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.]

July – September 2008

Driving Under the Influence

Johnson v. State, 994 So. 2d 960 (Fla. 2008).

In this case the Florida Supreme Court considered the defendant's waiver of the right to a jury trial in the second phase of a felony DUI case. A jury found the defendant guilty of a single incident of DUI. Then the trial court, without a jury, found that the defendant had three prior DUI convictions, based on his driving record. The district court held that despite the trial court's failure to conduct a colloquy concerning the defendant's waiver of a jury trial at that phase, defense counsel stipulated to a second-phase bench trial and that constituted a valid waiver of the defendant's right to a jury trial at that stage.

The Florida Supreme Court noted that Florida law requires a bifurcated trial process for felony DUIs. Once a jury returns a guilty verdict on the single incident of DUI, the court explained, the trial court must conduct a separate proceeding to consider the prior DUIs. The requirement of three prior misdemeanor DUI offenses is considered an element of the offense, so the defendant is entitled to a jury trial in that second phase. The court noted that it has required either a written waiver or an oral waiver with an appropriate colloquy. Silence, the court noted, is not equivalent to a waiver.

Turning to the case at bar, the court first held that the defendant's failure to request a jury trial and failure to object to the bench trial did not waive appellate review. The court then concluded that the trial court erred by conducting a bench trial for the second phase of the felony DUI proceeding because there was no colloquy and the defendant did not make a knowing and intelligent waiver of his right to a jury trial.

However, the court then applied harmless error analysis and found that the state proved beyond a reasonable doubt that there was no reasonable probability that the error contributed to the defendant's conviction. Section 316.192(12), Florida Statutes (2004), provides that driving records

are sufficient to establish the prior convictions. Thus the court disapproved the reasoning of the district court's decision to the extent it was inconsistent with the court's opinion, but approved the ultimate result.

Justice Anstead dissented.

Kelly v. State, 987 So. 2d 1237 (Fla. 2d DCA 2008).

In this appeal the district court considered whether a single injury could support convictions for three felonies: 1) DUI with serious bodily injury, 2) driving without a valid driver's license with serious bodily injury, and 3) leaving the scene of an accident with injury.

The district court held that the defendant was properly convicted of both DUI with serious bodily injury and leaving the scene of an accident with injury. The district court noted that only the DUI involved an element of causation and that the two offenses occurred sequentially.

However, the district court held that the convictions for DUI with serious bodily injury and driving without a valid license with serious bodily injury were not permissible. The district court noted that both the DUI and the offense of driving without a valid license with serious bodily injury contained an element of causation. The two crimes also occurred in one act of operating a vehicle rather than as sequential offenses. Thus the district court reversed the conviction and sentence for driving without a valid license with serious bodily injury. The district court affirmed the remaining two convictions but remanded for resentencing with a corrected score sheet.

Palazzotto v. State, 988 So. 2d 123 (Fla. 2d DCA 2008).

The defendant appealed his judgments and sentences for DUI with serious bodily injury, DUI with damage to person or property, child neglect and battery on a law enforcement officer.

Discussing only one issue, the district court found that there was probable cause to support the blood draw pursuant to section 316.1933, Florida Statutes (2004), based on odor of alcohol, the speed at which the defendant had been driving, and his violent behavior at the hospital.

McClelland v. State, 995 So. 2d 557 (Fla. 2d DCA 2008).

Although the district court affirmed the judgment and sentences for driving under the influence and causing death (DUI manslaughter), driving while license suspended, and child neglect, the district court briefly addressed the circuit court's handling of the defendant's pro se motion to withdraw plea. The district court pointed out that the circuit court should have stricken that motion rather than denied the motion on the merits, and noted that the court's denial of the motion to withdraw should not have any preclusive effect on any valid claim for postconviction relief.

Guy v. State, 993 So. 2d 77 (Fla. 2d DCA 2008).

