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.]

April – June, 2008

Driving Under the Influence

State v. Belvin, 986 So. 2d 516 (Fla. 2008).

The Florida Supreme Court considered the following question, certified by the Fourth District Court of Appeal to be of great public importance:

> Does admission of those portions of the breath test affidavit pertaining to the breath test operator's procedures and observations in administering the breath test constitute testimonial evidence and violate the Sixth Amendment's Confrontation Clause in light of the United States Supreme Court's holding in Crawford v. Washington, 541 U.S. 36 (2004)?

At a non-jury trial in county court on a driving under the influence charge, the breath test affidavit was admitted over the defendant's objection, although the breath test technician did not testify. The defendant argued on appeal that the failure to have the breath test technician testify at trial violated his constitutional right to confrontation as described in Crawford v. Washington, 541 U.S. 36 (2004).

Considering whether the breath test affidavit was testimonial under Crawford, the Florida Supreme Court noted that a key factor was the purpose of the document. The Court here held the breath test affidavit to be testimonial, noting that the affidavit was created to establish events potentially relevant to later prosecution, it was not created during an ongoing emergency but rather after the crime, it was created at the request of police for the DUI prosecution, and it fell within the category of formalized testimonial materials listed by the Crawford court as testimonial.

Finding that the breath test technician was unavailable at trial, the court next considered whether the defendant had a prior opportunity to cross-examine the technician. The court held that a discovery deposition under rule 3.220(h) of the Florida Rules of Criminal Procedure does

not satisfy the opportunity to cross-examine that Crawford requires, and so the defendant had not waived his opportunity to cross-examine the technician by failing to depose her under rule 3.220(h)(1)(D).

The court thus answered the certified question in the affirmative, holding that the admission of those portions of the breath test affidavit pertaining to the breath test technician's procedures and observations in administering the breath test were testimonial and the admission of those portions without a prior opportunity for cross-examination violated the defendant's Sixth Amendment right of confrontation under Crawford.

Sabree v. State, 978 So. 2d 840 (Fla. 4th DCA 2008).

The defendant was convicted of one count of DUI manslaughter/unlawful blood alcohol level and one count of DUI serious bodily injury/unlawful blood alcohol level. On appeal the defendant argued that misleading and inaccurate jury instructions relating to an element of an offense constituted fundamental error.

Two blood alcohol tests showed the defendant's blood alcohol level to be 0.11% and 0.09%, respectively. Another test showed a trace amount of cocaine.

The trial court gave jury instructions that included the following element for each charge: "2. While driving or while in actual physical control of the vehicle, QUADIR SABREE had a blood alcohol level of 0.08 or higher and/or a controlled substance to-wit: cocaine." The defendant did not object. The verdict form did not specify whether the jury found the defendant guilty for having an unlawful blood alcohol level or for having cocaine in his system, or both.

The district court explained that to be guilty of DUI under section 316.1933(1)(a)-(c), Florida Statutes (2004), a person must be either (a) "affected to the extent that [his] normal faculties are impaired" by alcohol or a controlled substance, which includes cocaine, (b) have a "blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood," or (c) have a "breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath." The district court pointed out that simply having cocaine in the system was legally insufficient to convict.

The district court noted that a general jury verdict resting on alternative grounds must be set aside when it is legally insufficient on one ground because it is impossible to determine the ground on which the jury convicted. The district court then found that the error here was fundamental, because the trial court failed to give a complete or accurate instruction relating to an element of the offenses. The district court reversed and remanded.

Hernandez v. State, 985 So. 2d 1115 (Fla. 3d DCA 2008).

The defendant appealed a felony DUI conviction arguing speedy trial violation. The defendant was arrested on July 22, 2005, and charged by citation with driving under the influence of alcohol pursuant to section 316.193, Florida Statutes (2005), driving in violation of

imposed restrictions and driving with a suspended driver's license, all filed in county court as misdemeanors.

At an October 7, 2005, hearing on these charges, the state announced that it was filing a felony information in circuit court based on the same offenses, charging felony DUI as well as the other citation violations. The state orally asked the court to transfer the misdemeanor cases from county to circuit court. The state did not nolle prosse the misdemeanor charges or file a motion to consolidate.

On December 5, 2005, the defendant filed a notice of expiration of the ninety-day speedy trial period on the DUI citation filed in county court, under Florida Rule of Criminal Procedure 3.191(a) and (h). On March 21, 2006, Hernandez filed a motion to dismiss the felony DUI count of the information. When the trial court denied the motion, the defendant pleaded guilty, reserving the right to appeal, and was sentenced.

