reasonable doubt about the juror's ability to be impartial, the district court concluded that the trial court erred and that reversal was required.

At the state's request and over defense objection, the trial courted admitted into evidence the entire court file regarding one of the defendant's prior convictions, and permitted the jury to read the file. The district court held that publishing the court file to the jury was "an affront to fairness" and clearly reversible.

Finally, the district court considered the constitutionality of section 316.193(12), Florida Statutes (2007), which provides that records of the Department of Highway Safety and Motor Vehicles showing that the defendant was previously convicted of DUI are sufficient to establish that prior conviction. The statute further provides that the records may be contradicted or rebutted and that the presumption may be considered along with any other evidence in deciding whether the defendant was previously convicted.

After discussion of various presumptions and inferences, the district court concluded that the statute did not shift the burden of persuasion to the defendant and so only created an inference. The district court found the statute constitutional as applied to the defendant but certified this question of great public importance to the Florida Supreme Court:

> IS SECTION 316.193(12) A PERMISSIVE INFERENCE AND DOES IT, AS APPLIED, SATISFY THE RATIONAL CONNECTION TEST OF CONSTITUTIONALITY?

Criminal Traffic Offenses

Barclay v. State, 993 So. 2d 110 (Fla. 1st DCA 2008).

In this appeal from a rule 3.800(a) motion, the district court noted that a trial court cannot impose drug offender probation for a conviction of driving with a permanently revoked license. The district court reversed and remanded for the trial court to strike the drug offender probation.

Bruce v. State, 993 So. 2d 155 (Fla. 1st DCA 2008), rev. granted, No. SC08-2127, 2009 WL 435363 (Fla. Feb. 17, 2009).

The defendant, with a negotiated plea, pleaded guilty to felony driving while license

suspended, not preserving any issues for appeal. On appeal the defendant argued for the first time that his conviction violated constitutional due process because his two prior convictions were obtained under an earlier version of the statute that did not include the knowledge element, as provided in Thompson v. State, 887 So. 2d 1260 (Fla. 2004). The state filed a motion to dismiss the appeal for lack of jurisdiction.

The state conceded that if the defendant had been convicted at trial or entered an open plea, the error asserted would be fundamental and would entitle the defendant to relief. The district court concluded that the recent case of Miller v. State, 988 So. 2d 138 (Fla. 1st DCA 2008), required reversal here. In Miller, the First District held that fundamental error existed if the record affirmatively demonstrated that a defendant could not have committed the crime to which he entered a guilty plea; Miller further held that the defendant did not waive that error by entering a negotiated plea.

Although agreeing with the dissenting opinion in Miller, which espoused the position that a defendant can waive fundamental error by entering a negotiated plea, the district court here was constrained to rule in accordance with the majority in Miller, and thus reversed the defendant's conviction and remanded. However, the district court certified the following issue to the Florida Supreme Court as a question of great public importance:

> MAY A DEFENDANT WHO HAS ENTERED A NEGOTIATED PLEA RAISE FOR THE FIRST TIME ON DIRECT APPEAL THE CLAIM THAT HIS CONVICTION VIOLATES THE DECISION IN THOMPSON V. STATE, 887 So. 2d 1260 (Fla. 2004)?

Attardi v. State, 2 So. 3d 362 (Fla. 4th DCA 2008).

The defendant was convicted of leaving the scene of an accident with serious injuries and driving without a license. The district court affirmed the convictions but held that the sentence of one year in jail, for the conviction of driving without a license, exceeded the maximum sentence of 60 days permitted by statute. The district court remanded for the trial court to correct that sentence.

Arrest, Search and Seizure

State v. Petion, 992 So. 2d 889 (Fla. 2d DCA 2008).

The trial court granted a motion to suppress evidence seized as a result of a traffic stop, and the state appealed.

The district court agreed with the trial court that the car was lawfully stopped and that the initial consent was valid. The district court also agreed that the scope of the consensual search included the passenger compartment.