This appeal addressed the propriety of a sobriety checkpoint. The defendant pleaded guilty to driving on a suspended license as a habitual offender and to violation of probation for DUI with

serious bodily injury, after the trial court denied a motion to suppress challenging the checkpoint.

The district court discussed Florida Supreme Court cases governing the constitutionality of sobriety checkpoints, or DUI roadblocks. Those cases required a written set of uniform and neutral guidelines, developed in advance, to minimize the discretion of officers in the field. In addition to this advance planning and direction, strict compliance to the guidelines is necessary.

Here the district court found that the plan improperly left vehicle selection procedure to the discretion of a field officer, if traffic backup occurred. The district court also concluded that there was not strict compliance with the plan, especially with regard to duty assignments. The district court reversed the conviction and directed a discharge, because the parties had stipulated that the motion was dispositive. The district court also reversed the revocation of probation.

Ochacher v. State, 987 So. 2d 1241 (Fla. 4th DCA 2008).

In this appeal from a conviction for felony DUI, the district court considered the propriety of testimony about the defendant's suspended license at the time of the DUI. The defendant argued that driving with a suspended license was not probative of whether he was driving under the influence.

The district court held that the trial court abused its discretion in finding that the probative value outweighed any prejudice. However, the district court then held that error harmless, concluding that there was no reasonable possibility that the error contributed to the verdict.

In reaching its decision the district court reviewed the totality of the evidence, describing facts that included the officers' testimony about the defendant's staggering, bloodshot eyes, odor of alcohol on his breath, and performance on field sobriety tests. The district court noted that the defense did not contradict the officers' observations or present any theory of defense other than to attack the observations of the officers. Thus the district court concluded that under the totality of the evidence and the direct observations of the officers, any error in admitting the suspended license evidence was harmless beyond a reasonable doubt.

Judge Taylor dissented.

Whynot v. State, 987 So. 2d 739 (Fla. 5th DCA 2008).

The district court, without reversing, found one issue worthy of discussion in considering this appeal filed pursuant to Anders v. California, 386 U.S. 738 (1967).

The defendant was convicted on two counts of DUI manslaughter and one count of DUI causing serious bodily injury. The defendant argued that the jury instruction on the DUI manslaughter counts was incomplete or inaccurate and thus fundamentally flawed.

The defendant relied on Sabree v. State, 978 So. 2d 840 (Fla. 4th DCA 2008), which held that "simply having cocaine in the system is legally insufficient to convict because the State is required to prove beyond a reasonable doubt that Sabree was 'under the influence' of cocaine." The court in Sabree continued by noting that a general jury verdict resting on alternative grounds cannot

stand "when it is legally insufficient on one ground because it is impossible to determine the ground on which the jury convicted."

The district court distinguished the jury instructions here, finding that the jury was given two alternative theories of criminal liability, either of which was legally sufficient. The jury could convict the defendant here, the appellate court found, "if it concluded, among other things, that he was driving under the influence of alcohol or a controlled substance *to the extent that his normal faculties were impaired* or had a breath alcohol level of 0.08 or higher (emphasis in original)." Conversely, the Sabree instruction was flawed because it did not include the phrase "to the extent that his normal faculties were impaired."

The district court affirmed the defendant's convictions.

Syverud v. State, 987 So. 2d 1250 (Fla. 5th DCA 2008).

After denial of a motion to suppress, the defendant pleaded *nolo contendre* to DUI manslaughter and DUI with serious bodily injury. The defendant had argued that his incriminating statements should have been suppressed because the state's evidence, without those statements, would be insufficient to establish *corpus delicti,* or that he was the driver of the car that caused the accident.

The district court noted that before a confession can be admitted the state has the burden of proving, by substantial evidence, that a crime was committed. While for most crimes *corpus delicti* does not involve the issue of identity, in Florida DUI cases *corpus delicti* does require evidence that the defendant was operating the vehicle while under the influence.