The district court pointed out that the state must file a motion to consolidate the misdemeanor with the felony, or nolle prosse the misdemeanor, if it were to proceed with the felony. The district court concluded that the state did not do this, since the record only showed that the misdemeanors were transferred to circuit court. Without a proper motion to consolidate as required by rule 3.151(b), the county court retained jurisdiction and should have dismissed the misdemeanor DUI when the ninety-day speedy trial period ended.

However, the district court continued the analysis noting that the Florida Supreme Court has held that dismissal of the misdemeanor DUI does not bar prosecution of the felony DUI because they are not the same offense – the felony DUI requiring proof of three or more misdemeanor convictions. But the Florida Supreme Court also concluded that section 316.193(2)(b) requires that there be a conviction for the current DUI misdemeanor to establish the felony DUI. As interpreted, the felony DUI conviction requires proving a misdemeanor conviction on the present charge as well as proof of three or more prior misdemeanor DUI convictions.

Thus the district court concluded that the trial court should have dismissed the misdemeanor DUI and therefore the instant felony DUI could not be maintained.

Robinson v. State, 982 So. 2d 1260 (Fla. 1st DCA 2008).

In this appeal from a conviction for causing bodily injury while driving under the influence of alcohol, in violation of section 316.193(3), Florida Statutes (2003), the defendant contested the admission of lay opinion testimony about horizontal gaze nystagmus (HGN). The state, conceding error, argued that the error was harmless.

The district court noted that HGN test results were scientific evidence and thus should not be admitted as lay evidence, because of the danger of unfair prejudice, confusion of issues, or misleading the jury.

The district court noted that the question regarding harmless error is whether there is a reasonable possibility that the error affected the verdict; the question is not whether the properly admitted evidence would alone have been sufficient to support the verdict.

The state here made the HGN opinion a feature of its opening statement and of its closing argument, and the district court found that this suggested a reasonable possibility that the error affected the verdict. The district court also noted that the state did not prove blood alcohol level or offer any other scientific evidence, unlike other cases promoted by the state.

Thus, the district court held that the lay opinion testimony about HGN tests could not be said beyond a reasonable doubt not to have affected the jury's verdict. The district court reversed and remanded for a new trial.

State v. Bastos, 985 So. 2d 37 (Fla 3d DCA 2008).

The decision is from the state's appeal regarding a county court certification of two questions of great public importance. The county court ruled that the DUI defendants were entitled to have testimony and documents produced regarding the source code for the breathalyzer used in their cases. The county court authorized the production of testimony and documents under the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, chapter 942, Florida Statutes (2005).

> The district court rephrased the first certified question as:
> Can chapter 942, the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, be used to compel production of documents/source codes in light of General Motors, Inc. v. State, 357 So. 2d 1045 (Fla. 3d DCA 1978), where the request is for testimony and production of documents?

The district court explained that the Uniform Law establishes a procedure by which a Florida court may obtain the attendance of a material witness from another state in a pending prosecution. The requesting court must certify that the witness is a material witness and specify the number of days needed.

The district court recognized that its prior decision in General Motors held that the Uniform Law did not apply to requests solely for production of documents. However, General Motors did not rule on requests for testimony accompanied by a request for documents. Here the district court, conforming to the prevailing rule of other states applying the Uniform Law, held that the Uniform Law does authorize a request, such as the one here, for testimony and production of documents.

The second certified question asks whether the source code for the Intoxilyzer 5000 is "material" within the meaning of section 942.03. The county court here, after a hearing involving numerous cases and judges, found the source code material, noting that the defendants needed the source code for complete information about how the Intoxilyzer makes its

calculations.

The district court held that there needed to be a particularized showing that observed discrepancies in the machine operation required access to the source code. Without this particularized showing, the district court found that the materiality for the Uniform law was not established, and it answered the second certified question "no."

State v. Brady, 985 So. 2d 656 (Fla. 2d DCA 2008).

This case was before the district court a second time on a speedy trial issue. The instant appeal is on a petition by the state for writ of certiorari to quash an order of the circuit court acting in its appellate capacity. The circuit court affirmed a county court dismissal of a DUI charge on speedy trial grounds.

The defendant was originally arrested for DUI and for possession of a controlled substance. When arrested, the defendant was issued a traffic citation for the DUI. After the expiration of the ninety-day speedy trial period for that DUI, the state filed an information in circuit court charging the defendant with felony possession of a controlled substance and misdemeanor DUI.

The defendant petitioned for certiorari arguing that the circuit court lacked jurisdiction over the DUI count of the information. In that initial appeal, this district court held that, without a motion to consolidate, the county court was never divested of jurisdiction over the misdemeanor DUI and the circuit court never properly obtained jurisdiction over that charge. But the district court noted that its decision had no effect on the pending county court case.