However, the district court then concluded that if a defendant raises the issue of withdrawal of consent by nonverbal communication, the state must prove by a preponderance that the defendant did not demonstrate nonverbal communication that an objectively reasonable officer would interpret as withdrawal of consent. Here, the district court found, the defendant's actions (shrugging his shoulders, lounging on the side of the road) could be considered a passive failure to object. Thus, the district court held that the defendant did not revoke his consent by nonverbal communication after the officers found a secret compartment. The district court reversed the order granting the motion to suppress.

Torts/Accident Cases

Bonich v. State Farm Mutual Automobile Ins. Co., 996 So. 2d 942 (Fla. 2d DCA 2008).

The plaintiff was injured while riding as a passenger in her own car, as the car was being driven by her boyfriend. The plaintiff sought coverage for her injuries under an automobile policy issued by the defendant insurance company to the boyfriend's mother.

Here the coverage turned on the definition of insured in the policy at issue; the policy defined "insured" for the purposes of this coverage as a person related to the named insured who resided primarily with the named insured.

The trial court found that the boyfriend was not residing primarily with his mother at the time of the accident. Considering testimony by the boyfriend that his mother had kicked him out of the house and he had been staying with various friends for about a year, the district court held that the trial court's finding was supported by competent, substantial evidence. The district court also approved the trial court's legal conclusion that there was no liability coverage under these circumstances.

West v. Enterprise Leasing Co., 997 So. 2d 1196 (Fla. 2d DCA 2008).

The trial court granted summary judgment in favor of the defendant rental car company, based on the Graves Amendment, 49 U.S.C. § 30106, a federal statute designed to preempt state laws imposing vicarious liability on rental car companies.

The district court agreed with the analysis and conclusions of the recent case of Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242 (11th Cir. 2008). In particular, the district court agreed with Garcia that the Graves Amendment targeted lawsuits contemplated by section 324.021(9)(b)2, Florida Statutes, lawsuits imposing vicarious liability against a rental car company for negligent acts of its lessee. The district court also agreed that section 324.021(9)(b)2 did not fall within the savings clause of the Graves Amendment. And finally, the district court agreed with Garcia's conclusion that the Graves Amendment was a constitutional exercise of Commerce Clause power because that power includes "'the ability to facilitate interstate commerce by removing intrastate burdens and obstructions to it.'"

However, the district court certified the following question of great public importance:

DOES THE GRAVES AMENDMENT, 49 U.S.C. § 30106, PREEMPT SECTION 324.021(9)(b)(2), FLORIDA STATUTES (2007)?

Rosenfeld v. Seltzer, 993 So. 2d 557 (Fla. 4th DCA 2008).

In this auto accident case, the plaintiffs argued on appeal that the trial court should not have instructed the jury on section 316.130(8), Florida Statutes. That section provides that "[n]o pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield."

The district court agreed that it was error for the trial court to instruct the jury that section 316.130(8) was evidence of negligence, because that would impermissibly place a duty of care on the two-year-old child victim. However, the district court found the error harmless, because the jury first found the defendant not negligent. Since, under comparative negligence theories, any jury consideration of plaintiff's negligence would have occurred after the jury determined the defendant's negligence, an erroneous instruction about plaintiff's negligence should have had no impact on the determination of the defendant's negligence.

Judge Polen dissented, finding that the erroneous instruction could have misled or confused the jury.

Moreno v. Salem, 993 So. 2d 588 (Fla. 4th DCA 2008).

The plaintiff appealed from the grant of the defendant's motion for directed verdict. The case involved an automobile accident that occurred on a rainy day when the defendant's car fishtailed and slid into the plaintiff's vehicle.

Noting that motorists have a duty of reasonable care and that it is generally for a jury to decide whether a defendant exercised reasonable care under the circumstances, the district court relied on a similar case, Enterprise Leasing Co. v. Sosa, 907 So. 2d 1239 (Fla. 3d DCA 2005). Quoting a passage from that case, the district court found its analysis and result applicable in the instant case. Enterprise noted that motions for directed verdict should be cautiously affirmed only if, viewing the evidence in a light most favorable to the non-moving party, a jury could not reasonably differ on a material fact or material inference and movant is entitled to judgment as a matter of law. The district court found, as the Enterprise court did, that the jury here should have considered the case.