The court below denied the motion after an evidentiary hearing. The district court concluded that competent, substantial evidence supported the trial court's factual findings. The state met its burden by offering circumstantial evidence, which included eyewitness testimony about the defendant's presence at the scene just after the accident, and the district court found the evidence sufficient to establish the corpus delicti.

Judge Lawson wrote a separate concurring opinion concluding that Florida's more stringent *corpus delicti* requirement for DUIs is misguided. He opined that the Florida Supreme Court should follow the United States Supreme Court's adoption of the trustworthiness doctrine instead of the *corpus delicti* rule.

Comeaux v. State, 988 So. 2d 101 (Fla. 5th DCA 2008).

The defendant entered a plea to felony DUI, preserving for appeal her argument that the state could not enhance the DUI to a felony by using a 1989 DUI conviction that resulted from an uncounseled plea.

The district court noted that a prior DUI based on an uncounseled plea can be used for enhancement if the prior DUI did not actually result in the defendant's imprisonment.

The sentence imposed in 1989 was a one-year probationary sentence, but that court awarded the defendant one day of credit against the probationary term for the day spent in jail upon arrest and before entry of a plea. The district court concluded that the conviction did not result in imprisonment but rather her arrest resulted in temporary confinement. The 1989 trial court had to give credit for that confinement against the year of probation to avoid a punishment longer than permitted by statute. Thus the district court rejected the defendant's argument and affirmed.

In a footnote, the district court pointed out that the question of whether state law guarantees a right to counsel for misdemeanors for which imprisonment was possible but was not imposed is currently pending in the Florida Supreme Court.

Morris v. State, 988 So. 2d 120 (Fla. 5th DCA 2008).

The defendant appealed from convictions of DUI within ten years after a prior DUI conviction, and driving while license suspended or revoked. On appeal the defendant argued that the prosecutor improperly commented on the defendant's right to silence and shifted the burden of proof to the defendant, by referring to the defendant's refusal to perform field sobriety tests and refusal to take a breath alcohol test.

In the defense's closing argument, counsel argued that the state did not have any evidence to prove impairment beyond a reasonable doubt. The state in turn argued that there was evidence of impairment and also argued that an innocent man would not refuse to perform field sobriety tests or take a breath test. The prosecutor also said that an innocent person would volunteer to take the tests to prove his innocence. The trial court overruled the defendant's objection.

The district court noted that the Fifth Amendment would not prohibit the prosecutor from arguing that the defendant's refusal to perform the field sobriety and breath tests evidence consciousness of guilt, because a law enforcement officer can lawfully compel a person to submit to those tests if the officer has probable cause to believe the person has committed a DUI offense.

However, the district court held that the prosecutor did violate the defendant's Fifth Amendment rights when he argued that an innocent person would protest his innocence. And the prosecutor improperly shifted the burden of proof by arguing that an innocent person would volunteer to take a breath test to prove innocence. The state failed to show beyond a reasonable doubt that these errors did not contribute to the verdict; the district court reversed and remanded for a new trial.

Criminal Traffic Offenses

Cunniff v. State, 986 So. 2d 656 (Fla. 2d DCA 2008).

In this case the district court addressed one of several claims of ineffective assistance of appellate counsel raised in the defendant's rule 9.141(c) petition.

The defendant was convicted by a jury of several offenses, including aggravated fleeing and eluding under section 316.1935(4), Florida Statutes (2003). The judgment and sentences were

affirmed on direct appeal. The district court found that the defendant was fleeing in a truck he had just stolen but was not leaving or attempting to leave the scene of a crash as defined in section 316.1935(4).

The district court concluded that the failure to argue this fundamental error on appeal was ineffective assistance of appellate counsel. Finding a new appeal unnecessary, the district court reversed the conviction and sentence for aggravated fleeing and eluding, then remanded for the trial court to enter judgment for the lesser-included offense of fleeing or attempting to elude a law enforcement officer under section 316.1935(1).

Revell v. State, 989 So. 2d 751 (Fla. 2d DCA 2008).