The defendant thereafter filed a motion for discharge on speedy trial grounds in county court. The county court granted the motion after a hearing.

The crux of the case involved a hearing in circuit court. The district court found that at the February 6, 2006, hearing, the circuit court offered the defendant a trial within speedy trial limits, offering to try the DUI as an acting county court judge. The defendant waived his right to speedy trial on the DUI charge in county court by declining that offer. The district court found that the circuit court misinterpreted the district court's initial decision, employing incorrect law about reviving misdemeanor charges in felony informations. The circuit court also failed to recognize the effect of the defendant's waiver of speedy trial.

The district court granted the state's petition for certiorari.

Criminal Traffic Offenses

Peer v. State, 983 So. 2d 34 (Fla. 1st DCA 2008).

In connection with an accident resulting in death to one person and injury to another person, the defendant was convicted of one count of leaving the scene of an accident causing death and one count of leaving the scene of an accident causing injury. Without ordering a pre-sentence investigation report, the trial court sentenced the defendant to 12 years in prison for the first count (leaving the scene of an accident causing death).

The district court found that conviction on both counts violated double jeopardy because the offenses charged are different degrees of the same crime and are described almost identically except for the harm caused to the victim.

The district court next noted that because appellant was a first offender being sentenced to more than probation, rule 3.710(a) of the Florida Rules of Criminal Procedure required the trial court to order a presentence investigation report (PSI) before sentencing. The district court vacated the conviction for leaving the scene of an accident causing injury and reversed and remanded for resentencing on the remaining count, after preparation and consideration of a PSI.

State v. Gatto, 979 So. 2d 1232 (Fla. 4th DCA 2008).

The defendant entered open no contest pleas to felony driving with a suspended license, grand theft and engaging in business as an unlicensed contractor during a state or emergency. At defendant's request, the trial court granted a downward departure sentence based on section 921.0026(2)(d), Florida Statutes (2006) (need for specialized treatment unavailable in prison setting). The state appealed.

The district court noted that section 921.0026(2)(d) permits a trial court to depart downward if the "'defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction . . . , and the defendant is amenable to treatment.'" To permit such departure, the defendant must also establish, by a preponderance of the evidence, that the Department of Corrections cannot provide the required "specialized treatment."

Reviewing the testimony of Dr. Michael Brannon, the district court noted that the doctor's testimony could be interpreted as an opinion that the defendant would receive better or more treatment outside of a prison setting, but not that treatment was unavailable through DOC.

The district court thus found that the doctor's testimony was insufficient to establish that the defendant could not receive the required "specialized treatment" for his mental disorder in prison, and reversed the downward departure sentence, remanding for a sentence comporting with the permissible sentence under the defendant's Criminal Punishment Code scoresheet.

Smith v. State, 982 So. 2d 1241 (Fla. 5th DCA 2008).

The defendant was charged with DUI manslaughter, vehicular homicide, and driving while license suspended causing serious bodily injury or death, based on an accident that occurred August 10, 2003. Formal charges were filed May 4, 2004, and the defendant was

arrested in July 2004. Trial was originally set for trial October 11, 2004. After nine continuances, the case was set for trial May 14, 2007. On the Friday before trial, the defendant's counsel requested a continuance because the defense's accident reconstruction expert was not available. The trial court denied the continuance, but gave the defendant the opportunity to call the expert at any time to accommodate the expert's schedule. The defendant did not call the expert at trial.

The district court noted that for a continuance based on witness unavailability, the movant must show prior due diligence in obtaining the witness's presence; the witness would offer substantially favorable testimony; the witness was available and willing to testify; and material prejudice if the continuance is denied, citing State v. Cook, 796 So. 2d 1247 (Fla. 5th DCA 2001).

Here the district court found that the defendant was not prejudiced because the absence of the expert did not hinder the defendant's ability to develop his defense of lack of causation. In addition to lack of prejudice, the district court noted, the defendant also failed to proffer the expert's testimony at the continuance hearing or at trial. Without proffer, the district court could not determine whether the expert would have offered substantially favorable testimony.

Finding that the appellant did not show that the trial court abused its discretion in denying the continuance, the district court affirmed.

Arrest, Search and Seizure

No new cases

Torts/Accident Cases

Grainger v. Wald, 982 So. 2d 42 (Fla. 1st DCA 2008).

This appeal was from a final judgment awarding damages for injuries sustained in a collision; the defendant admitted fault. The plaintiff alleged injuries to his neck, back, and right arm, foot and thigh in the collision, but sought damages only for his neck and back injuries. He did not seek damages for his thigh because it had no "ongoing daily chronic pain." Thus, the only jury issues were causation, permanency of injuries, and damages.