Flaxman v. Government Employees Ins. Co. , 993 So. 2d 597 (Fla. 4th DCA 2008).

After an automobile accident, the defendant incurred medical expenses exceeding $17,000. The plaintiff appealed the trial court order granting summary judgment in favor of the

defendant insurance company. The defendant insurance company paid only $10,000 on the plaintiff's expenses, and the plaintiff argued that he was entitled to additional payments.

The district court analyzed the policy to rule on the merits. The personal injury protection (PIP) section of the policy provided that the defendant would pay 80% of medical expenses and 60% of work loss. That section also included a limitation of $10,000 aggregate payments. Although the plaintiff's mother (the policyholder) had purchased additional PIP coverage (APIP), the terms of that coverage provided that APIP would be subject to all terms and conditions that apply to the PIP coverage.

Thus, the district court found that the policy clearly included an aggregate limit of $10,000 that applied to both the PIP coverage and the APIP amendment. Based on those policy provisions, the district court found, there was no violation of section 627.736(1), Florida Statutes. Since the defendant paid the $10,000, it had not breached the policy, and the district court affirmed summary judgment for the defendant.

Vargas v. Enterprise Leasing Co., 993 So. 2d 1029 (Fla. 4th DCA 2008).

In this vehicle accident case, the trial court granted the defendant Enterprise's motion for summary judgment, ruling that the federal Graves Amendment, 49 U.S.C. § 30106, preempted section 324.021(9)(b)2, Florida Statutes (2007). The district court *sua sponte* considered this case *en banc*, and then certified a question to the Florida Supreme Court.

The district court held that section 324.021(9)(b)2 involves the type of vicarious liability that the Graves Amendment addressed. Next considering whether the state statute falls within the savings clause of the Graves Amendment, the district court reviewed state legislative intent and ordinary meaning of the term "financial responsibility," as well as congressional intent. The district court concluded that section 324.021(9)(b)2 is not the type of law that Congress intended to save from preemption. The district court held that section 324.021(9)(b)2 is neither a financial responsibility statute nor an insurance requirement under § 30106(b) of the Graves Amendment.

Instead the district court determined that the state statute is based on the dangerous instrumentality doctrine and limits the vicarious liability that can be imposed on vehicle lessors. Thus, the district court agreed with other courts and concluded that the Graves Amendment preempts section 324.021(9)(b)2.

The district court also upheld the Graves Amendment as a constitutional exercise of Commerce Clause power.

The district court then certified this question of great public importance to the Florida Supreme Court:

> DOES THE GRAVES AMENDMENT, 49 U.S.C. § 30106 PREEMPT SECTION 324.021(9)(b)2, FLORIDA STATUTES (2007)?

Judge Farmer dissented; Judges Polen, Stevenson, and Hazouri concurred with that dissent. Judge Hazouri also dissented; Judges Farmer and Stevenson concurred with that dissent.

Johnson v. Skarvan, 992 So. 2d 873 (Fla. 5th DCA 2008).

In this personal injury action arising from a motor vehicle accident, the plaintiff appealed from an order granting a motion to enforce a settlement agreement.

After the plaintiff notified his attorney that he would be unable to attend a scheduled independent medical examination, the plaintiff granted the attorney authority to settle for $7,500. The attorney thereafter agreed to settle for $6,500, believing that it was in the plaintiff's best interest to avoid possible sanctions for failure to appear for the medical exam.

The district court noted the general rule that hiring an attorney does not give the attorney implied or apparent authority to settle the client's claim. While recognizing a possible exception for emergency circumstances, the district court concluded that, even if the exception was legally valid, no Florida appellate court has ever applied the exception. The district court noted also that the issue here was the authority of the attorney to settle, not the wisdom of his action.

Illinois National Ins. Co. v. Bolen, 997 So. 2d 1194 (Fla. 5th DCA 2008).