In this appeal from denial of a postconviction motion, the defendant was charged with driving while license suspended or revoked, habitual offender, a third-degree felony. Two prior convictions made the defendant eligible for habitual felony offender (HFO) sentencing.

The defendant claimed ineffective assistance of counsel in his attorney's failure to advise him that he could be subject to HFO sentencing. The defendant decided to reject the plea offer without knowing his potential HFO sentence. The district court noted that a counsel's failure to advise a client, when the client is considering a plea offer, of the maximum sentence faced, is ineffective assistance. The district court reversed the denial of the postconviction motion and remanded for a new trial.

Paul v. State, 991 So. 2d 404 (Fla. 2d DCA 2008).

This appeal involved a vehicle stop for a broken taillight. The trial court denied the defendant's motion to suppress his identification and statements following the stop. The defendant pleaded no contest to driving with license revoked.

Considering this case a second time, after the Florida Supreme Court's decision regarding stops for cracked windshields in Hilton v. State, 961 So. 2d 284 (Fla. 2007), the district court distinguished the facts and law relevant here.

The district court repeated the Florida Supreme Court's statement in Hilton that a stop under the "not in proper adjustment or repair" provision of section 316.610(1), Florida Statutes, would be constitutional only if the equipment defect or damage is in violation of law. The district court noted that the Hilton court thus held that a vehicle stop for a windshield crack was permissible only if the crack posed a safety hazard, because section 316.2952, Florida Statutes (2001), did not require a windshield free from cracks.

Distinguishing the case here, the district court noted that although section 316.221(1) does not require taillights free from cracks, it does require that the taillights emit a plainly visible red light. The record revealed that the broken taillight here did not meet that statutory requirement, so the trial court's denial of the motion to suppress was proper.

Joseph v. State, 988 So. 2d 133 (Fla. 5th DCA 2008).

The defendant appealed from his conviction and sentence for leaving the scene of an accident involving death. At the beginning of trial, the prosecutor informed the court and defense counsel that an audio recording of the defendant's phone call to the police station after the accident had been lost or destroyed.

The trial court denied the defendant's motion to dismiss based on the prejudice of the missing evidence, but sua sponte declared a mistrial. The trial court also denied defendant's subsequent motion to dismiss. The defendant was later retried, found guilty, and sentenced.

The district court held that the defendant did not clearly consent; failure to object to an illegal discharge of a jury does not constitute consent to the mistrial. Noting that the trial court should have considered alternatives, such as a continuance, before declaring a mistrial over the defendant's objection, the district court also concluded that the loss of the audio recording and the inability to locate a possible witness to the phone call did not create a manifest necessity requiring retrial.

The district court reversed the denial of the defendant's motion to dismiss and remanded with instructions to discharge the defendant.

State v. Resh, 992 So. 2d 294 (Fla. 5th DCA 2008).

In this appeal by the state, the district court considered the trial court's downward departure and the trial court's refusal to score victim injury points in the defendant's criminal punishment code scoresheet.

The case arose from an accident in which a thirteen-year-old boy was struck and killed. The defendant had run a red light, and after the accident fled the scene, although he later turned himself in to police. He pled guilty to leaving the scene of an accident involving death, tampering with physical evidence, and operating a vehicle without a driver's license, causing death.

At sentencing, the state objected to the trial court's downward departure but failed to object to the trial court's refusal to include victim injury points. The district court held that the state's failure to raise this objection precluded it from raising the issue on appeal.

Next considering the downward departure, the district court noted that the trial court gave two reasons: 1) that the defendant's capacity to appreciate the criminal nature of his conduct or conform his conduct to the law was substantially impaired; and 2) that the offense was an isolated incident committed in an unsophisticated manner and that the defendant had shown remorse. The district court held that these reasons were both statutory bases for departure and thus legally permissible. The district court then concluded that evidence of the defendant's low IQ and mental deficiencies supported the trial court's decision, so that it was not an abuse of discretion to depart on this basis.

Arrest, Search and Seizure

No new opinions.