Plaintiff moved for directed verdict on permanency, arguing that there was no evidence that he did not suffer a permanent injury from the collision. The trial court, over objection, granted the motion for directed verdict on permanency, but only as to the right thigh condition. The trial court told defense counsel that he could argue permanency of the other injuries to the jury. The trial court instructed the jury that it was free to weigh, accept or reject the opinions of any expert witness. However, neither the verdict form nor the jury instructions included any reference to permanence.

The district court noted that permanence was a jury question. Here, the district court found, there was conflicting evidence as to the permanency of the plaintiff's neck and back injuries and the testimony about the permanency of plaintiff's thigh injury was ambivalent. The jury was free to reject any evidence regarding permanency.

The plaintiff only sought damages for his neck and back injuries, and the directed verdict removed from the jury's consideration the issue of permanency of those injuries. The district court held that trial court erred as a matter of law.

Sanchez-Gutierrez v. State, 981 So. 2d 632 (Fla. 2d DCA 2008).

The defendant appealed from an order requiring him to pay restitution to the driver of a car he crashed into and to that driver's insurance company. The restitution award was for medical expenses and car damage. Finding no merit to the defendant's challenge to the evidence regarding ambulance service and medical treatment, the district court affirmed that part of the restitution order.

However, the district court reversed the portion of the restitution order for the value of the totaled automobile, because the awards were based on hearsay evidence and the defendant properly objected to that evidence. The district court remanded for a hearing to determine the proper amount of restitution for the automobile damage.

Edwards v. C. A. Motors, Ltd., 985 So. 2d 1147 (Fla. 1st DCA 2008).

After a fatal car accident, the plaintiff, who was the mother of a deceased passenger, brought a wrongful death action against the defendant, who was the owner of an auto dealership that leased the incident vehicle to the driver. The trial court entered summary judgment for the defendant, finding that the defendant's lease agreement complied with Florida law regarding minimum insurance requirements for long-term leases, thus protecting the defendant from suit.

Section 324.021(9)(b), Florida Statutes, provides that a lessor will not be considered the owner of a vehicle for the purpose of determining financial responsibility for acts of the vehicle or operator, if the lease agreement for one year or longer requires the lessee to obtain insurance within certain minimum limits. The lease at issue obligated the lessor to obtain insurance of appropriate amounts. However, the agreement also provided that the lessor "may change the amounts of required insurance."

The district court noted that strict compliance with the statute is required, because the statute abrogates common law that would otherwise hold the owner of an auto vicariously liable for damage caused by another person's use of the property.

Considering the need for strict compliance and reviewing similar case results, the district court held that the lessor's unilateral and unrestricted right to change the amounts of required insurance would permit the defendant to disregard the statute. The district court so found that the agreement did not strictly comply with the statute, and it reversed the summary judgment for defendant.

Driver's Licenses

Department of Highway Safety and Motor Vehicles v. Luttrell, 983 So. 2d 1215 (Fla. 5th DCA).

The defendant, after a DUI arrest, requested a formal administrative review of her license suspension pursuant to section 322.2615(1)(b)(3), Florida Statutes (2006). The defendant argued at the hearing that her suspension should be invalidated because she was illegally "stopped."

The officer did not testify at the hearing. The only evidence on this issue was the officer's probable cause affidavit and the defendant's testimony. The affidavit indicated that while on patrol between 2:00 a.m. and 3:00 a.m. one morning the officer observed the defendant's vehicle in a bank parking lot. After pulling up, the officer detected the odor of alcohol and observed that the defendant had slurred speech and very glassy eyes. The defendant was ultimately arrested for DUI. The defendant refused to submit to a breath test.

The defendant testified that she pulled into the parking lot because her glasses had fallen to the floor board. A patrol car pulled in behind her vehicle and had blue lights on.

The defendant argued that the officer's use of blue lights, combined with the act of parking his patrol car behind her vehicle, constituted an unlawful investigatory stop. The hearing officer expressly denied the motion to invalidate the suspension, but made no express findings of fact as to the defendant's credibility.

The circuit court considering the defendant's petition for writ of certiorari quashed the administrative order, finding that the hearing officer was not free to reject the defendant's testimony because it was not "contrary to law, improbable, untrustworthy, unreasonable or contradictory."

The circuit court's standard of review, however, was limited to determining whether procedural due process was accorded, whether the essential requirements of law were observed and whether the administrative order was supported by competent substantial evidence. On appellate review, the appellate court could only consider whether the circuit court followed procedural due process and whether the circuit court applied the correct law.

Noting that the hearing officer was free to accept or reject the licensee's testimony, the district court found that the facts of the affidavit were sufficient to support a consensual encounter. The district court concluded that the circuit court misapplied the law by reweighing the evidence.

Vehicle Forfeiture

No new cases