After a motor vehicle accident, the defendant brought a complaint against the plaintiff insurance company seeking to recover uninsured/underinsured motorist (UM) benefits and also asserting a bad faith claim for the insurance company's handling of her UM claim.

The plaintiff insurance company sought a writ of certiorari to review a discovery order that 1) required the plaintiff to produce its claims file to its insured (the defendant) and 2) required the plaintiff's claims adjuster to appear for deposition. The district court noted that an insurer's claims file is work product and not subject to discovery until its obligation to provide coverage is determined. Thus, the district court held that the trial court order, to the extent that it required the insurance company to produce its claims file, was a departure from the essential requirements of law. The writ of certiorari was granted in part.

Karling v. Budget Rent A Car System, Inc., 2 So. 3d 354 (Fla. 5th DCA 2008).

In this accident case, the trial court entered summary judgment for the defendants, finding that the federal Graves Amendment, 49 U.S.C. § 30106, preempts the vicarious liability of short-term vehicle lessors under Florida's dangerous instrumentality doctrine.

The district court agreed with the rulings of three federal court decisions on this issue. Those cases held that the Graves Amendment preempts Florida's state law that would otherwise impose strict vicarious liability on rental car companies up to the liability limits of section 324.021(9)(b)2, Florida Statutes. The district court also agreed with the rulings of those courts

that the Graves Amendment is a valid exercise of Commerce Clause power. The district court also cited other Florida appellate courts reaching the same conclusions.

[Note: On defendant's motion, the district court subsequently certified the following question of great public importance:
DOES THE GRAVES AMENDMENT, 49 U.S.C. § 30106, PREEMPT SETION 324.021(9)(B)2, FLORIDA STATUTES (2007)? 2 So. 3d 356 (Fla. 5th DCA 2009).]

Driver's Licenses

Hernandez v. Department of Highway Safety and Motor Vehicles, 995 So. 2d 1077 (Fla. 1st DCA 2008).

The defendant was involved in a motor vehicle crash, and refused to submit to a breath test. At the hearing regarding the administrative suspension, the hearing officer did not consider whether the defendant's arrest was lawful, despite the defendant's argument that he was illegally arrested.

Although section 322.2615, Florida Statutes, was amended in 2006 to delete the section providing that the hearing officer should also consider whether the arrest was lawful, the implied consent statute, section 316.1932(1)(a)1.a, Florida Statutes (2007), provides that the "chemical or breath test must be incidental to a lawful arrest." The district court found that section 316.1932 clearly provides for implied consent only when the breath or blood test is incidental to a lawful arrest.

The district court agreed with the Fifth District, which held in Department of Highway Safety and Motor Vehicles v. Pelham, 979 So. 2d 304 (Fla. 5th DCA 2008), that if the legislature intended to authorize suspension by the department for refusal to take the test, without regard to the legality of the arrest, then the legislature should have made that intention express. The district court here, like Pelham, certified the following question:

> Can the DHSMV suspend a driver's license for refusal to submit to a breath test, if the refusal is not incident to a lawful arrest? If not, is DHSMV hearing officer required to address the lawfulness of the arrest as part of the review process?

McLaughlin v. Department of Highway Safety and Motor Vehicles, 2 So. 3d 988 (Fla. 2d DCA 2008).

The defendant, after being arrested for DUI, refused to submit to a breath, urine, or blood test. At the administrative hearing, the defendant argued that the suspension was improper because his arrest was unlawful. The hearing officer explained that section 322.2615(7)(b), Florida Statutes, did not permit him to consider the validity of the arrest.

The district court first noted that although the suspension had expired and the petition was therefore moot, the court had jurisdiction because the petition presented a question likely to recur.

The district court then concluded that section 322.2615 was unambiguous because it limits the scope of the review before hearing officers to only three issues, and lawfulness of the arrest is not one of the enumerated issues. Although section 322.1932, Florida Statutes, does not require submission to a test unless the driver is lawfully arrested, the district court found no reason to consider section 322.2615 *in pari materia* with section 322.1932, because there was no ambiguity in section 322.2515's limitation of the hearing officer's scope of review.