Torts/Accident Cases

Sims v. State, Florida Supreme Court, 33 FLW S698, opinion filed September 25, 2008.

In this case the court addressed a procedural issue with regard to its own jurisdiction and also considered the application of victim-injury points.

The case involved an accident in which the defendant's vehicle struck and killed a man who was lying in the middle of the road with a bicycle. The defendant was charged and found guilty of leaving the scene of an accident resulting in death. At sentencing the trial court added 120 victim-injury points, but then departed downward because it found that the accident was nearly unavoidable.

The defendant filed a pro se petition to invoke all writs jurisdiction. The court treated that as a notice to invoke discretionary jurisdiction, but dismissed it as untimely filed. The defendant filed a motion for reinstatement, arguing that his attorney did not keep him informed of the status and did not send him a copy of the appellate court decision. The court granted the motion for reinstatement.

Considering the threshold question of jurisdiction, the court found that failures of the defendant's appellate counsel amounted to ineffective assistance and prevented the defendant from timely filing his pro se action for discretionary review according to time. The court then found that this ineffective assistance was appropriately considered during this action because it would be a waste of judicial resources for the court not to address that issue at this opportunity. The court found that it had authority to grant the motion for reinstatement and treat the belated filing as timely.

On its own motion the court adopted a new appellate rule to clarify the procedure for belated discretionary review or belated appeal in that court. See In re Amendments to Fla. R. App. Pro. 9.141, 992 So. 2d 233 (Fla. 2008).

Turning to the question of victim-injury points, the court reviewed the sentence *de novo*, because the defendant argued that the trial court did not follow the law but misinterpreted the relevant statutes. The court concluded that, for a trial court to impose victim injury points, a causal connection must clearly exist between the charged offense and the death of the victim. Here the court found that the death was a direct result of the initial impact, rather than the underlying offense of leaving the scene which occurred after the death. The requisite causal connection did not exist in the instant case.

Justice Cantero dissented with regard to the appellate jurisdiction.

Frye v. Anderson Columbia, Co., Inc., 988 So. 2d 61 (Fla. 1st DCA 2008), and Joyner v. Anderson Columbia, Co., Inc., 988 So. 2d 60 (Fla. 1st DCA 2008).

These two cases were tried together. The cases involved single-car accidents that occurred at the same intersection within a 12-hour period. A key issue was whether a stop sign at the intersection was properly placed.

The trial court found that the stop sign was properly placed and visible. However, the district court found that the evidence also permitted inferences that the sign was broken, was too low, and was placed too far from the road, and so was not visible. Concluding that the facts permitted different reasonable inferences, the district court held that the cases should have been submitted to the jury, and reversed the summary judgment.

Anand v. JEB Hotel Assoc., Ltd., d/b/a The Ramada Inn, 988 So. 2d 652 (Fla. 3d DCA 2008).

In this negligence action arising from a vehicle accident, an expert witness for the plaintiffs testified regarding the cause of the vehicle rollover. The witness testified that in reaching his conclusions he reviewed materials including the police report. When defense counsel attempted on cross-examination to mark a diagram in the police report, the plaintiffs' counsel objected that the report and diagram were protected by the accident report privilege.

The trial court ruled that the defense counsel could use the police diagram as a demonstrative aid but could not introduce the diagram or report into evidence. However, during closing argument, defense counsel displayed the diagram and referred to it as being from the accident report. The trial court overruled the plaintiffs' objection.

The trial court also denied the plaintiffs' motions for mistrial and a new trial, finding that although defense counsel violated the court's order, the violation was unintentional and not so prejudicial as to deny a fair trial.

The district court concluded that the trial court's findings were supported by facts. Noting that a trial court can best determine the potential effect of an allegedly improper closing argument, the district court declined to find that the single remark during closing required a new trial. The district court thus found no abuse of discretion in the trial court's denial of the motions for mistrial and new trial, and affirmed.

Kaye v. State Farm Mutual Auto Insurance Company, 985 So. 2d 675 (Fla. 4th DCA 2008).

In this case arising from an automobile accident, the plaintiff added an accident reconstruction expert to her witness list. The defendant sought a deposition *duces tecum*, but the expert did not appear at two scheduled depositions. The trial court ordered the defendant's counsel to provide a final report and a copy of the expert's files within 15 days, and to appear for a deposition within 30 days. Notwithstanding that order, the defendant filed a motion to strike the expert as a witness before the 30-day period had expired, and the trial court granted the motion before the expiration of the 30-day period.

At trial the plaintiff was the only witness for her case. Noting that striking a witness is a drastic remedy, the district court concluded that the trial court abused its discretion under the circumstances of this case. Among other circumstances, the expert did provide his files to the plaintiff's counsel within 15 days and did schedule his deposition within 30 days, as ordered by the trial court. The district court found that the defendant was not prejudiced, because there would have

been time between the trial court's order striking the expert and the trial. The district court reversed and remanded for a new trial at which the plaintiff should be allowed to call her expert witness.

Brookins v. Ford Credit Titling Trust, 993 So. 2d 178 (Fla. 4th DCA 2008).

In this accident case the trial court granted summary judgment in favor of the long-term lessor of a vehicle. Although the lessor failed to maintain liability insurance specified in the lease, the district court found that the lessor's blanket policy of liability insurance for its fleet satisfied the requirements of section 342.012(9)(b)1, Florida Statutes (2007). Thus the lessor avoided liability.

The district court in this *en banc* opinion found it unnecessary to consider whether the federal Graves Amendment, 49 U.S.C. section 30106, preempts section 342.012(9)(b)1, an issue that the circuit court addressed.

Driver's Licenses

Lescher v. Department of Highway Safety and Motor Vehicles, 985 So. 2d 1078 (Fla. 2008).

The Florida Supreme Court considered this certified question:

> Does the amendment to section 322.271(4), Florida Statutes, which eliminated hardship driver's licenses effective July 1, 2003, violate the prohibition against ex post facto laws as to persons who could have applied for a hardship license before the amendment became effective?

Noting that the principles of ex post facto are relevant only to criminal or punishment provisions, the court applied the test of Hudson v. United States, 522 U.S. 93, 99 (1997), to determine whether driver's license revocation and the unavailability of a hardship license constitutes criminal punishment.

The court considered the initial question of the legislature's intent, and found it apparent in the provisions of section 322.263, Florida Statutes (2005), that the legislature did not intend to punish but rather intended in that chapter to create a regulatory scheme designed to protect the public.

The court next applied seven Hudson factors to determine whether the "clearest of proof" negated the legislature's intent to create a civil remedy. Although two of the factors supported the defendant's argument that the instant statutes were so punitive in effect that they negated the legislature's intent, the court pointed out that no one factor controlled and that the statutes fully related to the purpose of protecting the public. Thus the court held that the petition failed to meet the required showing.

Answering the certified question "no," the court concluded that the statutes at issue were part of a civil regulatory scheme for protection of the public, and that the amendment eliminating the hardship license, as applied to petitioner, did not violate the constitutional prohibition against ex

post facto laws.

Bolware v. State, 995 So. 2d 268 (Fla. 2008).

The Florida Supreme Court accepted jurisdiction to resolve a conflict issue: "Whether the suspension or revocation of a driver's license is a direct consequence when it results from a guilty or no contest plea, for which the defendant must be informed to ensure that the plea is voluntary."

Here the defendant pled no contest to driving while license suspended or revoked, and paid a fine. Six months later the Department of Highway Safety and Motor Vehicles determined that the defendant was a habitual traffic offender and revoked his driver's license for five years, under section 322.28(5), Florida Statutes (2001). He filed a motion for postconviction relief arguing that he was not advised that he would be classified as a habitual traffic offender or that his license would be revoked.