However, the district court certified conflict with the Fifth District's holding in Department of Highway Safety and Motor Vehicles v. Pelham, 979 So. 2d 304 (Fla. 5th DCA 2008).

Department of Highway Safety and Motor Vehicles v. Elias, 997 So. 2d 1172 (Fla. 3d DCA 2008).

After a breath test yielding a breath alcohol level of .123, and an ensuing DUI arrest, the defendant's driving privileges were immediately suspended. Prior to a review hearing, the defendant asked the hearing officer to subpoena three officers of the Miami Beach Police Department. The hearing officer subpoenaed two officers but denied the request as to the third.

The defendant sought relief by filing in the circuit court a "Motion to Enforce the Issuance of his Subpoena on Officer Kevin Millan," and the circuit court entered an order compelling the hearing officer to issue the subpoena. The district court found that the circuit court had no jurisdiction to issue subpoenas but only to enforce subpoenas issued by hearing officers. Instead, the district court pointed out, section 322.31, Florida Statutes (2007), permits certiorari review, and that section provides the method for challenging the denial of the subpoena. However, the defendant's failure to seek such review here precluded further review of that issue.

Kirpalani v. Department of Highway Safety and Motor Vehicles, 997 So. 2d 502 (Fla. 4th DCA 2008).

The defendant, driving under a New Jersey license, was stopped for a traffic stop in Florida, and DUI investigation ensued when officers noted that she had bloodshot eyes, flushed face and an odor of alcohol on her breath. The defendant's license was suspended for a breath test with results over the legal limit of .08 grams of alcohol per 100 milliliters of blood.

The defendant challenged the suspension, asserting that she only agreed to take the test because the officer told her that her New Jersey license would be suspended for a year. The hearing officer upheld the suspension, finding that the officer had probable cause to believe that the defendant was driving a motor vehicle while under the influence of alcohol and that her

blood alcohol level was .08 or higher. The circuit court found that the department had afforded due process and observed essential requirements of law and that its actions were supported by competent, substantial evidence.

Discussing the appropriate standard of appellate review for this second-tier certiorari review, the district court noted that a district court of appeal may decline to grant certiorari relief even if a legal error could be argued to be a departure from the essential requirements of law, if that error does not result in a gross miscarriage of justice. Here the district court noted that even if the defendant had refused to take the test, her license would have been suspended for one year. Thus, finding no miscarriage of justice, the district court concluded that there was no departure from the essential requirements of law, and denied the petition for writ of certiorari.

Department of Transportation v. Baird, 992 So. 2d 378 (Fla. 5th DCA 2008).

The defendant driver was assessed toll violations because his EPASS transponder, unknown to him, was not working properly. After paying the citations in full, based on advice from a Department of Transportation (DOT) clerk, the defendant learned that this admitted his guilt to each infraction, resulting in a mandatory one-year suspension.

The defendant and DOT filed, in county court, a stipulated motion for withdrawal of plea and a stipulated motion for reduction of legal penalty. The county court denied the joint motion, allowing the license suspension to remain.

The state (DOT) and the defendant driver were the only parties to the ensuing appeal to the circuit court, and neither challenged the enforcement of the EPASS violations or sought any additional relief beyond the motions. The circuit court reversed the county court's denial of the stipulated motions, but then proceeded to find that prepaid users were exempt from enforcement of toll violations. The circuit court ordered further actions and injunctions, including enjoining the DOT, the Florida Turnpike Authority, and the Orlando-Orange County Expressway Authority from certain actions relating to toll violations against prepaid account holders.

The district court held that the DOT and the Expressway Authority were denied due process when the circuit court addressed issues that had not been raised below and ordered injunctive and other relief against them with no prior notice and no opportunity to be heard. The Expressway Authority was not even a party in the case.

However, the district court let stand the portions of the circuit court opinion that reversed the county court's order and granted relief to place the defendant in the same position that he would have been in if the citations had not been issued.

Vehicle Forfeiture

No new cases.