The court noted that a defendant must be informed of the direct consequences of a plea to satisfy due process requirements for a voluntary and intelligent plea. The court then described a direct consequence as a definite, immediate, and largely automatic effect on the range of the defendant's punishment.

The court then held that a license revocation, although a serious hardship, was not punishment and thus could not be a direct consequence of a plea. The court also noted that the revocation was not immediate and not an action by the trial court. Thus the trial court was not required to inform the defendant of this consequence.

However, the court then found that the license revocation is such a serious consequence that a defendant should be informed of it. So the court directed that rule 3.172(c) of the Florida Rules of Criminal Procedure be amended.

Pending any amendment, the court urged trial courts to inform defendants of this serious consequence, and suggested that counsel should advise defendants of the consequence as well.

Justice Pariente wrote a concurring opinion, joined by Justice Cantero; Justice Anstead wrote an opinion concurring in part and dissenting in part; and Chief Justice Quince wrote a dissenting opinion.

Department of Highway Safety and Motor Vehicles v. Sarmiento, 989 So. 2d 692 (Fla. 4th DCA 2008).

In this second-tier certiorari petition, the department challenged a circuit court grant of certiorari. The circuit court quashed the department's suspension of the defendant's driver's license for refusal to take a breath test.

The circuit court panel found that the statutorily created implied consent to a breath test applies only if the person arrested is in control of a motor vehicle. The circuit court then found that the record established that the vehicle was inoperable, so that the statutory implied consent did not apply.

The district court held that the circuit court afforded procedural due process and applied the correct law. The district court considered the circuit court's finding that the evidence was undisputed that the vehicle was inoperable to be equivalent to a holding that no competent, substantial evidence supported a finding that the vehicle was operable. Although the circuit court did not address the hearing officer's alternative finding that the officers had probable cause to believe that the defendant had been driving, the district court noted that its second-tier review would not permit this court to consider whether competent, substantial evidence was presented at the agency level. The district court denied the petition.

Judge Warner dissented.

Gupton v. Department of Highway Safety and Motor Vehicles, 987 So. 2d 737 (Fla. 5th DCA 2008).

The defendant, after being arrested for driving under the influence, refused to submit to a breath test. She requested a hearing, at which the resulting suspension was upheld, and the trial court also affirmed the suspension.

Section 322.2615(2), Florida Statutes (2007), requires the arresting officer to submit to the department an affidavit describing the officer's basis for believing that the defendant was driving or in actual physical control of a motor vehicle while under the influence of alcohol or some other intoxicating substance. The affidavit here was signed by the arresting officer and the attestor. Below the signature line for the attestor was the words "Notary/Law Enforcement Officer." Since the attestor did not indicate whether the document was executed in the capacity of a notary or as a law enforcement officer, the defendant argued that the document was not an affidavit as required by the statute.

Noting that Florida courts have concluded that minor technical defects in an affidavit do not render it void, the district court rejected the defendant's argument as overly technical. The district court pointed out in a footnote that evidentiary formalities are somewhat relaxed in administrative proceedings. The district court pointed out that whether the attestor was a notary public or a law enforcement officer, both are authorized to administer oaths under the circumstances.

Vehicle Forfeiture

In re Forfeiture of: 2007 Ford F350 Pickup Truck, Identification No. 1FTWW31P27EA46254 Department of Highway Safety and Motor Vehicles v. Bowers, 987 So. 2d 148 (Fla. 2d DCA 2008).

The defendant was charged with the third-degree felony driving while license suspended or revoked as a habitual traffic offender. The defendant moved to dismiss the related vehicle forfeiture action by the department.

The trial court found that the forfeiture would violate the Excessive Fines Clause of the Eighth Amendment, because the value of the motor vehicle was more than $50,000 and the defendant entered a plea to misdemeanor driving without a license.

Without reaching the Excessive Fines issue, the district court concluded that because the value of the vehicle was not described in the complaint, the trial court erred in looking beyond the "four corners" of the forfeiture complaint. The district court reversed the trial court's order granting defendant's motion to dismiss the forfeiture.